

The intakes, though massive in size, are a comparatively small part of the proposed enormous water conveyance facilities. The two Tunnels have actually increased in size from a proposed diameter of 33 feet in 2012 to what is now the Preferred Alternative, Alternative 4. Under Alternative 4, the two Tunnels would have an internal diameter of 40 feet and an external diameter of 44 feet.

The reduction in the number of intakes is an obvious subterfuge intended to make the proposed project look smaller in response to federal agency concerns even though the ultimate 15,000 cfs carrying capacity of the Tunnels is preserved. In fact, the two Tunnels have actually been *increased* in diameter from 33 feet to 40 feet. Consequently, the Delta Water Tunnels project has not been downsized at all. Instead, the Administrative Draft fails to provide the “accurate, stable, and finite project description” required by CEQA and the accurate project description required by NEPA and ESA. By this same subterfuge, the BDCP process unlawfully segments, piecemeals, and chops up the project into different phases by seeking approval now based on intake capacity when the intent is to actually operate in the future at the capacity of the Tunnels. That also violates the ESA, NEPA, and CEQA. This violation is explained in more detail in our comment letter of August 13, 2013. (January 14, 2014 FOR comment letter, Attachment 2).

VIOLATIONS OF THE ESA

I) VIOLATION OF SECTION 7 OF THE ENDANGERED SPECIES ACT

The Sacramento River creates habitat for dozens of endangered and threatened species. Five of these species include the *Sacramento River Winter-Run Chinook Salmon*, the *Central Valley Spring-Run Chinook Salmon*, the *Central Valley Steelhead*, the *Southern Distinct Population Segment of the North American Green Sturgeon*, and the *Delta Smelt*. 50 C.F.R. § 17.11. Realizing the reliance these fish have on the Sacramento River, USFWS and NMFS designated the Delta and the lower stretch of the Sacramento River as critical habitat for each species.⁷ USFWS and NMFS designate habitats as critical when they contain the primary

⁷ 50 C.F.R. § 226.204 (Sacramento River Winter-Run Chinook Salmon), 50 C.F.R. § 226.211(k)(5)(i) (Central Valley Spring-Run Chinook Salmon), 50 C.F.R. § 226.211(l)(5) (Central Valley Steelhead), 50 C.F.R. § 226.219(a)(3) (Southern DPS of NA Green Sturgeon), and 50 C.F.R. § 17.95–e–Fishes–Part 2 (Delta Smelt).

constituent elements (PCEs) needed for a species to survive and recover. 50 C.F.R. § 424.12(b). PCEs of the Delta and Sacramento River include “physical habitat, water, river flow, and salinity concentrations” (59 FR 65256) and “water quality and quantity” (70 FR 52488). *River flow* includes the magnitude, frequency, and duration of flow; *water quality* includes temperature and salinity. (74 FR 52300).

The Endangered Species Act (ESA) commands federal agencies to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat . . .” 16 U.S.C. § 1536(a)(2). Because the BDCP will affect listed species and designated critical habitat, NMFS and USFWS must issue BiOps determining whether the BDCP will jeopardize a listed species or destroy or adversely modify designated critical habitat. 50 C.F.R. § 402.14(a). To make these determinations, NMFS and USFWS must “evaluate the current status of the listed species or critical habitat,” “the effects of the action,” and “cumulative effects on the listed species or critical habitat.” 50 C.F.R. § 402.14(g)(2)-(3).

A) CURRENT STATUS OF LISTED SPECIES AND CRITICAL HABITAT

Although USFWS and NMFS designated the Delta and lower portions of the Sacramento River as critical habitat, dams and diversions have degraded many of the habitats’ PCEs. As a result of these degradations, the five listed fish species struggle to survive in the critical habitat designated for their survival and recovery. The BDCP identifies degradations of the critical habitat which each species encounters in the Delta and Sacramento River. These modifications include physical habitat loss and increased water temperature, which continue to worsen as the climate changes.

1) Physical Habitat Loss

The Sacramento River was once rich with spawning, rearing, and staging habitat for Delta species. The unimpaired Sacramento River flow inundated key spawning habitat and floodplains, providing access to productive ecosystems of abundant food sources for growing fish. Today, levees and dams prevent flooding and restrict flows, resulting in lower water levels and significantly less inundated habitat. As reported by the BDCP, “[a]ccess to much of the

historical upstream spawning habitat for winter-run Chinook salmon has been eliminated or degraded by artificial structures (e.g., dams and weirs) associated with water storage and conveyance, flood control, and diversions and exports . . .” (Plan, 2A.3-9). These developments have had a disastrous effect on the Winter-Run Chinook Salmon. “. . . Shasta Dam reduced the winter-run Chinook salmon ESU from four independent populations to just one.” (Plan, 2A.3-9). Habitat modification has had similar impacts on the other listed species. For example, “[m]ost historical adult staging/holding and spawning habitat for Central Valley steelhead is no longer accessible to upstream migrating steelhead.” (Plan, 2A.6-9). The Delta Smelt’s habitat may be reduced “because of land reclamation, channelization, and riprapping of historical intertidal and shallow subtidal wetlands,” but “[t]he extent to which such habitat loss may be limiting the population is unknown.” (Plan, 2A.1-11). Dams render 44.2% of Green Sturgeon spawning habitat inaccessible. (Plan, 2A.8-7).

These five endangered and threatened species of fish rely heavily on the Sacramento River to provide irreplaceable habitat for spawning, rearing, and adult staging. Development and diversions have caused sharp declines in populations, demonstrating that these fish adapt poorly, if at all, to interference with their habitat. The remaining habitat must be preserved and expanded in order to support Delta species’ survival and recovery.

2) Increased Water Temperature

Historically, the cool Sacramento River water provided the needed temperatures for coldwater fish species migrating from the Pacific Ocean. Cool precipitation and snowmelt maintained the river’s lower temperatures despite warm ambient conditions. Today, Sacramento River temperatures rise above suitable levels. The Draft Recovery Plan for Central Valley Salmonids identifies elevated water temperatures as a cause of habitat decline. (Pg. 3). The BDCP admits that “[e]xposure to seasonally elevated water temperatures may occur as a result of reductions in flow, as a result of upstream reservoir operations . . .” (Plan, 2A.3-17). Dams and reservoirs restrict the natural flow of the Sacramento River, resulting in weakened flows downstream of the dam. With less water flowing in the river, the ambient conditions have a larger impact on the lower volume of water, causing it to warm faster. In addition to reservoir

operations, diversions also weaken river flow and contribute to warming the remaining river water.

The increasing water temperatures have adversely impacted critical habitat in the Delta and the species that rely on it. “Spring-run and winter-run Chinook salmon are highly vulnerable to increased temperatures upstream of the Delta.” Draft BDCP, (5.A.2.0-2). “Increasing temperatures will result in less spawning habitat for anadromous fish.” (Plan, 5.A.2.0-2). “Higher water temperatures can lead to physiological stress, reduced growth rates, prespawning mortality, reduced spawning success, and increased mortality of salmon [and steelhead].” (Plan, 2A.3-17; 2A.6-13) (internal citations omitted). The Green Sturgeon also struggles with increasing temperature. “The Feather River is likely to have supported significant spawning habitat for the green sturgeon population in the Central Valley before dam construction.” (Plan, 2A.8-6). Today:

[w]ater temperatures in the Feather River may be inadequate for spawning and egg incubation as the result of releases of warmed water from Thermalito Afterbay. Warmed water may be one reason why neither green nor white sturgeon are [sic] found in the river during low-flow years. It is not expected that water temperatures will become more favorable in the near future and this temperature problem will continue to be a factor affecting habitat value for green sturgeon

Draft BDCP, (2A.8-9 – 8.10) (internal citations omitted). The Delta Smelt “are sensitive to exposure to elevated water temperatures, and high temperatures are known to reduce delta smelt survival and interfere with spawning.” (Plan, 2A.1-12). The Delta Smelt is considered to be the most vulnerable of these species to increasing temperatures. (Plan, 5.A.2.0-2). Whereas the other four species will return to the cool waters of the Pacific Ocean, the Delta Smelt lives in the Delta exclusively and cannot escape its rising temperatures. Conditions in the Delta continue to decline for coldwater species. As temperatures rise, the suitability of the critical habitat plummets, threatening Delta species’ survival and recovery.

3) Climate Change

Climate change will intensify deterioration of critical habitat and expose fish species to higher temperatures in the Delta. As stated in the BDCP, “[d]ue to climate change, some areas in northern California may experience more rainfall, but California generally will be 15 to 35% drier by 2100.” (Plan, 2.C-7). “Simulated projections indicate decline in precipitation for the Sacramento region for the rest of the 21st Century, especially the latter half of the century.” (Plan, 2.C-7). Snowmelt is also a major source of water for the Sacramento River. Reduced snowmelt necessarily results in lower water levels and reduced flow in the Sacramento River. According to predictions in the BDCP, “[s]nowpack volumes are expected to decline 25% by 2050.” (Plan, 2.C-10). The resulting lower flows in the Sacramento River will affect, not only the river itself, but also the Bay Delta which relies on Sacramento River flows. As sea level rises, water from the Pacific Ocean and San Francisco Bay will push further into the Delta, increasing salinity level and drastically impacting water quality.

Maintaining healthy X2⁸ locations will require increasingly stronger Delta outflows. According to the BDCP:

[f]or the existing salinity conditions, the X2 will move downstream about 1 km for each 10% increase in Delta outflow. Therefore, to move the X2 positions downstream 2 km would likely require about 20% more outflow. For existing conditions, an outflow of about 7,100 cfs is required to maintain X2 at Collinsville (km 81); the required Delta outflow for the projected LLT sea level rise of 45 cm likely would require about 8,520 cfs (1.2 x 7,100 cfs). An outflow of about 11,400 cfs is required to maintain X2 at Chipps Island (km 75); the required Delta outflow for the projected LLT sea level rise of 45 cm likely would require about 13,680 cfs (1.2 x 11,400 cfs).

(Plan, 5.A.2-91). The Delta Smelt relies almost exclusively on the inner Delta as its primary habitat. Encroaching seawater will impact the water quality of the Delta. It remains unclear whether the Delta Smelt could tolerate higher salinity levels in the Delta.

Climate change will worsen habitat loss and already-increasing water temperatures. With less precipitation and snowmelt, water levels in the Sacramento River will continue to decline. As water levels decline, less habitat will remain inundated and accessible to fish. Also, the water temperatures will rise faster, especially with the warming ambient conditions. Without adequate

⁸ “X2 is the distance, expressed in kilometers from the Golden Gate Bridge, at which channel-bottom water salinity (isohaline) is 2 ppt.” (Plan, 5.A.2-91).

preservation and restoration measures for Delta critical habitat, these fish face dim prospects for survival and recovery.

B) THE EFFECTS OF THE ACTION

“When considering the designation of critical habitat, [USFWS and NMFS] shall focus on the principal biological or physical *constituent elements* within the defined area that are essential to the conservation of the species.” 50 C.F.R. § 424.12(b) (*italics added*). USFWS and NMFS must determine and list the primary constituent elements with the critical habitat description. 50 C.F.R. § 424.12(b). PCEs “are essential to the conservation of a given species and [] may require special management considerations or protection.” 50 C.F.R. § 424.12(b). Without these PCEs, there would be no reason to designate habitat as critical. Accordingly, when considering the effects of a proposed action on critical habitat, NMFS and USFWS must evaluate the proposed project’s effects on critical habitat PCEs. Concerning the BDCP, NMFS and USFWS must evaluate the BDCP’s potential impacts on PCEs in the Delta and Sacramento River: physical habitat, water temperature, river flow, and salinity.

1) Physical Habitat and Water Temperature

(a) *CM1 Effects on Physical Habitat and Water Temperature*

“The primary purpose of *Conservation Measure 1 Water Facilities and Operation* is to construct and operate a facility that improves conditions for covered species and natural communities in the Delta while improving water supply.” (Plan, 3.4-1). Great tension exists between these goals. The more water left in the river for fish necessarily means a lower diversion; conversely, a greater diversion will result in less water kept in the river for biological goals. The BDCP claims to attempt to balance these goals with decision trees, which establish minimum flow criteria for the Sacramento River. Under these criteria, BDCP claims the proposed north Delta intake facility will only be permitted to divert water when the Sacramento River flow exceeds 5,000-7,000 cfs (depending on the month). (Plan, 3.4-20).

These minimum flow levels of 5,000 and 7,000 cfs are dangerously low. According to the United States Geological Survey, the average Sacramento River flow at Freeport, California in

October is 12,200 cfs.⁹ This means that operating at the constant low level pumping during October, which has a minimum flow requirement of 7,000 cfs, will, on average, decrease the Sacramento River's flow by 4,200 cfs. This represents a flow reduction of 34%, which will necessarily result in lower water levels, further deteriorating the PCEs of physical habitat and water temperature. With lower water levels, the Sacramento River will inundate less land, denying listed species access to physical habitat. Moreover, the lower water levels will expose listed species to higher temperatures. CM1 operations will worsen declining PCEs in the Delta and Sacramento River.

(b) CM2 Effects on Physical Habitat and Water Temperature

CM2: *Yolo Bypass Fisheries Enhancement Plan* includes plans to restore and enhance the Yolo Bypass as habitat for covered species. The Yolo Bypass is a floodplain along the Sacramento River, west of the City of Sacramento. In the unusual circumstances when Sacramento River flows exceed 55,000 cfs, water spills over the Fremont Weir and into the Yolo Bypass before reaching and flooding the City of Sacramento. The goal of CM2 is restoration of high quality habitat for fish species struggling in the Sacramento River. (Plan, 3.4-41). When inundated, floodplains often demonstrate a significant increase in biomass. (Plan, 3.4-41). Increases in production of phytoplankton and dipteran larvae provide abundant food sources for juvenile fish. (Plan, 3.4-41). The Knaggs Ranch Experimental Agricultural Floodplain Pilot Study 2011-2012 Year One Overview reports "remarkable growth rates" for salmon reared in the Yolo Bypass. (Pg. 10).

Yolo Bypass inundation results from significant flood events, not typical overtopping events at Fremont Weir. (Plan, 3.4-44). Conditional on these flood events, Yolo Bypass inundation is too infrequent to consistently support salmonid development. To take advantage of the productive floodplain habitat, CM2 includes plans to modify Fremont Weir to allow flooding at flows lower than 55,000 cfs, the current threshold for Yolo Bypass flooding. (Plan, 3.4-53). The modified weir would allow flows of 1,000 cfs to 6,000 cfs into the Yolo Bypass at a lower Sacramento River flow (25,000 cfs rather than 55,000 cfs under existing conditions).

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http://nwis.waterdata.usgs.gov/nwis/monthly/?referred_module=sw&site_no=11447650&por_11447650_2=2209860,00060,2,1948-10,2010-03&format=html_table&date_format=YYYY-MM-DD&rdb_compression=file&submitted_form=parameter_selection_list

(Plan, 5C.A-72). The target diversion range for the Yolo Bypass is 3,000 to 6,000 cfs of Sacramento River water. (Plan, 5C.A-58).

Even if the virtually always dry Yolo Bypass could serve as a fish habitat, the Sacramento River flow will rarely be high enough to inundate the Yolo Bypass while satisfying the biological needs and diversions of the Sacramento River. Diverting up to 6,000 cfs into the Yolo Bypass could result in as much as 3 feet of reduction in river stage in the Sacramento, although understanding of how notch flows would affect river stage is incomplete. (Plan, 5C.5.4-6). This would radically worsen the deterioration of physical habit and water temperature PCEs. The Sacramento River currently lacks adequate water levels needed to provide access to physical habitat and preserve cool river temperatures. A reduction of as much as three feet in river stage would provide less access to habitat and increase water temperatures, further diminishing the conservation value of the habitat.

Additionally, the restored Yolo Bypass will serve as poor habitat for adult and juvenile fish. The Preliminary Report on the Experimental Agricultural Floodplain Habitat Investigation at Knaggs Ranch on Yolo Bypass states that when “flood waters leave main river channels to flow over adjacent floodplains, they slow, spread out, and warm” (Pg. 4) (internal citation omitted). Warm water temperatures and low water levels are the same conditions deteriorating PCEs in the Sacramento River and Delta. Further, species which enter the Yolo Bypass would endure increased losses due to stranding. (Plan, 3-3, 3-6, 4-5). Instead of improving habitat conditions, CM2 will intensify the decline of physical habitat and water temperature conditions.

2) River Flow

The State Water and Central Valley Projects (SWP/CVP) divert so much water from the south Delta that they reverse Delta flows. Instead of flowing to the Bay, some Delta channels flow toward the Clifton Court Forebay. In addition to confusing migratory fish following attraction flows and olfactory cues (Plan, 5.5.3-2, 4-20, 3-32), these reverse flows capture fish, especially juveniles and smaller species, and entrain them in the SWP/CVP intake facilities. According to the Draft BDCP, north Delta intake facilities are expected to result in “substantial reductions in entrainment and associated adverse effects associated with operation of the south Delta intakes.” (Plan, 3.4-7).

However, implementation of USFWS and NMFS BiOps has already mitigated SWP/CVP entrainment. According to the BDCP, “[i]mplementation of south Delta export pumping restrictions under the USFWS (2008a) BiOp has considerably limited the entrainment loss of adult delta smelt.” (Plan, 5.5.1-27) (internal citations omitted). Entrainment poses an even lower threat to the anadromous species. The BDCP cites entrainment losses of the Sacramento River Winter-Run Chinook Salmon population at .1% in 2007 and 5% in 2001. (Plan, 5.5.3-15). Similarly, “entrainment is not thought to be a major stressor” to Green Sturgeon. (Plan, 5.5.8-14). Entrainment is not as problematic as it was prior to 2008. The 2008 USFWS BiOp and 2009 NMFS BiOp limit pumping in the south Delta, minimizing entrainment and associated impacts on listed species. (EIR/EIS, 11-162-63).

These facts undermine the proposed benefit of reducing entrainment. As admitted in the Draft BDCP, entrainment is no longer a serious threat to listed species due to USFWS and NMFS BiOps. Thus, the room for improvement with dual conveyance operation appears minimal at best. In fact, constructing and operating north Delta intake facilities may expose listed species to increased entrainment risks in the Sacramento River. According to the Delta Science Independent Review Panel, “the validity of the primary assumption that there will be no entrainment of fish at the north Delta diversion (NDD) should be evaluated. In reality, there will be some fish lost at the transfer point” (BDCP Effects Analysis Review, Phase 3, Pg. 37-38). Nonetheless, the Draft BDCP fails to assess the likely entrainment and impingement impacts caused by North Delta diversions.

CM2 is meant to mitigate of impacts caused by CM1 by providing an alternative migration route in the Yolo Bypass, allowing smolt to avoid entrainment or impingement associated with the north Delta intake pumps. (Plan, 5.F-16). According to the BDCP, few juvenile fish would migrate through the Yolo Bypass to the Delta. “Of the Sacramento Basin population of Chinook salmon smolts that reach the Delta, an estimated 3 to 10% (depending on the run) would migrate via the Yolo Bypass” (Plan, 5.F-iii). This demonstrates that very few fish would reap the benefits of having access to the Yolo Bypass. Instead, most of the fish, adult or juvenile, would have to migrate through the Sacramento River and survive radically worsened conditions for the benefit of a small population of juveniles.

3) Salinity

The Sacramento River minimum flow requirements under CM1 will interfere with Delta outflow requirements. Under State Water Resources Control Board Decision 1641 (D-1641), diversions may not shift X2 “east of Chipps Island (75 river kilometers upstream of the Golden Gate Bridge) during the months of February through May” or “east of Collinsville (81 kilometers upstream of the Golden Gate Bridge) during the months of January, June, July, and August.” (D-1641, Pg. 150). As cited above, a Delta outflow of 11,400 cfs is required to maintain X2 at km 75 under current conditions. Once sea level rises by the predicted 45 cm, maintaining X2 at km 75 will require a Delta outflow of 13,680 cfs.

For April, the BDCP minimum flow bypass is 5,000 cfs. The San Joaquin River outflow into the Delta is, on average, 7,100 cfs during April.¹⁰ This means that the combined flow of the Sacramento and San Joaquin Rivers, ignoring evaporation and seepage, will be, on average, 12,100 cfs. By the LLT of the project, this Delta outflow of 12,100 cfs would fail to reach the necessary 13,680 cfs required to maintain X2 at km 75 by 1,580 cfs. To make matters worse, by the LLT of the project, precipitation and river flows will be drastically lower, and the Delta outflow would probably face a deficit much higher than 1,580 cfs.

Consequently, the increased diversions and inadequate bypass flow requirements will ensure that there is insufficient Delta outflow to preserve water quality in the Delta. Without sufficient Delta outflow, saltwater will intrude and increase salinity levels in the bays and Delta. The increased salinity will impair the water quality PCE. The Delta Smelt has adapted to a range of salinity which reflects seasonal change. (59 FR 65256). Salmonids rely on specific salinity levels to transition between freshwater and saltwater environments. (70 FR 52488). The proposed BDCP operations threaten the sensitive ecological balance in the Delta and bays, relied on by listed species. It remains unclear whether Delta species could adapt to disturbed salinity levels in the Bay Delta.

C) CUMULATIVE EFFECTS

1) Adverse Modification of Critical Habitat

¹⁰ <http://wdr.water.usgs.gov/wy2011/pdfs/11303500.2011.pdf>

ESA regulations direct the consulting fish and wildlife agency to “[f]ormulate its biological opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.” 50 C.F.R. § 402.14(g)(4). Joint NMFS and USFWS regulations define *destruction or adverse modification* to mean “a direct or indirect alteration . . . adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.” 50 C.F.R. § 402.02.¹¹¹² Accordingly, NMFS and USFWS BiOps must determine whether the BDCP will cumulatively, adversely modify the physical or biological features, or PCEs, of the Sacramento River and Delta.

Consider the implementation of CMs 1 and 2. If the government implements CM1 at capacity diverting 6,000-15,000 cfs from the Sacramento River while implementing CM2 at capacity, diverting 6,000 cfs from the Sacramento River, a range of 12,000 to 21,000 cfs will be diverted from the Sacramento. Such a massive diversion would drastically worsen declining PCE values in the river. Water levels would plummet, inundating less land, increasing water temperatures, and allowing saltwater intrusion. As discussed above, the restored Yolo Bypass under CM2 would include the same inadequate conditions causing species to decline in the Sacramento River. Although CM2 is meant to mitigate the effects of CM1, CM2 would intensify the adverse effects of CM1. Attempts to restore habitat with insufficient water quantity will spread thin an already-limited resource, leaving these listed species with inadequate habitat. Diverting up to 6,000 cfs from the Sacramento while operating the proposed intake facility will ensure that neither the Sacramento nor the Yolo Bypass maintains the PCEs needed to support the survival and recovery of listed species.

Reduced pumping in the south Delta could decrease entrainment and associated effects of pumping, but the NMFS and USFWS BiOps have already minimized entrainment and associated effects. Moreover, maintaining natural flows in the south Delta does nothing to improve conditions in the Sacramento River, which will sustain the largest impacts of the project. Instead,

¹¹ The Ninth Circuit invalidated part of the agencies’ definition of “destruction or adverse modification”. *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059, 1070-71 (9th Cir. 2004). However, the court did not review or invalidate the definition cited above.

¹² NMFS and USFWS have proposed joint regulations re-defining “destruction or adverse modification” which retain focus on “physical and biological features”. See 70 FR 27060.

the dual conveyance system will interfere with Sacramento River flow, creating more entrainment and impingement impacts in the Sacramento.

These BDCP operations will invariably result in the adverse modification of Delta and Sacramento River PCEs. Physical habitat will be lost due to diversions causing lower water levels; water temperature will increase, creating harsher conditions for struggling species; and salinity levels in the Delta will rise as Delta outflow decreases. The loss of these PCEs would drastically diminish the conservation value of the Sacramento River and Delta. The Sacramento River and Delta would cease to provide the irreplaceable habitat that NMFS and USFWS sought to protect. Accordingly, implementation of the BDCP would adversely modify designated critical habitat, in violation of Section 7 of the Endangered Species Act.

2) Arbitrary and Capricious Authorization of Incidental Take

Under the Administrative Procedure Act, courts reviewing agency decisions shall “hold unlawful and set aside agency actions, findings, and conclusions found to be . . . *arbitrary, capricious*, an abuse of discretion, or otherwise not in accordance with law . . .” 5 U.S.C. § 706 (emphasis added). “A Biological Opinion is arbitrary and capricious if it fails to consider the relevant factors and articulate a rational connection between the facts found and the choice made.” *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1121 (9th Cir. 2012) (internal quotations omitted). In this case, the BDCP BiOps must articulate a rational connection between the project’s cumulative impacts and the decision of whether the BDCP will adversely modify critical habitat. However, due to the pervasive uncertainty in the Draft BDCP CMs, there is insufficient science to support the conclusion that the BDCP would not adversely modify critical habitat. Concluding that there would be no adverse modification of critical habitat based on the Draft BDCP and EIR/EIS would be arbitrary and capricious.

The Delta Science Program Independent Review Panel (DSPIRP) and the Delta Independent Science Board (DISB) Draft BDCP and EIR/EIS reviews highlight the unsupported conclusion that the CMs will benefit covered species. According to the DSPIRP, “many of the critical justifications behind the supposed benefits of the conservation measures are highly uncertain.” (BDCP Effects Analysis Review, Phase 3, Pg. 17). “Approximately 72% of the

objectives for covered fish could not be fully evaluated at this time due to insufficient information.” (BDCP Effects Analysis Review, Phase 3, Pg. 21). According to the DISB:

the analysis regarding habitat restoration assumes there will be increases in phytoplankton production and that these increases will be transferred up the food web to covered species. This largely ignores an equally likely result that the added biomass of phytoplankton will be consumed by [invasive] clams, which have had substantial effects on phytoplankton abundance and species composition throughout the Delta.

(Review of the Draft BDCP EIR/EIS and Draft BDCP, Pg. B-39). The BDCP assumes that restored habitat will benefit covered species, not invasive species which threaten covered species. “Some of these other species, such as nonnative predators and invasive clams, may also benefit from these expanded habitats. Benefits for the other species may dampen any benefits of the habitat restoration for covered species.” (Review of the Draft BDCP EIR/EIS and Draft BDCP, Pg. B-41).

Further, it is unclear which habitats the BDCP would restore. As stated by the DISB, the “priority of habitats to be restored is not indicated, so it is not clear if the most critical habitats will be first on the list.” (Review of the Draft BDCP EIR/EIS and Draft BDCP, Pg. B-39). In *Gifford Pinchot*, the Ninth Circuit held that mitigation efforts outside critical habitat cannot offset adverse effects to designated critical habitat. 378 F.3d at 1076 (9th Cir. 2004). Without detailed descriptions of the proposed restoration measures, it is impossible to ensure that the BDCP would restore critical habitat instead of habitats with low conservation values.

As a result of this pervasive uncertainty, there is insufficient evidence to support a conclusion that the cumulative BDCP effects will not adversely modify critical habitat. Accordingly, any finding that the BDCP would not adversely modify critical habitat will be arbitrary and capricious. The ESA commands NMFS and USFWS to “*insure* that any action . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat . . .” 16 U.S.C. § 1536(a)(2) (emphasis added). An arbitrary and capricious finding that the BDCP would not adversely modify critical habitat will fail to *insure* the protection of critical habitat, violating the commands of the ESA.

D) CONCLUSION

The *Sacramento River Winter-Run Chinook Salmon*, the *Central Valley Spring-Run Chinook Salmon*, the *Central Valley Steelhead*, the *Southern Distinct Population Segment of the North American Green Sturgeon*, and the *Delta Smelt* face declining conditions throughout the Sacramento River and Delta. Dams and diversions have caused low flows, warming temperatures, increases in salinity, and reversed river flows, devastating the health of the Delta ecosystem. Nevertheless, the Draft BDCP includes measures to increase Sacramento River diversions, which will worsen these conditions and adversely modify the critical habitat that endangered and threatened Delta species rely on for survival and recovery. To comply with the commands of the ESA, NMFS and USFWS must reject the requests for authorized incidental take of listed species under the BDCP.

II) THE BDCP DOES NOT MEET THE REQUIREMENTS FOR AN INCIDENTAL TAKE PERMIT UNDER ESA SECTION 10.

The Endangered Species Act prohibits the taking of any federally designated endangered species. 16 U.S.C. § 1538 (West 2014). A take is defined as to “harass, harm, pursue, hunt, wound, kill, trap, capture, or collect.” 16 U.S.C. § 1538(a)(1) (West 2014). Any significant habitat modification or degradation that impairs breeding, feeding, or sheltering is also considered harm in terms of ESA. 50 C.F.R. § 17.3 (West 2014).

ESA Section 10 allows exceptions to the prohibition on takings through acquiring an incidental take permit. 16 U.S.C.A. § 1539 (West 2014). In applying for a take permit, the applicant must develop a habitat conservation plan that specifies “what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized.” 16 U.S.C.A. § 1539(2)(A)(iii) (West 2014).

If the habitat conservation plan meets the ESA section 10 requirements, then the Secretary must then assess the permit application to determine with an incidental take permit is appropriate. *See* 16 U.S.C.A. § 1539(a)(2)(B). The Secretary may issue a permit only if they determine that:

- (ii) “the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking”;
- (iii) “the applicant will ensure that adequate funding for the plan will be provided”;

(iv) “the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild”; and

(v) the other measures required under subparagraph (A)(iv) will be met.

16 U.S.C.A. § 1539(2)(B)(i-v) (West 2014).

The permit must “contain such terms and conditions as the secretary deems necessary or appropriate to carry out the purposes of this paragraph, including... such reporting requirements as the Secretary deems necessary for determining whether such terms and conditions are being complied with.” *Id.* If a permittee is not complying with the terms and conditions of the permit, the Secretary will revoke the permit. 16 U.S.C. § 1539(a)(2)(C).

In addition to the permitting laws under ESA, NMFS and FWS regulate incidental take permits through regulations. Under NMFS regulations, the Secretary must also consider:

(i) “the status of the affected species or stocks”;

(ii) “the potential severity of direct, indirect, and cumulative impacts on the species or stocks and habitat as a result the proposed activity”; and

(iv) “the use of the best available technology for minimizing or mitigating impacts”.

50 C.F.R. § 222.307 (c)(1)(i-v) (West 2014).

The Secretary must also ensure that the permit is consistent with ESA Section 7. See 16 U.S.C.A. §1536(a)(2) (West 2014).

A) THE BDCP’S ITP WOULD BE ISSUED ARBITRARILY AND CAPRICIOUSLY IF GRANTED.

If either FWS or NMFS issued an ITP, the permit would be issued arbitrarily and capriciously. Administrative agencies must consider the relevant factors and articulate a rational connection between the facts found and the choices made. *Nw. Ecosystem Alliance v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007). The Administrative Procedure Act (APA) makes unlawful any agency action found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5 U.S.C.A. § 706(2)(A) (West 2014). A decision is arbitrary and capricious if the agency relied on factors congress did not intend it to consider, filed to consider an important aspect of the problem, offered an explanation that runs counter to

the evidence, or is so implausible that it cannot be ascribed to a difference in view or the product of agency expertise. *Motor Vehicle Mfrs. Ass'n of U.S., Inc., v. State Farm Mut. Auto., Ins. Co.*, 463 U.S. 29, 43 (1989).

Here, the agencies would issue permits arbitrarily and capriciously if they issued permits pursuant to the plans outlined in the BDCP. To issue permits under joint regulations the agencies would have to ignore that the BDCP: (1) has not adequately addressed alternatives, (2) has not reduced by the maximum extent practicable; (3) has not provided adequate funding; and (4) has appreciably reduced the likelihood of the species' survival in the wild. 16 U.S.C.A. § 1539(2)(A-B) (West 2014). To issue a permit under NMFS regulations, the agency would have to ignore that the BDCP: (1) threatens direct, indirect, and cumulative impacts on the species or stocks and habitat; and (2) does not use the best available technology for minimizing and mitigating impacts. 50 C.F.R. § 222.307 (c)(1)(i-v) (West 2014).

B) THE BDCP HAS NOT ADEQUATELY ASSESSED ALTERNATIVES TO TAKE TO WARRANT AN ITP.

Take alternatives are required by ESA when applying for an ITP. 16 U.S.C.A. § 1539(2)(A) (West 2014). The take alternatives are designed to provide different levels of incidental take from the original plan. *See* Draft BDCP, 9-1. They “differ primarily in the location and scale of water conveyance facilities and operations.” Draft BDCP, 9-13. Nonetheless, the take alternatives are almost entirely the same project.

The Draft BDCP offers nine take alternatives lettered A through I. The take alternatives vary in their method of conveyance, operational criteria, average annual water deliveries, and conservation components. Draft BDCP, 9-14 – 9-16. Development of alternatives “focused on the identification of alternatives that reduced the scope and intensity of potential environmental effects, including adverse effects on covered fish and wildlife specie.” Draft BDCP, 9-8. But, the BDCP concedes that “each take alternative would involve the construction of new conveyance facilities,” while some of the take alternatives would only change a single conservation measure. Draft BDCP, 9-13. Furthermore, every single proposed take alternative, except one, would result in a range of 4.17-5.59 MAF in water deliveries a year. The only alternative that provides a lesser amount is take alternative E, which offers a 3.4 MAF in deliveries. The BDCP itself

estimates 4.71-5.59 MAF in annual deliveries. Alternative E is the only take alternative that makes a real attempt at reducing the annual deliveries of the project. Draft BDCP 9 – 14-16.

The BDCP lists differences between the take alternatives such as: location and type of primary conveyance facilities; number of pumping plants; water facility components; number of forebays; and more. Draft BDCP 9-14. These differences, however, are focused on water conveyance methods, not methods to avoid the taking of species.

Almost ironically, the Conceptual Engineering Report (CER) did propose changes that would affect the amount of incidental take by the project, but these changes were not implemented in any of the BDCP take alternatives. The CER suggests “constructing a new fish screening facility on [a] realigned section of Victoria Canal, and closing the existing inlet gate structure to CCF at the southwest corner to prevent fish from entering the forebay” because over “80% of juvenile salmonids and juvenile/adult smelt entering CCF do not survive.” BDCP CER 20-1. There is a clear problem here since the mortality rate in forebays is so high, and the BDCP’s own CER suggested an alternative that would result in reduced take, yet the BDCP failed to consider anything like this in the final take alternatives.

The CER also suggests closing the existing inlet structure located at the southeast corner of CCF. BDCP CER 20-2. The existing inlet would be close to allowing only a single inlet through the Victoria Canal. *Id.* The CER states that this would prevent any new fish from entering CCF following this improvement, but again, the BDCP take alternatives fail to consider anything close to this idea that would significantly reduce take. Draft BDCP Chapter 9.

The CER enters into a length discussion of twelve different kinds of intakes, yet the BDCP take alternatives make no mention of different kinds of intake, they only vary in their location and number. BDCP CER B 2-1-19; Draft BDCP 9-14-16. The BDCP assumes that only its selected intakes are worth consideration as alternatives, even though the CER concedes that other possibilities do exist.

The BDCP implicitly concedes that the take alternatives are incomplete by proposing more effective alternatives to take in the CER. There are many other approached the BDCP

could have taken in proposing alternatives, but includes projects that were essentially identical to the original plan.

C) THE BDCP HAS NOT MINIMIZED AND MITIGATED THE DAMAGES TO THE MAXIMUM EXTENT PRACTICABLE, AND PROVIDES TOO NARROW A RANGE OF ALTERNATIVES TO ADEQUATELY MITIGATE DAMAGES.

ESA requires the secretaries to consider whether the take has been reduced by the maximum extend practicable. 16 U.S.C. § 1539(2)(A) (West 2014). The BDCP fails to do so for two reasons. First, as shown above, the CER had already suggested practicable methods that would have significantly reduced take, which the BDCP outright ignores in the take alternatives discussion. Secondly, the BDCP's rejection of its narrowly selected alternatives take the decision making process away from the secretary and places it in the hands of the BDCP.

In *Gerber v. Norton*, the Fish and Wildlife service, the court held that the government did not minimize the impacts of the taking "to the maximum extent possible," pursuant to 16 U.S.C. § 1539(a)(2)(B). 294 F.3d 173, 184 (D.C. Cir. 2002).

When an agency is required to make a finding as a prerequisite to an action, it must do so. *Sugar Cane Growers Coop.*, 289 F.3d at 97. Furthermore, an agency many not delegate the responsibility to the regulated party. *Gerber*, 294 F.3d at 184.

Here, the BDCP has not minimized or mitigated damages to the maximum extent practicable, as discussed in the above section. The BDCP's lack of adequate alternatives shows that the BDCP has failed to meet the minimum criteria necessary for the alternatives to count.

Furthermore, it is the Secretary's decision, and not the applicant's, to determine whether the applicant has satisfied the issuance criterion. *Gerber*, 294 F.3d at 185. Therefore, before issuing a permit, the Secretary must independently find that there are no viable alternatives to the development plan. *Id.* at 185. If the agency suggests a modification of the existing plan or proposes a modification to the existing plan, the result is an implicit rejection of the proposal. See *id.*

The BDCP outlines five questions that were asked regarding the take alternatives in determining whether they were chosen or not:

1. “Does the take alternative reduce take of covered species?”
2. “Does the take alternative increase conservation benefit to covered species?”
3. “Is the take alternative consistent with the BDCP overall goal to provide “a comprehensive conservation strategy for the Sacramento-San Joaquin River Delta designed to restore and protect ecosystem health, water supply, and water quality within a stable regulatory framework?”
4. “Is the take alternative practicable in terms of costs, logistics, and technical feasibility?”
5. “Are there additional significant unavoidable adverse effects to other resources?”

Draft BDCP 9-35.

These questions leave the secretary to think that there are no viable alternatives outside of those suggested by the BDCP. But, these questions are insufficient by themselves to determine whether the alternatives are adequate. One fundamental question that the BDCP does not ask in its assessment of is: Are there any plans we did not consider? Or, are these alternatives too similar? The answer to both is, yes. The CER presented multiple options that would have been much more effective in reducing the amount of take over the primary plan. The CER proposes: constructing a new fish screening facility on a realigned section of Victoria Canal, and closing the existing inlet gate structure to CCF at the southwest corner to prevent fish from entering the forebay; and suggests closing the existing inlet structure located at the southeast corner of CCF. BDCP CER 20-1. The BDCP take alternatives also fail to consider using any different intakes, or low flow fish screen as methods of reducing take. BDCP CER 2–1-19.

The proposed alternatives are alternatives methods of conveyance. Their purpose is not to reduce the amount of species taken, but the method through which water is delivered. The amount of take associated with these alternatives is just coincidental, and the marginal differences between the projects shows this.

D) THE BDCP HAS NOT ENSURED ADEQUATE FUNDING AS REQUIRED BY ESA SECTION 10.

ESA states that there must be adequate funding prior to issuance of an ITP. However, the BDCP does not have adequate funding to meet this requirement. The BDCP refers to the implementation agreement for assurances of adequate funding, but the implementation

agreement clearly falls short of the mark for adequate funding as discussed in “Funding Assurances,” page 117 of this document.

E) THE TAKING WILL APPRECIABLY REDUCE THE LIKELIHOOD OF THE SURVIVAL AND RECOVERY OF CRITICALLY ENDANGERED SPECIES IN THE WILD.

ESA states that the taking cannot appreciably reduce the likelihood of the survival and recovery of the critically endangered species in the wild, but the BDCP clearly does so. “Violations of the ESA,” page 67 of this document addresses why the taking will appreciably reduce the likelihood of survival and recovery in the wild.

F) THE POTENTIAL SEVERITY OF DIRECT, INDIRECT, AND CUMULATIVE IMPACTS ON THE SPECIES OR STOCKS AND HABITAT AS A RESULT THE PROPOSED ACTIVITY ARE TOO GREAT FOR NMFS TO GRANT AN ITP.

The NMFS secretary must consider cumulative impacts on the species and stocks prior to issuing an ITP. 50 C.F.R. § 222.307 (c)(1) (West 2014). The severity of cumulative impacts has not been properly addressed by the BDCP. For additional discussion on cumulative impact please see “Cumulative Effects,” page 77.

G) THE BDCP DOES NOT USE THE BEST AVAILABLE TECHNOLOGY FOR MINIMIZING AND MITIGATING IMPACTS.

The secretary of NMFS must consider whether the best available technology for minimizing and mitigating impacts has been used. 50 C.F.R. § 222.307 (c)(1)(iv) (West 2014). Here, the BDCP concedes through its own CER that it has not used best available technology to reduce take. The CER lists multiple alternatives methods that would be much more effective as reducing take than the current proposed alternatives, but the BDCP does not consider any of these, ignoring technology that the CER already conceded was available.

The CER suggests multiple alternatives including: “constructing a new fish screening facility on [a] realigned section of Victoria Canal, and closing the existing inlet gate structure to CCF at the southwest corner to prevent fish from entering the forebay”; and closing the existing inlet structure located at the southeast corner of CCF. BDCP CER 20-2. The existing inlet would be close to allowing only a single inlet through the Victoria Canal. *Id.* The BDCP take alternatives fail to consider anything close to this idea that would significantly reduce take, and

instead tried to alter the amount of take through changing the locations of intake, the number of pumping plants, etc. Draft BDCP 9-14.

The CER also discusses twelve different kinds of intakes, yet the BDCP take alternatives make no mention of different kinds of intake, they only vary in their location and number. BDCP CER B 2-1-19; Draft BDCP 9-14-16. The BDCP failed to use technology that its own CER had suggested would be effective at reducing the amount of take from the Delta. Given the presented facts, the secretary would be unable to grant a Section 10 permit under NMFS regulations.

H) CONCLUSION

For the foregoing reasons, if a Section 10 permit were issued pursuant to the BDCP, it would be in violation of the law. The legally required elements that the secretaries must consider prior to issuing a section 10 permit make it essentially impossible to determine whether something is new or used.

III) ILLEGAL AWARD OF INCIDENTAL TAKE PERMITS AND NO SURPRISES PROTECTION

When state or private parties seek the authorized take of listed species, they must receive incidental take permits from NMFS or USFWS. Section 7. However, federal agencies seeking the authorized take of listed species must obtain an incidental take statement, not permit, from NMFS or USFWS. Section 7. A critical distinction between the two types of authorizations is the “No Surprises” rule. Under the No Surprises rule, once an incidental take permit has been issued and its terms and conditions are being implemented, the federal Fish and Wildlife Agencies will not require additional measures for changed circumstances not provided for in the plan or for unforeseen circumstances. 50 C.F.R. § 222.307(g). Federal agencies, who may receive incidental take statements, not permits, are ineligible for assurances under the No Surprises rule. *Id.*

The U.S. Bureau of Reclamation (Reclamation), which operates the CVP, is seeking incidental take statements for the BDCP from NMFS and USFWS. Reclamation is therefore ineligible for No Surprises rule assurances. CVP water contractors who have entered water contracts with Reclamation seek incidental take permits along with No Surprises rule assurances. (IA, 3). These CVP contractors are parties to the BDCP because they will assist Reclamation in

making changes to CVP operations through implementation of the BDCP. Because the CVP contractors are parties to the BDCP by extension of Reclamation, the CVP contractors are ineligible for any rights or assurances unavailable to Reclamation. In other words, because Reclamation is ineligible for No Surprises rule assurances, their contractors are also ineligible since Reclamation cannot contract for rights and assurances that it does not have. Instead, Reclamation's CVP operations will be limited to the terms and conditions of the BDCP incidental take statement, and the CVP water contracts will be subject to the same limitations. Accordingly, granting No Surprises rule assurances to the CVP contractors would violate the ESA.

IV) UNLAWFUL FAILURE TO RELEASE BIOLOGICAL ASSESSMENT AND BIOLOGICAL OPINION

The failure to prepare the ESA and National Environmental Policy Act (NEPA) required Biological Assessments and Opinions analyzing the threatened adverse modification of critical habitats renders the draft EIR/EIS essentially worthless as an environmental disclosure and informational document under NEPA. The draft EIR/EIS is also premature and unlawful under the ESA.

The ESA Regulations (50 C.F.R. § 402.14(a)) require that "Each Federal agency shall review its actions *at the earliest possible time* to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required. . . ." *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1020 (9th Cir. 2012) (en banc)(emphasis added), *cert. denied*, 133 S.Ct. 1579 (2013). The Biological Assessments and Biological Opinions are the written documents that federal agencies must prepare during the ESA consultation process. The NEPA Regulations require that "To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental impact analyses and related surveys and studies required by the . . . Endangered Species Act. . . ." 40 C.F.R. § 1502.25(a). "ESA compliance is not optional," and "an agency may not take actions that will tip a species from a state of precarious survival into a state of likely extinction." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 929-30 (9th Cir. 2008).

The Biological Opinion is to determine “whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.” 50 C.F.R. § 402.14(g)(4).

Consequently, against this threat of extinction, conducting the draft EIR/EIS public review and comment stage without Biological Opinions or even Biological Assessments and draft Biological Opinions, leaves the public in the dark and violates both the ESA and NEPA. Conducting the NEPA environmental draft process prior to and in a vacuum from the ESA consultation process violates the ESA command to carry out the ESA process “at the earliest possible time” and violates the NEPA command to conduct the NEPA and ESA processes “concurrently” and in an “integrated” manner.

The public and the decision-makers now have what they do not need: 40,000 pages of advocacy from the consultants including self-serving speculation that the adverse effects of reducing flows in the Sacramento River, sloughs, and Delta will be offset. ***The public and the decision-makers do not have what they do need and are entitled to by law:*** the federal agency Biological Assessments and Biological Opinions required by the ESA and NEPA.

This draft EIR/EIS circulated prior to preparation and circulation of federal agency prepared Biological Assessments and Biological Opinions is “so inadequate as to preclude meaningful analysis,” 40 C.F.R. § 1502.9(a), because the public and decision-makers do 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.

As mentioned above, the BDCP itself identifies stressors and threats to each of the five species. Common threats and stressors to the five species include habitat loss due to water conveyance systems and increasing water temperatures. The BDCP Water Tunnels will worsen these threats and stressors in each species’ critical habitat. By diverting massive amounts of water from the Sacramento River, the BDCP will literally reduce the amount of habitat available to these five species in their critical habitats. Additionally, the massive diversion will reduce flow in the critical habitat and contribute to a further increase in water temperature.

Taking the water and flows away from the Endangered and Threatened fish species would not insure their survival let alone insure their recovery and delisting. On-the-ground habitat restoration is not a lawful substitute under the ESA for maintaining the critical habitat of and in the waters of the Sacramento River, sloughs, and Delta.

The reduction of water and flows and increase in water temperature are adverse modifications of critical habitat. The BDCP ignores all the conservation measures, including critical habitat designations, NMFS and USFWS have taken to protect five federally listed species. If approved, the BDCP will undo years of conservation efforts, adversely modify critical habitat, and further jeopardize the continued existence of five listed species. Approval of the BDCP would violate the ESA. Consequently, the BDCP Water Tunnels are not a permissible project under the ESA.

Just as the inadequate draft EIR/EIS violates NEPA, the draft EIR/EIS is so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment are precluded which also violates the California Environmental Quality Act (CEQA). 14 Code Cal. Regs. § 15088.5(a)(4). As the California Supreme Court said in *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal.4th 412, 449 (2007), “Especially given the sensitivity and listed status of the resident salmon species, the County’s failure to address loss of Cosumnes River stream flows in the Draft EIR ‘deprived the public . . . of meaningful participation’ [citation] in the CEQA discussion. (See CEQA Guidelines, Cal. Code Regs., tit. 14, § 15065, subd. (a)(1)[potential substantial impact on endangered, rare or threatened species is per se significant].)”

A) ESA CONCLUSION

In the absence of answers to basic questions including ESA questions about jeopardy of listed fish species and adverse modifications of designated critical habitats, the draft BDCP EIR/EIS is not sufficient for informed review by the public and the decision-makers. It will be necessary at minimum under the ESA, NEPA and CEQA for the federal and state agencies to prepare, issue, and circulate for public review a **new draft** EIR/EIS concurrently with and integrated with Biological Assessments and Biological Opinions. 40 C.F.R. §§ 1502.9(a); 1502.25(a) (NEPA); 14 Code Cal. Regs. §§ 15065(a)(1); 15088.5(a)(CEQA). Then, and only

then, would the public and the decision-makers have the opportunity to engage in meaningful analysis of a preferred project alternative and informed comparison with other alternatives.

Finally, we reiterate that the BDCP Water Tunnels project is in fact prohibited by the ESA because it would adversely modify designated critical habitat for at least five endangered and threatened fish species. The fact that the ESA required consultations would result in determinations in the Biological Assessments and Opinions that the preferred project alternative is prohibited by the ESA does not justify the unlawful evasion and postponement of the consultations.

B) THE BDCP AND THE DRAFT EIR/EIS VIOLATES ESA §10.

The BDCP will undeniably require agency consultation and Incidental Take Permits under §§7 and 10 of the Endangered Species Act (ESA). This comment focuses solely on the §10 process. Existing pumping operations in the Delta require these permits; and the proposed massive additions in infrastructure assure that any new operations will also require the permits. Yet despite the certain need for these permits, the BDCP proponents have not properly engaged in the §10 process. The haphazard and incomplete nature of both the Plan and the accompanying Draft EIR/EIS insures that neither the US Fish & Wildlife Service nor the National Marine Fisheries Service should issue the required ITPs.

Under §10 of the Endangered Species Act, otherwise lawful activities can be granted exceptions that allow for the “taking” of listed species. 16 U.S.C. §1539(a)(1)(B) (West 2014). The exceptions allow for the development of lands that would otherwise be blocked in order to protect species. However, there still exist procedural protections that ensure development does not run rampant over endangered animals. The BDCP proponents have failed in fully complying with these measures.

In order for an ITP to be issued, the applicant must submit a valid conservation plan. 16 U.S.C. §1539(2)(a) (West 2014). In order to be considered valid, the conservation plan must include the projected impacts of anticipated take, minimization steps, alternatives to take, and “such other measures that the Secretary may require.” 16 U.S.C. §1539(2)(a)(i)-(iv) (West 2014). Once the application is submitted, NMFS or USFWS must make findings that “the taking will be

incidental,” the taking will be minimized “to the maximum extent practicable,” that there will be “adequate funding,” and that “the taking will not appreciable reduce the likelihood of the survival and recovery of the species.” 16 U.S.C. §1539(2)(B)(i)-(iv). Only once these primary steps and the accompanying sub-steps have been completed can an ITP be issued.

In addition to these basic requirements, the issuance of an ITP is, in itself, a “Federal action subject to §7 of the ESA.” (*Habitat Conservation Planning and Incidental Take Permit Processing*, U.S. Department of the Interior et al., p. 7-4-7-5 (1996)). As such, there must be a Biological Opinion issued that determines whether the issuance of the ITP will affect the conservation efforts of a listed species. 16 U.S.C. §1536(c). Because the §10 process and the §7 process related to the Bureau of Reclamation require a Biological Opinion, a joint opinion can be issued. (*Habitat Conservation Planning and Incidental Take Permit Processing*, U.S. Department of the Interior et al., p. 3-2 (1996)). Once all of these steps have been completed, NMFS or USFWS can make the required findings, and the FWS and NMFS can make a final decision on the issuance of Incidental Take Permits. Only if all of the application requirements are met and all required findings are issued can an ITP be legally issued. As a Habitat Conservation Plan, the BDCP does not meet the requirements set forth for application package or for NMFS or USFWS to make the required findings.

1) Purposeful Limitation of Take Discussion in the Application for an Incidental Take Permit

The BDCP fails to meet several requirements. Chief among the examples of BDCP failures, again, regards the Delta smelt. In the BDCP, the discussion of the Delta smelt and associated take of the species is extremely limited. The document primarily deals with entrainment of the Delta smelt in the proposed north-of-Delta facilities. (*See Plan*, Ch. 5, 5.2-37—38) (for a table listing biological objectives for the Delta Smelt); (*See generally Plan*, Ch. 5, 5.5-1) (including 5.5.1-1 for a summary of overall effects). Very little unbiased discussion is given to other forms of take, including critical habitat modification. (*Plan*, 5.5.1-35) (Following discussion of minimal take factors, focusing primarily on entrainment, states, “the BDCP has the potential to reduce take of delta smelt through entrainment... [and] has the potential to great population size.”).

The disproportionate amount of space and discussion given a single issue of take is contradictory to the letter of the law and the intent of the §10 permitting process. The BDCP's focus on entrainment as the primary source of take and as the biggest stressor on the smelt populations amounts to a smokescreen. The optimism regarding the level of entrainment take does nothing to allay concerns regarding the overall health and recovery of the Delta smelt population. It is an effort in deflection. More critically, this type of discussion steers questions away from other forms of take by suggesting, with a sunny thoroughness, that the BDCP has taken a long look at the larger issue of take and species decline. The plan has not taken such a look and the failure to adequately address the issue of take, and minimization measures beyond entrainment screens is a fatal error in the application package under the §10 permit requirements.

2) Inability of the DOI to Make the Required Findings for ITP Issuance

Beyond the failure of the application package, it is impossible for NMFS or USFWS to make all the required findings necessary to issue the ITP. There are significant issues regarding all four of the statutory requirements. The first issue deals with the whether the takings will be incidental to an otherwise lawful activity. When take is confined to entrainment at the pumping facilities, it may be possible for the finding to be made. However, this definition and discussion of take is far too narrow to be appropriately applied when considering the BDCP. The cumulative impacts of entrainment, flow disruption, changes in sediment and turbidity, and overall habitat modification are not sufficiently addressed. The BDCP Water Tunnels will circumvent natural through-Delta flow, further altering an ecosystem completely reshaped by human intervention. (EIR/EIS, 1A-1). This will have a significant impact on the flow, salinity, and overall habitat stability of the Delta smelt. This habitat modification is not incidental to any activity—it is the fundamental activity. In artificially limiting take discussions to entrainment and salvage, the BDCP has not provided enough relevant information for the Department of the Interior to determine if any BDCP activity will result in other forms of take. This deflection away from serious changes in critical stressors on the Delta smelt onto a single issue means that the DOI cannot make an informed finding, and the HCP should not be validated.

3) A Finding of “No Jeopardy”

In addition to other requirements, §10 permits are also governed by the general §7 standards, including the “jeopardy standard.” (*Habitat Conservation Planning and Incidental Take Permit Processing*, U.S. Department of the Interior et al., p. 3-2 (1996)). This means that in order for an ITP to be issued, the take must be incidental AND there must be a “no-jeopardy finding for all affected federally listed species.” (*Id.* at 3-2). The basis for the finding is, of course, the Biological Opinion issued by either the FWS or NMFS. Without a proper Biological Opinion dealing specifically with the BDCP, it should be impossible for the issuing agencies to grant the required ITPs.

Issuance of an Incidental Take Permit (ITP) is required so long as the HCP application meets the requirements set forth in §10 (a)(2)(A) AND that it is determined by the Secretary of the Interior that, amongst other things, “the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.” (§1539(a)(2)(B)(i-v)). These vital criteria are not met under the BDCP.

There are two primary areas where there are serious questions about the viability of the BDCP as a valid HCP: in ensuring the continued recovery of a listed species, and in taking all active mitigation measures. The reasons behind this failing are intertwined, and primarily have to do with the uncertainties expressed about the Delta smelt (explored in much larger detail above) and flow criteria (for further detail, see comment focusing on §7 deficiencies). As presented, the BDCP has offered only vague hopes regarding the recovery of the Delta smelt, rather than the concrete measures required for a valid HCP. As such, the DOI cannot issue the required findings, and the BDCP should not be issued the requested Incidental Take Permits.

4) The BDCP Adopts a Programmatic Approach Rather than the Appropriate Project Approach to ITP Issuance.

Finally, HCP Guidelines recognize that occasionally a programmatic approach to conservation serves the purposes of development and conservation. However, it also recognizes the limitations, and possibility for abuse, that this type of planning approach offers. In order to limit abuse of the, NMFS warns that programmatic HCPs may only be successful “when the activities being addressed are well-defined, similar in nature, and occur within a described

geographical nature or at similar points in time.” (*Habitat Conservation Planning and Incidental Take Permit Processing*, U.S. Department of the Interior et al., p. 3-39 (1996)).

The larger Delta Plan has previously described the BDCP as a project, rather than a program. (Draft Delta Plan Program EIR, Ch. 23, 23-1). Yet despite this, it again has been structured and described as a programmatic document, rather than as a project document. The exception to this is CM1, which is the only major element given a full project treatment. In deferring or not producing required documents (including the Implementing Agreement and Biological Opinion) to coincide with the release of Draft EIR/EIS, the BDCP has attempted to adopt a programmatic approach. This is incompatible with the HCP guidelines. The project scope, timeframe, and impact are not well defined and therefore fail the HCP guidelines. As such, the plan must be redrafted to reflect the proper approach to ITP processing, and should not be granted permits at this time.

V) IGNORING THE CONCERNS OF THE INDEPENDENT SCIENCE REVIEWS

A) THE FAILURE OF THE DRAFT BDCP AND DRAFT EIR/EIS TO PROVIDE SUFFICIENT SCIENTIFIC DATA & THE NEED FOR AN EXTERNAL CONSULTATION PROCESS.

For the future of the Delta, the California Water Code §85054 defines two coequal goals of providing a more reliable water supply and to protect, restore and enhance the Delta ecosystem. The proposals contained within the Draft Bay Delta Conservation Plan (BDCP) and the companion Draft Environmental Impact Report/Environmental Impact Statement (EIR/EIS) have failed on this mandate. The Draft BDCP EIR/EIS are akin to someone being wheeled into an ER on a stretcher with a massive bleeding chest wound, being dressed with some loose gauze bandages, given two generic pain relievers, and being discharged. It is fraught with inconsistent, incomplete, uncertain, and inaccurate data. Furthermore, the most alarming issue is that these documented discrepancies are either neglected, ignored, minimized or spun in an attempt to make the Draft BDCP EIR/EIS documents appear to be sufficient enough to forego a formal Biological Assessment/Biological Opinion process as required by Section 7 of Endangered Species Act (ESA, 16 U.S.C § 1536). The glaring omissions and inconsistencies, including ESA questions about jeopardy of listed fish species and adverse modifications of designated critical habitats, and lack of a commitment to engage in the Section 7 process have resulted in a set of documents that are not sufficient for informed review by the public and the decisionmakers. Our

concerns are mirrored in the recent independent science reports produced by the Delta Science Program (<http://deltacouncil.ca.gov/science-program/about-science-program>): BDCP Effects Analysis Review Panel Report, issued March, 17, 2014 (Attachment 1 http://deltacouncil.ca.gov/sites/default/files/documents/files/Delta-Science-Independent-Review-Panel-Report-PHASE-3-FINAL-SUBMISSION-03132014_0.pdf); Delta Interior Flows and Related Stressors Workshop, April 16 and 17, 2014 (Attachment 2 <http://deltacouncil.ca.gov/sites/default/files/documents/files/21-Jonathan-Rosenfield-Impact-of-Altered-In-Delta-Hydrodynamics-an-Overview.pdf>); and the Delta Independent Science Board Review of the Draft EIR/EIS for the Bay Delta Conservation Plan, issued May 15, 2014 (Attachment 3 <http://deltacouncil.ca.gov/sites/default/files/documents/files/Attachment-1-Final-BDCP-comments.pdf>). Furthermore, The recent Ninth Circuit Court of Appeals decision in *San Luis & Delta-Mendota Water Auth. v. Jewell* (*San Luis v. Jewell* No. 11-15871 9th Cir. Mar. 13, 2014) (<http://cdn.ca9.uscourts.gov/datastore/opinions/2014/03/13/11-15871.pdf>) discusses the importance of the Biological Opinion and the goals of the ESA. Based upon these scientific reports, related materials, and the Court of Appeals decision, we reiterate the concerns we have voiced and detailed in previously submitted comment letters that it is necessary at minimum under the ESA, NEPA and CEQA for the federal and state agencies to prepare, issue, and circulate for public review a new draft BDCP EIR/EIS concurrently with and integrated with Biological Assessments and Biological Opinions. 40 C.F.R. §§ 1502.9(a); 1502.25(a) (NEPA); 14 Code Cal. Regs. §§ 15065(a)(1); 15088.5(a)(CEQA). The adverse modification of critical habitats for five threatened and endangered fish species that would be caused by the proposed BDCP Water Tunnels is unconscionable. Extinction is forever. The BDCP Water Tunnels would adversely modify designated critical habits and thus promote species extinction and preclude species recovery.

This section of FOR's comment letter focuses on the scientific analyses presented via the aforementioned scientific reports and follows up our earlier comment letters submitted to your attention. Each of our previous comment letters is also attached hereto (pages showing cc's deleted from the attachments) and incorporated herein by this reference. We will submit or join in one or more additional comment letters.

**B) SCIENTIFIC REVIEWS & REPORTS: BDCP EFFECTS ANALYSIS INDEPENDENT REVIEW
PANEL REPORT (MARCH, 17, 2014)**

The Delta Science Program (DSP) convened a seven-member independent scientific panel tasked to review the scientific soundness of the BDCP Effects Analysis. This review, initiated in October of 2011, was conducted over three phases of the Draft BDCP documents in their various incarnations. The third phase was specifically focused on the December 2013 release of the Draft BDCP Chapter 5 Effects Analysis and all of its associated technical appendices. On March 17th, the independent scientific review panel (Panel) issued a very detailed report specifically indicating their concerns, questions, and recommendations regarding the Draft BDCP. Based on the Executive Summary of the report, Chapter 5, in many aspects, was found to be incomplete, inconsistent, highly uncertain, overly optimistic, leaning in favor of beneficial conclusions, and at times, inaccurate (See Attachment 1 Executive Summary).

“...the Panel universally believes that by itself, Chapter 5: Effects Analysis inadequately conveys the fully integrated assessment that is needed to draw conclusions about the Plan, in part because of incomplete information on factors affecting the covered species.”

The Panel also addressed their concerns regarding the fragmented and inaccessible structure of the materials and found the foundation of the BDCP to be “weak in many respects” (Id. at p. 6):

“...the lack of accessibility to information within the chapter or clear reference to supporting details inhibits rather than elucidates comprehension of the findings and thus conveys an unsatisfying “trust us” message.”

The Panel voiced concerns, numerous times throughout the report, regarding the failure to acknowledge the high levels of uncertainty associated with BDCP’s assumptions and predictions (Id. at p. 8). There is a troubling disconnect between the substantive information presented within the chapter and the information presented in the summary pages. Generally, the more beneficial outcomes are used in the conclusions. Often times, the BDCP fails to consider alternate scenarios. The Panel recommended that the Chapter 5 Net Effects Analysis needed greater objectivity:

“Regardless of the degree of uncertainty and the number of linkages without analyses, the conclusion is often overstated as the most beneficial result.”

This criticism is revisited further in the review, specifically in the context of expected goals for covered fish and failure to adequately address levels of uncertainty. Conclusions often overstated potential beneficial effects while neglecting to adequately address lower-end effects (Id. at p. 15). The Panel found critical information gaps and questioned why life cycle models were not developed for the specific purpose of evaluating BDCP effects on each of the covered species. The Panel provided a list of recommendations, including a directive to complete work on biological objectives (Id. at p. 18). What is most disconcerting is that with regard to the endangered and threatened fish populations (e.g. salmonids, delta smelt, and green sturgeon) in the context of habitat restoration, the Panel found that the BDCP continued to overstate beneficial effects (Id. at p. 25). The Panel continued to stress the need for additional information and clarification to address the gaps and uncertainties for the covered fish species. Another glaring concern was the missing, yet critical, information (such as exclusion of some relevant life cycle models). Failure to include this information resulted in the inability to properly address negative net effects on salmonids and steelhead. No justification was provided for the exclusion of this critical information (Id. at p. 31).

The Panel also detailed the inconsistencies and inaccuracies set forth in the technical appendices, such as Appendix 5-F - Biological Stressors on Covered Fish. Specifically, the range estimate in predation effects due to the north Delta diversion “is deceptive and technically incorrect” (Id. at p. 68). In the Executive Summary section of the Report, the Panel urges the BDCP to “make a commitment to the fundamental process, and specifically the required monitoring and independent science review, not just the concept of adaptive management” (Id. at p. 9). Unfortunately, it appears that this very detailed Report may be ignored by the BDCP staff. In a letter dated April. 1, 2014, John Laird, Secretary for Natural Resources, acknowledges the Report and commends the panel on their hard work and recognition of the uncertainties in the BDCP, however, he fails to mention or address the numerous and troubling major concerns, inconsistencies, inaccuracies identified by the Panel. Nor does he purport to answer any of the questions presented (<http://deltacouncil.ca.gov/sites/default/files/documents/files/AR-M550U-20140401-141126.pdf>). Furthermore, his letter appears to be dismissive of the Panel’s recommendations as he states:

“We appreciate the recommendations from the panel in this area.

However, we must ultimately draw conclusions and take action based on our

current understanding and interpretation of the best available science notwithstanding the fact that there remains uncertainty”

The Panel provided a plethora of valuable and detailed constructive recommendations and criticisms, designed to improve a severely flawed BDCP. Based on the Panel’s Report, it is clear that an ESA consultation is needed. At our November 7, 2013 meeting with the federal agency BDCP representatives, it was confirmed that no final or even draft Biological Opinion has been prepared by NMFS or USFWS with respect to the impacts of the operation of the BDCP on the five listed species of threatened/endangered fish or their critical habitats.

As detailed and discussed in our previous comment letters (See FOR letter 1-14-2014), failure to comply with the relevant and required state and federal regulations and guidelines for the Draft BDCP EIR/EIS is a violation of ESA, NEPA and CEQA and an inexcusable disservice to the public as it deprives the public and decision-makers of the needed analyses, therefore, preventing any semblance of a meaningful review.

C) DELTA INTERIOR FLOWS AND RELATED STRESSORS WORKSHOP (APRIL 16 AND 17, 2014)

The Delta Science Program convened an independent panel workshop on Delta interior flows and stressors on April 16th and 17th, 2014 (<http://deltacouncil.ca.gov/science-event/10470>). Although the focus of the workshop was not specifically the draft BDCP EIR/EIS, several of the panelists presented scientific data that was directly relevant for analysis of the draft BDCP EIR/EIS and impacts to covered fish species. Concerns regarding negative impacts due to new conveyances, such as the proposed tunnel under the BDCP, were repeatedly expressed (<http://deltacouncil.ca.gov/delta-science-program-workshop-interior-delta-flows-and-related-stressors-presentations>). Specifically, Bay Institute Conservation Biologist, Jonathan Rosenfeld, Ph.D. presented on the Impact of Altered In-Delta Hydrodynamics. Reduced inflows and increased exports would have a direct negative impact on several threatened and endangered fish species, including but not limited to, direct mortality (“salvage”), pre-screen mortality, altered behavioral cues resulting from altered hydrology increasing in-delta mortality, and low dissolved oxygen levels (See Attachment 2 p. 5). Furthermore, high entrainment losses for Delta smelt would persist under the proposed BDCP (Id. at p. 18). Similar negative impacts are expected for Longfin smelt and Chinook salmon (See <http://deltacouncil.ca.gov/delta-science-program-workshop-interior-delta-flows-and-related-stressors-videos>). Despite the compelling and

disconcerting scientific data presented at this two day workshop, that is clearly relevant for any changes being proposed to the Delta, the BDCP staff has not responded to or addressed these concerns. This reaffirms FOR's concerns regarding the deficiencies in the current Draft BDCP EIR/EIS and the necessity of addressing these alarming issues by properly engaging in the legally required consultation process for obtaining Biological Assessments and Biological Opinions.

D) DELTA INDEPENDENT SCIENCE BOARD REVIEW OF THE DRAFT EIR/EIS FOR THE BAY DELTA CONSERVATION PLAN (MAY 15, 2014)

The Delta Independent Science Board (DISB), pursuant to the Delta Reform Act of 2009 §85320(c), is mandated to review the draft BDCP EIR/EIS. On May 15, 2014, DISB submitted their review focused on analyzing the scientific data and methodologies used in the draft BDCP EIR/EIS and the validity of the conclusions reached as a result of that process. (See Attachment 3, Cover Letter). According to the DISB, the science presented in the draft BDCP EIR/EIS “falls short of what the project requires” and if the issues and concerns, as raised in the detailed review, are not addressed it “may undermine the contributions of BDCP to meeting the co-equal goals for the Delta” (Id.). The DISB listed major concerns and found that several broad areas of the draft BDCP EIR/EIS to be scientifically incomplete or inconsistent (Id. at pgs. 5-9). Some of the major concerns:

Expectations for the effectiveness of conservation actions are too optimistic.

Uncertainties are inconsistently or incompletely addressed.

The potential effects of climate change and sea-level rise are underestimated.

Confounding effects of linkages and interactions among species, landscapes, and the proposed actions themselves are insufficiently considered.

Several important effects are neglected (i.e. exclusion of important geographical areas such as San Pablo Bay and San Francisco Bay, or levee failure and maintenance issues, focusing on potential economic benefits of increased water production for agricultural interests without addressing the environmental impacts on crops and water quality).

Descriptions of the alternative conveyance structures, operations, and environmental impacts do not facilitate informative comparisons.

Although the DISB report had a broader focus, they did also review the Independent Panel's detailed Chapter 5 Effects Analysis report from March 17, 2014 (See Attachment 1 analysis above) and concurred with the major findings (See Attachment 3 p. 9). Both panels shared some of the same concerns regarding failure to adequately convey the sources and effects of

uncertainty in the data, disconnect between the appendices and the substantive chapters, and poor organization without clear and concise summaries (Id at p. 10).

E) URGENT NEED FOR A FORMAL CONSULTATION PROCESS

On May 29th, 2014 the Delta Stewardship Council (DSC) heard presentations on the scientific review reports cited above, in addition to a presentation and report submitted by DSC's independent consultant, ARCADIS (Attachment 4 <http://deltacouncil.ca.gov/docs/council-meeting/2014-05-22/delta-stewardship-council-may-29-30-2014-meeting-agenda-item-9-attach>). Incidentally, the ARCADIS report mirrors some of the same concerns identified in the the other science reports such as uncertainties, overstatement of benefits, overly optimistic timelines and benefits of habitat restoration, as well as failures to address impacts to in-Delta users of the Delta water supplies and concerns regarding levee failures (Id at p. 3). Upon receiving these reports and presentations, Randy Fiorini, DSC Chair, submitted DSC's formal comments to the BDCP staff addressed to Ryan Wulf, including the aforementioned reports on June 24, 2014

(Attachment 5

<http://deltacouncil.ca.gov/sites/default/files/documents/files/BDCP%20Comments%20Cover%20Letter%20and%20Final%20BDCP%20EIR-S%20Comments.pdf>). The DSC stresses the key

concerns and issues identified in the reports and submits recommendations to address, among other key issues, the inconsistencies, uncertainties, impacts to water quality, evaluation of alternatives, impacts to aquatic species, preservation of the Delta as a place, and use of realistic timelines for habitat restoration. Despite the alarming concerns identified in the reports cited above and further emphasized in the DSC's formal comment letter, the BDCP staff has not issued any public statement or press release responding to the concerns identified by the DSC.

Unfortunately, the Correspondence section of the BDCP website was shut down, effectively depriving the public access to important information that may assist in evaluating the draft BDCP EIR/EIS., so this information would not be posted there. However, the The BDCP staff do continue to post supportive documents and opinion letters on the BDCP's Blog and News sections. These science reports are a necessary and valuable analysis tool and emphasize the many problems and issues that are evident in the draft BDCP EIR/EIS and the need for a proper external consultation process in compliance with state and federal regulations.

The “Your Questions Answered” section of the BDCP website
 (<http://baydeltaconservationplan.com/AboutBDCP/YourQuestionsAnswered.aspx#PCRR>)
 purports to answer the question of Whether or not a Biological Opinion is needed for the BDCP:

Is a Biological Opinion required prior to the release of the Draft BDCP?
 A biological opinion is not required prior to the release of the Draft BDCP.

For the BDCP, the USFWS and NMFS must conduct an internal ESA section 7 consultation related to their issuances of incidental take statements to DWR for the BDCP. These federal agencies will coordinate the ESA consultation process and other environmental review processes, such as the National Environmental Policy Act (NEPA) and California Environmental Quality Act (CEQA), consistent with federal regulations. In addition, the USFWS and NMFS will consult with the United States Bureau of Reclamation (Reclamation) to complete biological opinions or a joint biological opinion prior to the issuance of any federal incidental take statement or federal action to carry out the BDCP.

No further explanation is provided. Has this process even started? Is there a reason the process is being conducted internally? Are there documents or reports that are being generated from this process? Have the parties involved in this process reviewed and assessed the independent scientific reports? The BDCP staff claims that this is an open planning process and they are committed to sharing the information with the public, however, as we have learned, some important documents, necessary for a meaningful public understanding and review, such as the Implementing Agreement, were not released until May 30, 2014 until the BDCP staff was pressured through a Public Records Act Request. In contrast to the incomplete and/or missing BDCP planning documents, the Lower Colorado Multi-Species Conservation Plan (LCR-MSCP) operates with transparency. Similar to the BDCP, The LCR-MSCP is also a Habitat Conservation Plan which provides ESA coverage for both federal and non-federal activities. Among other things, the planning documents also include a BA, an EIS/EIR, the BiOp, and a Funding and Management Agreement (http://www.lcrmscp.gov/steer_committee/regulatory_compliance.html). There has been no discussion or commitment from the BDCP staff to obtain these documents. Without such a commitment, the BDCP will not have the proper legal framework for compliance and implementation activities. In light of the concerns expressed in the scientific reports, it is imperative for the BDCP to engage in a proper consultation process that is transparent instead of a mystery internal process.

F) CONCLUSION

The numerous independent scientific reports and presentations referenced above clearly identify the deficiencies in the Draft BDCP EIR/EIS. It is incomplete, inconsistent, highly

uncertain and over-exaggerates potential benefits while ignoring the very real detrimental impacts of exports and conveyances to threatened/endangered fish populations. No amount of statistical manipulation can change the fact that pumping more water out of the Delta will cause further damage to the ecosystem. Not only will it negatively impact the ESA covered fish species, but further degradation of the Delta through the draft BDCP EIR/EIS also negatively impacts Delta communities, Delta farmers, Delta fishermen, and Delta recreational opportunities. It cannot guarantee a reliable water supply and it cannot guarantee the survival or recovery of the threatened/endangered species. The draft BDCP EIR/EIS, as it stands, will fail to protect or restore the Delta ecosystem. It will not fulfill the coequal goals of the Delta Reform Act. In the absence of answers to basic questions including ESA questions about jeopardy of listed fish species and adverse modifications of designated critical habitats, the draft BDCP EIR/EIS is not sufficient for informed review by the public and the decision-makers. As stated earlier in this letter, it will be necessary, at minimum, under the ESA, NEPA and CEQA for the federal and state agencies to prepare, issue, and circulate for public review a new draft EIR/EIS concurrently with and integrated with Biological Assessments and Biological Opinions. 40 C.F.R. §§ 1502.9(a); 1502.25(a) (NEPA); 14 Code Cal. Regs. §§ 15065(a)(1); 15088.5(a)(CEQA). Then, and only then, would the public and the decisionmakers have the opportunity to engage in meaningful analysis of a preferred project alternative and informed comparison with other alternatives.

As detailed in the ESA comments section of this letter, we reiterate that the draft BDCP EIR/EIS is in fact prohibited by the ESA because it would adversely modify designated critical habitat for at least five endangered and threatened fish species. The fact that the ESA required consultations would result in determinations in the Biological Assessments and Opinions that the preferred project alternative is prohibited by the ESA does not justify the unlawful evasion and postponement of the consultations.

Violations of Freedom of Speech Requirements

I) FAILURE TO POST COMMENTS ON BDCP WEBSITE

This section pertains to the California Resources Agency, California Department of Water Resources (DWR) and the Bureau of Reclamation's recent decision to stop posting public

comment letters and other vital information on their jointly hosted BDCP website (baydeltaconservationplan.com) just after issuance of the public drafts of the BDCP Plan and EIR/EIS on about December 13, 2013.

When our country was formed, people peaceably assembled in order to hear each other's views on matters of public importance. Informed public debate is the hallmark of our democracy. The modern equivalent of the venerable town hall/public park assembly is the public comment process via the Internet on proposed major government actions. Americans have fought wars to retain these freedoms. The BDCP proponent agencies, however, seem intent upon wresting these hard-earned freedoms from the public. These freedoms have been suppressed by these agencies' decision to stop posting critical comment letters on the established project website. If we lived in Communist China, we might expect thoughtful or critical public comment to be suppressed. We do not expect this in the United States of America.

The BDCP Water Tunnels are another effort by the same Governor and others to develop the old peripheral canal project that was defeated by a referendum vote in 1982. The Water Tunnels are one of the most controversial proposed public works projects in California history. There were no public hearings or meetings on the public BDCP Drafts so that the public could hear what others have to say. Instead, there were "open houses" where the public could ask questions of BDCP representatives. These were settings of all-powerful rulers and lowly subjects, not the spirited give and take of American democracy.

A) WEBSITE CHANGE REGARDING POSTING OF COMMENTS

The webpage confirming receipt of BDCP comments advised "Additional information can be found at www.baydeltaconservationplan.com." What can be found on the BDCP website are the 40,000 pages of the consultant prepared Plan and EIR/EIS documents which the federal Bureau of Reclamation, NMFS and United States Fish and Wildlife Service (USFWS), have previously called "advocacy" and/or "biased" documents for the BDCP Water Tunnels project. (Federal Agency Release, Bureau of Reclamation Comments p.1; NMFS Comments p.2; USFWS Comments p.1, July 18, 2013).

What cannot be found on the BDCP website is the January 14, 2014 Friends of the River initial comment letter explaining that the Water Tunnels project “is not a permissible project under the Endangered Species Act (ESA) because it would adversely modify designated critical habitat for at least five Endangered and Threatened fish species.” (p.1). What also cannot be found on the BDCP website is the Responsible Exports Plan alternative submitted by the EWC or the earlier version of that alternative, the Reduced Exports Plan, that was submitted by the EWC as far back as April and December of 2012 and February of 2013. In fact, no comments are included on the BDCP website. FOR has been forced to obtain the comments under the Freedom of Information Act (FOIA). FOR does what the the government of a free country should do: posting all comments regardless of whether FOR agrees or disagrees with the comments. FOR posts the comments at www.friendsoftheriver.org/bdcpcomments.

To explain the change in policy regarding posting of correspondence on the BDCP website, the following language now appears under “Correspondence”: *“In order to maintain the integrity of the formal public review period, incoming correspondence will not be available via the website beginning December 13, 2013 to the close of the public comment period April 14, 2014.”* (See <http://baydeltaconservationplan.com/library/Correspondence.aspx>, emphasis added.)

The obvious purpose of refusing to post comment letters is to hide critical comments from the public. It limits the information available to the public to the pro-BDCP Water Tunnels documents posted in December 2013. This restriction is an unconstitutional and unlawful exercise of viewpoint discrimination by the State agencies, the Resources Agency and DWR, aided and abetted by the participating federal agencies, NMFS which is receiving the comments but not posting them on a website, and USFWS and Reclamation. The First Amendment prohibits viewpoint discrimination. This restriction is also an unlawful denial of public access to the comments prohibited by the California Constitution. Furthermore, the decision to withhold posting of comments is a direct violation of the environmental full disclosure purposes of both the National Environmental Policy Act (NEPA) and the California Environmental Quality Act (CEQA).

B) THE CLOSING OF THE FORUM TO CRITICAL COMMENT IS CONTRARY TO THE PROMISE OF ENCOURAGING PUBLIC PARTICIPATION

The State claims that “The BDCP encourages public participation.” (BDCP website under “Correspondence”.) Secretary Laird of the California Resources Agency and numerous other state officials have claimed that the BDCP process is open and transparent. Those claims of encouraging public participation and openness are false. By refusing to post critical comment letters, the speech of the commenters is being silenced. The public does not see the other side of the Water Tunnels story.

Meanwhile, the proponent agencies continue to tout the Water Tunnels on the website. (Spanish language posting, January 3, 2014 entitled *Breve Informativo*; English language Overview Presentation posting, January 20, 2014). The project proponents have been free to misrepresent, advocate, speculate and omit unpalatable facts from the website while silencing responsive correction.

Instead of encouraging public participation, the agencies are doing everything in their power to discriminate against and exclude views opposing the Water Tunnels from the public website forum they have created. This is part of a pattern of suppression of free speech that was displayed in the summer of 2013 when Caltrans employees trespassed on private property in the Delta to remove signs carrying the message “Save the Delta! Stop the Tunnels!” That thuggery by the State only stopped after it was brought to widespread public attention by media coverage and rallies protesting the sign removals.

Claiming that taking more water away from the fish will be good for the fish, that taking more freshwater away from the Delta will be good for the Delta and that a water grab for the benefit of the exporters is really a conservation plan is false propaganda intended to deceive and confuse the public. This pattern and practice of viewpoint discrimination by the BDCP proponent agencies is the strongest self-indictment that could be made of the environmental destruction and economic waste threatened by the Water Tunnels project. The government would not be trying to suppress the speech of project opponents if it actually believed its own claims about the asserted benefits of the project.

C) THE VIEWPOINT DISCRIMINATION ON THE BDCP WEBSITE VIOLATES THE FIRST AMENDMENT

The First Amendment of the United States Constitution provides in pertinent part that there shall be no law “abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” Similarly, the California Constitution commands that “A law may not restrain or abridge liberty of speech or press” and the people have the right to “assemble freely to consult for the common good.” Cal. Const., Art. 1, § 2(a); § 3(a). “In a public forum, by definition, all parties have a constitutional right of access and the state must demonstrate compelling reasons for restricting access to a single class of speaker, a single viewpoint, or a single subject. When speaker and subject are similarly situated, the state may not pick and choose.” *Perry Educ. Ass’n v. Perry Local Education Ass’n*, 460 U.S. 37, 55 (1983). “Any access barrier must be reasonable and viewpoint neutral [citations].” *Christian Legal Soc. Chapter of the University of Cal., Hastings Coll. of the Law v. Martinez*, 130 S.Ct. 2971, 2984 (2010). “When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. [Citation.] Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationality for the restriction.” *Rosenberger v Rector and Visitors of University of Virginia*, 515 U.S. 819, 829 (1995).

Under the current regime, only those viewpoints that the government chooses will be posted on the BDCP website. For example, the website continues to include blogs purporting to debunk alleged “Myths” about the BDCP, and other materials written to promote BDCP and discount public concerns. (See, e.g., http://baydeltaconservationplan.com/news/blog/14-01-10/Correcting_Stubborn_Myths_Part_II.aspx.) This blog suggests that a comment on the blog may be provided by clicking on a link. (“Click here to contact us with your questions or comments about the BDCP Blog.”) Yet that link is the same link to the email address for submitting formal public comments on the Plan and EIR/EIS (BDCP.comments@noaa.gov). As explained clearly on the BDCP website, such comments will not be posted. The exclusion of critical comments from the BDCP website at the same time as the government agency proponents continue to post materials that promote their viewpoint that BDCP is a worthwhile

project violates the First Amendment prohibition of viewpoint discrimination in forums created by the government.

D) THE DENIAL OF THE RIGHT OF ACCESS TO CRITICAL COMMENTS VIOLATES THE CALIFORNIA CONSTITUTION

The California Constitution provides in pertinent part that “The people have the right of access to information concerning the conduct of the people’s business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.” Cal. Const. Art. 1, § 3(b)(1). Moreover, any authority “shall be broadly construed if it furthers the people’s right of access, and narrowly construed if it limits the right of access.” Cal. Const. Art. 1, § 3(b)(2).

“Given the strong public policy of the people’s right to information concerning the people’s business (Gov.Code, § 6250), and the constitutional mandate to construe statutes limiting the right of access narrowly (Cal. Const., art. 1, § 3, subd. (b)(2), all public records are subject to disclosure unless the Legislature has *expressly* provided to the contrary.” *Sierra Club v. Superior Court*, 57 Cal.4th 157, 166 (2013) (internal quotation marks deleted).

The complexity of the BDCP and the volume of documents being circulated for public review to explain that complexity make review challenging even for professionals. For an average member of the public, the job is almost impossible. The public’s ability to be informed regarding this project is facilitated by having access to comments being made by others during the review process, including non-profit environmental groups and other public agencies. The refusal to publish comment letters on the website as they come in denies the public the right of access to the comments in violation of the California Constitution.

E) THE EXCLUSION OF ENVIRONMENTAL INFORMATION CONTRARY TO THE OPINIONS OF THE PROJECT PROPONENTS VIOLATES NEPA AND CEQA

NEPA and CEQA are both “environmental full disclosure laws.” *Silva v. Lynn*, 482 F2d 1282, 1284 (1st Cir. 1973); *Cmtys. for a Better Env’t v. City of Richmond*, 184 Cal.App.4th 70, 88 (2010). Both laws require that an agency “use its best efforts to find out all that it reasonably can” about the subject project and its environmental impacts. *Barnes v. U.S. Dept. of Transp.* 655

F.3d 1124, 1136 (9th Cir. 2011); *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal. 412, 428 (2007).

Interfering with review by members of the public of comments made by other members of the public is environmental concealment, not disclosure, and is calculated to prevent the public from finding out all that it reasonably can about the subject project and its impacts.

CEQA provides that “notwithstanding any other provision of law” the record of proceedings “shall include, but is not limited to,” written documents submitted by any person relevant to findings and all written correspondence submitted to the respondent public agency with respect to compliance with CEQA or the project. Public Resources Code § 21167.6(e)(3), (7). The NEPA Regulations require that federal agencies make comments received under NEPA available to the public pursuant to the provisions of the Freedom of Information Act and that they shall be provided without charge to the extent practicable. 40 C.F.R. § 1506.6(f).

The CEQA Regulations provide that:

Public participation is an essential part of the CEQA process. Each public agency should include provisions in its CEQA procedures for wide public involvement, formal and informal consistent with its existing activities and procedures, in order to receive and evaluate public reactions to environmental issues related to the agency’s activities. *Such procedures should include, whenever possible, making environmental information available in electronic format on the Internet, on a web site maintained or utilized by the public agency.*

14 Code Cal. Regs § 15201(emphasis added).

Instead, the BDCP proponent agencies have selectively published information favorable to the project on their website while concealing what they consider to be unfavorable information. Making the comments available only *after* the comment period has closed makes a mockery of the promise of a fair, transparent and open process. Members of the public will have no opportunity to learn information provided by those with concerns about the BDCP in time to help them develop their own timely comments, including suggested alternatives to the project. The exclusion of comments from the website violates the environmental full disclosure purposes of both NEPA and CEQA, and the CEQA regulation requiring the posting of environmental information on the agency’s website.

F) COMMENT CONCEALMENT CONCLUSION

The exclusion of public comments from the BDCP website violates the First Amendment, California Constitution, NEPA and CEQA. This violation can only be remedied by the BDCP agencies posting all comments on the BDCP website and then providing a new public review and comment period on the Draft EIR/EIS, Plan, and Implementing Agreement so that the public can see the information and contentions about the problems that would be created by new upstream conveyance.

DEFECTS IN THE IMPLEMENTING AGREEMENT

I) THE IMPLEMENTING AGREEMENT IS UNLAWFUL

“The overall goal of the BDCP is to restore and protect ecosystem health, water supply, and water quality within a stable regulatory framework.” ((IA “IA”, 3, also 14 (all cites to page number). Also, the Plan claims it “Provides for the conservation and management of Covered Species within the Plan Area through the preservation, restoration, and enhancement of aquatic, riparian and associated terrestrial natural communities and ecosystems that support these Covered Species and through other conservation actions.” (IA 3).

Contrary to the assertion that “Reclamation has incorporated the BDCP into a biological assessment to support a Section 7 consultation for reclamation’s actions within the Plan Area and the resulting Integrated Biological Opinion” (IA 3-4), Reclamation has not prepared a biological assessment and the Integrated Biological Opinion has not been prepared. The IA refers to a “subsequent Integrated Biological Opinion.” (IA 22). Under a heading entitled “Role of Bureau of Reclamation in the BDCP” admissions are made that: “Federal agencies, such as Reclamation, comply with the ESA through the Section 7 consultation process and not through the Section 10 HCP permitting process. Given the scale of Reclamation’s CVP operations and the degree to which these operations are coordinated with the SWP, BDCP has been designed to address both SWP and CVP operations in the Delta. Reclamation will enter into a Memorandum, or similar agreement, with the Parties that sets out Reclamation’s roles and responsibilities pursuant to the BDCP and establishes processes to ensure that Reclamation’s actions are implemented in a manner consistent with the Plan.” (IA 15). This puts the cart before the horse. Since the Plan is to

govern Reclamation actions, ESA § 7 consultation needs to come before, not after, preparation of the Plan.

The false assertion is made that “DWR and the participating SWP/CVP Contractors are agreeing to substantial commitments of water, land, other natural resources, financial resources, human resources and other assets to provide for the conservation and management of the Covered Species, their habitats and other natural communities, in exchange for the Fish and Wildlife Agencies providing take authorizations, and the Assurances.”” (IA 4). In fact, no commitments are made at all.

The inaccurate finding by the California Department of Fish and Wildlife (CDFW) that the BDCP satisfies the requirements of the Sacramento-San Joaquin Delta Reform Act of 2009 including Water Code § 85320 is included. (IA 14). Also included is the assertion that the BDCP EIR provides “a comprehensive review and analysis” of “A reasonable range of flow criteria, rates of diversion, and other operational criteria required to satisfy the criteria for approval of a natural community conservation plan. . . and other operational requirements and flows necessary for recovering the Delta ecosystem and restoring fisheries under a reasonable range of hydrologic conditions, which will identify the remaining water available for export and other beneficial uses.” (IA 14). In fact, none of that has been done.

The IA takes away what the BDCP may appear to give in terms of conservation of Covered Species. “[I]n the event of a direct conflict between the terms of this Agreement and the BDCP, the terms of this Agreement shall control.” (IA 15).

USFWS and NMFS give away their authority to carry out a future Integrated Biological Opinion/conference opinion to protect Covered Species that become listed in the future in advance. “...USFWS and NMFS will not request, impose, recommend, or require mitigation, conservation, compensation, enhancement, or other protection for such Covered Species, beyond that expressly provided in this Agreement.” (IA 19).

In the face of declining fish populations, admitted uncertainties and adverse effects, as well as implicit denial of the undeniable fact that reducing flows is bad, not good, for the fish, the IA parties “agree” that “Through the implementation of the Plan, including adjustments made

through the adaptive management process, Permittees will satisfy their obligation to achieve the biological goals and objectives.” (IA 24). The all-knowing prophets then give away all powers and obligations to continue protecting the fish. “Unless otherwise specified in the Plan or this Agreement, failure to achieve a biological goal (s) and/or objective(s) shall not be a basis for a determination by the Fish and Wildlife Agencies of non-compliance with the Plan or for the suspension or revocation of the Permits, provided the Permittees are properly implementing the BDCP and are in compliance with this Agreement and the terms and conditions of the Permits.” (IA 24). This is so even though “The Parties agree that a key area of scientific uncertainty concerns the volume of Delta outflow that is necessary to advance the biological goals and objectives for both Delta smelt and longfin smelt.” (IA 25). The Parties also admit “that other covered fish species, including salmonids and sturgeon, are affected by outflow.” (IA 26). The decision tree process and adaptive management process are declared to be the answer to the uncertainties. (IA 25).

The IA admits the obvious that “Ecological conditions in the Delta are likely to change as a result of future events and circumstances that may occur during the course of the implementation of the BDCP.” (IA 44).

In spite of the declining fish populations and repeated references to possible future extinctions as a result of changing conditions in the Effects Analysis (Chapter 5) of the BDCP Plan, the IA helps carry out the future extinctions by providing regulatory assurances including: “That is, if unforeseen circumstances occur that adversely affect species covered by an HCP or an HCCP, the Fish and Wildlife Agencies will not require of the permit holder any additional land, water, or financial compensation nor impose additional restrictions on use of land, water, or other natural resources without their consent.” (IA 48).

“Pursuant to the No Surprises Rule. . . and provided that the BDCP is being implemented consistent with the terms of this Agreement, the Plan, and the Federal Permits, the USFWS and NMFS shall not require the Permittees to provide additional land, water, or other natural resources, or financial compensation or additional restrictions on the use of land, water, or other natural resources beyond the level provided for under the BDCP, this Agreement and the Federal Permits with respect to Covered Activities without the consent of the Permittees.” (IA 50). Even

though the No Surprises Rule does not apply to federal agencies, USFWS and NMFS report to limit Reclamation's ongoing responsibilities under §7 of the ESA to the maximum extent allowed by law. (IA 50, 51).

Moreover, "Under the ESA regulations and this Agreement, if unforeseen circumstances arise during the life of the BDCP, USFWS and/or NMFS may not require the commitment of additional land or financial compensation, or additional restrictions on the use of land, water, or other natural resources other than those agreed to in the Plan." (IA 51).

CDFW similarly gives away its powers and responsibilities for the 50 year term of the permit. (IA 52, 53).

Though the IA purports to recognize the applicability of ESA § 7 to possible future actions, it provides "unless otherwise required by law or regulation, USFWS and NMFS will not require through the Section 7 consultation additional land, water or other natural resources, or financial compensation or additional restrictions on the use of land, water, or other natural resources for Covered Activities and Associated Federal Actions beyond the measures provided for under the BDCP, the Implementing Agreement, the Permits, and the Integrated Biological Opinion." (IA 74, 75). Even for biological opinions issued in connection with projects that are independent of the Covered Activities and Associated Federal Actions, "USFWS and NMFS agree to make every effort to avoid rendering opinions or taking actions that would cause additional restrictions on the use of land, money, or water for the Authorized Entities with respect to their obligations under the BDCP or this Agreement." (IA 75). "If critical habitat is designated within the BDCP Plan Area subsequent to issuance of the permits, no compensation, mitigation, or minimization measures will be required of the Permittees as a result of the designation." (IA 76).

The Parties "acknowledge that ESA recovery plans have no effect on the implementation of the BDCP" and that "With respect to any recovery plan applicable to any Covered Species within the Plan Area that is developed after the approval of the BDCP the parties agree that: Recovery plans cannot require any additional land or financial compensation or otherwise diminish the take authorization for Covered Species granted to the Authorized Entities pursuant to the Federal Permits or the Integrated Biological Opinion." (IA 77).

II) VIOLATIONS OF ESA IN THE DRAFT IMPLEMENTING AGREEMENT

A) BRIEF SUMMARY

The Draft IA violates the provision of ESA which requires a conservation plan to describe certain steps of a conservation plan in order to be issued an incidental take statement. The Draft IA does not detail the steps that will be taken to monitor, minimize, or mitigate impacts, nor ensure funding for the implementation of such steps. Many details and decisions are avoided and left to the Adaptive Management Program, which itself suffers from generalized assertions that provide no real guidance. Once again, the Draft IA is an incomplete document that does not provide the necessary guidance to implement the BDCP.

B) LEGAL BACKGROUND

An IA is needed for ESA compliance; the ESA requires a permit for the incidental take of a species to include “a conservation plan, based on the best scientific and commercial data available” which details “the steps that will be taken to monitor, minimize, and mitigate such impacts, and the funding available to implement such measures.” 40 C.F.R. § 222.307(b)(5)(iii). The Draft IA covers the implementation of the conservation plan, and therefore needs to detail the monitoring, mitigation steps as well as the funding for implementation of these steps.

C) DISCUSSION

1) Monitoring and Minimizing Impacts

The Draft IA relies heavily on the Adaptive Management Team to provide the necessary steps for monitoring impacts on Covered Species. The Draft IA has provisions stating the “Covered Activities relat[ing] to the development and operation of water conveyance infrastructure” will include “monitoring of Covered Species.” (IA, 9.2, 21). The Adaptive Management Team is the primary group responsible for the biological monitoring program, which is supposed to help determine whether “conditions warrant a change to a Conservation Measure or a biological objective.” (IA, 10.3.2.1, 29; 10.3.4, 31.) The “effects monitoring will provide the basis for evaluating the impacts of Covered Activities, Associated Federal Actions, and Conservation Measures on Covered Species, including the amount of take of Covered Species...” (IA, 10.4.1, 39) (internal quotations omitted).

However, “metrics and protocols” for monitoring will only be developed after the BDCP has been approved and begun implementation. (IA, 10.4.1, 39.) An “Annual Monitoring and Research Plan” is to be prepared every year to identify “the type, scope, nature and timing of the proposed monitoring” as well as the “rationale and need for such activities,” but the Permit Oversight Group determines whether to adopt the monitoring plan or not. (IA, 10.4.3, 39).

The provisions included in the IA are broad and provide no real guidance on the steps for monitoring covered species. Furthermore, the fact that protocols for monitoring do not have to be developed before the Plan is authorized means that Plan proponents are trying to pass the BDCP without ever having to detail the steps they will take to monitor the impacted species. This is violation of ESA’s requirements, as the Draft IA must detail the steps it will take to monitor the impact on Covered Species.

Less attention is paid to minimizing impacts on Covered Species. The Conservation Strategy of the Draft IA states the BDCP includes “biological goals and objectives and conservation actions that appropriately minimize and mitigate the potential effects of Covered Activities and Associated Federal Covered Species.” (IA, 10.0, 23). Later, the Draft IA states “if critical habitat is designated within the BDCP Plan area subsequent to issuance of the permits, no...minimization measures will be required of the Permittees,” allowing the Permittees to avoid minimizing impacts on covered species on certain habitat. (IA, 20.1.6, 76).

Overall, the Draft IA provides very little detail on the steps that will be taken to monitor and minimize impacts on Covered Species, as is required by the ESA. The monitoring and minimization of impacts of Covered Species is left largely to the Adaptive Management program. However, there is no real guidance on what the Adaptive Management Program will involve. The Draft IA provides too little detail on the Adaptive Management Program’s monitoring and minimizing to satisfy the ESA.

2) Mitigation of Impacts

The IA states the Plan “includes measures to...mitigate to the maximum extent practicable the effects on the Covered Species.” (IA, 2.1.8, 3). Most of the language describing mitigation of impacts comes from the section on ‘Conservation Strategy,’ which consists of “(1)

biological goals and objectives; (2) Conservation Measures; (3) adaptive management; and (4) monitoring.” (IA, 3.17, 6). However, the Conservation Strategy chapter merely serves to provide assurances that the Conservation Measures will mitigate impacts to Covered Species without going into any detail about the Conservation Measures. After stating the Conservation Measures “have been developed in accordance with the principles of conservation” and “are expected to be sufficient to achieve the biological goals and objectives,” the Draft IA does not detail the steps the Conservation Measures will take, and instead says the Conservation Measures are described in Chapter 3.4 of the BDCP. (IA, 10.2, 24). Furthermore, the Draft IA tries to qualify the assurances of mitigation by stating the “Parties agree that a key area of scientific uncertainty” exists over the conditions “necessary to advance the biological goals and objectives.”

The Draft IA puts forth the concept that the Conservation Measures are adequate to ensure mitigation of impacts on Covered Species; however, outside science reviews of these assertions have cast doubt on the Conservation Measure’s capability. The Delta Independent Science Board’s (DISB) review of the BDCP listed the ‘effectiveness of conservation actions’ as “too optimistic;” stating the Conservation Measures represented “an implausible standard of perfect for such a complex problem.” (Review of the Draft BDCP EIR/EIS and Draft BDCP, p. 5). Furthermore, the DISB found “few of the many uncertainties in DEIR/DEIS are acknowledged in conclusions about impacts and mitigation actions.” (Review of the Draft BDCP EIR/EIS and Draft BDCP, Appendix A). Overall, the DISB found “far greater uncertainty about the mitigation,” concluding that questions surrounding mitigation success were “not adequately addressed,” and “simply referring to adaptive management as a way to deal with such uncertainties is not sufficient.” (Review of the Draft BDCP EIR/EIS and Draft BDCP, p. B-52). The Delta Science Program Independent Review Panel (DSPIRP) found similar inadequacies, concluding “many of the critical justifications behind the supposed benefits of the conservation measures are highly uncertain,” and stated “the default burden to ensure Covered Species benefit, if not recovery, rests on adaptive management.” (BDCP Effect Analysis Review, Phase 3, p. 17).

The DISB and DSPIRP both found the BDCP’s detail and assurances of Conservation Measures’ success wanting, and realized much is left to the adequacy of the adaptive management program. Adaptive management specifics have been left to the IA, yet the Draft IA

contains very little detail on how the Adaptive Management Program will be carried out, as described earlier in this comment. Troublingly, the Adaptive Management Team is allowed to change or even eliminate biological goals and conservation measures. (IA, 10.31, 29). This, along with the fact neither the Draft IA nor the corresponding chapters in the DEIR/DEIS specify mitigation steps to reduce impact, presents a violation of ESA's mandates to detail the steps taken to mitigate impacts on Covered Species.

3) Funding Assurances

The Draft IA asserts that the Parties do not have to guarantee funding "be secured at the time of permit issuance," and instead lowers its assurances to "reasonably certain to occur during the course of Plan implementation," which is over the term of 50 years. (IA, 13.0, 45). The Draft IA provides no certain areas of funding, instead relying on "historically...reliable means" from which "funding will likely be drawn. (*Id.*). However, the Draft IA asserts that the BDCP "is designed to demonstrate that...funding will be adequate for such purposes and will be forthcoming." (IA, 13.2, 47). Unfortunately, there are no guarantees that the funding is certain, much less adequate.

The funding for ensuring steps to reduce impact on Covered Species is inadequately represented throughout the Draft IA. The purpose of an IA is to provide some certainty of the mechanics of a conservation plan. Here, the Draft IA provides no certainty of funding for the BDCP. The Parties have violated the ESA by failing to ensure funding for monitoring, minimizing, and mitigating impacts on Covered Species.

D) CONCLUSION

The ESA requires the conservation plan to detail the steps for monitoring, minimizing, and mitigating the impacts on Covered Species, as well as provide for the funding to carry out those goals. 40 C.F.R. § 222.307(b)(5)(iii). As a guide to the implementation of the BDCP, the IA needs to provide detail on these provisions. However, the Draft IA does not provide detail on monitoring, minimizing or mitigating impacts. Instead, it provides general statements and removes the detail to chapters of the DEIR/EIS. Independent science reviews of the relevant chapters of the DEIR/EIS have shown the conservation steps to be inadequate, overly optimistic,

and unrealistic. This is a violation of the ESA's mandate to provide detailed steps of the monitoring, minimizing, and mitigation of impact on the Covered Species. The funding provisions are also inadequate; the Draft IA even states funding is not assured at this time, and only provides it become "reasonably certain" after the BDCP has already been agreed to and implemented. The Draft IA has violated the ESA by failing to provide the necessary detail regarding the implementation of the conservation plan.

III) VIOLATIONS OF NCCPA IN THE DRAFT IMPLEMENTING AGREEMENT

A) BRIEF SUMMARY

The Draft IA violates several provisions of the Natural Community Conservation Planning Act (NCCPA) and presents an incomplete picture. Instead of providing the necessary framework for understanding how the BDCP will be implemented, the Draft IA provides little specificity, defers necessary findings for a later date, and includes provisions that insulate Permittees from necessary oversight. These violations are most frequently seen in the provisions dealing with funding, specifying conservation and habitat measures, and the suspension/revocation process.

B) LEGAL BACKGROUND

The purpose of the NCCPA is to "sustain and restore those species and their habitat...that are necessary to maintain the continued viability of those biological communities impacted by human changes to the landscape." Cal. Fish & G. Code, § 2801(i). The Act outlines the specific findings and standards required to satisfy NCCPA, including a provision requiring an Implementation Agreement (IA), which contains several additional requirements that must be fulfilled. Cal. Fish & G Code § 2820(b).

The NCCPA requires the IA to provide details about the BDCP and its environmental consequences specified in nine different provisions, including conservation implementation, suspension/revocation of the Incidental Take Permit (ITP), funding, and modifying the IA. Cal. Fish & G Code § 2820(b)(1-9). The Draft IA violates all four categories and is impermissibly defective.

C) DISCUSSION

1) Violation of Conservation Provisions of the NCCPA

The NCCPA requires an IA to include provisions “defining species coverage, including any conditions of coverage.” Cal. Fish & G. Code § 2820(b)(1). The Draft IA does nothing more than provide overbroad and vague assurances without specifying definite actions to ensure that species will be adequately covered. For instance, the Draft IA states the “BDCP and this Agreement provide a comprehensive, habitat-based approach to the protection of Covered Species by focusing on the land and water necessary to provide for the long-term conservation and management of the Covered Species.” (IA, 20.1.6, 76). Instead of fulfilling the NCCPA’s requirement to define the conditions of species coverage, the Draft IA makes oblique references to “actions associated with restoration” and “desired biological outcomes.” (IA, 9.2, 21 and 10.1, 23). Section 9.2, titled ‘Covered Actions’ would be an ideal place to specify coverage; however, it merely mentions “activities related to the development and operation of water conveyance infrastructure.” (IA, 9.2, 21). The only ‘specifics’ provided are the “development and operation of new Delta conveyance facilities...to transport and deliver water to State Water Project and Central Valley Project.” (IA, 9.2, 21).

These provisions violate the NCCPA in two ways: first, they divide the complete definition of species coverage among multiple documents in the BDCP, but the NCCPA requires the IA itself to define and include conditions of species coverage. Second, the Draft IA is too vague to satisfy the condition of “defining species coverage” at all. For example, the Draft IA itself does not even include a list of covered species; ‘Exhibit A’ is titled “List of Covered Species” in the Table of Contents, but is not actually included in the document. (IA, vi).

The Draft IA states that species coverage will be adequately defined once the public comment period is over. (IA, 4.2, 12). This is a failure to provide a meaningful review opportunity. Defining species coverage after the public comment period has ended undermines the purpose of public review.

(a) Habitat Reserves and Conservation of Covered Species

The NCCPA next requires the IA to include provisions for establishing “long-term protection of any habitat reserve” or other measures to provide “equivalent conservation of covered species.” Cal. Fish & G. Code § 2820(b)(2). The Draft IA specifies reserve system lands are to be permanently protected by fee title or conservation easement. (IA, 11.4.1, 42). This is provided for in the Draft IA by the development of conservation easement templates by the Authorized Entities, a group made up of “the Director of DWR, the Regional Director for Reclamation, a representative of the SWP contractors and a representative of the CVP contractors.” (IA, 15.3.1, 58). The original templates are subject to approval by the Fish and Wildlife Agencies, who can then designate templates to be amended without further approval of the Agencies. (IA, 11.4.1, 42). Essentially, the Authorized Entities will have the power to change certain designated habitat templates without any oversight. This violates the NCCPA’s requirements to ensure long-term protection of habitat reserves because the Authorized Entities will be able to remove certain habitat protections, with no oversight from the fish and wildlife agencies. The assurance that habitats will be maintained is eliminated by giving the Authorized Entities this level of control.

(b) Four-Year Lapse until Management

There is a four year gap from the acquisition of land for habitat reserves until these lands actually have to start being managed to help conserve species. (IA, 11.4.2.1, 43). Four years is an unacceptable time frame to wait until conservation measures are implemented, as that would allow land to continue being used with no active conservation methods taking place. This could result in further deterioration of the Covered Species. Also, changes to these management plans can be made internally by the Implementation Office (IO), with no oversight by fish and wildlife agencies. (IA, 11.4.2.1, 43). This provision would allow the IO to be able to change the habitat conservation plans without any oversight from fish and wildlife agencies.

Furthermore, the specifics of the management and “general enhancement” techniques to be used are omitted from the IA and instead included in the Conservation Measure 11 in Chapter 3 of the BDCP. (IA, 11.4.2, 43). This is another example of the unacceptable way the BDCP is piecemealing information between multiple documents. In order to ensure conservation and

long-term protection of habitat and covered species, the IA itself must include the specifics and techniques the BDCP proposes. Instead, details are left out of the IA and put in another BDCP document. This violates the NCCPA's requirements for the IA to establish and ensure conservation measures.

(c) Funding of Habitat Reserves

The funding provisions for the habitat reserves state that the IO must ensure that “non-wasting endowments” or a “substantial equivalent” is established. (IA, 11.4.1, 43). Once the Authorized Entities have secured enough funding to satisfy “certain conservation obligations” under the Plan and it is approved by the fish and wildlife agencies, additional funds cannot be required from the Authorized Entities. (IA § 11.4.1, 43). No funding for long-term management is specified, and the “certain conservation obligations” that must be met are not defined or detailed what is required to satisfy them. The Draft IA provisions fail to clarify Permittees’ commitments and therefore violate the NCCPA’s requirements to ensure funding. This does not ensure funding for long-term habitat protection, which violates the NCCPA and could lead to more money being required from taxpayers.

(d) Rough Proportionality on Habitat/Covered Species and Conservation Measures

An IA must include provisions specifying what the CDFW must do “if the plan participant fails to maintain rough proportionality between impacts on habitat or covered species and conservation measures.” Cal. Fish & G. Code § 2820(b)(3)(B). The Draft IA states that if the Conservation Measures are implemented according to the implementation schedule and procedure set out in Chapter 6 of the BDCP, the CDFW is required to find that rough proportionality is satisfied. (IA, 11.1.1, 40). This is an underhanded way of forcing the CDFW to find that rough proportionality is maintained unless there is an explicit discrepancy with the implementation schedule. This presents a two-fold violation: it is another example of piecemealing necessary information in the Draft IA and Chapter 6 of the BDCP; and since the implementing schedule is likely written in vague terms, there will be no way to ever find a failure to maintain rough proportionality. For instance, Chapter 6 of the BDCP lists the implementation schedule of the Conservation Measures in several tables. Draft BDCP, 6-3, 6-4, 6-5. The explanations often give “expected” timelines, and goals when facilities “will likely

be completed.” Draft BDCP, 6-3, 6-4. These are vague terms, and it would be nearly impossible for the CDFW to find an explicit discrepancy.

This renders the fish and wildlife agencies’ job in determining rough proportionality useless and gives the Permittees the power to implement their best interests without being held accountable to maintain rough proportionality. There is no real oversight by parties outside of the BDCP to help hold the Authorized Entities accountable. This violates Section 2820(b)(3)(B) of the NCCPA because the CDFW must be able to take action if it finds a lack of rough proportionality, but the provision of the Draft IA completely wipes out this ability.

An IA must also “identify the conservation measures, including assembly of reserves where appropriate” as well as the “monitoring and management activities that will be carried out in rough proportion to the impact on habitat or covered species.” Cal. Fish & G. Code §2820(b)(9). The measurements that will be used to determine rough proportionality is maintained must also be included. Cal. Fish & G. Code §2820(b)(9). Conservation measures are never specifically described in the Draft IA. Section 10.2 states that the measures have been developed in “accordance with the principles of conservation biology and address...ecological processes, environmental gradients, biological diversity, and regional aquatic and terrestrial linkages.” (IA, 10.2, 24). The section then goes on to say that the conservation measures are described not in the Draft IA but in Chapter 3.4 of the BDCP. This violates the NCCPA’s requirement to identify in the IA the conservation measures that will be used.

Section 10 is labeled Conservation Strategy, and states the Strategy has been designed to achieve the BDCP’s goals of “restoring and protecting ecosystem health, water supply, and water quality in the Delta within a stable regulatory framework.” (IA, 10, 23). The Conservation Strategy states that biological goals and objectives reflect the expected ecological outcomes of the BDCP and its intended functions, but does not specify what these biological goals and objectives actually are. (*Id.*). Instead, they are left out and put in Chapter 3 of the BDCP. This violates the basic requirement of the NCCPA to actually identify the conservation measures and the Draft IA avoids describing the conservation measures throughout the entire document.

As mentioned above, the Draft IA states that if the conservation measures are implemented in accordance with the implementation schedule that is set out in Chapter 6 of the

Plan, the CDFW must find that there is rough proportionality as required by the NCCPA. (IA, 11, 40). As well as setting a pre-determined standard for the CDFW, the Draft IA also fails to satisfy the last clause of §2820(b)(9) to include measurements to determine whether rough proportionality is occurring. Stating that the CDFW must find rough proportionality is occurring does not equal including the measurements the agencies plan to use in the BDCP, and is a violation of the NCCPA's requirements.

(e) Adaptive Management

A key aspect of conservation implementation is the role of the adaptive management program, and the IA is required to contain provisions "ensuring implementation of the...adaptive management program." Cal. Fish & G. Code § 2820(b)(5). While the Draft IA discusses adaptive management, the provisions lack detail and certainty. (IA, 10.3 – 10.3.7.3, 29-38). The Draft IA discusses "new information and insight gained" to develop "alternative strategies," as well as affording the Plan "the flexibility to allow changes to be made to Conservation Measures." (IA, 10.3.1, 29). The language is broad and over-generalized. This lets the Adaptive Management Team make decisions "including the addition to or elimination of" the Conservation Measures and biological objectives without any oversight by the Fish and Wildlife Agencies. (IA, 10.3.1, 29). This assigns a huge amount of power to the Adaptive Management Team and will allow the Team to subvert the Conservation Measures and biological objectives if they do not appear to be in the Authorized Entities' best interests.

2) Violations of Suspension & Revocation Provisions of the NCCPA

The NCCPA requires specific terms and conditions to be included in the IA, which if violated, result in the suspension or revocation of the permit, in whole or in part. Cal. Fish & G. Code § 2820(b)(3). If certain provisions are violated, they invoke the overall suspension/revocation process outlined in the Draft IA. (IA, 22.4, 82).

(a) Suspension/Revocation Process

The Draft IA's suspension/revocation process itself is problematic. The process is invoked anytime the CDFW determines the Permittees have "failed to fulfill their obligations under the BDCP, this Agreement, or the State Permit." (IA, 22.4, 82. If the CDFW finds

circumstances to warrant suspension or revocation, it must follow a review process which is invoked by a Permittee and set forth in an entirely different section of the IA. The decisions reached at the end of the review process are non-binding, but getting a decision could take over six months from the time the CDFW determines the permit should be revoked. (IA, 115.8.2, 67). The process allows the Permittees to continue their unlawful actions as long as possible. Even more troublesome is the fact that the Draft IA states the review schedule can be adjusted “as necessary,” seemingly giving anyone the power to adjust the schedule to delay the revocation process even further. (IA, 15.8.2, 67). This would allow the Permittees to delay the suspension or revocation of their State permit even when the regulatory agency has determined there is cause to suspend or revoke the permit.

A separate process is invoked if the CDFW finds the continued take of the species would lead to jeopardizing the continued existence of the species. The CDFW is given the power under the NCCPA to suspend or revoke any permit if it finds the take of the species is jeopardizing its survival. Cal Fish & G. Code § 2823. However, in the Draft IA, the CDFW cannot suspend the permit until there has been a 45-day remedial period, meaning that the Permittees can keep taking the covered species for over a month before a suspension of the Permit would even go into effect. (IA, 22.6, 83). Then, revocation cannot happen until the non-binding review process from Section 15.8.2 is exhausted. (IA, 22.6, 83). This means even if the CDFW believes the continued take of a species will jeopardize its existence, it cannot suspend the permit for over a month and then cannot revoke the permit for over six months after that. This could be disastrous for the survival of several Covered Species’ and exemplifies another BDCP deficiency in satisfying NCCPA’s procedural requirements.

3) Violations of Funding Provisions of the NCCPA

(a) Adequate Funding for Conservation Actions

The Draft IA violates the NCCPA’s requirements to ensure adequate funding for conservation measures. An IA must include “mechanisms to ensure there is adequate funding to carry out the conservation actions identified in the plan.” Cal. Fish & G. Code § 2820(b)(8). The Draft IA contains different language, stating that all that is needed is to “establish that such funding is reasonably certain to occur during the course of Plan implementation.” (IA, 13.0, 45.

The Draft IA only references “various sources from which funding will likely be drawn,” and does not even list the possible sources. (IA, 13.0, 45). It states the Permittees only agree to ensure the funds to “carry out their obligations under the BDCP.” There are no assurances that funding will be adequate, just types of funding that are “typical” to these projects and “historically...reliable.” (IA, 13.0, 45). This is a clear violation of the NCCPA’s requirements to ensure funding. The Draft IA fails this provision by omitting any certainty of funding, which serves to highlight the many weaknesses of the Draft IA.

(b) Suspension/Revocation for Lack of Funding

There are terms and conditions listed in Section 2820(b)(3) of the NCCPA for which the violation of results in suspension or revocation of the permit. Cal. Fish & G. Code § 2820(b)(3). The first states the IA must contain provisions specifying the actions the department must take if the plan participant fails to provide adequate funding. Cal. Fish & G. Code § 2820(b)(3)(A). The Draft IA has a provision allowing the CDFW to suspend or revoke the State Permit if it determines the Authorized Entities are not providing adequate funding, pursuant to the review process earlier outlined. (IA, 13.2, 47). The CDFW must find that a funding shortfall exists AND that the shortfall either prevents specific actions from being implemented in a timely manner, as set out in Chapter 6, or that it prevents specific actions from being fully implemented, as described in the BDCP. (*Id.*). However, a Fish and Wildlife Agency is prohibited from suspending or revoking a permit if the funding shortfall is determined “likely to have no more than a minimal effect on the capacity of the Plan to advance the biological goals and objectives.” (*Id.*). It is not stated outright who determines whether or not the shortfall is likely to have a minimal effect on the capacity of the Plan. This is a very vague sentence put in at the end of the section that could be used to get out of providing less funding originally promised. This violates the NCCPA because it takes away the CDFW’s power to suspend or revoke a permit if there is a lack of funding.

4) Violations of Modification Provisions of the NCCPA

The NCCPA requires an IA to set out “procedures for amendment of the plan and the implementation agreement.” Cal. Fish & G. Code § 2820(b)(4). Section 23 of the Draft IA allows for administrative changes, minor modification, and formal amendments to the BDCP.

(IA, 23, 84). Administrative changes that do not substantively change the purpose, intent, or terms of the Plan or IA can be made without modifying or amending the Plan or the IA. These administrative actions can include changing the representatives of member entities of the Stakeholder Council, the only area where Delta counties and communities have any representation. (*Id.*). This provision is harmful because it allows changing the Stakeholder Council, which is the only area where Delta communities have some sort of input in the BDCP's decision-making process. This could be used to get rid of members who do not subscribe to the Authorized Entities' viewpoints.

Minor modifications are allowed as well, but are not supposed to involve changes that adversely affect Covered Species, the level of take, or obligations of the Authorized Entities. Minor modifications can include adjusting the conservation measures or biological objectives through the adaptive management program, transferring natural community acreage among the Conservation Zones, and transferring acreage between Resource Opportunity Areas. (IA, 23.2, 85). The Authorized Entities must agree to any proposed modification; if they cannot agree, the proposal is then processed as a formal amendment to the Plan. There is an ambiguity in the last paragraph of the minor modification section, which states that the Authorized Entities do not have to approve minor modifications that involve changes to the conservation measures or biological objectives *that are adopted through the adaptive management process*. (IA, 23.2, 86) (emphasis added). This could be used to pass dangerous changes to the Conservation Measures without the approval of the Fish and Wildlife Agencies. The adaptive management process allows the Authorized Entities to develop "alternative strategies" if "new information" pertaining to the Conservation Measures is discovered. (IA, 10.3.1, 29). If alternative strategies can include modifications to Conservation Measures, the Authorizes Entities are granted the power to change the Conservation Measures, which could potentially be very harmful to continued coverage of species.

5) Inconsistent Amendments or Plan/Project Adoption

A provision specifying actions to be taken if there is an amendment or adoption of a plan or project "that is inconsistent with the objectives and requirements of the approved plan" must also be included in the IA. Cal. Fish & G. Code § 2820(b)(3)(C). The Draft IA contains a clause

that almost exactly mirrors this requirement, stating the CDFW can suspend or revoke the State Permit if the Permittees adopt, amend, or approve a plan or project that is *substantially* inconsistent with the approved Plan and without the concurrence of the CDFW. (IA, 9.5, 22) (emphasis added). The Draft IA attempts to raise the threshold required by the NCCPA to “substantially inconsistent,” which is more difficult to meet. If the CDFW believes that a plan or project has been approved, adopted, or amended in a manner that is substantially inconsistent with the requirements of the BDCP, the CDFW meets with the Permittees and then provides written notice to the Permittees. (IA, 9.5, 22). Increasing the requirement that the CDFW must meet before suspension/revocation can be triggered represents an attempt by the BDCP to further ensure there will be plenty of leeway before the Fish and Wildlife Agencies can take any real action. This is a violation of the NCCPA because it adds an additional requirement that is not included in the statute itself.

D) CONCLUSION

The Draft IA violates NCCPA provisions and avoids other provisions detailing descriptions of funding, conservation measures, and plan oversight. This results in a generalized and piecemealed document that provides very little guidance and subverts the requirements of the NCCPA. Specifically, there needs to be more detail and assurances when guaranteeing funding for the BDCP, and more detailed descriptions of how the IA will ensure conservation and habitat protection. Also, there are troubling issues throughout the IA that allow changes to the IA or aspects of the Plan with no oversight by the fish and wildlife agencies, a tactic that could be used to avoid the BDCP’s conservation mandate. Overall, the Draft IA is an incomplete and incorrect representation of what the NCCPA requires.

The IA becomes an especially dangerous document when one considers the Adaptive Management program put forth in the IA. While adaptive management in theory seems workable, in practice it allows for decisions to be made on the go without any real oversight or checks from fish and wildlife agencies. This, along with the regulatory assurances that guarantee water delivery south of the Delta and the “No Surprises” rule, allow for a lot of power to be locked into the Implementing Agreement. (IA, 14.1, 45). The IA surrenders the fate of the listed fish species to the exporters. The BDCP agencies cannot do that. Beyond that, there must be a

new BDCP Draft EIR/EIS, Plan and IA with a new public comment period on the Drafts before such an astonishing degree of agency authority is given away. The new Drafts must include a range of reasonable alternatives and alternatives to take reducing exports. Moreover, ESA Biological Assessments and formal consultations including preparation of Biological Opinions are required before, not after such giveaways.

This looks like a massive scandal in the works. The offices of Inspector General of the involved federal agencies must be involved now and given the opportunity to review the BDCP Plan and IA before, not after, adoption of the BDCP and the IA guarantees the unlawful extinctions of the listed fish species. Whether the consultants or the exporters like it or not, the ESA and NEPA are the law of the land.

ADAPTIVE MANAGEMENT AND THE DECISION TREE FAIL TO CURE THE INFORMATION DEFICIENCIES IN THE DRAFT PLAN, EIR/EIS AND IMPLEMENTING AGREEMENT

Over and over throughout the Draft Plan, Draft EIR/EIS, and Draft Implementing Agreement adaptive management and the decision tree are referred to as the future procedures that will save the fish from all of the claimed “uncertainties” in the BDCP. Neither device cures the informational and analytical deficiencies in the BDCP documents under NEPA, CEQA, or the ESA.

Under NEPA, the regulations specify when the required environmental assessment must happen. 40 C.F.R. §1501.2 states in part:

Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. Each agency shall: . . . (b) Identify environmental effects and values in adequate detail so they can be compared to economic and technical analyses. Environmental documents and appropriate analyses shall be circulated and reviewed at the same time as other planning documents.

40 C.F.R. §1501.2.

In *Sierra Club v. Babbitt*, Plaintiffs challenged a reconstruction project by the National Parks Service (NPS) regarding Highway 140 from Yosemite. 69 F.Supp.2d 1202, 1211 (E.D. Cal. 1999). They sought to enjoin Defendants from taking any steps towards the continuation of the El Portal Road reconstruction project until NPS provides necessary consideration of *all significant environmental effects* in compliance with NEPA, WSRA, NPOA, and the APA. *Id.* Their main cause of action focused on

declaring that the EA, FONSI, and the BA for the project were not in compliance with NEPA regulations 40 C.F.R. §§1500-1517.7. *Id.*

Plaintiffs contended that Defendants failed to adequately define the Project. *Id.* at 1214. Plaintiffs claimed that the “design/build” method of construction used on the Project caused an inadequate description of the Project and prevented a sufficiently detailed analysis of both environmental values and effects of the project by NEPA.

The court held that the draft EA spoke in generalities and contained few details of what would actually be done on the Project, thus making it impossible to relate project elements to project impacts. *Id.* Lacking was sufficient detail to understand the nature, extent and location of rock removal, tree removal, vegetation removal, rebuilding of guard walls, and construction of fills into the Merced River or riparian corridor. *Id.* The court found the “design/build” to violate NEPA in that Defendants failed to comply with the requirement in 40 C.F.R. §1501.2(b), that each agency shall “[i]dentify environmental effects and values in adequate detail so they can be compared to economic and technical analyses.” *Id.* at 1218. Also, insufficient detail was provided to allow the public a meaningful opportunity to comment on the Project during the planning stages along with the existence of insufficient detail for Defendants’ own experts to express an informed opinion and for Defendants to make an informed decision. *Id.*

Adaptive management and a decision tree cannot be a substitution for the regulatory requirements of NEPA and CEQA. Promises to plan, collaborate, or manage toward compliance should environmental conditions degrade below the substantive management criterion are insufficient to survive judicial review. *Natural Res. Def. Council v. Kempthorne*, 506 F.Supp.2d 322, 387 (E.D. Cal. 2007) (“the absence of any definite, certain, or enforceable criteria or standards make its [adaptive management] use arbitrary and capricious under the totality of the circumstances”). In the case cited, the court faulted the protocol for failing to assure that the result of the process would be some kind of action taken to secure the continued existence of the smelt. *Natural Res. Def. Council*, 506 F.Supp.2d at 352.

A promise to adaptively manage problems does not fulfill the NEPA requirement that agencies take a “hard look” at the impacts of their action. For instance, *High Sierra Hikers Ass’n v. Weingardt*, overturned a Forest Service decision to liberalize the rules limiting campfires in high country parts of a wilderness area. 521 F.Supp.2d 1065, 1090-91 (N.D. Cal. 2007) The court ruled that the agency could not rely on adaptive management to overcome an inadequate response to the problems raised in the record.

Under CEQA the EIR’s purpose is to inform the public and its responsible officials of the environmental consequences of their decisions *before* they are made. *Napa Citizens for Honest Gov’t v.*

Napa Cnty. Bd. of Supervisors, 91 Cal.App.4th 342, 355 (2001). The Public Resource Code has defined “Environment” to mean the physical conditions that exist within the area that will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, and objects of historic or aesthetic significance. Pub. Res. Code §21060.5. Also, “Significant effect on the environment” is defined to mean a substantial, or potentially substantial, adverse change in the environment. Pub. Res. Code § 21068; *See Cmtys. for a Better Env’t v. Cal. Res. Agency*, 103 Cal.App.4th 98, 110 (2002)(invalidating CEQA guideline that set regulatory standards to determine whether project could have significant environmental effect). Thus, the EIR protects not only the environment but also informed self-government. *Citizens of Goleta Valley v. Bd. of Supervisors of Santa Barbara Cnty.*, 52 Cal.3d 553, 563-564 (1990).

A project’s environmental analysis is inadequate if it does not take into account the full range of “feasible” significant environmental effects. *See Napa Citizens for Honest Gov’t v. Napa Cnty. Bd. of Supervisors*, 91 Cal.App.4th 342, 381 (2001) (finding that because sources for water and resources for wastewater treatment identified in the EIR were uncertain, the EIR should have identified alternative sources and environmental consequences of tapping them; the EIR should have also discussed possible impacts the proposed project would have on steelhead trout, which had been identified as endangered species within the project area).

“When the informational requirements of CEQA are not complied with, an agency has failed to proceed in ‘a manner required by law’ and has therefore abused its discretion. *Save Our Peninsula Comm. v. Monterey Cnty. Bd. of Supervisors*, 87 Cal.App.4th 99, 118 (2001).

The BDCP Draft Plan and Draft EIR/EIS violate the informational requirements of NEPA, CEQA and the ESA. Adaptive management and the decision tree do not cure the violations. The BDCP agencies must prepare a new Draft Plan, Draft EIR/EIS, and Draft Implementing Agreement and afford a new public review period based on sufficient environmental impact disclosure and analysis rather than deferring that to adaptive management and a decision tree that would follow project approval.

CONCLUSION

Approval of the BDCP and finalization of the Draft EIR/EIS would violate NEPA, CEQA, ESA, NCCPA, the First Amendment, and the California Constitution. Under NEPA and CEQA, the EIR/EIS fails to discuss an adequate range of alternatives, provide adequate scientific support for its conclusions, and analyze significant impacts of the project. Under the ESA, the Draft BDCP and EIR/EIS indicate that operation of any of the alternatives would adversely

modify designated critical habitat, threatening the survival and recovery of listed species. As a conservation plan, the Draft BDCP fails to comply with ESA Section 10 and the NCCPA. Lastly, the removal of public comments on the BDCP website violated the First Amendment and California Constitution.

In California, we struggle to provide freshwater for our state's competing interests, which include wildlife conservation, agricultural production, and municipal water supply. The Sacramento-San Joaquin River Delta, a globally significant ecosystem, is in dire need of protection. The BDCP will continue to mismanage and further strain our limited resources. However, we still have time to develop a sustainable system of water management that will fulfill everyone's legitimate needs. Friends of the River urges you to go back to the drawing board and invite all interested parties to participate in the development of an improved water management system. If you have any questions about the points raised in this comment letter, please contact Robert Wright at (916) 442-3155 x207 or BWright@FriendsoftheRiver.org.

Sincerely,

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

/s/ Tabinda Riaz
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/s/ Abby Bloetscher
Summer Law Clerk

/s/ Ara Karamian,
Summer Law Clerk

/s/ Daniel Quinley
Summer Law Clerk

/s/ Rachel Miller
Summer Law Clerk

List of Attachments

1. Lety Belin, Personal Correspondence email, Feb 25, 2014. On file with author
2. David Beard, Personal Correspondence email, October 23, 2013. On file with author
3. Sacramento River Hydrologic Region Summary, California Water Plan Update 2013—Governor’s Draft (edited), *available at*
http://www.waterplan.water.ca.gov/docs/cwpu2013/2014-rdt/1Vol2_SacramentoRiverRR_GovernorsDraft_Final_MT_FG_v2.pdf
4. Kyle Morgado, *Effects of Groundwater Pumping for Water Transfers on Groundwater Elevations in the Sacramento Valley and Modeling Stream/Aquifer Interactions Compared to Analytical Solutions* 79 (CSU Chico, 2012), *available at* <https://csuchico-dspace.calstate.edu/bitstream/handle/10211.4/600/4%2023%202013%20Kyle%20Morgado.pdf?sequence=1>
5. Table A4. Draft CASGEM Groundwater Basin Prioritization: Sorted by Basin Number, *California Groundwater Elevation and Monitoring Basin Prioritization Process*, Department of Water Resources, Draft December, 2013
6. California Dep’t of Water Resources, *Sacramento River Basinwide Water Management Plan*, Groundwater Hydrology 50 (2003) *available at*
http://www.water.ca.gov/pubs/groundwater/sacramento_river_basinwide_water_management_plan/sacbasmgmtplan.pdf
7. CH2M HILL, Davids Engineering, & MBK Engineering, *Efficient Water Management for Regional Sustainability in the Sacramento Valley, prepared for the Northern California Water Association* 8 (2011), *available at* <http://www.norcalwater.org/wp-content/uploads/2012/01/Technicalreport-jul2011.pdf>
8. Delta Independent Science Board, *BDCP Analysis Review Panel Report*, issued March 17, 2014, *available at* http://deltacouncil.ca.gov/sites/default/files/documents/files/Delta-Science-Independent-Review-Panel-Report-PHASE-3-FINAL-SUBMISSION-03132014_0.pdf
9. Delta Independent Science Board, *Delta Interior Flows and Related Stressors Workshop*, April 16-17, 2014, *available at*
<http://deltacouncil.ca.gov/sites/default/files/documents/files/21-Jonathan-Rosenfield-Impact-of-Altered-In-Delta-Hydrodynamics-an-Overview.pdf>
10. Delta Independent Science Board, Review of the Draft EIR/EIS for the Bay Delta Conservation Plan, issued May 15, 2014, *available at*
<http://deltacouncil.ca.gov/sites/default/files/documents/files/Attachment-1-Final-BDCP-comments.pdf>
11. Delta Stewardship Council Meeting, *ARCADIS’ Report on How the BDCP Addresses the Delta Reform Act’s Goals and Objectives*, May 29-30, 2014, *available at*
<http://deltacouncil.ca.gov/docs/council-meeting/2014-05-22/delta-stewardship-council-may-29-30-2014-meeting-agenda-item-9-attach>
12. Delta Stewardship Council, *BDCP Comments*, June 24, 2014, *available at*
<http://deltacouncil.ca.gov/sites/default/files/documents/files/BDCP%20Comments%20Cover%20Letter%20and%20Final%20BDCP%20EIR-S%20Comments.pdf>