From: Bob Wright <BWright@friendsoftheriver.org>
Sent: Tuesday, July 29, 2014 8:40 AM
To: BDCP.Comments@noaa.gov
Subject: comments on BDCP
Attachments: 7 29 14 FOR Final Comment Letter.pdf

Dear BDCP. Comments@noaa.gov:

Attached here on July 29, 2014, please find the final comments of Friends of the River (a 131 page letter) on the BDCP Drafts that were issued in December 2013. Please confirm receipt by reply message. Thank you.

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July 29, 2014

Dear BDCP.Comments@noaa.gov (via email)

Re: Comment Letter on BDCP Plan, EIR/EIS, and Implementing Agreement Including Violations of NEPA, CEQA and the ESA

Friends of the River (FOR) objects to approval of the Bay Delta Conservation Plan (BDCP). Our 12 prior comment letters of: January 14, 2014 including our earlier comment letters of June 4, August 13, September 25, and November 18, 2013 that were attached to the January 14, 2014 letter; January 28, 2014; March 6, 2014; May 15, 2014; May 21, 2014; May 28, 2014 (joint letter with the Environmental Water Caucus); June 11, 2014 (Environmental Water Caucus) and July 24, 2014 are repeated, adopted and incorporated herein by FOR by this reference. In addition, FOR adopts and incorporates by this reference all comments by other organizations, public agencies, and individuals submitted by the close of the BDCP comment period on July 29, 2014, including but not limited to the three comment letters submitted July 28, 2014 on behalf of the California Sportfishing Protection Alliance (CSPA), that do not support approval of new upstream conveyance and that are not in conflict with FOR's comments.

On the one hand, the 40,000 pages of BDCP drafts violate the NEPA regulation, 40 C.F.R. 1502.7, specifying that Draft EIS text shall normally not exceed 150 pages and "for proposals of unusual scope or complexity shall normally be less than 300 pages." Here, the volume was calculated to overwhelm the public.

On the other hand, and more importantly, there was silence on the profound issue of whether to increase the capacity to divert more water from the Sacramento River, sloughs, and the San Francisco Bay Delta or instead begin to reduce exports. The BDCP agencies ignored and refused to consider any alternatives that would reduce exports. Consequently, there was no alternatives section "sharply" defining the issues as required by 40 C.F.R. 1502.14, and no rigorous exploration and objective evaluation of "all reasonable alternatives" required by that regulation.

Our detailed comments follow.

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INTRODUCTION

Friends of the River (FOR) objects to the approval of the Bay Delta Conservation Plan (BDCP) including the Delta Water Tunnels, Preferred Alternative 4, of the Draft Environmental Impact Report/Environmental Impact Statement EIR/EIS. (EIR/EIS, 3-3). That alternative is referred to as the BDCP "Proposed Action" in Chapter 9 of the Plan. FOR also objects to the approval of any other existing, revised, or new alternative that would include new, upstream conveyance from the Delta.

The Water Tunnels would divert enormous quantities of water from the Sacramento River near Clarksburg, California. The water would be shipped south through two giant, 40-mile long Tunnels for diversion to the Central Valley and State Water Projects. As a result of this massive diversion, enormous quantities of water that presently flow through the Sacramento River and sloughs to and through the Sacramento-San Joaquin Delta would not reach the Delta, and flows would be reduced in the Sacramento River and sloughs. There would also be adverse cumulative effects, ranging from rising sea levels and reduced snowpack and runoff due to climate change to changes in upstream reservoir operations and current preservation of flows for fishery purposes all the way upstream to the Shasta, Trinity, Oroville, and Folsom reservoirs.

FOR objects to preparation, approval, or issuance of a BDCP Final EIR, Final EIS, Final EIR/EIS, Final Plan, and/or Final Implementing Agreement (IA) for the BDCP. The Draft EIR/EIS and Plan issued for public review in December 2013 and the Draft IA issued in May 2014 are so inadequate for the purpose of providing meaningful public and decision-maker review that a new Draft EIR/EIS, Draft Plan, and Draft IA must be prepared and issued to provide an adequate basis for such review pursuant to the requirements of the National Environmental Policy Act (NEPA), California Environmental Quality Act (CEQA), and the Endangered Species Act (ESA). The 40,000 pages of project advocacy and speculation making up the BDCP Plan, Draft EIR/EIS, appendices and IA are worthless for the purpose of providing informed public and decision-maker review.

VIOLATIONS OF ALTERNATIVES REQUIREMENTS UNDER NEPA, CEQA, and ESA

I) THERE IS NO LEGALLY SUFFICIENT DEVELOPMENT AND ASSESSMENT OF BDCP ALTERNATIVES

Development and evaluation of a range of reasonable alternatives are the declared "heart" of both the National Environmental Policy Act (NEPA) and California Environmental Quality Act (CEQA) required EISs and EIRs. Despite that, the alternatives section (Chapter 3) of the Draft EIR/EIS and the Endangered Species Act (ESA) required Alternatives to Take section (Chapter 9) of the BDCP Draft Plan fail to include even one, let alone the CEQA, NEPA and ESA required range of, reasonable alternatives that would increase water flows in the San Francisco Bay-Delta by reducing exports. These serious violations of law require corrective action by developing and including the required range of reasonable alternatives in a new Draft EIR/EIS and Alternatives to Take Chapter in the BDCP Plan. A new public review and comment period is necessary so the public can evaluate and comment on a range of reasonable alternatives.

"The overall goal of the BDCP is to restore and protect ecosystem health, water supply, and water quality with a stable regulatory framework." (Plan, 5. 1-1, all citations to BDCP Plan chapter and page number unless otherwise indicated). "The BDCP will contribute to the restoration of Sacramento-San Joaquin River Delta (Delta) ecosystems largely by addressing ecological functions and processes on a broad landscape scale. Proposed actions will result in fundamental, systemic, long-term physical changes to the Delta. These changes include substantial alterations to water conveyance and management and extensive restoration of tidal, floodplain, and terrestrial natural communities." (*Id.*)

"The complexity [of chapter 5] is inevitable because of the large size of the Plan Area, the large number of natural communities and covered species addressed, the scale of the covered activities, the long-term horizon of the Plan, the intrinsic and often highly variable properties of the Bay-Delta environment (e.g., salinity gradients, hydrology, projected effects of climate change) and the confounding effects that climate change may have on ecosystems and species in the Plan Area." (Plan, 5. 1-2).

The BDCP omission of alternatives reducing exports to increase flows is deliberate. A claimed purpose of the BDCP Plan is "reducing the adverse effects on certain listed [fish] species due to diverting water." (BDCP Draft EIR/EIS Executive Summary, p. ES-10, all citations to Draft EIR/EIS chapter and page number unless otherwise indicated). "There is an urgent need to improve the conditions for threatened and endangered fish species within the Delta." (*Id.*). The omission of a range of reasonable alternatives reducing exports to increase flows violates CEQA, NEPA and the ESA. The failure to include even one alternative reducing exports to increase flows is incomprehensible. Alternatives reducing the exporting/diversion of water are the obvious direct response to the claimed BDCP purpose of "reducing the adverse effects on certain listed [fish] species due to diverting water." (*Id.*)

The BDCP agencies have been marching along for at least three years in the face of "red flags flying" in their deliberate refusal to develop and evaluate a range of reasonable alternatives, or indeed, any alternatives that would increase flows by reducing exports. Three years ago the National Academy of Sciences declared in reviewing the then-current version of the draft BDCP that: "[c]hoosing the alternative project before evaluating alternative ways to reach a preferred outcome would be post hoc rationalization—in other words, putting the cart before the horse. Scientific reasons for not considering alternative actions are not presented in the plan." (National Academy of Sciences, Report in Brief at p. 2, May 5, 2011).

More than two years ago, on April 16, 2012, the Co-Facilitators of the EWC transmitted a short, 1 ½ page letter to Gerald Meral, Deputy Secretary of the California Resources Agency, sharing "concerns with the current approach and direction of the [BDCP] project and we would like to share those concerns with you." (Letter, p. 1). Most of the paragraphs in the letter dealt with the types of issues involving consideration of alternatives. The penultimate paragraph of the letter specifically pointed out:

> *The absence of a full range of alternatives,* including an alternative which would reduce exports from the Delta. It is understandable that the exporters, who are driving the project, are not interested in this kind of alternative; however, in order to be a truly permissible project, an examination of a full range of alternatives, including ones that would reduce exports, needs to be included and needs to incorporate a public trust balancing of alternatives.

(Letter, p. 2). We have already attached (for BDCP.Comments@noaa.gov) and incorporated by reference a copy of the April 16, 2012, EWC letter. (FOR/EWC comment letter May 28, 2014).

On December 15, 2012 by email, and December 17, 2012 by letter, Nick Di Croce, Co-Facilitator of the EWC transmitted the EWC's Reduced Exports Plan to the California Resources Agency Deputy Secretary and requested "that you include it among the alternatives to be included in the BDCP." On November 18, 2013, FOR submitted a comment letter in the BDCP process urging those carrying out the BDCP to review the "Responsible Exports Plan [a later, more detailed version of the Reduced Exports Plan]" proposed by the 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. 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."(FOR November 18, 2013 comment letter at p. 3, Attachment 4 to FOR January 14, 2014 comment letter).

FOR specifically pointed out (at p. 3, fn. 1) that the plan was online at http://www.ewccalifornia.org/reports/resonsibleexpltsplanmay2013.pdf.

By this letter, we repeat the demand for consideration of the "Responsible Exports Plan" (2013) alternative (attached to FOR May 21, 2014 comment letter) and reasonable variants on that alternative. This demand follows up EWC's similar requests from April 16, 2012 and FOR's requests that have to date been ignored in the BDCP process. Obvious variants on the Responsible Exports Plan alternative creating a range of reasonable alternatives will include reducing exports to both more and less than the 3,000,000 acre-feet limit on exports called for by the Responsible Exports Plan alternative as well as phasing in reductions in exports over time.

The BDCP agencies have failed to produce an alternatives section that "sharply" defines the issues and provides a clear basis for choice among options as required by NEPA Regulations. 40 C.F.R. § 1502.14. The choices presented should include increasing flows by reducing exports, not just reducing flows by increasing the capacity for exports as is called for by ***all*** of the so-called "alternatives" presented in the BDCP Draft Plan and EIR/EIS. No matter how badly

the BDCP proponents do not want to reduce exports and increase flows, during the Draft CEQA, NEPA and ESA processes inclusion of such alternatives as part of a range of reasonable alternatives is mandatory.

By way of brief summary, actions called for by the Responsible Exports Plan alternative include no development of new upstream conveyance; reducing exports to no more than 3,000,000 acre-feet in all years in keeping with State Water Resources Control Board (SWRCB) flow criteria; water efficiency and demand reduction programs including urban and agricultural water conservation, recycling, storm water recapture and reuse; reinforced levees above PL 84-99 standards; installation of improved fish screens at existing Delta pumps; elimination of irrigation water on drainage-impaired farmlands south of the Bay-Delta; return the Kern Water Bank to State control; restore Article 18 urban preference; restore the original intent of Article 21 surplus water in SWP contracts; conduct feasibility study for Tulare Basin water storage; provide fish passage above and below Central Valley rim dams for species of concern; and retain cold water for fish in reservoirs.

The Responsible Exports Plan alternative calls for a statewide benefit-cost analysis to determine economic desirability of any plan or alternative; water availability analysis to align water needs with availability; protecting the Delta ecosystem pursuant to public trust obligations; and meeting NCCP recovery standards for listed fish species. Other obvious alternatives would include actions ranging from meeting ESA recovery standards for listed fish species, to halting the planting of almond orchards that cannot be fallowed in dry years on desert lands receiving export waters, to consideration of the development of desalinated water supplies as is being done in the San Diego County Water Authority. (Plan, 9-43).

A) THE FAILURE OF THE BDCP AGENCIES TO EVEN CONSIDER THE RESPONSIBLE EXPORTS ALTERNATIVE IS INEXPLICABLE GIVEN THAT THE ALTERNATIVE WAS CONSIDERED, ALBEIT INADEQUATELY, BY THE DELTA STEWARDSHIP COUNCIL AND FOUND TO BE ENVIRONMENTALLY SUPERIOR IN MANY RESPECTS

The Delta Stewardship Council (DSC) issued the Recirculated Draft Program Environmental Impact Report (RDEIR) for the Draft Delta Plan back on November 30, 2012. Included was Delta Plan Alternative 2. (RDEIR 25-4). The RDEIR stated that "Development of Alternative 2 was informed by proposals from environmental organizations led by the

Environmental Water Caucus. It involves sharply decreased water exports from the Delta and its watershed to areas that receive Delta water (limited to a maximum of 3,000,000 acre-feet/year)." (*Id.*)

The RDEIR conceded that "Overall, Alternative 2 would have less water quality impacts than the revised Project, because it involves fewer facilities and less diversions of water from the Delta and Delta watershed." (RDEIR 25-6). The RDEIR also conceded that "Alternative 2 contributes more to improving conditions for biological resources and arresting ecosystem decline than the Revised Project." (RDEIR 25-7). Finally, it was conceded that the EWC Alternative "would also eliminate the water quality impacts associated with agricultural runoff water from Tulare Late Basin agriculture and areas with drainage constraints in the San Luis Drainage Area. It is thus environmentally superior to the Revised Project with respect to these types of impacts." (RDEIR Executive Summary, ES-10; 25-18). Ultimately, the DSC did not adopt Alternative 2, claiming that it was "slightly environmentally inferior to the Revised Project primarily because of its impacts on water supply reliability." (RDEIR 25-17, 18).

The lawfulness of the DSC Delta Plan and the compliance of the Delta Plan EIR are presently in litigation in the Sacramento County Superior Court. FOR is one of the plaintiffs challenging the DSC's actions under CEQA and the Delta Reform Act. Whether or not the DSC proceeded in the manner required by law when it did not adopt the EWC Alternative is one subject of that litigation. Here, it is inexplicable that the BDCP agencies did not even consider or disclose the EWC Alternative or develop any other alternatives reducing exports for inclusion in the BDCP Draft EIR/EIS and in the draft alternatives to take chapter of the BDCP Draft Plan.

Instead of enthusiastically embracing the duties mandated by our environmental laws to develop and consider a range of reasonable alternatives, the BDCP proponents have concealed or misrepresented reasonable alternatives presented to them. The EWC Responsible Exports Plan has been concealed and ignored. It is excluded from the alternatives chapters in the BDCP Plan and Draft EIR/EIS.

B) Declining Fish Populations Cry Out for Evaluation of Alternatives Increasing Flows

There should be a range of alternatives in the BDCP Draft EIR/EIS starting with the Responsible Exports Plan and related variants of that alternative. As pointed out in our previous comment letters (March 6, 2014 letter, January 14, 2014 letter and its four attachments) several listed fish species are already in catastrophic decline in the subject area. 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 listed endangered and threatened fish species including Winter-Run Chinook Salmon, Central Valley Spring-Run Chinook Salmon, Central Valley Steelhead, Southern Distinct Population Segment of North American Green Sturgeon, and Delta Smelt.

As explained last year 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). The National Marine Fisheries Service (NMFS) has pointed out that the Water Tunnels threaten the "potential extirpation of mainstream Sacramento River Populations of winter-run and spring-run Chinook salmon over the term of the permit. . ." (NMFS Progress Assessment, § 1.17, 12, April 4, 2013). As explained by the EPA in its 2013 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, p. 1-2, March 28, 2013). The EPA has also explained with respect to Administrative Drafts of the BDCP documents that "many of these scenarios of the Preferred Alternative 'range' appear to decrease Delta outflow (p. 5-52), 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).

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 [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/flow 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.

These recommendations have not been the basis for the BDCP's preferred Water Tunnels project, and would preclude development of the preferred alternative making that alternative infeasible pursuant to water quantity and quality considerations. In contrast, EWC's Responsible Exports Plan alternative reduces exports to increase flows and is designed to comply with SWRCB flow criteria. The BDCP Draft EIR/EIS does not use the SWRCB flow criteria to evaluate alternatives, nor does the BDCP process await completion of pending SWRCB proceedings to update flow objectives.

The basic, flawed BDCP premise that taking water away from the fish and their habitats will be good for them is both nonsensical and contrary to science. As the EPA has noted, "[t]he benefits of increasing freshwater flows can be realized quickly and help struggling fish populations recover." (EPA comments on the Bay-Delta Water Quality Control Plan; Phase 1; SED, March 28, 2013 at 1). It is necessary that the BDCP process develop and consider a range of reasonable alternatives that increase Delta outflow. Fair evaluation and consideration of a range of alternatives reducing exports would be a required first step in that process.

Alternatives reducing exports are consistent with the claimed project purpose of "Reducing the adverse effects on certain listed species due to diverting water." (EIR/EIS, ES-10). Such alternatives are also consistent with findings that "the Delta is now widely perceived to be in crisis. There is an urgent need to improve the conditions for threatened and endangered fish species within the Delta." (*Id.*). On the other hand, the stated purpose to "restore and protect the

ability of the SWP and CVP to deliver up to full contract amounts" is contrary to the prevalence of "paper water" reflected by "information indicating that quantities totaling several times the average unimpaired flows in the Delta watershed could be available to water users based on the face value of water permits already issued." (*Id.* at ES-10 & 11). Alternatives such as the Responsible Exports Plan alternative are 21st century alternatives focused on cost-effective measures, such as conservation and recycling, to establish a more reliable water supply, as opposed to costly huge delivery projects further depleting our rivers and the San Francisco Bay-Delta.

None of the positive water supply availability action measures in the Responsible Exports Plan alternative (or the NRDC's Portfolio alternative) have been included as alternatives or portions of alternatives in the BDCP Draft EIR/EIS or alternatives to take Plan chapter. The Water Tunnels proponents have "tunnel vision" confined to the sole alternative of developing new upstream conveyance. Moreover, there is no consideration of the lost opportunity cost that would result from the billion dollar construction and operation of the Water Tunnels instead of the development of such modern water supply measures as conservation and recycling.

C) The Absence of a Range of Reasonable Alternatives Violates CEQA, NEPA and the ESA

The failure to include a range of reasonable alternatives violates CEQA. An EIR must "describe a range of reasonable alternatives to the project...which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives." 14 Code Cal. Regs (CEQA Guidelines) § 15126.6(a). "[T]he discussion of alternatives shall focus on alternatives to the project or its location which are capable of avoiding or substantially lessening any significant effects of the project, even if these alternatives would impede to some degree the attainment of the project objectives, or would be more costly." 14 Code Cal. Regs § 15126.6(b). Recirculation of a new Draft EIR/EIS will be required by CEQA Guidelines Section 15088.5(a)(3) because the Responsible Exports Plan alternative and other alternatives that would reduce rather than increase exports have not been previously analyzed, but must be as part of a range of reasonable alternatives.

In addition, EIR conclusions must be supported by substantial evidence. "Argument, speculation, unsubstantiated opinion or narrative…does not constitute substantial evidence." CEQA guidelines, § 15384. All that the BDCP Draft EIR/EIS contains to support the Preferred Project alternative is argument, speculation, unsubstantiated opinion, narrative and saying "we don't know." For example, the Draft EIR/EIS made "no determination (ND)" findings under NEPA as to whether the Water Tunnels, even after "mitigation," would have adverse impacts on spawning, incubation habitat, and migration conditions for winter-run Chinook salmon and spring-run Chinook salmon; and migration conditions for fall-run Chinook salmon, steelhead, green Sturgeon, and white Sturgeon. (EIR/EIS, ES-73, ES-75, ES-77, ES-79, ES-81, & ES-83). A new Draft EIR/EIS must be prepared and recirculated because "the draft EIR[/EIS] was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded." CEQA Guidelines § 15088.5(a)(4).

The rules under NEPA are similar. Under the NEPA Regulations, "This [alternatives] section is the heart of the environmental impact statement. The alternatives section should "sharply" define the issues and provide a clear basis for choice among options by the decision-maker and the public." 40 C.F.R. § 1502.14. The EIS alternatives section is supposed to "Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.14(a). Moreover, if "a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion. The agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action." 40 C.F.R. § 1502.9(a).

Instead of discussing all major points of view, lost in the 40,000 pages of BDCP Plan and Draft EIR/EIS advocacy and speculation are any alternatives reducing exports and increasing flows instead of constructing and operating expensive new upstream diversions with the capacity to increase exports and reduce flows. Under NEPA as well as CEQA, recirculation of a new Draft EIR/EIS will be required because of the extreme deficiencies in the current Draft EIR/EIS. The deficiencies in the Draft EIR/EIS cannot and will not be evaded by responses to comments in a Final EIR/EIS.

With respect to the ESA, we have commented several times over the past year that the failure of the federal agencies to prepare the ESA required Biological Assessments and Opinions violates both the ESA Regulations "at the earliest possible time" requirement and the NEPA Regulations "concurrently with and integrated with" requirement. (50 C.F.R. § 402.14(a); (40 C.F.R. § 1502.25(a); FOR January 14, 2014 comment letter and its four attachments). The missing Biological Assessments and Biological Opinions would be essential to any meaningful public review and comment on a project claimed to be responsive to declining fish populations.

As conceded by BDCP Chapter 9, Alternatives to Take, the analysis of take alternatives must explain "why the take alternatives [that would cause no incidental take or result in take levels below those anticipated for the proposed actions] were not adopted." (BDCP Plan, Chapter 9, pp. 9-1, 9-2). Here, the lead agencies failed to even develop let alone adopt alternatives reducing exports and increasing flows to eliminate or reduce take. The agencies ignored the Responsible Exports Plan (and the earlier Reduced Exports Plan version) alternative that was handed to them on a silver platter a full year ***before*** they issued the Draft Plan and Draft EIR/EIS for public review and comment.

In short, the fundamental flaws in the alternatives sections in the BDCP Draft EIR/EIS and Chapter 9 of the BDCP plan have led to a Draft EIR/EIS and Alternatives to Take analysis "so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded."

D) Alternatives Conclusion

The most important and fundamental planning decision in the history of the Delta will be whether to finally begin to reduce exports and increase flows or to develop massive, new upstream conveyance from the Delta. An epic choice will be made between those two basic options. The BDCP Plan and Draft EIR/EIS are hopelessly deficient because they fail to set out this choice, let alone illuminate, the bases for making the epic decision that will determine whether five or more endangered and threatened species of fish become extinct.

The failure to include any alternatives reducing exports was an intentional, bad faith violation of NEPA, CEQA, and the ESA. The omission was calculated to deprive the public of

the opportunity to support an alternative that the exporters do not want to see the light of day. Extinction is forever. Alternatives reducing exports that would make extinction less likely must be developed and considered in a new Draft EIR/EIS and alternatives to take evaluation process.

II) ADDITIONAL REASONS WHY THE BDCP DRAFT EIR/EIS FAILS TO PROVIDE AN ADEQUATE RANGE OF ALTERNATIVES UNDER CEQA AND NEPA.

The BDCP logic that removing water from the Delta will help restore it is the ecological equivalent of a modern doctor bloodletting a patient in order to cure illness. Science undeniably shows that the project will be harmful, but government has chosen to carry on anyway.

There is a critical problem with the BDCP Draft EIR/EIS. CEQA and NEPA require proposals of reasonable alternatives to the project, but the BDCP Draft EIR/EIS alternatives are essentially the same plan dressed up in different outfits; there is no proposed alternative.

A) THE BDCP'S PROPOSED OBJECTIVES, PURPOSE, AND NEED.

The alternatives to the project must be determined in light of what the project's goals are. The BDCP serves two purposes: (1) restore and protect ecosystem health to the Delta; and (2) create a reliable water supply within a regulatory framework. BDCP Draft EIR/EIS Chapter 2 Page 1.

The BDCP's fundamental purpose is to "make physical and operational improvements to the SWP system in the Delta necessary to restore and protect ecosystem health, water supplies of the SWP and CVP south-of-Delta, and water quality within a stable regulatory framework, consistent with statutory and contractual obligations." BDCP Draft EIR/EIS Chapter 2, Page 2. Broken down, the alternatives considered must (1) make physical improvements to the State Water Project; (2) restore and protect ecosystem health in the Delta; and (3) restore and protect water quality in the CVP with a stable regulatory framework. BDCP Draft EIR/EIS Chapter 2, Page 2.

The BDCP's proposed objectives make no mention of creating new conveyances from the Delta. However, the alternatives assume it is necessary to divert new water from the upper Sacramento River.

B) Description of Action Alternatives

The Draft BDCP includes 15 proposed action alternatives and one CEQA-mandated no action alternative. The 15 action alternatives vary in location, design, conveyance capacity, and the rules that would determine the operation of conveyance facilities. BDCP Draft EIR/EIS Chapter 3, Page 2.

The 15 proposed alternatives branched out of four preliminary alternatives. These four preliminary alternatives propose a: (1) through-Delta conveyance with opportunistic Delta operations and potential new storage; (2) through-Delta conveyance with San Joaquin River isolation; (3) dual conveyance: isolated conveyance between the Sacramento River SWP CVP pumping plants and through-Delta conveyance with San Joaquin River isolation; or (4) isolated conveyance between the Sacramento River and SWP and CVP pumping plants. BDCP Draft EIR/EIS Chapter 3, page 6. These four preliminary alternatives that establish the potential range of alternatives, all but one of the proposed 15 projects fall under category 3 or 4 with a conveyance from the Sacramento River. Draft BDCP EIR/EIS 3 – 14-16. These alternatives include plans 1A, 1B, 1C, 2A, 2B, 2C, 3, 4, 5, 6A, 6B, 6C, 7, 8, and 9. BDCP Draft EIR/EIS Chapter 5, Pages 14-16. Alternatives that are separated by letters following the number (e.g. 1A, 1B, 1C) have "only one or a handful of differences." BDCP Draft EIR/EIS Chapter 3, Page 40.

1) North and South Delta Intakes

Every proposed alternative other than the no action alternative would build new intakes along the Sacramento River. BDCP Draft EIR/EIS Chapter 3, Pages 14-16. The project identifies 12 sites for these potential intakes, 7 along the Sacramento River's east bank, and 5 along the west bank. BDCP Draft EIR/EIS Chapter 3 page 85. The BDCP allowed for a maximum of 5 intakes for many of the alternatives, and each intake would divert a maximum of 3,000 cfs. BDCP Draft EIR/EIS Chapter 3, Page 85. Alternative 9 is the only variant, as it would create two 7,500 cfs intake structures at where the Sacramento River meets the Delta Cross Channel and Georgiana Slough. BDCP Draft EIR/EIS Chapter 3, Page 86.

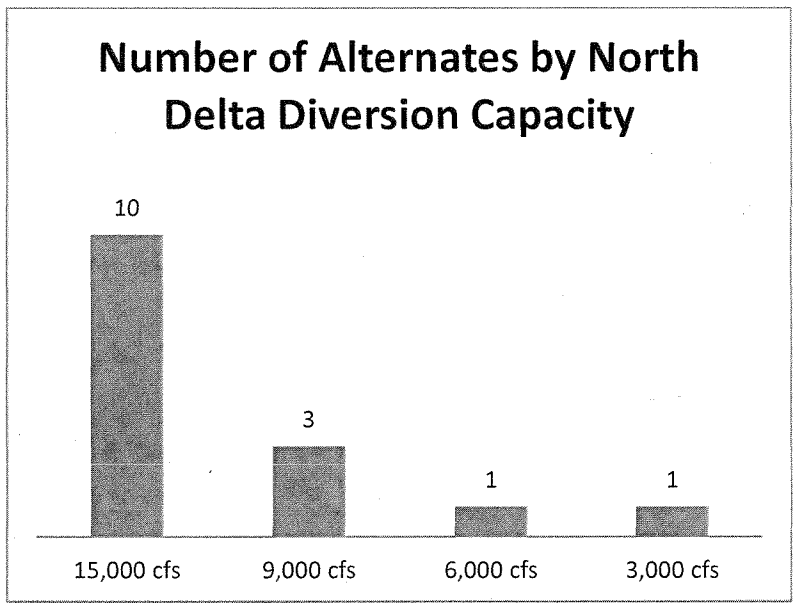
Aside from alternative 9, every proposed intake is along the same ~20 mile stretch of the Sacramento River. BDCP Draft EIR/EIS Appendix 3, Figure 2. Some intakes would be canals

while others would be tunnels, and some would be on the west bank while others would be on the east bank, but otherwise they are all 3,000 cfs intakes along the same ~20 mile stretch of the same river. BDCP Draft EIR/EIS Chapter 3, Page 87. Moving an intake down a mile does not constitute a material alternative or alteration. The alternative intakes are different versions of the same plan.

2) North Delta Capacity

Among the 15 proposed alternatives, 10 of them have a 15,000 cfs north Delta capacity. BDCP Draft EIR/EIS Chapter 3 Pages 14-16. 13 of the 15 projects have a 9,000 cfs or greater north Delta capacity. Id. Only two of the proposed alternatives offer a new conveyance below 9,000 cfs, alternatives 3 and 5. Alternative 3 offers a 6,000 cfs conveyance capacity, which is still over half the capacity of the maximum 15,000 cfs proposals. Alternative 5 offers the lowest cfs capacity of any of the proposed alternatives at 3,000 cfs. BDCP Draft EIR/EIS Chapter 3, Pages 14-16.

The BDCP Draft EIR/EIS concedes: "each alternative… would involve some level of construction of conveyance facilities/improvements to the system for diverting water to the existing SWP and CVP south Delta export facilities." BDCP Draft EIR/EIS Chapter 3, Page 40. There is a clear discrepancy here between the BDCP's range of alternatives and those mandated by relevant laws. Ten approaches to diverting the same amount of water out of the same river are not alternative plans; these are different methods to accomplishing the same plan. Also, the BDCP assumes the necessity that every single alternative would require some diversion. There is no proposal that offers a solution for Delta conservation and water management without diversions.



3) Total Conveyance Capacity

The BDCP also considers two types of conveyances. The Dual Conveyance and the Isolated Conveyance. BDCP Draft EIR/EIS Chapter 3, Page 16. The dual conveyance would use the existing south conveyance to supplement the new north conveyance, while the isolated conveyance would rely solely on the new northern conveyance. BDCP Draft EIR/EIS Chapter 3 Page 16.

The Dual Conveyance would keep the existing SWP/CVP facilities at the south Delta to supplement the north Delta diversions. Other than that the northern diversion would serve as the primary diversion. BDCP Draft EIR/EIS Chapter 3, Page 16. In other words, every proposed alternative would still have the capacity to pump 15,000 cfs out of the Delta when combined with the SWP/CVP. See BDCP Draft EIR/EIS Chapter 3, Pages 14-16, Figures 3-9 to 3-18.

The Isolated Conveyance doesn't keep the southern facilities as auxiliary. Id. Alternates 6A, 6B, and 6C are the only alternates with an isolated conveyance, and they all convey 15,000 cfs. Either way, every plan would result in a 15,000 cfs conveyance and every plan other than alternate 9 would result in the construction of a new northern conveyance. The only difference in these plans is that some propose pipelines, some canals, and others a combination of the two. BDCP Draft EIR/EIS Chapter 3, Pages 46-79.

4) Conservation/Stressors

Every action alternative uses the same BDCP Steering Committee Proposed Project that the BDCP uses. BDCP Draft EIR/EIS Chapter 3, Page 14-19. The only alternatives that have some degree of variation are alternatives 5, 7, and 9.

Alternative 5 is similar in every conservation aspect other than it would restore 25,000 rather than 65,000 acres of tidal habitat. BDCP Draft EIR/EIS Chapter 3, Page 71. Alternative 7 only differs in that 40 (rather than 20) miles of channel margin habitat would be enhanced, and 20,000 (rather than 10,000) acres of seasonally inundated floodplain would be restored. BDCP Draft EIR/EIS, Chapter 3, Page 77. Finally, alternative 9 would only differ in locations for restoration or enhancement activities due to the different conveyance method of the project. BDCP Draft EIR/EIS Chapter 3, Page 82.

5) 50 Year Incidental Take Permit

Every plan other than the mandated no action alternative involves the issuance of a 50-year ITP and a NCCP permit. BDCP Draft EIR/EIS Chapter 3, Page 2. Not a single proposed plan attempts to mitigate damages through a plan that would not require the issuance of a ITP, let alone a 50 year ITP, the maximum. See BPCP Draft EIR/EIS Chapter 3, Pages 14-16.

C) THE PROPOSED ALTERNATIVES ARE INADEQUATE UNDER CEQA.

The Draft BDCP EIR/EIS range of alternatives violates CEQA. CEQA requires that projects discuss alternatives or feasible mitigation measures available that "substantially lessen the significant environmental effects of such projects." Cal. Pub. Res. Code § 21002 (West 2014)(emphasis added). The purpose of an EIR is to "identify alternatives to the project, and to indicate the manner in which those significant effects can be avoided or mitigated." Cal. Pub. Res. Code § 21002.1(a). Here, the EIR has failed to identify alternatives to the project, and failed provide a manner in which the significant effects could be avoided or mitigated.

Also, the EIR "need not consider every conceivable alternative to a project," but it must "consider a reasonable range of potentially feasible alternatives that will foster informed decision-making and public participation." 14 Cal. Code Regs. § 15126.6(a) (West 2014). The

discussion of alternatives must focus on "alternatives to the project or its location which are capable of avoiding or substantially lessening any significant effects of the project." 4 Cal. Code Regs. § 15126.6(b) (West 2014). This is necessary even if these alternatives would impede to some degree the attainment of the project objectives or would be more costly. Id.

Thus, CEQA has two general requirements for alternatives: (1) The alternatives must substantially lessen the environmental effects of the project in light of its goals and objectives; and (2) the range of potential alternatives must foster informed decision-making.

1) The proposed alternatives do not lessen significant environmental effects.

The chief goal of alternatives and mitigation measures under CEQA is to avoid environmental harm. *Laurel Heights Improvement Ass'n. v. U.C. Regents*, 47 Cal. 3d 376, 403 (1988). An EIR alternative should "feasibly accomplish most of the basic objectives of the project and could avoid or substantially lessen one or more of the significant effects." 14 Cal. Code Regs. § 15126.6(c) (West 2014). Alternatives considered under CEQA must: "(1) offer substantial environmental advantages over the project proposal; and (2) "[be] feasibly accomplished in a successful manner" considering the economic, environmental, social and technological factors involved." *Citizens of Goleta Valley v. Bd. of Supervisors of Santa Barbara Cnty.*, 52 Cal.3d 553, 566 (1990).

Here, no alternative provides any substantial environmental advantages over the project proposal and the BDCP Draft EIR/EIS inherently assumes that there is no feasible way to accomplish the goals of the project other than creating a North Delta conveyance.

Every alternative proposed would result in a north Delta diversion, but no alternative makes an effort to substantially lessen one or more of the significant effects. This is evident through the EIR alternatives' identical total diversion capacity, use of similar intakes/intake locations, use of the exact same conservation measure for every proposed alternative, and the issuance of 50 year incidental take permits for every alternative.

First, the proposed alternatives all retain a 15,000 cfs total diversion capacity. See Draft BDCP EIR/EIS, 3-14. The alternatives may vary in the amount of water they take from the north Delta, but they all retain the capacity to pull up to 15,000 cfs, so no effort has been made to

substantially lessen the environmental effects cause by pumping water from the delta. No matter the alternative chosen, the total diversion capacity remains the same.

Second, the Draft BDCP EIR/EIS alternatives fail to consider smaller intakes, or alternatives that do no require the building of new intakes. Other than alternative 9, the intakes are all the same size, and relatively in the same location, so no environmental harm is mitigated in regards to the intakes either.

Finally every alternative uses essentially the same conservation measures and would attain a 50 year incidental take permit. The alternatives are intended to lessen significant environmental effects of the project, yet none of them are able to reduce the environmental harm done to a point where the take permit could be reduced or eliminated. A possible cause of this is that every single alternative uses almost the exact same conservation method, so no environmental harm would be mitigated from implementing one alternative over another.

2) The Draft EIR fails to provide a reasonable range of alternatives.

The Draft BDCP EIR/EIS fails to provide the required "reasonable range of alternatives to the project or to its location." 14 Cal. Code Regs. § 15126.6(a) (West 2014). The adequacy of the range of alternatives is governed by the rule of reason. 14 Cal. Code Regs. § 15126.6(f) (West 2014). The rule of reason states that the EIR must set forth those alternatives necessary to permit a well-reasoned choice. Id. The two primary factors that must be considered in applying the rule of reason are the feasibility of the alternatives and alternate locations. Id.

A feasible alternative must consider suitability, economic viability, availability of infrastructure, general plan consistency, other plans of regulatory limitations, jurisdictional boundaries, and whether the proponent can reasonably acquire, control, or otherwise have control of the alternative site. 14 C.C.R. § 15126.6(f)(1) (West 2014).

Alternative locations must also be considered in determining whether alternatives provide a reasoned choice. Locations that would avoid or substantially lessen any of the significant effect of the project need be considered for inclusion in the EIR. 14 C.C.R. § 15126.6(f)(2)(A) (West 2014).

The BDCP Draft EIR failed to provide a reasonable range of alternatives through its 15 quasi-alternatives that are far too similar in their north Delta diversion capacity, total diversion capacity, intake locations, and conservation measures, to provide a well-reasoned choice.

(a) North Delta/Total Diversion Capacity

The alternatives proposed in the Draft EIR/EIS all assume the necessity of a new diversion in the north Delta and most would still use the existing southern conveyance as well. Supra. This poses multiple problems in terms of CEQA: (1) the alternative north Delta conveyances and total conveyance capacity of the alternatives do not provide any substantial environmental advantages over the BDCP; and (2) the similarity in the alternative diversions do not provide a reasonable range of alternatives to permit a well reasoned choice.

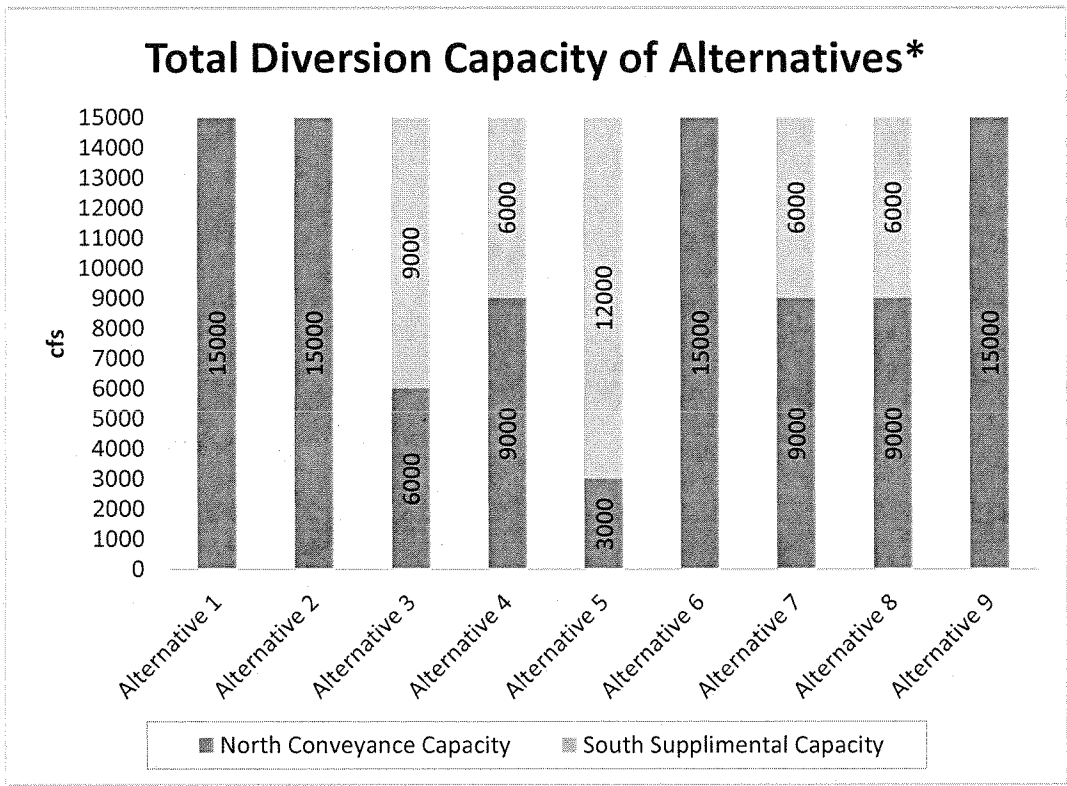
The problem with the lack of environmental advantages of diversion capacity is two-pronged. When the north Delta diversions are viewed in conjunction with the total diversion capacity of each proposed alternative, no substantial environmental impacts are avoided, no matter the choice.

The Draft BDCP EIR/EIS alternatives offer little to no difference in the amount of water the project would pull out of the Delta when the north Delta conveyance is observed in conjunction with the existing south Delta conveyance. The Draft BDCP EIR provides the diversion capacity for the north conveyances.

Even if the alternatives' diversion capacities are taken at face value, it still reveals that two-thirds of the proposed alternatives would have a 15,000 cfs diversion capacity in the north Delta, no different from the BDCP. However, the five other alternatives that seem to offer a smaller diversion from the delta are not much different.

All the dual conveyance proposals would supplement the north Delta diversions with the existing south Delta conveyance, which means that regardless of which action alternative is

observed, every single out would have the capacity to divert 15,000 cfs from the delta.



*Alternatives 1ABC, 2ABC, and 6ABC have been consolidated under their respective numbers.

There is no alternative other than the mandated no action alternative that would provide a solution for water management and restoring the Delta without creating a new conveyance. The BDCP EIR implicitly assumes the necessity of new conveyances, and assumes it necessary to retain the capacity to divert 15,000 cfs from the delta no matter the alternative.

Every alternative proposed with a diversion capacity below 15,000 cfs is a dual conveyance alternative. These plans would all still use the existing south conveyance as well as the new north conveyance. Supra. This means that while they may be taking less water from the north Delta, they all have the ability to export 15,000 cfs from the delta. Delta Independent Science Board Review of the Draft BDCP EIR/EIS and Draft BDCP Page B-4 (May 15, 2014). The proposed action alternatives are a bait and switch. On the surface, these plans seem to offer a decrease in the amount of water they convey, but that is because the alternatives discussion only provides half the picture through discussing only the north Delta conveyances.

This similarity in the conveyances of the alternatives fails to give any substantial environmental advantages, since the same water will be pulled out of the delta, regardless of the plan chosen. There is also no reasonable range of alternatives. Every alternative proposed has the capacity to divert the same amount of water, so there was never any real opportunity to consider a substantively different plan. The conveyance capacity of the alternatives is inadequate under CEQA requirements.

(b) Intakes/locations

The BDCP Draft EIR also fails to consider alternatives regarding intakes. None of the proposed alternatives would lessen significant environmental effect nor would they offer a reasonable range of alternatives due to their limited scope. Other than alternative 9, every proposed north Delta intake would be a 3,000 cfs intake regardless of the alternative or the location of the intake. Supra. These intakes would all also be along the same 20-mile stretch of the Sacramento River.

The proposed alternative intakes do not provide any level of environmental advantage. The primary purpose of an alternative under CEQA is to mitigate environmental harm. Here, every intake would be a 3,000 cfs pump along the same 20 mile stretch of the Sacramento River. If the goal of the alternatives is to mitigate harm, why does every single one plan on building the same type of intakes along the same stretch of the Sacramento River? The only reasoning that would justify using this narrow scope of alternatives would be if nothing else was feasible, but the BDCP Draft EIR/EIS and the CDWR's Conceptual Engineering Report (CER) both provide feasible solutions that are not mentioned in the alternatives. The CER even listed different type of intakes that the BDCP could use, but none were even mentioned in the plan. BDCP CER 2 – 1-19.

Also, no alternative other than alternative 9 considers any modification to the existing modification to the existing pumps in the south Delta. See, BDCP Draft EIR/EIS Chapter 3 Page 79 (showing plans for changes to existing SWP and CVP, but no other alternative does so). The lack of any modification of this sort is especially suspicious in light of the Conceptual Engineering Report (CER) that was prepared by the CDWR. These feasible modifications would

help mitigate the existing damage done by the CVP and SWP, only one of the proposed alternatives even considers this.

(c) Conservation measure/Take permit

One of the criteria used to eliminate an alternative from detailed consideration in an EIR is "inability to avoid significant environmental impacts." 14 Cal. Code Regs. § 15126.6(c) (West 2014). Through this criterion alone, every proposed alternative should be unreasonable under this analysis since they all use essentially the same conservation plan, and the same plan would result in no reduction of environmental damage over the BDCP.

The use of essentially the same conservation plan and the same 50-year incidental take permit no matter the selected alternative implicitly concedes that there is not enough of a difference between the alternatives to permit a well-reasoned choice.

D) THE PROPOSED ALTERNATIVES ARE INADEQUATE UNDER NEPA.

The BDCP Draft EIR/EIS fails analysis under NEPA as well as CEQA. NEPA requires that an EIS discuss alternatives to the project. 42 U.S.C. § 4332 (C)(iii) (West 2014). Federal agencies must "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. 4332(E) (West 2014). The alternatives are considered the "heart of the environmental impact statement." 40 C.F.R. § 1502.14 (West 2014). The alternatives under NEPA must (alongside other requirements): (1) rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated; (2) "devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits"; and (3) "include appropriate mitigation measures not already included in the proposed action or alternatives"; 40 C.F.R. § 1502.14 (West 2014). The BDCP Draft EIR/EIS has failed to meet these listed requirements.

In considering the range of alternatives required under NEPA, the courts apply the rule of reason. The rule of reason requires that the alternatives considered permit a reasoned choice as

far as the environmental aspects of the project. *Natural Res. Def. Council, Inc. v. Morton*, 458 F.2d 827 (D.C. Cir. 1972). An EIS "need not consider an infinite range of alternatives, only reasonable or feasible ones." *City of Carmel-By-The-Sea v. U.S. Dept. of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997). The alternatives must derive from the project's purpose and objectives. Id. Thus, the primary consideration is whether the alternatives permit a well-reasoned choice in light of the project's purpose and objectives.

The fact that all these alternatives are in reality the same project when observed as a whole raise concerns regarding NEPA on multiple grounds. First, the BDCP has not performed its duty to "rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated". 40 C.F.R. § 1502.14 (a) (West 2014). Second, the BDCP has not included "appropriate mitigation measures not already included in the proposed action or alternatives." Id. Third, because the alternatives are the same plan in different outfits, the BDCP alternatives fail to permit a well-reasoned choice in light of the project's purpose and objectives.

1) The BDCP does not perform its duty to rigorously explore and objectively evaluate all reasonable alternatives.

The EIS required under NEPA must "rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.14(a) (West 2014). The BDCP alternatives are so narrowly tailored that they inherently assume that there is no reasonable and feasible way to carry out the project's objectives without creating new conveyances.

2) The BDCP has not included appropriate mitigation measures not already included in the proposed action or alternatives.

Every BDCP Draft EIR/EIS alternative retains a 15,000 cfs diversion capacity, a 50-year incidental take permit, and uses essentially the same conservation measures as the BDCP. The alternatives serve the purpose of to mitigate environmental damage but no damage has been mitigated. No matter the alternative, water diverted from the delta, the potential harm to endangered species, and the conservation measures remain essentially identical.

3) The BDCP alternatives fail to permit a well-reasoned choice in light of the project's purpose and objectives because the alternatives are the same plan in different outfits.

As shown above, there are too many stark similarities between the alternatives proposed by the BDCP Draft EIR/EIS to the BDCP and to each other for the alternatives to permit a well-reasoned choice. If the BDCP Draft EIR/EIS alternatives are the "heart of the EIS," then the alternatives are inadequate. The fact that they all create a new conveyance, all retain a 15,000 cfs conveyance capacity, all require a 50 year incidental take permit, all but one create 3,000 cfs intakes along the same stretch of the Sacramento River, all culminate to show that there are no alternatives, there is only the same project dressed up in different outfits. These quasi-alternatives provide no choice in alternative projects, only different ways to carry out the same one.

E) Conclusion

For the foregoing reasons the alternatives proposed under the BDCP Draft EIR/EIS are inadequate under both CEQA and NEPA. A new EIR/EIS appropriately assessing whether alternatives to the BDCP are available should be prepared.

ADDITIONAL VIOLATIONS OF NEPA AND CEQA

I) PROCEDURAL VIOLATIONS OF CEQA AND NEPA

The BDCP and the accompanying Draft EIR/EIS are plagued with improper procedure and are contrary to key environmental statutes, including CEQA, NEPA, and ESA. This comment addresses several of the critical procedural deficiencies under CEQA and NEPA, as well as deficiencies in §10 of the ESA. The errors committed by the BDCP in this laborious, drawn-out process necessitates, at the very least, redrafting the EIR/EIS. Several of the issues, including the structure and presentation of the Habitat Conservation Plan (HCP) mandate that the project not move beyond the planning stages.

CEQA and NEPA require that any project with potential environmental impacts prepare a document that thoroughly analyzes the anticipated impact. While there is some difference in how the state and federal statutes then approach what actions should be taken, the intent and

practicality of the final document is essentially the same: to sufficiently present and analyze the environmental impacts so that decision makers and the general public are well informed. (*Laurel Heights Improvement Ass'n. v. Regents of Univ. of Cal.*, 47 Cal. 3d 376, 405 (1988)) (for the CEQA requirement); (*Or. Natural Desert Assn. v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1122 (9th Cir. 2010)) (for the NEPA requirement). In order to meet the broad intent and detailed requirements of these acts, a series of guidelines have established the procedure and basic content of the EIR/EIS. Further, case law has established the boundaries of what is considered a sufficient analysis under the guidelines. Particularly relevant to the deficiencies of the BDCP's Draft EIR/EIS are requirements regarding the sufficiency of information within the document. (14 Cal. Code Regs. §15151) (CEQA sufficiently informational); (*Dry Creek Citizens Coal. v. Cnty. of Tulare*, 70 Cal. App. 4th 20, 26 (1999)) (interpreting NEPA to determine that full disclosure qualifies as sufficiently informational). In tandem with the sufficiently informational requirement, the draft EIR/EIS must take a "hard look" at the environmental impact under NEPA. (*Ctr. for Biological Diversity v. U.S. Dept. of the Interior*, 623 F.3d 633, 642 (9th Cir. 2010)) (for the NEPA requirement). The document can, of course, only do this if it is sufficiently informational. Under both statutory requirements there are serious breaches of NEPA and CEQA guidelines. In short, the Draft EIR/EIS does not meet the standards of a sufficiently informational document and must be redrafted.

The BDCP, as a whole project, is also riddled with fatal issues under the ESA. As presented the Plan is an infrastructure project masquerading as a Habitat Conservation Plan (HCP) in order to obtain the required Incidental Take Permits under §10 of the ESA. There are significant flaws with the process the BDCP uses to present the plan to the Federal issuing agencies. Consequently there are also significant flaws with the steps that are required to validate the BDCP as a HCP. These flaws bring serious questions of the intentions and utility of the BDCP and consequently, the underlying legality of the entire project.

A) The Deficiency in the Articulation of Project Objectives & Language is Contrary to CEQA Requirements.

CEQA requires that any proposed project state the project goals in the Environmental Impact Report (EIR). (CEQA Guidelines §15124(b)). This statement should be "clearly written" and "help the lead agency develop a reasonable range of alternatives to evaluate in the EIR

and… aid the decision makers in preparing findings or a statement of overriding considerations." (*Id.*). The statement of objectives must also contain the fundamental, "underlying purpose of the project." (*Id.*). The inclusion and sufficiency of these elements are essential in determining the overall validity of the EIR. Put simply, the Draft EIR for the BDCP does not fulfill even these basic requirements.

The BDCP vainly attempts to conform to CEQA requirements through form alone. It states that the fundamental project objectives are to "make physical and operational improvements to the SWP [State Water Project] system in the Delta necessary to restore and protect ecosystem health, water supplies of the SWP and the CVP [Central Valley Project] south-of-Delta, and water quality in a stable regulatory framework, consistent with statutory and contractual obligations." (EIR/EIS, 2-2). Laid out in this single sentence are several very distinct and very different goals. These distinct goals break down into either increasing water exports to the Central Valley or restoring the already decimated Delta ecosystem.

The language of the Draft EIR echoes the goals articulated by the Sacramento-San Joaquin Delta Reform Act of 2009 "to provide for the sustainable management of the… [Delta] ecosystem, to provide for a more reliable water supply for the state, to protect and enhance the quality of water supply from the Delta, and to establish a governance structure…." (Cal. Water Code §85001(c) (West 2014)). The major deviation between the two sets of fundamental objectives is the description of securing the water supply. The BDCP focuses on the water supply for south-of-Delta regions, whilst the Delta Reform Act is meant to assure water security for the entirety of California, including the watersheds that feed the Delta. This tension between the statutory objectives and the BDCP's CEQA objectives is indicative of the inadequacy present in the Draft EIR.

The EIR breaks down the overall project objectives into several programmatic objectives. These objectives include obtaining "incidental take permits for covered species," "improv[ing] the Delta ecosystem," and "restor[ing] and protect[ing] the ability of SWP and CVP to deliver up to full contract amounts." (EIR/EIS, 2-2—2-3). The BDCP then addresses several specific conveyance issues on the programmatic level, including improving safety and infrastructure in light of seismic and climate change threats; and at the very bottom of the list, "identify[ing] new

operations and a new configuration for conveyance of water entering the Delta from the Sacramento River watershed to the existing SWP and CVP pumping plants in the southern Delta by considering conveyance options in the north Delta that can reliably deliver water." (EIR/EIS, 2-3—2-4).

At the programmatic level, the BDCP proponents have essentially glossed over any concrete environmental goals for the project and focused exclusively on water conveyances and ensuring there is money to support the massive investment in the infrastructure required to support increased water transfers. Of the acknowledged programmatic goals, two deal with conservationist measures. One of these, the processing of ITPs, ensures that any other activity conducted under the auspices of conservation will not be subject to prosecution under the Endangered Species Act, protecting the plan proponents in the likely event that endangered or threatened species are irreversibly harmed. The other programmatic conservation goal is AS BROAD AS the overall project goal regarding conservationist measures. The wording of the fundamental project goal and programmatic goal is essentially the same. There are no specific elements enunciated or programmatic actions even remotely developed in this introductory statement that detail how the BDCP plans to "improve the Delta ecosystem." This format is incompatible with the CEQA guidelines for outlining the project goals and the statute's overall intent to provide stringent environmental protection. (*Mountain Lion Found. v. Fish and Game Comm'n*, 16 Cal. 4th 105, 112 (1997)) (agencies must interpret the statute to award the fullest environmental protection when developing goals).

The Draft EIR's statement of objectives is neither clearly written nor useful in developing a range of alternatives. It does not meet either of the primary, statutory goals that a statement of objectives must fulfill (providing information for policy makers and those who did not participate in the process to make a good decision). The statement is obfuscation in plain words, a statement of misinformation that eviscerates the concept of conservation in the same utterance that it sets ecosystem protection as a primary goal. The reason behind this is simple: where the plan delves into the specifics of water conveyances and infrastructure, it keeps the conservation methods intentionally broad, thereby absolving itself of any duty to discuss concrete conservationist measures. The plan attempts to follow CEQA guidelines and the requirements of the 2009 Delta Reform Act, but only does so solely through lip service; instead favoring the

interests of water-hungry plan proponents. This structure artificially limits the EIR to considering ONLY conveyance measures and alternatives. In refusing to adequately address conservation goals on the same programmatic level as the conveyance goals in the statement of objectives, the BDCP proponents have violated CEQA guidelines. The project's underlying and specific goals have been artificially constructed. As an artificial construction, the EIR fails basic CEQA requirements and cannot, under any circumstance, be considered sufficiently informational. At the very least, the statement of objectives must be redrafted to include an outline of specific conservation methods or desired outcomes to fully inform policy makers and the public of the basis for the development of the BDCP.

B) The Deficiency with the Project Objectives & Language is Contrary to NEPA Requirements

The purpose statement of an Environmental Impact Statement (EIS) must "briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." (40 C.F.R. §1502.13 (2014)). This regulation allows the preparing agencies a significant amount of leeway in defining a project and expressing the underlying goals. The courts have routinely upheld the broad nature of the regulation; but the BDCP still fails to conform to even this basic statutory requirements.

The Draft EIR/EIS is a joint document, designed to fulfill both CEQA and NEPA requirements. Immediately following the CEQA objectives and purpose statement, the BDCP lists objectives and needs in an effort to satisfy the NEPA regulations. In the purpose statement, the document reiterates the attempts of the Plan to provide for the co-equal goals established in the Sacramento-San Joaquin Delta Reform Act of 2009 by "providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem." (EIR/EIS, 2-5) (This seemingly contradicts the CEQA purpose of assuring only south-of-Delta water supplies). The purpose statement breaks down three primary goals of the BDCP: dealing with applications for ITPs, "improv[ing] the Delta ecosystem," and allowing the SWP and CVP to deliver up to full contract amounts for water deliveries. (EIR/EIS, 2-4).

The Draft EIS then enunciates the underlying purpose and underlying need in consecutive sections, with further subsections relating to specific needs the Plan proponents have identified in

the Delta, including: Delta Ecosystem Health and Productivity, Water Supply Reliability, and Delta Hydrology and Water Quality (§2.4; §2.5; 2-5.1-2-5.3). (EIR/EIS, 2-4—2-7). These sections divulge vague, summary descriptions of the issues facing the Delta. These descriptions include a primarily pessimistic look at the declining ecosystem health, an emphasis on the water disparity that plagues California, and brief mentions of climate change and other challenges to a stable Delta hydrology. (EIR/ESI, Ch. 2, 2-4—2-7). Essentially, these need sections identify the severe issues facing the Delta, without any acknowledgement of the complex interplay and competing interests also present.

When evaluating project goal and need statements under NEPA, there are minimal guiding regulations; essentially requiring a brief description of the underlying purpose of the project and the alternatives presented in the EIS. (40 C.F.R. §1502.13 (2014)). In addition to the proscribed guidelines, there is also a significant amount of case law that guides how a project should be defined, including the description of a project's purpose AND need. The central element of an EIS is a good faith and "objectively hard look" at the potential environmental impact of any proposed project. (*City of Sausalito v. O'Neil*, 386 F.3d 1186, 1207 (9th Cir. 2004)). In order for this requirement to be met, the Draft BDCP EIS must contain sufficient information, including a valid, concise, and informative purpose and need statement. *Id.*

The purpose statement contained in the EIS seems to interpret the brevity requirement in favor of vagueness. This vagueness leads to the same issue that plagues the Project under CEQA regulations: artificially narrow construction of project goals. An EIS cannot define a project with artificially narrow goals. (*Jones v. Regents of Univ. of Cal.*, 183 Cal. App. 4th 818, 826-27 (2010)). Overly broad or possibly contradictory project goals are not acceptable because they preclude meaningful disclosure of environmental impacts. (*Envt'l Law & Policy Ctr. v. U.S. Nuclear Regulatory Comm'n*, 470 F.3d 676 (7th Cir. 2006)); (*see also Simmons v. U.S. Army Corps of Eng'rs* 120 F.3d 664 (7th Cir. 1997)).

The BDCP falls into the category vehemently derided by the courts. The co-equal goals offer an overly broad definition that has allowed for the manipulation of alternatives to focus solely on water conveyance. The subsequent purpose and need statements further emphasize a single goal (water conveyances) instead of the established coequal goals. In doing so, the EIS

issued for the BDCP violates the Congressional intent behind NEPA. In constructing the project definitions to not award equal weight to the established co-equal goals, the EIS has violated NEPA procedural requirements. Focusing almost solely on conveyance and water security issues, at the expense of the already identified conservationist goals fails the sufficiently informational requirement. As such the document cannot be considered valid and cannot be adopted without redrafting and recirculation of a new Draft BDCP Plan and a new Draft EIR/EIS.

C) The Draft EIR/EIS Does Not Take a Sufficiently Hard Look at the Plight of the Delta Smelt.

NEPA and CEQA both require the EIR/EIS to be sufficiently informational. (Cal. Water Code §15121(a); 40 C.F.R. §1502.1). In addition to this requirement, the EIR/EIS must also take a "hard look" at the environmental impacts of any proposed project. (Cal. Water Code §15121(a)) ("inform… of the significant environmental effect of a project [and] identify possible ways to minimize the significant effects…"); (40 C.F.R. §1502.1 ("Statements shall be concise, clear, and to the point, and shall be supported by evidence….")). (See also Cal. Water Code §15126.2).

The courts have unabashedly adopted this doctrine in determining the sufficiency of an EIR/EIS. (*See generally City of Sausalito v. O'Neill*, 386 F.3d 1186 (9th Cir. 2004); *Nat'l Audubon Soc'y v. Dept. of the Navy*, 422 F.3d 174 (4th Cir. 2005)). When evaluating a document under CEQA, the hard look doctrine requires that the EIR describe significant environmental impacts and describe any possible mitigation measures or why the project should move forward in light of the impacts. (Cal. Water Code §15126.2(a)-(b)). In NEPA practice, the hard-look doctrine means examining and disclosing all of the significant environmental impacts in the EIS, as well as examining reasonable alternatives. (40 C.F.R. §1502.14(a)).

The BDCP and its accompanying EIR/EIS do not meet the hard-look disclosure requirements under CEQA and NEPA regulations, beyond the project description issues raised above. Rather than the frank and full look required by the law, the Plan and its associated documents instead force false optimism onto the ecological challenges facing the Delta; sacrificing objectivity in order to satiate the demand for water in the Central Valley. This section

of the comment focuses on the issues particularly relevant to the already heavily litigated Delta smelt, and the disparities between existing conservation plans and the BDCP's treatment of the issue.

1) The BDCP Does Not Take a Sufficiently "Hard Look" at the Major Stressors Affecting the Delta Smelt Population.

Just one example of BDCP deficiencies is the incredibly optimistic assessment of the threat facing the Delta smelt. Normally, optimism is to be commended, except where realistic expectations are both the norm and required by law. In regards to the Delta smelt, there are several critical issues; including salvage, salinity, and critical habitat modification, that are not addressed sufficiently in the BDCP documents. Consequently, the EIR/EIS fails to the take the required "hard look" at the environmental impact of the BDCP.

The issue of overall salvage and take is dodged throughout the majority of the BDCP and the Draft EIR/EIS. "Salvage of delta smelt at the south Delta facilities could increase in the future if the population size increases as a result of the BDCP or other actions; however, this will not represent an increase in loss as a proportion of the population." (Plan, 5.5-35). The above statement blithely assumes that salvage will not be a problem with any new north Delta facilities, and any increased salvage at the existing south Delta facilities will be the result of overall increased Delta smelt population. Such an assessment ignores several critical factors regarding the threatened nature of the Delta smelt. It is an oversimplification of the factors resulting in the overall decline of the Delta Smelt population and a blatant misrepresentation of the overall stressors on the Delta smelt.

Furthermore the Plan states, "[m]any of the conservation measures proposed under CM1 constitute a continuation of existing operational criteria being implemented under the biological opinions... that currently constrain State Water Project and Central Valley Project operations." (Plan, ES-10). This statement seems to presuppose that the existing scientific information and conservation actions regarding the Delta smelt will feature prominently in the BDCP and any future changes to the Delta infrastructure. This assessment is blatantly not the case; there are only a smattering of references to the previous Biological Opinions and prior science throughout the BDCP. There is no succinct, centralized section that discusses the integration of the BDCP

with existing, legally required ecological initiatives. This deficiency is a violation of the "hard look" required under both CEQA and NEPA, and mandates the redrafting of the EIR/EIS.

The existing BiOp (from 2009) identifies multiple stressors on the Delta smelt population, including: decline in food availability, predation, multiple contaminants, low dissolved oxygen, excessive turbidity, alterations in Delta hydrodynamics, increases in temperature, increases in salinity, and entrainment. (*Independent Expert Panel Review of the Family Farm Alliance's Information Quality Act Correction Requests*, 5-6, prepared for the Environmental Protection Agency (2009), available http://www2.epa.gov/sites/production/files/documents/ocap-iqa-appeal-response-expert-review_0.pdf). The BiOp, and follow-up independent reviews, notes that it is nearly impossible to predict which of the stressors has the most impact on the Delta smelt population. However, it does identify long-term changes, such as outflow and salinity; and the decline in food resources as key factors. (*Id.* at 6). While entrainment is a major issue (and perhaps one of the most easily managed) for the delta smelt, it is also one of the least critical in fostering the recovery of the species. (*Id.*). The BiOp, the myriad of litigation involving the validity of the BiOp, and the independent evaluations of the BiOp all make this abundantly clear.

Yet despite the numerous other critical factors affecting the Delta smelt, entrainment is one of the primary focuses of the BDCP and its accompanying EIS. In constructing the north of Delta conveyance facilities, the BDCP touts improved entrainment systems than the existing facilities south of Delta. In limiting entrainment of the Delta smelt, the BDCP hopes to fulfill its conversation goals without substantively addressing any of the other numerous (and arguably more critical) factors relating to destruction of the fish's habitat.

This myopic approach to Delta smelt conservation is in direct contradiction to NEPA guidelines. The limited scope of the EIS's evaluation of the proposed project on the Delta smelt is inconsistent with the "objective hard look" standard. Simply focusing on one element affecting the Delta smelt does not fully disclose the environmental risks or impacts in any meaningful way. The refusal to incorporate good, existing scientific data regarding the threats and proposed resolutions to recover the Delta smelt population cannot be deemed valid. At best it

is willful ignorance of existing scientific data; at worst it is a deliberate attempt to subvert required conservation programs through obfuscation.

2) The BDCP Does Not Sufficiently Integrate Existing Science and Therefore Fails to Take a Sufficiently Hard Look at the Conservation Measures Required for the Delta Smelt Population.

The Draft EIR/EIS places a small, two-paragraph description of the relationship between the BDCP and the existing Biological Opinions in Chapter 1, which is cross-referenced in the Executive Summary. (Plan, 1-9). This minor reference is fundamentally flawed in several ways. First and foremost, it refers to a state of the Biological Opinion that is no longer true. As of March 2014, the Ninth Circuit certified the existing BiOp as valid. (*San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 592 (9th Cir. 2014)). The BDCP instead maintains that this BiOp must be revised and brushes aside any further discussion of being bound by the existing science. (Plan, 1-9) ("In 2011, these BiOps were remanded… [and] revised BiOps are to be issued by December 1, 2014 (USFWS) and February 1, 2017 (NMFS)…the joint BiOp for the BDCP will cover only those operations that occur after the new water conveyance facilities are operational [after 2026]…."). This presupposition ensures that the discussion regarding necessary steps to conserve and foster repopulation of the Delta smelt under the BDCP is fundamentally flawed.

The BDCP does discuss the preexisting Biological Opinion for the Delta smelt in very minor detail.

> The BDCP is expected to result in very low levels of entrainment relative to conditions prior to implementation of the USFWS (2008a) BiOp, and is expected to maintain total proportional entrainment loss across all SWP/CVP Delta export facilities at levels below those achieved under the current USFWS BiOp. The BDCP provides the additional benefit of natural communities restoration, which is expected to increase the extent of tidally influenced habitat, including tidal marshes, and shallow subtidal habitats, in the Plan Area. Proposed restoration areas are spatially diverse, are within and adjacent to currently important habitats, and are expected to provide a range of habitat conditions, SOME [emphasis added] of which will be suitable for delta smelt spawning and rearing.

(Plan, 5.5-35). Further discussion of the USFWS BiOp occurs over the course of about a page. The BDCP concludes that impacts will be beneficial on the poor Delta smelt, with "low certainty." (Plan, 5.5.1-42). The limited discussion of the overall Biological Opinions, and

particularly discussion regarding the Delta smelt, ensures that the neither the Draft BDCP nor the Draft EIR/EIS executes the required hard-look at environmental impacts.

Subsuming the existing BiOps into a larger regulatory framework dilutes and quietly disappears fundamental and mandated recovery methods. Refusing to address the existing BiOps evidences a desire to avoid legally mandated conservation steps. Furthermore, the time gaps between the existing BiOps and the proposed, integrated opinions for the project allow for severe degradation and the possible extinction of the Delta smelt. In structuring the BDCP's proposed integration with existing, legal requirements in such a tenuous manner, the plan proponents are attempting to free themselves from the constraints imposed by existing conservation requirements. This is again a violation of the "hard look" required under NEPA and CEQA. Rather than acknowledge the existing science and preexisting conservation requirements, the BDCP has only mentioned that these elements exist before promoting its own optimistic assessment of the stressors affecting the Delta smelt. This is contrary to the law, and requires the redrafting of the EIR/EIS in order to fully embrace existing science and provide the mandated "hard look."

3) The BDCP Does Not Take a Sufficiently "Hard Look" at the Future Requirements of Conservation in the Delta in its Approach to Structuring Future Biological Opinions in either the Plan or the Draft EIR/EIS.

In addition to not adopting, or at least mostly appropriating, the existing Biological Opinion in a faithful attempt to conserve the Delta smelt, the production any further Biological Opinions will be disturbingly fragmented. Such production is contradictory to the stated goal of encapsulating everything Delta-related in a stable regulatory framework. The BDCP discusses a revised BiOp to cover activities that occur "after the new water conveyance facilities are operational." (Plan, 1-9). In the interim, the Plan wants the existing BiOps to remain the governing documents; all but precluding usage of new BiOp documents during the 50-year life of the permit, with the exception of the single joint document to be produced in approximately 2026. (Plan, 1-9). The plan proponents are seeking a fifty-year carte blanche without any attendant responsibility, and in the process assuring species destruction through a subversive and abusive ESA process.

The Draft EIR/EIS seems to confirm the fatalistic impulse behind plan proponent's logic, stating, "fundamental changes to the Delta are certain to occur… add[ing] to the difficulty of resolving the increasingly intensifying conflict between the ecological needs…and the need to provide adequate and reliable water supplies." (EIR/EIS, 2-7). This statement solidifies the Plan's attitude towards conservationist measures. With the changing nature of the Delta ecosystem, the plan attempts to persuade us that it will be unable to accurately accommodate conservation needs. This will certainly be true if it cannot abide by and produce accurate and timely biological opinions. In approaching the BiOps in such a fragmentary way, the BDCP is creating a self-fulfilling prophecy of species extinction, contrary to the law.

D) Conclusion

Spread across the Draft EIR/EIS and the overall BDCP, are significant and fatal errors in procedure and structure. While this is unsurprising giving the complex and convoluted nature of CEQA and NEPA, it does not mean that the BDCP should be shown leniency. The project is simply too complex and far-reaching to ignore these serious deficiencies. In determining project descriptions, the Draft EIR/EIS fails the sufficiently informational and "hard look" requirements under NEPA. The project is ill defined and vague. This necessitates, at the very least, redrafting the project objectives to more fully encompass the established co-equal goals of conservation and water security. Furthermore, the Draft EIR/EIS fails the "hard look" requirements by not fully incorporating the best existing science, including existing Biological Opinions, regarding the stressors affecting the Delta smelt. This is a violation under both CEQA and NEPA. Only through serious redrafting and revision can all of the issues currently affecting the BDCP be fixed, and until that time, the legal requirements for the project to move forward have not been met. Due to the complexity of the issues, it may be best to simply abandon the project before committing massive amounts of funding to an improper project.

II) FAILURE TO ANALYZE CUMULATIVE IMPACTS UNDER NEPA AND CEQA

The Bay Delta Conservation Plan is an enormous project which, if approved, would cause widespread, environmental impacts. However, many of these impacts remain unevaluated in the Draft BDCP and EIR/EIS. These impacts, even if individually insignificant in some instances, accumulate to cause significant cumulative impacts. Some of the BDCP's significant

cumulative impacts include the geographic scope of effects, dredging, operational impacts to upstream reservoir operations, and the recreation industry.

As a result of California's history with large projects, we can expect the initial projections to be inflated by the time the project reaches implementation. "[A]cross the globe, large infrastructure projects almost invariably arrive late, over-budget and fail to perform up to expectations." Dan Walters, Op-Ed., *Is Bay Bridge Fiasco a Harbinger for Future Projects?*, Sac. Bee, July 28, 2013, §A3. (quoting Bent Flyvberj, "Delusions and Deception in Large Infrastructure Projects." (51 California Management Review 170) (Winter 2009)). The underlying reasons are "delusions born of ignorance, deceptions to make projects sound more feasible than they truly are, and bad luck."(Dan Walters *supra*). The BDCP is "based on assumptions of need and utility that are questionable and may be …'delusions' or perhaps 'deceptions.'" (Dan Walters, quoting Bent Flyvberj *supra*). In fact, limiting the analysis of cumulative impacts makes the "project[] sound more feasible than [it] truly [is]" but the overall report is misleading. To prevent this misrepresentation of project benefits, the BDCP must be all-inclusive, transparent and accessible so that the public can adequately review the proposal before further action is taken.

Both NEPA and CEQA require that the lead agency assess the cumulative environmental impacts of a project using the best available information and tools available. The laws mandate that a cumulative impact analysis is required when a project is proven to be significant in combination with the effects of past projects, other current projects and future projects. Further indicators that an analysis is necessary are the past, present and foreseeable future projects that are closely connected that will have a probably effect on the environment.

However, the Delta Independent Science Board cautions that danger of speculation does not allow an agency to omit discussion of uncertainties surrounding the effects of a project: "[A]voiding clear articulation of uncertainties is not the same as avoiding speculation." Delta Independent Science Board, *Review of the Draft EIR/EIS for the Bay Delta Conservation Plan*, (May 15, 2014). Excluding uncertainties deprives the public and government agencies of the opportunity to evaluate and assess unanticipated impacts on human activity and the environment.

The current, narrow geographic scope must be expanded to include all potential impact areas, such as effects from dredging tunnel muck and effects on the recreation industry in and around the Delta region. Here are a few examples of issues that are not properly considered on a programmatic level.

A) Limited Geographic Scope of Effects

The Plan's geographic scope is narrowly limited to where the new infrastructure will be located and where it will directly or indirectly impact previously built resources. (EIR/EIS, 18.3.3). San Pablo Bay and the San Francisco Bay are two impacted bays that are not included in the BDCP's defined boundaries for the EIS. *Id.* This excludes cumulative impacts from the Draft BDCP:

> The Plan Area terminates at Carquinez Bridge, effectively excluding the entirety of San Francisco Bay. As a result, impacts to water quality, aquatic habitats, fish and wildlife, and estuarine dynamics in the San Francisco and San Pablo Bays have not been considered adequately in the Draft EIR/EIS and Effects Analysis. 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.

Letter from Barbara Salzman, President, Friends of the San Francisco Estuary, to Felicia Marcus, Chair, Water Resources Control Board (Oct. 30, 2013) (accessed on July 17, 2014). The Draft EIR/EIS states that it, "consider[s] significant effects of the proposed alternatives within certain boundaries as determined by direct impacts, tunnel areas, temporary and permanent power, visual or auditory impacts and impacts to national register listed districts or potential districts. (EIR/EIS, 18-45). However, the consequences that will result from the activities within the boundaries of the current geographic scope as defined by Chapter 18 will "extend downstream to affect [excluded] bays." Delta Independent Science Board, to Randy Fiorini, Chair, Delta Stewardship Council, and Charlton Bonham, Director, California Department of Fish and Wildlife (May 15, 2014) (accessed on July 17, 2014). Changes in these omitted bays as a result of the proposed new water conveyance infrastructure will impact the Draft BDCP's Plan Area. *Id.* For example, any changes in sedimentation within the Delta will cause environmental impacts outside the plan's geographic scope. *Id.* at 9. Further, the San Pablo Bay and the San

Francisco Bay will affect the "tidal fluxes and salinity intrusion into the Delta. Many fish species also migrate into or through these areas." *Id.* A geographic scope that fails to include the San Pablo Bay and the San Francisco Bay will fail to analyze the whole of the cumulative impacts.

B) TUNNEL MUCK AND DREDGING MATERIAL

The enormous size of the new infrastructure would require substantial excavation of land in addition to treatment of the resulting "tunnel muck". The Plan has increased in size from a proposed diameter of 33 feet in 2012 to what is now the Preferred Alternative, Alternative 4. (Administrative Draft EIR/EIS, pp. 3-54, 3C-17, March 2013). Under Alternative 4, the conveyance would be about 35 miles long, 150 feet underground, with an external diameter of 44 feet. *Id.* In order to install these enormous tunnels, "Tunnel muck" (also known as dredged material) needs to be excavated: "In the world of tunneling, "muck" refers to the excavated, toothpaste-like material that is bored from the ground below and transported by conveyor belts or rail carts to a staging area above…tunneling can produce a lot of material." Richard Stapler, Deputy Director, Communications, California Natural Resources Agency, "Muck: A Reusable Material from Tunneling" (June 13, 2013) (accessed on July 22, 2014).[1] The Draft EIR/EIS alleges that the attempts to mitigate the inevitable adverse effects to air quality from the extensive and necessary use of large, construction machinery: "Site selection…such as locations within 10 miles of construction feature would minimize truck travel to help address air quality effects [and] implementing a construction equipment exhaust reduction plan…would also help reduce adverse effects." (EIR/EIS, 31.5.1.4). Regardless of the Plan's proposed travel zone, there will be a substantial increase in greenhouse emissions from countless trips by large trucks to move the excavated tunnel muck away from the construction sites: "[I]mpacts include pile driving, every day for a year. Trucks will be moving "tunnel muck," excavated to build the tunnels, 24 hours a day, seven days a week—causing an increase in greenhouse gas emissions." Galen Kusic, *Skepticism Growing toward 'Twin Tunnels' Project: Gov. Brown's Bay Delta Conservation Plan in Hot Water*, San Francisco Bay View (May 7, 2014) (accessed July, 17, 2014).[2] Furthermore, the Draft EIR/EIS only mentions a ten mile zone for mitigating the trucks

[1] http://baydeltaconservationplan.com/news/blog/13-06-13/%E2%80%9CMuck_%E2%80%9D_A_Reusable_Material_from_Tunneling.aspx

[2] http://sfbayview.com/2014/05/skepticism-growing-toward-twin-tunnels-project-gov-browns-bay-delta-conservation-plan-in-hot-water/

emissions, but omits any reference to final dump sites and reuse sites that will undoubtedly adversely affect the air quality. The expansive tunnels will demand a great number of trucks to remove the tunnel muck.

The Draft EIR/EIS suggests that not only will they mitigate the adverse effects to the environment resulting from excavating the "tunnel muck" but that these measures will result in positive contributions: "[Selected reuse strategies, implementation of spoils, RTM, and dredged material reuse plans could result in beneficial effects associated with flood protection and response, habitat creation, and depth to groundwater in areas where the ground level is raised." (EIR/EIS, 31.5.1.4). The Draft EIR/EIS focuses on the reusability of the tunnel muck, but fails to adequately address the costs associated with the excavation and transportation of vast amounts of the earth. (EIR/EIS, 31.5.1.4). The Draft EIR/EIS recites a litany of benefits from reuse of the excavated land: "It is anticipated that one or more of the disposal and reuse methods could be implemented in any individual spoil, reusable tunnel material (RTM), or dredged material site." (EIR/EIS, 31.5.1.4). While the report lists likely adverse effects resulting from reuse of the "tunnel muck", it fails to explore the costs associated with "implementation of material reuse plans":

> Depending on which combination of these approaches is selected, implementation of material reuse plans could create environmental impacts related to ground disturbance, noise, release of hazardous materials, traffic, air quality, water quality, and Important Farmland or farmland with habitat value for covered species.

Id. The Draft EIR/EIS does not adequately discuss costs associated with the disposal and reuse of spoils or the costs from the expansive material dredging: "Under the estimates released by the state, building the tunnels, three large intakes on the river and associated facilities would cost $14.5 billion." Bettina Boxall, *California Plan to Overhaul Water System Hub to Cost $25 Billion*, Los Angeles Times (May 29, 2013) (accessed July 17, 2014).[3]

[3] http://articles.latimes.com/2013/may/29/local/la-me-delta-cost-20130530

C) Operational Impacts to Upstream Reservoir Operations

Despite the tunnels dependence on incorporating upstream reservoirs in order to ensure flow exports, the "BDCP analysis assumes no operation impacts to upstream reservoir operations." Restore the Delta, *BDCP Would Make All This Worse*, quoting the Bureau of Reclamation's comments on the Draft BDCP's EIS (July 31, 2013) (accessed July 17th, 2014).[4] The Draft BDCP dumps the issue of impacts to upstream reservoirs in a brief section entitled "Issues Not Carried Forward for Detailed Analysis". The Draft EIR/EIS states "operational changes are not carried forward for detailed analysis because they are *too speculative* for meaningful consideration." (EIR/EIS, 18.3.4) (emphasis added). In addition to pointing to climate change as a main contributor to upstream impacts, the plan declares that "current modeling shows that precipitation, rather than operational rules, is the largest cause of fluctuation at upstream reservoirs." *Id.* While saying that fluctuations prevent a proper analysis, the report identifies that "Alternative 4 however, has some potential to increase fluctuation of reservoirs levels at Lake Oroville." *Id.*

D) Adverse Effects on Recreation

It is undisputed that the Delta is a popular, lucrative destination for water and land based recreation. The overlap in these activities increases the appeal of the Delta and many visitors engage in multiple activities in one day. The Draft EIR/EIS lays out a review of recreation in the Delta, including the many different activities on a daily basis: "Recreation users in the Delta often participate in multiple activities during a daily visit… [such as] boating and fishing…wildlife viewing, sightseeing, walking, picnicking, and camping." (EIR/EIS, 15.1.1.1).

The Draft EIR/EIS accepts that the Delta is one of the premier attractions for land and water activity: "These waterways are used for boating, fishing, and other water-based and water-related recreation opportunities and are among the most popular waterways in the state for the pursuit of these activities. (EIR/EIS, 15.1.1.2.) For instance, the Delta is the fourth most popular boating destination: "Portions of the Delta…accounted for nearly half of the registered boats in the state…" (EIR/EIS, 15.1.1.1). Further, competitive activities not only bring positive attention to California but also bring revenue for the Delta region: "The Delta is one of the most

[4] http://restorethedelta.org/bdcp-would-make-all-this-worse/

productive trophy bass fisheries in the nation, and numerous bass tournaments are held in the Delta throughout the year, including several corporate-sponsored tournaments (California Department of Fish and Game 2007a)." (EIR/EIS, 15.1.1.1).

The Draft EIR/EIS limits its conservation plan directly to lands overseen by the United States Fish and Wildlife Service: "The conservation plan identifies goals, objectives, and strategies only for the lands that are currently, or soon to be, managed by USFWS, regarding habitat restoration and enhancement and protection of cultural resources." (EIR/EIS, 15.2.1.2). The Draft EIR/EIS projects that the timeline for construction undertakings "adjacent to or within certain recreation areas or sites could last from 1 to 7.5 years; Temporary effects (loss of recreation opportunity) are considered short-term if the duration is 2 years or less, or long-term, if the duration is more than 2 years." (EIR/EIS, 15.3.3).

The Draft EIR/EIS assumes that because there is not absolute data projecting long-term use at certain recreation areas, the Draft EIR/EIS can circumvent analysis of areas managed through leases from outside agencies:

> While recreational activities could be disrupted at ponds used for water ski instruction and hound racing, access to these parcels is subject to lease agreements with DWR. Due to the nature of these lease agreements, these activities could not reasonably be expected to continue for the long-term with any definitiveness, therefore, these facilities would not be considered long-term and/or well-established recreational facilities.

(EIR/EIS, 15.3.3.9).

The Draft EIR/EIS states that "property values may decline in areas that become less desirable in which to live, work, shop, or participate in recreational activities. For instance, negative visual- or noise-related effects on residential property could lead to localized abandonment of buildings." (EIR/EIS, 16.3.3.9). But, Bill Wells, Executive Director of the California Delta Chamber of Commerce, commented that many of the businesses in the Delta that will feel the effects of the plan are locally owned businesses that are unlikely to withstand a shift to recreation activity in the region following California's economic downturn. *Peripheral Tunnels Economic Impacts Inflated: Gov. Brown Refuses to Conduct Benefit-Cost Analysis; Cost Estimate has Tripled, Public will Pay*, Restore the Delta (August 5, 2013) (accessed on July 23,

2014).[5] Agriculture, tourism and recreation are the main sources of commerce in the Delta. *Id.* According to the California Delta Chamber of Commerce:

> While 75% of Delta boaters live within 75 miles of the Delta the region attracts visitors from all over the world with its 1,000 miles of waterways and vast opportunities for land based too. [But] [p]roposed disruptions to State Routes 4, 12, and 160 will limit the number of automobiles that visit the area. The 24 hour per day operations of pile drivers and huge trucks hauling 'muck' will further disrupt traffic as well as boating, fishing, hunting, bird watching, wine tasting and casual day trips to area towns, museums, and restaurants. The construction of giant intakes at the town of Hood will disrupt boat traffic on the Sacramento River. The proposed barriers on Georgiana Slough and elsewhere in the Delta will further block boat traffic.

Id.

E) NEPA Violations

NEPA defines a cumulative impact as a series of connected actions that, while appearing to be separate actions, all work to contribute to an aggregated impact:

> [T]he impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. §1508. For example, the EIR/EIS's limited Geographic Scope of Effects for the study area prevents a full analysis of the 'reasonably foreseeable future actions' and project impacts. Connected actions that are not considered in the narrow geographic scope include any impact to either the environment or human activities that will result outside of the current area of study. Projects that will impact one contiguous system require an adequate analysis of the impacts in an EIS.

Narrowing the geographic scope of the effects does not act as a get out of jail free card. The agency must show all the effects from the project, including those outside the direct project area, even if the agency negligently failed to include measurements regarding the significance or

[5] http://restorethedelta.org/peripheral-tunnels-economic-impacts-inflated-gov-brown-refuses-to-conduct-benefit-cost-analysis-cost-estimate-has-tripled-public-will-pay/

insignificance of the effects on the San Pablo and San Francisco Bays. Further, analysis is problematic when the impact to the existing system and the system's capacity to sustain additional use generated from the project had not been prudently contemplated. *Id.* at 1199. Omitting two large bays that are vital to California proves that the Draft BDCP improperly fails to analyze supplementary uses required by the project and the affect to San Pablo and San Francisco Bay's current operations.

The "Connected actions" create a cumulative impact and must be discussed in the one single EIS. These "individually minor but collectively significant actions" (40 C.F.R. § 1508.7) cannot be broken up into separate segments so as to fragment what is in actuality a single project:

> "Actions are *connected* if they (i) "[a]utomatically trigger other actions which may require environmental impact statements," (ii) "[c]annot or will not proceed unless other actions are taken previously or simultaneously," and (iii) "[a]re interdependent parts of a larger action and depend on the larger action for their justification.""

40 C.F.R. § 1508.25(a)(1). Simply put, "[connected actions] are links in the same bit of chain"; unconnected actions are "separate segments of chain." *Northwest Res. Info. Ctr. v. Nat'l Marine Fisheries Serv.*, 56 F.3d 1060, 1068 (9th Cir.1995). NEPA necessitates an adequate cumulative analysis in every EIS for transparency and accessibility to the public: "To make an informed decision about how or whether to proceed with the proposed projects and to comply with NEPA, an agency must identify their potential combined environmental impacts and make that information available to the public." *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 991 (9th Cir. 2004).

NEPA institutes a "hard look" standard of review to determine if several actions could result in a cumulative effect. If so, the agency is required to draft an EIS that includes detailed and calculated information regarding all potential effects. This "hard look" must be more than "general statements about possible effects and some risk do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided." 40 C.F.R. § 1508.7.

The Draft EIR/EIS's treatment of adverse effects resulting from dredging for the tunnel construction to air quality is too brief. Contrary to NEPA's purpose to ensure the public has access to the information surrounding the Plan, glossing over these adverse effects undermines goals of transparency and accessibility. Bureau of Land Mgmt. at 991. Dredging tunnel material is a connection action with effects that domino into other environmental effects, such as air quality, and associated costs. 40 C.F.R. §1508.25(a)(1). The Draft EIR/EIS falls short of NEPA's "hard look" standard of review, which requires that the "EIS includes detailed and calculated information regarding all potential effect…and [more] than some risk". 40 C.F.R. §1508.7. For example, the explanation of the "construction equipment exhaust reduction plan" is not suitably detailed. (EIR/EIS, 31.5.1.4). The missing analysis of greenhouse emissions, costs, number of large trucks of removal, and the distance to final dump sites or reuse areas are all connected actions under NEPA and are not analyzed in the Draft EIR/EIS. The Draft EIR/EIS also states that placing dredging dump locations within ten miles from the construction site will help to mitigate air quality. *Id.* However, the Draft EIR/EIS fails to continue the analysis of potential mitigation measures. There is no discussion of final destination sites to store and/or reuse this dredged material. Establishing a ten-mile travel zone to "minimize truck travel" is misleading without information regarding the number of trucks and the projected demands on each truck. The "selected reuse strategies" are not explained in any detail, which violates NEPA's requirement for something more than a cursory explanation. *Id.* This attempt to purport "beneficial effects" is far too conclusory without the in depth analysis to create a context for readers.

The hidden costs around the excavation and transportation of the tunnel muck must be clearly presented. NEPA's "hard look" standard of review requires that the EIS contain "detailed and calculated information regarding all potential effects…and more than general statements…" 40 C.F.R. § 1508.7. Actions that may be "individually minor but [are] collectively significant actions…" must be fully analyzed. 40 C.F.R. § 1508.7. This cursory analysis of the tunnel constructions' adverse impacts on the environment omits a discussion of the costs and, more importantly, who will be bearing these costs. These omissions violate NEPA.

The stunted analysis of operational impacts to upstream reservoirs operations defies NEPA's definition of collected actions that are "collectively significant actions taking place over

a period of time." *Id.* The upstream reservoirs have a direct effect on the Delta and various rivers. Importantly, the proposed conveyance would be a significant project and substantial invasion into the existing environmental system. The Plan erroneously points to other, existing factors as insurmountable obstacles to an analysis: "incremental actions when added to other past, present, and reasonably foreseeable actions regardless of what agency…or person undertakes such other actions…" 40 C.F.R. § 1508. Further, the EIS is responsible for evaluating "significant actions taking place over a period of time." *Id.* The Draft EIR/EIS violates NEPA when it assumes no operational impact, leaning on current environmental factors such as fluctuation in precipitation and climate change. These existing factors are part of "past" and "present" actions that contribute to the overall impact. The new conveyance would be added to these factors in a single analysis. Plus, studies around climate change, precipitation, and independent management agencies are well established, so the argument that the EIR/EIS could not do slightly more analysis of the projects impacts upstream is attenuated. The Draft EIR/EIS cannot circumvent a proper analysis merely because there may be some uncertainty.

Both the National Marine Fisheries Service and the Bureau of Reclamation have stated that failure of the current Draft EIR/EIS to analyze upstream operations and the related consequences of operating the tunnels is inadequate to satisfy NEPA requirements. The Draft EIR/EIS needs to be redrafted to include the impacts of the tunnels on upstream reservoirs.

The Draft EIR/EIS fails to adequately analyze the potential adverse effects on recreation and the respective industry. NEPA requires that connected actions require a single EIS, but the Draft EIR/EIS does not present data either way on whether lands outside of the Draft EIR/EIS's geographic scope will be affected, positively or negatively. 40 C.F.R. § 1508.25(a)(1). For example, the Draft EIR/EIS cannot exclude effects that are projected to occur outside the direct geographic scope as those effects are interdependent actions that are triggered by actions inside the Plan area. Moreover, the Draft EIR/EIS separates construction operations into long term and short term projections: "adjacent to or within certain recreation areas or sites could last from 1 to 7.5 years; Temporary effects (loss of recreation opportunity) are considered short-term if the duration is 2 years or less, or long-term, if the duration is more than 2 years." (EIR/EIS, 15.3.3). But the Draft EIR/EIS does not discuss the possibility that "short-term" 2-year or less

construction projects may have impacts on recreation for periods equal to or longer than the long-term projections. However,

The EIR/EIS's preferred option, Alternative 4, does not satisfy NEPA's requisite "hard look" standard. The Draft EIR/EIS erroneously fails to look at the potential adverse impacts on a programmatic level:

> "In the Cosumnes River Preserve, an east-west permanent transmission line would be constructed adjacent to the northern boundary of the preserve along Lambert Road, where CDFW manages the lands as an ecological reserve. There is no public access permitted within this part of the preserve; therefore, the placement of the transmission line would not displace any recreational facilities."

(EIR/EIS, 15.3.3.9). Narrowly focusing on this area in such a way limits a more comprehensive analysis of the cumulative impacts on the numerous recreation activities previously enumerated in the Draft EIR/EIS. This violates NEPA's requirement by overlooking the "past, present, and reasonably foreseeable future" impact on "collectively significant actions". 40 C.F.R. § 1508.7. Placing the "permanent transmission line" in an area where there is supposedly no public access does not preclude impacts to adjacent recreation that does not require direct access to that land, such as bird watching. But there is no discussion to this effect. Furthermore, the ecological reserve is purported to act as a northern boundary, which draws on an assumption that this will prevent any impact to the reserve itself. However, construction will undeniably impact the reserve and could cause a ripple effect. These actions are potentially connected, but there is no explanation in the EIS. By building the tunnels flush with an ecological reserve boundary it is inevitable that the construction, maintenance, and the close placement itself will cause adverse effects with the reserve. These effects could move through other areas in the Delta. Impacts in the ecosystem that fall outside the Plan area are further examples of connected actions that must be analyzed in the cumulative effects. The Draft EIR/EIS assumes that the impacts will and can be confined to where public access is not directly permitted. The Draft EIR/EIS's assumption fallaciously dismisses a necessary cumulative impacts analysis regarding the potential of effects on adjacent recreation.

The Draft EIR/EIS did not conduct impacts analysis on certain recreation areas due to an alleged lack of sufficient data modeling long-term usage. According to NEPA, an EIS must

analyze the cumulative effects resulting from the connected actions of past, present and "future actions regardless what agency…or person undertakes such other actions." 40 C.F.R. §1508. Inconsistent with NEPA's regulation, the Draft EIR/EIS relies on current lease agreements for access in its decision that this data allows them to circumvent a cumulative impact analysis: "[A]ccess to these parcels is subject to lease agreements with DWR. Due to the nature of these lease agreements, these activities could not reasonably be expected to continue for the long-term with any definitiveness…" (EIR/EIS,15.3.3.9). This reliance on third party leases as a baseline for neglecting to incorporate an analysis for these recreation areas violates NEPA's cumulative impact standard for connected actions that contribute to an aggregated impact. 40 C.F.R. §1508.7. Moreover, the Draft EIR/EIS must incorporate "future actions regardless what agency . . . or person undertakes such other actions." 40 C.F.R. §1508. In the missing analysis, the Draft EIR/EIS needs to elaborate on the "nature of the lease agreements". There is no inclusion of any studies on lease behavior in past years even though these trends would be indicative of future behavior that can show whether these facilities should be treated as "well-established recreational facilities". *Id.* The Draft EIR/EIS must account for past, present and foreseeable future actions and subsequent effects. But there is no such analysis, and the Draft EIR/EIS is relying on assumptions and conclusions.

Despite the proposition that there will be effective mitigation measures that reduce the impact on recreation activities and revenue for Delta businesses, the Draft EIR/EIS assumes that "the location of the proposed water conveyance facilities… would not cause adverse effects…". (EIR/EIS,15.3.3.9). This statement is misleading at best and apposite to NEPA requirement to provide a fully developed analysis of the cumulative affects based on the "hard look" guideline that requires more than generalized statements. 40 C.F.R. § 1508.7.

F) CEQA VIOLATIONS

CEQA regulations state that: "[A]n EIR shall discuss cumulative impacts of a project when the project's incremental effect is cumulatively considerable…." 40 C.C.R. §15130(a). Cumulative impacts are defined as "two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts." 40 C.C.R. §15355. Specifically, CEQA defines cumulatively considerable as "the incremental

effects of an individual project are significant when viewed in connection with the effects of the past projects, the effects of other current projects, and the effects of probable future projects". 40 C.C.R. §15065(a)(3). The most important indicators are environmental changes resulting from "incremental impacts of the projects when added to other closely related past, present, and reasonably foreseeable probably future projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time." 40 C.C.R. §15355. CEQA compels the lead agency(s) to "identify ways that environmental damage can be avoided or significantly reduced" and assists to "[p]revent significant, avoidable damage to the environment by requiring changes in projects through the use of alternatives or mitigation measures when the governmental agency finds the changes to be feasible." *Id.* (Quoting Guidelines § 15002(a)(2)-(3)).

If the combined impact of the project is not significant then an EIR may only be required to provide a succinct explanation as to why the combined cumulative impact is insignificant: "[B]riefly indicate why the cumulative impact is not significant and is not discussed in further detail in the EIR. A lead agency shall identify facts and analysis supporting the lead agency' s conclusion that the cumulative impact is less than significant." 40 C.C.R. §15130(a)(2). Nevertheless, discussion of the cumulative impacts is still required to address the "severity of the impacts and the likelihood of occurrence." 40 C.C.R. §1530(b).

The Plan's narrow geographic scope unlawfully limits the analysis of effects. A cumulative impact considers the individual effects together as well as effects of past, current and future projects. However, the Draft EIR/EIS's limited scope of analysis focused directly on direct impacts and the proposed infrastructure prevents a proper, lawful cumulative impacts analysis. It is impossible to determine the incremental effects that contribute to a considerable cumulative effect when two significant bays are excluded, the San Francisco Bay and the San Pablo Bay. There are more than two individual impacts expected to affect these Bays if the new conveyance is implemented: "[I]mpacts to water quality, aquatic habitats, fish and wildlife, and estuarine dynamics" (Barbara Salzman). In addition, there will be changes in sedimentation in the Delta that is expected to cause effects outside the Plan area, as well as "tidal fluxes and salinity intrusion in the Delta" from the excluded Bays. (Randy Fiorini). The Draft EIR/EIS's

narrow boundary prevents its scope of analysis and omits significant effect that will contribute to the cumulative impacts.

The Draft EIR/EIS's lack of focus on dredge tunnel muck operations excludes the cumulative impacts of the removal of excavated material. There are "two or more individual effects listed above, but the Draft EIR/EIS does not adequately analyze these considerable, incremental effects. Impacts from the dredging include but not limited to adverse effects to air quality, a substantial increase in greenhouse gas emissions from large construction vehicles removing the tunnel muck twenty-four hours a day, seven days a week, and further emissions from the power and energy used to for excavation and removal. Furthermore, the Draft EIR/EIS fails to contextualize these effects on the environment resulting from excavation and removal. The Draft EIR/EIS unlawfully skims over the connection between "effects of the past projects, the effects of other current projects, and the effects of probable future projects". 40 C.C.R. §15065(a)(3). The most important indicators are environmental changes resulting from "Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time." 40 C.C.R. §15355. At most, the Draft EIR/EIS offers a cursory reference regarding the required construction and the unavoidable impact on the environment: "Site selection...such as locations within 10 miles of construction feature would minimize truck travel to help address air quality effects [and] implementing a construction equipment exhaust reduction plan...would also help reduce adverse effects." (EIR/EIS, 31.5.1.4). Not only are these mitigation proposals weak on their face, but this brief statement blatantly violates CEQA's statement to provide a full analysis of projected cumulative impacts resulting from tunnel dredging over a period of time. While the Draft EIR/EIS offers an initial muck removal to sites ten miles away, they fail to address the long-term impacts of storage, transportation, or greenhouse emissions. The Draft EIR/EIS makes no mention of transporting the muck to a final destination, let alone how far this destination might be from the excavation. The lack of analysis of the probable extensive transportation over a period of time undermines CEQA regulations. The brief and unfocused discussion of the dredging impacts breaches CEQA's determination for cumulative impact studies when there are considerable, connected and incrementally significant impacts on the environment.

The Draft EIR/EIS's focus on its proposed benefits from reusing the tunnel muck results is an insufficient analysis under CEQA of the adverse effects from excavation and removal. The Draft EIR/EIS's alleged reusability and optimistic benefits from the tunnel muck is an assumption: "[Selected reuse strategies, implementation of spoils, RTM, and dredged material reuse plans could result in beneficial effects associated with flood protection and response, habitat creation, and depth to groundwater in areas where the ground level is raised." (EIR/EIS, 31.5.1.4). There is no detailed discussion of how these "reuse strategies" and implantation plans would operate. There also lacks detail regarding the specific outcomes of these proposals. Further, the Draft EIR/EIS avoids discussions of alternative scenarios where the "tunnel muck" cannot be reused and omits any discussion of associated costs. The Draft EIR/EIS contains the assumption that there is no significant impact from the dredging prompts CEQA's requirement for a succinct explanation as to why the combined cumulative impact is insignificant and must "identify facts and analysis supporting the lead agency's conclusion..." 40 C.F.R. §15130(a)(2). But there is no discussion or reference to this effect. Therefore, the Draft EIR/EIS assumes the benefits of reusing the dredged material but violates CEQA's requirement for a succinct statement explaining why there is no discussion supporting this assumption.

The Draft EIR/EIS side steps the issue of operational impacts to upstream reservoir operations by asserting the assumption that the data is too speculative to make provide any analysis. If an agency deems a project's impact insignificant, CEQA demands that there is at least a presentation of facts and analysis that supports that decision. This is to ensure a discussion of the "severity of the impacts and likelihood of occurrence." 40 C.F.R. §15130(b). The Draft EIR/EIS's passing mention of climate change and fluctuations in precipitation is a severely inadequate attempt to satisfy CEQA's requirements. The Draft EIR/EIS needs to provide a more detailed analysis, either to show the impacts are insignificant or to explain the impacts upstream as a result of implementing new infrastructure.

The Draft EIR/EIS underestimates the cumulative impacts of the project on recreation-based commerce in the Delta. CEQA dictates that when "two or more individual effects, which when considered together, are considerable" are significant and must be considered together. 40 C.F.R. §15355. However, the Draft EIR/EIS underrates the individual effects on Delta recreation from construction and maintenance of the new conveyance that will be forty-feet wide, thirty-

five miles long, and one hundred feet deep. The construction alone will be hugely disruptive to daily life in the region. But the Draft EIR/EIS ignores the interruption of daily commerce in the Delta region and fails to accurately evaluate all the impacts of the project. There is no analysis that sufficiently includes the economic impact to businesses and families in the Delta region that will be affected by this invasive project. Further, the analysis must include the conveyance "in connection with the effects of the past projects, the effects of other current projects, and the effects of probable future projects." §15065(a)(3). The Draft EIR/EIS does not follow CEQA's guideline here as it states the timeline for construction of the conveyance. The temporary projection of two years or less suggests that loss of recreation will pace the temporary construction projections. (EIR/EIS, 15.3.3). However, there is no analysis connecting the effects of "temporary" construction to past effects, other current project, or effects of future projects. Moreover, the Draft EIR/EIS neglects to discuss the likelihood or severity of effects to Delta recreation that may continue past the cessation of the construction timeline. The Draft EIR/EIS is not in accord with CEQA and must be amended.

G) Conclusion

Under NEPA and CEQA regulations, all connected actions must be discussed in a cumulative impacts analysis in the Plan's EIS. The report is inherently incomplete since it fails to include numerous connected actions and other impacts from the project. First, the geographic scope of effects is far too narrow to allow for a comprehensive discussion of the effects from the new conveyance and relevant infrastructure. It is incomprehensive that an impact in one part of an interconnected system, such as the bays and Delta waterways, would only affect the direct impact area but would not travel to affect distant parts of the intertwined system. Even if this were possible in a land-based system, connected waterways are constantly responding to shifts in the system, like a ripple in a pond. It has been proven that excluding the San Francisco and San Pablo Bays is an egregious misstep and immensely undermines any attempt at the required cumulative impacts analysis. Second, "tunnel muck" dredging has many factors, more than the immediate construction of the infrastructure. Without incorporating these aspects in the cumulative impacts analysis the EIS cannot be consider lawful or complete. Third, operational impacts to upstream reservoirs is part of the connected system that requires analysis, yet the Draft EIR/EIS attempts to bypass the issue altogether. Legally, the Draft EIR/EIS needs to

identify the facts that allow them to ignore these important impacts, or it needs to incorporate an appropriate analysis into the EIS. Fourth, impacts to the recreation industry in and around the Delta are incredibly important, as they will affect a multitude of people and the ecosystem. However, the analysis is far too limited. The Draft EIR/EIS needs to be expanded from the current narrow geographic scope. It also needs to incorporate associated costs, and allow for impacts to the Delta not just directly around the immediate infrastructure but also downstream and upstream impacts from construction. For this reason, the Draft EIR/EIS doesn't provide the necessary context necessary for readers. The Draft EIR/EIS must adhere to NEPA and CEQA requirements in order to avail readers and California citizens of the projected consequences.

III) FAILURE TO DISCLOSE NECESSARY WATER TRANSFERS

A) SUMMARY

Omitted from the BDCP, but documented elsewhere, is the intent to add 1.3 million acre feet of "new" Delta outflow water, which would be made possible by mining the declining groundwater aquifers of the Northern Sacramento Valley's Colusa groundwater subbasin. The environmental and economic implications are great, yet they have not been analyzed anywhere in documentation associated with the BDCP, as required by CEQA and NEPA.

B) BACKGROUND

The BDCP's success in achieving its conservation measures relies on adequate water flowing through the Delta. In order to achieve this, Plan proponents have advocated for increased water transfers north of the Delta that will meet the flow requirements of the BDCP, to be sold to buyers south of the Delta. The specific increased exportation of water from the Delta is left out of BDCP documents that have been released for public review, yet referenced repeatedly by the proponent agencies in documents obtained through PRA and FOIA requests. (See E-mail from Lety Belin; e-mail from David Beard; KCWA, Voluntary Water Acquisition Program; Supplemental Water Purchase Concept; all on file with author).

The internal planning process for the BDCP discusses purchasing additional water supplies, referencing the water as "enhanced environmental flows," and the money used to buy the water as a "supplemental adaptive management fund." (E-mail from David Beard, KCWA, to

Urban Bakersfield Committee, Oct. 23, 2013, on file with author; Draft Implementing Agreement, 10.3.7.3.2, 37). These euphemisms refer to the BDCP proponents' plan to purchase up to 1.3 million acre feet (maf) of water, which will be transferred through the Delta and make up for the decreased flows of the Sacramento River that are a result of the new intake diversions. (E-mail from Lety Belin, Senior Counsel to the Deputy Secretary at Department of the Interior, Feb. 25, 2012, on file with author). The funding for these transfers will come from private water agencies as well as state and federal governments. (E-mail from David Beard, KCWA to Urban Bakersfield Committee, Oct. 23, 2013, on file with author). Correspondence between the Department of the Interior, DWR, and CDFW dating back to 2012 indicates that the BDCP proponents expect the extra water will be paid for by the public through the state water bond, now slated for the 2014 ballot. The contractors receiving the water would then expect to be able to turn around and sell the water for a profit. (E-mail from David Beard, KCWA, to Urban Bakersfield Committee, Oct. 23, 2013, on file with author).

The water transfers would be completed through surface water purchases from water rights holders north of the Delta. The surface water must then be supplemented through groundwater substitutions or fallowing. The groundwater pumping will impact the Sacramento Valley Aquifers, the Sacramento River, the surrounding area, and several species of waterfowl, yet these specific transfers and their resulting actions have not been identified in the BDCP documents.

These water transfers are necessary to the BDCP to meet certain flow requirements. The EIR acknowledges that "demands for supplemental water supplies…will increase." BDCP Plan, Ch. 5, Water Supply, p. 5-61. The desire for an extra 1.3 maf, the ongoing water bond fight in the Capitol, in which Plan proponents are attempting to secure language ensuring funding for these transfers, and the inclusion of phrases like "supplemental adaptive management fund" in BDCP documents are all further evidence that Plan proponents recognize they will need this extra water for the BDCP to succeed. (Email from Lety Belin, on file with author; (IA, 10.3.7.3.2, 37; Governor's Office Water Bond, 10, 79736 (a)(1); Supplemental Water Purchase Concept). However, no further discussion of the location, duration, or impacts of these transfers are included in any BDCP documents.

C) Negative Environmental Effects

1) Sacramento Valley Aquifer Impacts

The Sacramento Valley Hydrologic system provides a vast amount of water throughout the Delta and California. Groundwater contributes to about 31% of total water supply, but that percentage can jump substantially in drought years like the one California is experiencing now, when surface water availability is drastically reduced. (DWR 2005, Megdal et al. 2009). The groundwater levels in the Sacramento River Hydrologic Region have been dropping recently, with 30-foot declines seen in the northwestern portion of the Sacramento Valley Groundwater Basin. (California Water Plan Update, *Sac. River Hydrologic Region Summary*, SR-1). There are already groundwater pumping effects being felt across the Sacramento Valley. Land subsidence associated with groundwater withdrawal in the Sacramento River region has been documented in the southern portion of the Sacramento Valley, and as groundwater levels decline, the potential for land subsidence increases. (California Water Plan Update, *Sac. River Hydrologic Region Summary*, SR-13).

Scientific modeling experiments have shown that large-scale pumping for water transfers in the Sacramento Valley can negatively affect water table elevations over a large area, including drawdowns and the inability of the aquifer to rebound back to pre-pumping conditions. (Kyle Morgado, *Effects of Groundwater Pumping for Water Transfers*, p. 79). The Colusa Subbasin, located in the Glenn Colusa Irrigation District, has been highlighted in a DWR report as the source of increased groundwater pumping to satisfy replacing surface water transfers. (DWR, *CASGEM Groundwater Basin Prioritization*, Table A-4). However, the subbasin is already experiencing severely declining groundwater levels along the west side of Glenn County, and moderately declining groundwater levels in the Capay area. (DWR, *CASGEM Groundwater Basin Prioritization*, Table A-4). Pumping more water from an area that is already experiencing lower groundwater levels will further reduce water availability and the aquifer's capacity to recharge.

2) Sacramento River Impacts

The BDCP Parties request a fifty-year permit. Fifty years of pumping up to 1.3 maf of groundwater to replace surface water transfers will impact the Sacramento River. The

Sacramento River is considered a flow-through system, meaning pumped groundwater not consumptively used returns to the river. (NCWA, *Water Conservation and Efficiency in the Sacramento Valley*, p. 2). However, increases in groundwater extraction can reduce or even reverse groundwater seepage from aquifers to the Sacramento River, leading to lower Sacramento River flows. (Karin Hoover, *Aquifer Performance Testing Concerns*, p. 3). This would directly affect the BDCP's outflow scenarios, which contemplate high diversions of river flows. Lower flows would negatively impact protected fish species that require certain flow levels to maintain their populations. Reverse flows from the Sacramento River into groundwater aquifers could even end up being pumped into domestic wells. (Karin Hoover, *Aquifer Performance Testing Concerns*, p. 3).

3) Distorted Implementation with BDCP

These water transfers are not mentioned or described in any environmental document included in the BDCP; however, it is clear that Plan proponents realize they need the transfers to implement the BDCP. Although the transfers are not described throughout the BDCP, the funding and necessity of the transfers is made clear through the emails obtained through FOIA/PRA requests, as well as the Implementation Agreement, which references a "supplemental adaptive management fund." (IA, 10.3.7.3.2, 37). Plans for this 'supplemental' fund are written broadly in order to be used for other projects, such as funding a portion of the water transfer cost. Plan proponents are willing to ensure they will have adequate funding for these water transfers, yet have not disclosed the breadth of these water transfers, nor the likely effects of groundwater pumping.

Currently, the amount of water proposed to be transferred is 1.3 million acre feet- however, this amount could easily be expanded by decision-making parties in the BDCP. The approval of the BDCP would allow the authorized parties to not only pump up to 1.3 maf of substitute groundwater from the Sacramento Valley aquifers for the next 50 years, but to also possibly increase their level of pumping if more water is needed. The specifics of these water transfers, as well as the resulting impacts, need to be disclosed in the appropriate BDCP documents.

4) Negative Third Party Impacts

With up to 1.3 maf of surface water being transferred and decreasing groundwater levels, it is possible that some proportion of the water transfers might be effectuated through fallowing. The flooded conditions of rice fields that are beneficial to famers are also necessary to many species of waterfowl. Around 7 million birds use the Pacific Flyway, which encompasses the Sacramento Valley. (*CH2M HILL Report for NCWA*, 2011 p. 8). Rice acreage provides about 60% of all food for wintering waterfowl in the Sacramento Valley, and supports 230 species, of which 31 are considered species of special concern by the conservation community. (*CH2M HILL Report for NCWA*, 2011 p. 8). Fallowing more rice acreage will only result in reduced habitat and food availability for these migratory waterfowl. Fallowing more land can also lead to economic and employment impacts associated with the local agriculture industry. This past year, rice farmers have had to fallow 100,000 acres, almost 20% of last year's rice acreage, to deal with the drought. (Edward Ortiz, *Drought's Latest Effect?*, Sacramento Bee 2014). It is foolish to think California will not experience another drought cycle like the one we are experiencing now; and as the water transfers take 1.3 maf every year, the reduced water supply could result in much heavier economic costs to local business and employment.

Those who aren't party to these new water transfers will likely also feel a negative economic impact. With more water being pumped and moved south of the Delta, there will be less available for those who rely on individual wells and groundwater pumping for their water supply. Several towns and small cities are entirely dependent upon groundwater for drinking water; these areas could be negatively impacted with groundwater substitution pumping up to 1.3 maf from the aquifers. Non-contracting parties who may be affected by groundwater depletion need to have a say into the management process, since these water transfers will almost certainly limit the amount of groundwater they are able to pump themselves.

D) Legal Implications

1) Violations of CEQA and NEPA

These water transfers and their effects have not been evaluated or in the Draft BDCP. The failure to discuss these transfers violates the California Environmental Quality Act (CEQA) and the National Environmental Protection Act (NEPA). Proponents violated CEQA by failing to

provide a full description of the project, impermissibly piecemealing the project, and failing to adequately describe the project's impacts. Furthermore, the failure to adequately describe the project and its impacts violate NEPA.

2) NEPA

As federal law, NEPA requires an environmental impact statement of all major federal actions significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(C). Courts have defined the term "federal action" broadly to include not only projects directly carried out by federal agencies, but state and local programs funded by federal assistance and private development authorized by federal permits as well.

(a) Violation of Adequate Project Description

In order to satisfy NEPA, an agency needs to properly and thoroughly evaluate the environmental impacts of a proposed project. *Laguna Greenbelt, Inc. v. U.S. Dept. of Transp.* 42 F.3d 517, 527 (9th Cir. 1994). An EIS must "properly define" the project in order to alert the public of the agency's intentions and give the public enough information to foster intelligent public participation. 40 C.F.R. § 1502.4(a); *State of Cal. v. Block*, 690 F.2d 753, 772 (9th Cir. 1982). Furthermore, "to prevail on a claim that [a federal agency] violated its statutory duty to prepare an EIS, a plaintiff need not show that significant effects will in fact occur;" it is enough to raise substantial questions whether significant effects on the environment may occur. *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1997).

Here, the nondisclosure of the water transfers represents a violation of NEPA because these transfers and the subsequent groundwater substitutions/fallowing will have environmental impacts that have not been evaluated or disclosed to the public. The federal agencies failed to adequately identify and evaluate significant adverse impacts of the water transfers in the DEIS. The project has not been properly defined; therefore the public has not been alerted to the agency's true intentions, and public participation has suffered as a result. The water transfers are necessary to the BDCP's success on providing adequate flows through the Delta, and the effects of these transfers need to be described in adequate detail in order to be evaluated properly.

Potential impact include subsidence and lowered water tables as a result of the groundwater substitutions or fallowing that will likely take place.

(b) Failure to Adequately Describe Impacts

Under NEPA, an EIS must include information on the affected environment, as well as "every significant aspect of the environmental impact of a proposed action." *Or. Natural Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1109 (2008). The federal agency must analyze foreseeable environmental impacts, including the direct and indirect effects of the project and their significance. 43 C.F.R. § 1502.16; *City of Davis v. Coleman*, 521 F.2d 661, 676 (9th Cir. 1975). The evaluation of impacts must use high quality information and accurate scientific analysis. 40 C.F.R. 1500.1(b).

Plan proponents violated NEPA by failing to adequately disclose impacts to the Sacramento Valley area. No information on the water transfers has been included in their DEIS, and the direct and indirect effects on the environment have also not been disclosed or analyzed. Surface water that is sold south of the Delta will have several consequences in the Sacramento Valley region because the water will have to be substituted by either increased groundwater pumping or fallowing. This will have direct consequences on the surrounding water aquifers, the Sacramento River, and several species of birds and fish. The groundwater substitutions or fallowing will also have economic impacts on local towns and agriculture. These actions are all foreseeable as it is evident Plan proponents need this water for the BDCP to work properly. However, none of this has been analyzed or included in the Draft Environmental Impact Statement, which represents a violation of NEPA's requirements to adequately describe the foreseeable impacts.

3) CEQA

CEQA applies to most public agency decisions to carry out, authorize, or approve projects that could have adverse effects on the environment. The term 'project' refers to the "whole of an action, which has a potential for resulting in…a reasonably foreseeable indirect physical change in the environment." CEQA Guidelines § 15378(a). Case law has resulted in the definition of "project" receiving broad interpretation in order to maximize environmental

protection. *McQueen v. Bd. of Directors of the Mid-Peninsula Reg'l Open Space Dist.*, 202 Cal.App.3 1136, 1143 (1988). Before making a decision, CEQA requires the agencies to consider all relevant information and avoid or reduce significant environmental impacts when feasible. Pub. Resources Code § 21000. The agency's decision must then be supported by "substantial evidence," defined as "relevant, reasonable information and inferences that a fair argument can be made to support a conclusion." CEQA Guidelines § 15384(a).

(a) Faulty Project Description

CEQA requires the project description to include the precise location and boundaries of the proposed project, as well as a statement of objectives and a general description of the proposed project's technical, economic, and environmental characteristics. CEQA Guidelines § 15124(a-c). Describing the entire scope of the project is necessary for accurate and informative public evaluation and input, which has been held to be a vital part of satisfying CEQA. *City of Santee v. Cnty. of San Diego*, 214 Cal.App.3d 1438, 1454 (1989). The public review process is distorted and fails to inform public decision-makers without an accurate project description. *Cnty. of Inyo v. City of Los Angeles*, 71 Cal.App.3d 185, 192-93 (1977). The failure to include relevant information, including an accurate project description by the agency is prejudicial error if it "precludes informed decision-making and informed public participation. *Rialto Citizens for Responsible Growth v. City of Rialto*, 208 Cal.App.4th 899, 925 (2012).

The BDCP's DEIR needs to include these water transfers in their analysis; the failure to do so is a violation of CEQA's requirements to adequately describe the project. These water transfers will take place in the Sacramento Valley, and the groundwater transfers will take place in the Sacramento Valley Hydrologic Region; neither area has been included in the BDCP description. The Draft BDCP & DEIR/DEIS fail to provide a sufficient EIR project description because the project's location and boundaries do not encompass the proposed transfer areas, nor the aquifers where groundwater will be pumped from. The failure to include these water transfers and groundwater substitutions in any documents results in a violation of CEQA's requirements to provide an accurate and complete description. Furthermore, this error by the agency is prejudicial because it has prevented informed public participation by hiding important details about the BDCP's intent to increase water transfers and groundwater substitution or fallowing in

the Sacramento Valley. Public participation and comment is essential to informed decision-making, and the BDCP has violated CEQA by failing to include these water transfers in public documents. As a matter of law, the DEIR's failure to adequately describe the project violates CEQA's procedures by preventing the public's ability to meaningfully consider or comment on these potential adverse impacts.

(b) Improper Piecemealing/Segmentation of the Project

CEQA prohibits piecemealing projects into smaller pieces, in which it may be easier to find there is no significant environmental effect. *El Dorado Cnty. Taxpayers for Quality Growth v. Cnty. of El Dorado*, 122 Cal.App.4th 1591, 1599 (2004). Piecemealing impermissibly results in a curtailed project description, which allows the EIR to misstate the cumulative impacts "by separately focusing on isolated parts of the whole." *San Joaquin Raptor/Wildlife Rescue Center v. Cnty. of Stanislaus*, 27 Cal.App.4th 713, 729-30 (1994). Project descriptions must include integral parts of the project; otherwise their omission would result in important ramifications remaining hidden from public review. *Santiago Water Dist. v. Cnty. of Orange*, 118 Cal.App.3d 818, 830 (1981).

Additionally, future phases or consequences of a project need to be assessed in the initial DEIR if: "(1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project of its environmental effects." *Laurel Heights Improvement Ass'n v. Regents of the University of Cal.*, 47 Cal. 3d 376, 396 (1988). However, plans that do not contemplate additional parts of the project need not disclose possible future developments. *Rio Vista Farm Bureau Ctr. v. Cnty. of Solano*, 5 Cal.App.4th 351, 371 (1992).

Here, the BDCP documents do not include information and analysis of these water transfers in any of their documents. This violates the piecemealing prohibition of CEQA because the proponents have avoided reviewing the environmental effects of these transfers. These water transfers will have significant environmental impacts on the Sacramento Valley Hydrologic region, yet nothing has been disclosed. The cursory attention paid to environmental impacts relating to water transfers in Chapter 30 of the DEIR does not actually discuss the specific water transfers that are being proposed to maintain adequate flows through the Delta. Draft EIR,

30.3.6, 117. These specific water transfers have been left out of all BDCP environmental documents. Plan proponents' decision to defer any evaluation of the possible impacts of these water transfers until after project approval is piecemealing, and constitutes a procedural violation of CEQA.

Furthermore, this is not a "tiering" situating where future project EIRs would be appropriate. The water transfers satisfy both prongs of the *Laurel Heights* test: they are reasonably foreseeable consequence of the BDCP because Plan proponents know they will need additional water to satisfy flow requirements, and these transfers will likely change the initial project's environmental effects. The need for these additional transfers is recognized in the Implementing Agreement's Supplemental Adaptive Management Fund, where parties "anticipate that such funds could be used to acquire water to supplement flows." (IA, 10.3.7.3.2, 37. When "additional outflow [is] determined to be necessary," the fund can be used to buy "supplemental water" from "voluntary sellers." (IA, 10.3.7.3.2, 37. This language represents an admission that additional water will be needed to meet outflow requirements under the BDCP. These transfers are not merely possible future developments, they are a contemplated and necessary part of the BDCP. Furthermore, the transfers will also expand the scope of the initial project's environmental effects because the groundwater substitutions and fallowing will have different impacts than what the BDCP has chosen to disclose.

(c) Failure to Adequately Describe Impacts

An agency must prepare an EIR that provides enough environmental analysis to give decision-makers with sufficient information to adequately consider environmental impacts of a proposed project in order to satisfy CEQA. *Cnty. of Inyo v. City of Los Angeles*, 71 Cal.App.3d 185, 192093 (1977). CEQA requires EIRs to identify a project's significant effects on the environment, identify alternatives, and indicate the manner in which those effects can be mitigated or avoided. Pub. Resources Code § 21002.1. CEQA Guidelines require "direct and indirect significant effects of the project on the environment" to be "clearly identified and described, giving due consideration to both the short-term and long-term effects. This includes the significant "irreversible environmental changes which would be caused by the proposed project should it be implemented." CEQA Guidelines, § 15126.2 (a) & (c).

Plan proponents have failed to disclose these water transfers to the public, thereby avoiding all required discussion of the environmental impacts. These water transfers will have to be supplemented through groundwater substitutions, fallowing, or a combination of both. These actions will have impacts on the surrounding Sacramento Valley Hydrologic region, such as land subsidence, lower water table levels, and decreased water availability. The Sacramento River could also be negatively impacted, which would have multiple effects on surrounding bird and fish species. Fallowing too will have negative environmental impacts on the habitat and food availability for several protected species in the Sacramento Valley area. However, none of these impacts have been disclosed to the public in the BDCP environmental review documents, much less adequately described. This is another violation of CEQA's requirements.

E) Conclusion

It is clear that the BDCP proponents need these water transfers to go through the Delta to satisfy flow requirements. Without these transfers providing water passing through the Delta as it is sold down south, the whole idea put forth by the BDCP of maintaining Delta flow would fail. The necessity of these water transfers is evidenced by the ongoing water bond fight, in which Plan proponents are making sure enough money is secured in the language of the water bond to facilitate these transfers, and the inclusion of phrases like "supplemental adaptive management fund" in BDCP documents. (IA, 10.3.7.3.2, 37.

The BDCP proponents have strategized to put forth a "conservation plan" which actually will give them the ability to sell 1.3 maf of surface water from the Sacramento Valley and transfer it south of the Delta to water contractors, who can then sell the water for a profit. The water loss in the Sacramento Valley area will then be substituted through extra groundwater pumping and/or fallowing. Meanwhile, none of the various impacts and concerns have been studied, much less made public knowledge. There are several significant possible impacts that need to be analyzed and evaluated before the BDCP is pushed through and parties are allowed to pump even more water from an area that is already experiencing declining groundwater levels. None of the possible effects outlined above from this proposed water transfer have been studied, or if they have, have not been released to the public.

This represents a violation of CEQA and NEPA. Both require an adequate description of the project to be implemented, as well as a full disclosure of the impacts. The BDCP has not given a full description of their project because they have not included the water transfers, and the likely groundwater substitutions/fallowing, in the project description. Similarly, they have not disclosed all the environmental impacts that will result from these water transfers. There are severe consequences that have not been disclosed or described, which represents a violation of CEQA and NEPA.

The Sacramento Valley Hydrologic Region represents a vast resource for water, but the transfers being put forth in secret do not show a dedication to sustainable and reasonable management of the groundwater. Allowing the transfers to go forward could result in the decimation of groundwater levels that would have long-lasting negative impacts. This water grab is an underhanded attempt by BDCP proponents to take even more water than what is listed in the BDCP documents, and there needs to be a careful evaluation and assessment of the region before the BDCP becomes a reality for California for the next 50 years.

IV) THE DRAFT EIS/EIR IS SO DEFICIENT THAT IT PRECLUDES MEANINGFUL ANALYSIS

The Draft EIS/EIR cannot pass muster under NEPA or ESA because it does not have adequate information to contribute to a "meaningful analysis." NEPA requires that "Impacts shall be discussed in proportion to their significance." 40 C.F.R. § 1502.2(b). NEPA specifically includes 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 as factors in evaluating significance." 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 that the Water Tunnels would not be a permittable under the ESA 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.

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 significant uncertainty about whether the BDCP Water Tunnels project is permittable under the ESA. This 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," 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. 40 C.F.R. § 1502.9(a).

A) The Draft EIS/EIR Precludes Meaningful Analysis Because of the Absence of Essential Water Quality and Quantity Information

The Draft EIS/EIR lacks required water quantity and water quality analyses. As set forth above in the "Alternatives" section of these comments, the BDCP process fails to base the preferred alternative on the SWRCB flow recommendations made pursuant to the Delta Reform Act, nor does it 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 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. As is virtually always the case in the BDCP process, the cart has been placed before the horse. SWRCB flow determinations, water quantity and quality analysis, and public trust determinations must precede, not follow, BDCP decision-making.

Consequently, the BDCP process has failed to conduct the water supply availability analysis, quantification, and analysis of the environmental impacts required under the 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, basic analyses essential to determine whether the BDCP Water Tunnels, DWR's preferred project, is even feasible will be absent. 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).

B) The Absence of Other Essential Information

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, the lack of a cost-benefit study 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 missing 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 inadequately analyzing effects upstream, the BDCP process is also lacking 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."[6] Indeed, by reducing outflows from the Delta, the BDCP Water Tunnels would thereby reduce inflows into the Bay.

To sum it all up, there are more unanswered than answered questions about DWR's preferred project, the Water Tunnels.

C) Absence of an Accurate Project Description

There is a fundamental BDCP inaccuracy that was accepted at face value in the July 18, 2013 Release for federal agency comments that is profound. 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).

[6] (*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).