



FRIENDS OF THE RIVER
1418 20TH STREET, SUITE 100
SACRAMENTO, CA 95811

September 9, 2015

Via Email and U.S. Mail

The Honorable Sally Jewell
Secretary of the Interior
U.S. Department of the Interior
1849 C Street, NW
Washington, D.C. 20240
exsec@ios.doi.gov

John Laird, Secretary
California Natural Resources Agency
1416 Ninth Street, Suite 1311
Sacramento, CA 95814
Kimberly.goncalves@resources.ca.gov

The Honorable Penny Pritzker
Secretary of Commerce
U.S. Department of Commerce
1401 Constitution Ave., NW
Washington, D.C. 20230
thesec@doc.gov

Mark W. Cowin, Director,
California Department of Water Resources
P.O. Box 942836, Room 1115-1
Sacramento, CA 94236-0001
Mark.cowin@water.ca.gov

The Honorable Gina McCarthy, Administrator
U.S. Environmental Protection Agency
WJC North, Room 3,000 1101A
Washington, D.C. 20460
McCarthy.Gina@epa.gov

David Murillo, Regional Director
U.S. Bureau of Reclamation
2800 Cottage Way
Sacramento, CA 95825
dmurillo@usbr.gov

RE: RDEIR/SDEIS Comments and Request for BDCP Agencies to Comply with NEPA and the ESA by Preparing a Biological Assessment and Carrying out Consultation with the U.S. Fish and Wildlife Service and National Marine Fisheries Service and then Issuing a New Draft EIR/EIS Concurrently with and Integrated with the Biological Assessment(s) and resulting Biological Opinion(s) and Including Reasonable and Prudent Alternatives

Dear Secretary Jewell, Secretary Pritzker, Administrator McCarthy, Secretary Laird, Director Cowin, Regional Director Murillo, and Federal and California Agencies, Officers, and Staff Members Carrying out and Reviewing the BDCP/California Water Fix:

Summary

Friends of the River (FOR), Restore the Delta, the Center for Biological Diversity, the California Water Impact Network, the California Sportfishing Protection Alliance, and the Environmental Water Caucus (EWC) (a coalition of over 30 nonprofit environmental and community organizations and California Indian Tribes) object to the adverse modification of critical habitat for five threatened and endangered fish species, which would occur under the Bay Delta Conservation Plan (BDCP)/California Water Fix/Water Tunnels project.¹ Under the BDCP, three large new intakes would divert vast amounts of water from the Sacramento River between Clarksburg and Courtland through two tunnels roughly 35 miles south for export from the Central Valley and State Water Projects' pumping plants. As a result of this massive new diversion ("Water Tunnels project"), enormous quantities of freshwater which now flow through the Sacramento-San Joaquin Delta before being diverted would never even reach the Delta.

The BDCP Delta Water Tunnels project is not a permissible project under the Endangered Species Act (ESA) because it would adversely modify critical habitat for at least five endangered and threatened fish species. We previously addressed the failure of the BDCP agencies to develop and consider a range of reasonable alternatives increasing Delta flows by reducing exports in our July 22, 2015 letter to you. This letter expands on the ESA substantive and procedural violations to the National Environmental Policy Act (NEPA) alternatives analysis violations set forth in our earlier letter.

To summarize, *first*, the Sacramento River Winter-Run Chinook Salmon is listed as an endangered species under the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* Likewise, the Central Valley Spring-Run Chinook Salmon, Central Valley Steelhead, Southern Distinct Population Segment of North American Green Sturgeon, and Delta Smelt, are listed as threatened species under the ESA.² *Second*, the reaches of the Sacramento River, sloughs, and

¹ The lead agencies for the project are the federal Bureau of Reclamation and the California Department of Water Resources.

² Each of these species is listed under the California Endangered Species Act as well, with most of them considered threatened. Bay Delta Conservation Plan, Section 1.4.3, *Covered Species*, Table 1-3, p. 1-24. This table shows that under the California Endangered Species Act, Delta smelt is listed as threatened; however, the BDCP species account for Delta Smelt states that the California Fish and Game Commission elevated delta smelt to the status of endangered on March 4, 2009. (BDCP, Appendix 2A, section 2A.1.2, p. 2A.1-2, lines 21-24.) Longfin smelt is considered threatened, winter-run Chinook salmon is considered endangered, spring-run Chinook salmon

the Delta that would lose significant quantities of freshwater flows through operation of the proposed Water Tunnels are designated critical habitats for each of these five listed endangered and threatened fish species. **Third**, no Biological Assessment has been prepared and transmitted to the U.S. Fish and Service (USFWS) or National Marine Fisheries Service (NMFS) by Reclamation with respect to the Water Tunnels project. **Fourth**, ESA Section 7 consultations have not occurred and no Biological Opinion has been prepared by the USFWS or NMFS with respect to the effects of the operation of the Water Tunnels on the five federally listed species of fish or their designated critical habitats. **Fifth**, because of Reclamation's failure to prepare Biological Assessments and failure to initiate ESA consultation, no "reasonable and prudent alternatives" (RPAs) have been developed or suggested by the USFWS or NMFS to avoid species jeopardy or adverse modification of designated critical habitat.

Approval of the Water Tunnels project in the form of preferred Alternative 4A or otherwise would violate the substantive prohibitions of Section 7 of the ESA by adversely modifying designated critical habitat as well as by jeopardizing the continued existence of the endangered and threatened fish species.

Approval of the Water Tunnels project would violate the procedural requirements of the ESA because Reclamation has not evaluated its proposed action "at the earliest possible time" to determine whether its action may affect listed species or critical habitat and has not entered into formal consultation with USFWS and NMFS.

Approval of the Water Tunnels project would violate the procedural requirements of NEPA because the BDCP Draft EIR/EIS and Water Fix RDEIR/SDEIS have not been prepared "concurrently with and integrated with" Biological Assessments and Biological Opinions required by the ESA. Again, the Biological Assessments and Biological Opinions, though required, do not exist.

These are not deficiencies that can be "fixed" by responses to comments in a Final EIR/EIS. Instead, Reclamation and the Department of Water Resources (DWR) must prepare a new Draft EIR/EIS to be circulated for public review and comment. The new public Draft EIR/EIS document must include the range of reasonable alternatives including alternatives increasing flows by reducing exports as set forth in our July 22, 2015 letter. The new public Draft NEPA document must also be prepared concurrently with and integrated with the ESA required Biological Assessments, Biological Opinions, and include reasonable and prudent alternatives, developed by the USFWS and NMFS. The required reasonable and prudent alternatives would include alternatives increasing flows through the Delta to San Francisco Bay by reducing exports.

The Water Tunnels Threaten Jeopardy and Adverse Modification of Designated Critical Habitat of Endangered and Threatened Fish Species in Violation of the Substantive Prohibitions of the ESA

The Sacramento River Winter-Run Chinook Salmon is listed as an endangered species under the ESA. 50 C.F.R. § 17.11. Critical habitat for the species was designated to include the Sacramento River extending from River Mile 0 near the Delta to River Mile 302, which is far

threatened, fall- and late fall-run Chinook salmon are considered species of special concern; and green sturgeon (southern DPS) is also considered a species of special concern. Longfin smelt is at this time a candidate species for listing under the federal Endangered Species Act.

north of the proposed BDCP diversion near Clarksburg. 50 C.F.R. § 226.204. The Water Tunnels project would divert enormous quantities of freshwater from the Winter-Run Chinook Salmon's designated critical habitat. The four threatened fish species mentioned above would likewise lose enormous quantities of freshwater from their designated critical habitats because of diversion of water resulting from the project.³

“The ESA provides ‘both substantive and procedural provisions designed to protect endangered species and their habitat.’” *San Luis & Delta-Mendota Water Auth. v. Jewell* (*Jewell*), 747 F.3d 581, 596 (9th Cir. 2014), *cert. denied*, 135 S.Ct. 948 and 950 (2015). Pursuant to the commands of Section 7 of the ESA, each Federal agency “shall . . . insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of [critical] habitat of such species. . . .” 16 U.S.C. § 1536(a)(2). “Actions” include “actions directly or indirectly causing modification to the land, *water*, or air.” 50 C.F.R. § 402.02 (Emphasis added). “ESA section 7 prohibits a federal agency from taking any action that is ‘likely to jeopardize the continued existence’ of any listed or threatened species or ‘result in the destruction or adverse modification’ of those species’ critical habitat.” *San Luis & Delta-Mendota Water Auth. v. Locke* (*Locke*), 776 F.3d 971, 987 (9th Cir. 2015).

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 the operation of water conveyance systems, increasing water temperatures and predation hotspots. By installing gigantic diversion intakes in at least three locations between Clarksburg and Courtland, and by diverting massive amounts of water from the Sacramento River, the Water Tunnels project will literally reduce the amount of aquatic habitat available to these five species in their critical habitats. Additionally, the massive diversion will reduce flow in the critical habitat and contribute to a further increase in water temperature. The Effects Analysis chapter (Chapter 5) of the Draft BDCP Plan (November 2013) admits that significant adverse effects could result from

³ The Central Valley Spring-Run Chinook Salmon is listed as a threatened species under the ESA. 50 CFR § 17.11. Critical habitat for the species was designated to include the Sacramento River from Lat 38.0612, Long -121.7948, near Mile 0, upstream to Elk Slough (38.4140, -121.5212) in Clarksburg, California. 50 C.F.R. § 226.211(k)(5)(i).

The Central Valley Steelhead is listed as threatened under the ESA. 50 CFR § 17.11. Critical habitat for the species was designated to include the Sacramento River from Lat 38.0653, Long -121.8418, near Mile 0, upstream to Elk Slough in Clarksburg. 50 CFR § 226.211(l)(5).

The Southern Distinct Population Segment of North American Green Sturgeon is listed as threatened under the ESA. 50 CFR § 17.11. Critical habitat for this species is designated to include the Sacramento–San Joaquin Delta including all waterways up to the elevation of mean higher high water within the area defined in California Water Code Section 12220. 50 CFR § 226.219(a)(3). The National Marine Fisheries Service’s website provides a map displaying Green Sturgeon critical habitat: <http://www.nmfs.noaa.gov/pr/pdfs/criticalhabitat/greensturgeon.pdf>. The map indicates that the critical habitat includes the Sacramento River from Mile 0 near the Delta to upstream beyond the proposed intake site near Clarksburg.

The Delta Smelt is listed as threatened under the ESA. 50 CFR § 17.11. Critical habitat for the species was designated to include “all contiguous waters of the legal Delta.” 50 CFR § 17.95–e–Fishes–Part 2. The US Fish and Wildlife Service’s website provided a map displaying some of the Delta Smelt’s critical habitat: http://www.fws.gov/sfbaydelta/maps/delta_smelt_critical_habitat_map.pdf. The map indicates that the Delta Smelt’s critical habitat includes the Sacramento River near Mile 0 upstream to the proposed BDCP intake site near Clarksburg.

the Water Tunnels on the covered fish and their habitat including: “Change in entrainment of fish in water diversions. Change in predation as a result of new structures. Modification of river flow. Change in habitat. Change in food and foraging. Permanent indirect and other indirect losses. Disturbances related to construction and maintenance.” (Plan, ch. 5, 2-13).

The BDCP identifies key hydrologic and hydrodynamic changes that reduce or adversely modify habitat of these listed fish species. (See below) These changes will exacerbate threats and stressors already known to affect these fish. BDCP modeling in the RDEIR/SDEIS finds that through-Delta survival rates of winter-run, spring-run, and fall-run Chinook salmon all decrease relative to the No Action Alternative from Water Tunnels operation. (RDEIR/SDEIS Tables 11-4A-23, 51, and 74).

Specifically, the BDCP identifies reduced habitat due to water storage and water conveyance systems as a stressor and threat to Winter- Run Chinook Salmon. BDCP EIR-EIS Administrative Draft, 11A-47 (March 2013). There will be adverse effects on juvenile winter-run Chinook salmon including near-field (contact with screens and aggregation of predators) and far-field (reduced downstream flows (Plan, ch. 5, 5.3-23; RDEIR/SDEIS p. 4.3.7-48), reduced Sacramento River attraction flows for migrating adult winter-run Chinook salmon (Plan, ch. 5, 5.3-29), possible reduction of survival of juvenile winter-run Chinook salmon during downstream migration and possible negative effect on upstream migration of adult winter-run Chinook salmon by changing attraction flows/olfactory cues. (Plan, ch. 5, 5.3-32). The BDCP also admits that “A potential adverse effect of the BDCP on adult winter-run Chinook salmon will be the reduction in flow downstream of the north Delta diversions on the Sacramento River, reducing river flow below the north Delta intakes.” (Plan, ch. 5, 5.3-45; BDCP Appendix 5C, Tables C.A-41 and C.A-42; RDEIR/SDEIS Figures 4.3.2-7 and 4.3.2-8.) The reduced outflow along with the possible change in olfactory signals due to change in the flow mixture “could affect upstream migration.” (*Id.*). The RDEIR/SDEIS states: “when compared to the CEQA baseline, [Alternative 4A, the Water Tunnels], including climate change, would substantially reduce the quantity and quality of spawning and egg incubation habitat for winter-run Chinook salmon relative to existing conditions.” (RDEIR/SDEIS, 4.3.7-58.) The BDCP likewise identifies similar threats and stressors to the Spring-Run Chinook Salmon, Steelhead, Green Sturgeon, and Delta Smelt that would result from the Water Tunnels.⁴

In 2013, NMFS reiterated its previous “Red Flag” comment that the Water Tunnels project threatens the “potential extirpation of mainstem Sacramento River Populations of winter-run and spring-run Chinook salmon over the term of the permit . . .” (NMFS Progress Assessment and Remaining Issues Regarding the Administrative Draft BDCP Document, Section 1.17, 12, April 4, 2013). As we pointed out in our July 22, 2015 letter, the U.S. Environmental Protection Agency (EPA) has called for alternatives addressing “the need for water availability and greater freshwater flow through the Delta.” (EPA Letter, August 26, 2014, p. 2). Likewise, the Army Corps of Engineers, State Water Resources Control Board, and USFWS scientists also raised concerns regarding the BDCP’s impacts on water quality and impacts to endangered and threatened species.⁵

⁴ See references to threats and stressors for the four other fish species in Attachment 1 of this letter.

⁵ We briefly summarized some of these agencies comments in our July 22, 2015 letter (at pp. 8-10) to you.

However, comments from other federal agencies were ignored. In April 2015, the claimed habitat conservation elements of the BDCP have been dropped or drastically pared back in the switch from the BDCP to the “California Water Fix.” As just one example, the plan to provide “65,000 acres of tidal wetland restoration” has been eviscerated to merely “59 acres of tidal wetland restoration.” (RDEIR/SDEIS ES–17 (emphasis added)). Consequently, the current Water Tunnels project is *even more of a threat* to fish species and their habitat compared to the previous version that resulted in the concerns raised then by the EPA, Army Corps of Engineers, State Water Resources Control Board, and NMFS and USFWS scientists.

“The goal of the ESA is not just to ensure survival but to ensure that the species recover to the point it can be delisted.” *Alaska v. Lubchenko*, 723 F.3d 1043, 1054 (9th Cir. 2013), citing *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059, 1070 (9th Cir. 2004). Pursuant to the commands of the ESA, each Federal agency “shall. . . insure that any action authorized, funded, or carried out by such agency. . . is not likely to jeopardize the continued existence of any endangered or threatened species *or result in the destruction or adverse modification of [critical] habitat of such species . . .*” 16 U.S.C. § 1536(a)(2) (emphasis added). “[T]he purpose of establishing ‘critical habitat’ is for the government to carve out territory that is not only necessary to the species’ survival but also essential for the species’ recovery.” *Gifford Pinchot*, 378 F.3d 1059, 1070. Also, “existing or potential conservation measures outside of the critical habitat cannot properly be a substitute for the maintenance of critical habitat that is required by Section 7 [of the ESA, 16 U.S.C § 1536].” *Gifford Pinchot*, 378 F.3d 1059, 1076.

Taking the fresh water flows and safe refuge away from the endangered and threatened fish species would neither insure their survival nor 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, increased residence times of water, and increased water temperature are adverse modifications of their critical habitat. Approval of the BDCP would violate the ESA. The Water Tunnels project is thus not permissible under the ESA.⁶

Reclamation is Presently Violating both NEPA and ESA Procedure by Failing to Issue a Draft EIR/EIS Concurrently with and Integrated with ESA Required Biological Assessments and Biological Opinions

Extinction is forever. Fortunately, the ESA obligates federal agencies “to afford first priority to the declared national policy of saving endangered species,” *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 185 (1978). Despite that, Reclamation has failed to prepare a Biological Assessment pertaining to its action and has failed to initiate consultation with USFWS and NMFS even though Biological Assessment preparation and initiation of consultation are required by the ESA. (See RDEIR/SDEIS 1-15 (under “Section 7 of the Endangered Species

⁶ We have brought the impermissibility of the Water Tunnels project given the substantive prohibitions of the ESA and the related procedural ESA and NEPA violations to the attention of Reclamation and DWR on numerous occasions for more than two years now. These prior communications include the FOR letters of June 4, September 25 and November 18, 2013, January 14, March 6, May 21, and July 29 (including pp. 10-11), 2014, EWC letter of June 11, 2014 (including pp. 29-30) and our recent joint letters of July 16 (requesting an extension of time to comment), and July 22 (alternatives), 2015. We also addressed these issues in our meeting with federal agency representatives in Sacramento on November 7, 2013.

Act’’). The RDEIR/SDEIS concedes that “formal consultation under ESA Section 7” will be necessary. (*Id.*).

Section 7 of the ESA (16 U.S.C. § 1536(a)(4) requires that “Should the agency find that its proposed action *may* affect a listed species or critical habitat, it must formally or informally consult with the Secretary of the Interior, or his or her delegatee [USFWS and/or NMFS].” *Jewell*, 747 F.3d 581, 596 (emphasis in decision). “Formal consultation is required when the acting agency or consulting agency determines that the proposed action is *likely* to adversely affect a listed species or critical habitat. 50 C.F.R. §§ 402.13, 402.14. Formal consultation requires the consulting agency . . . , to issue a biological opinion stating whether the proposed action is likely to jeopardize such species or habitat. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14.” *Jewell*, 747 F.3d at 596 (emphasis in decision).

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 California v. U.S. Forest Service*, 681 F.3d 1006, 1020 (9th Cir. 2012) (en banc)(emphasis added), *cert. denied*, 133 S.Ct. 1579 (2013). The Ninth Circuit Court of Appeals has repeatedly held that: “Any possible effect, whether beneficial, benign, adverse or of an undetermined character, triggers the formal consultation requirement.” *Western Watersheds Project v. Kraayenbrink*, 620 F.3d 1187, 1210 (9th Cir. 2010). *Accord*, *Karuk Tribe*, 681 F.3d 1006, 1027; *Cal. ex rel. Lockyer v. U.S. Dep’t of Agric.*, 575 F.3d 999, 1018 (9th Cir. 2009).

Even the ardent advocates for the Water Tunnels project who prepared the 48,000 pages of BDCP advocacy documents do not contend that taking large quantities of water away from the Sacramento River, sloughs, and Delta will not have “any possible effect, whether beneficial, benign, adverse or of an undetermined character” on the endangered and threatened fish species or their habitat. Not surprisingly, no preposterous claim of “no possible effect” is made in the Draft EIR/EIS or RDEIR/SDEIS. But instead of reviewing the proposed Water Tunnels at the earliest possible time, Reclamation is delaying ESA review until some unspecified and unacknowledged future time.

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). “The [ESA] regulations also acknowledge that the agencies are expected to concurrently comply with both Section 7 of the ESA and NEPA. *See* 50 C.F.R. § 402.06 (‘Consultation, conference, and biological assessment procedures under section 7 may be consolidated with interagency cooperation procedures required by other statutes, such as the National Environmental Policy Act (NEPA).’).” *Jewell*, 747 F.3d 581, 648. “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). Consequently, against this threat of extinction, conducting the draft EIS public review and comment stage without Biological Assessments or Biological Opinions leaves the public in the dark and violates both the ESA and

NEPA. In the absence of the ESA required analyses, the draft EIS/EIR is “so inadequate as to preclude meaningful analysis” in violation of NEPA. 40 C.F.R. § 1502.9(a).⁷

Reclamation has violated the “at the earliest possible time” ESA mandate and the “concurrently with and integrated with” NEPA mandate by prematurely issuing the Draft EIR/EIS and now the REDIR/SDEIS attempting to hide from the reviewing public the critical pertinent information and analyses that would be supplied by the missing Biological Assessments and Biological Opinions. New upstream diversions of large quantities of water from the Sacramento River will undeniably “affect” the listed fish species and their critical habitats.

The public now has what it does not need: unsupported advocacy from the consultants speculating that the adverse effects will be offset or that the effects will not really be all that adverse. *The public does not have what it does need:* the federal agency Biological Assessments and Biological Opinions required by the ESA and NEPA.⁸

The evasion of ESA obligations by Reclamation is both extreme and deliberate. Reclamation has on August 26, 2015 joined with DWR in submitting a petition to the State Water Resources Control Board for a change in the point of diversion necessary for the Water Tunnels. The petition recites that “The proposed project reflects the culmination of a multiyear planning process that began in 2006 . . .”(Petition cover letter, p. 1). The passage of nine years makes a mockery of the ESA requirement to commence ESA review “at the earliest possible time.” Because of the absence of the ESA-Required Biological Assessments and Biological Opinions, Reclamation feels free to make the demonstrably false representation in the petition that “The California WaterFix would result in substantially improved conditions in the Delta for endangered and threatened species and afford greater water supply reliability for the state.” (Petition cover letter, p. 2).

Red flag comments and the Record so far have made it clear that there is at minimum significant uncertainty about whether the Water Tunnels project is even permissible under the ESA. This critical issue cannot be resolved until the Biological Assessments and Opinions have been prepared. Reclamation has not obtained the determination pursuant to ESA-required consultation whether the “preferred alternative”— the Water Tunnels— is even lawful or feasible.

Against this threat of extinction from known stressors and negative effects on the critical habitat, 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. This also constitutes unlawful piecemealing or segmenting of the NEPA process from the ESA required analyses of the jeopardy and habitat threats posed by the proposed Water Tunnels.

⁷ The CEQA rule is the same. Recirculation is required where feasible project alternatives were not included in the Draft EIR. CEQA Guidelines, 14 Cal. Code Regs., § 15088.5(a), or when “The draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded.” CEQA Guidelines, § 15088.5(a)(4).

⁸ “The ESA requires an agency to use ‘the best scientific and commercial data available’ when formulating a BiOp.” *Locke*, 776 F.3d 971, 995. “The purpose of the best available science standard is to prevent an agency from basing its action on speculation and surmise.” *Locke*, 776 F.3d at 995.

Reclamation is Proceeding in the Absence of the “Reasonable and Prudent Alternatives” that Must be Developed and Identified pursuant to the ESA

Our July 22, 2015 letter to you set forth the NEPA violations resulting from the failure of the BDCP documents including the Draft EIR/EIS and the new RDEIR/SDEIS to include a range of reasonable alternatives increasing freshwater flows through the Delta by reducing exports and not including new upstream conveyance. We pointed out how Reclamation and DWR have ignored repeated warnings and suggestions made to them over the years by public agencies including the EPA, U.S. Army Corps of Engineers, and State Water Resources Control Board, by the National Academy of Sciences and by the Environmental Water Caucus (EWC).

Beyond ignoring the NEPA alternatives mandate, expert government agencies, the Academy and the EWC, Reclamation is also ignoring the crystal clear prohibitions and mandates of the ESA and NEPA. The previous section set forth the procedural ESA requirements for consultation “at the earliest possible time” and the procedural NEPA requirements for the NEPA Draft EIS to be prepared “concurrently with and integrated with” the analyses required by the ESA.

There is more. Under Section 7 of the ESA, 16 U.S.C. § 1536(b)(3)(A), after consultation “If it appears that an action may affect an endangered or threatened species, the consulting agency must provide a biological opinion to the action agency explaining how the action ‘affects the species or its critical habitat.’ *Id.* § 1536(b)(3)(A). When a biological opinion concludes that the action is likely to jeopardize an endangered or threatened species, or adversely modify its habitat, then the consulting agency must suggest ‘reasonable and prudent alternatives [RPA].’ *Id.*” *Cottonwood Env’tl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1085 (9th Cir. 2015). *Accord, Jewell*, 747 F.3d 581, 596; *Locke*, 776 F.3d 971, 988. The consulting agency “in the course of proposing an RPA, must insure that the RPA does not jeopardize the species or its habitat.” *Jewell*, 747 F.3d 581, 636.

We pointed out in our July 22, 2015 letter (at p. 10) that Reclamation and DWR had to drop the attempt to sell the Water Tunnels as part of a habitat conservation plan. The USFWS and NMFS scientists were unwilling to find falsely that the Water Tunnels would not be harmful to endangered species of fish and their habitat. The RDEIR/SDEIS calls this “difficulties in assessing species status and issuing assurances over a 50 year period . . .” (RDEIR/SDEIS, 1-2). In fact, for more than three years, the federal scientists have been issuing “Red Flag” warnings that the Water Tunnels threaten the “potential extirpation of mainstem Sacramento River populations of winter-run and spring-run Chinook salmon over the term of the permit,” contrary to publicity claims made for the project.

The Draft EIR/EIS and RDEIR/SDEIS alternatives and alternatives analyses are of no value whatsoever to either decision-makers or the public. This appears to be a deliberate effort on the part of Reclamation and DWR to unlawfully evade the obligation to develop in a Draft EIR/EIS for public review and comment a range of reasonable alternatives including alternatives that would increase freshwater flows through the Delta by reducing exports and that would not include new upstream conveyance. A central feature of this intentional violation of the procedural requirements of both NEPA and the ESA is premature issuance by Reclamation of the Draft EIR/EIS and RDEIR/SDEIS on the one hand, while with the other hand, Reclamation has deliberately failed to prepare a Biological Assessment and initiate formal ESA consultation with USFWS and NMFS.

As a result of these violations, *reasonable and prudent alternatives* have not been prepared by USFWS and NMFS and are not available to the public during the BDCP and Water Fix public review and comment periods. Reclamation and DWR wish to approve the Water Tunnels *in spite of* their adverse impacts on Delta water quality and quantity and on endangered and threatened fish species. In contrast, the ESA requires that the project *must not* jeopardize endangered species or their habitat. In essence, the current Water Tunnels project/Water Fix is an unlawful attempt by Reclamation and DWR to approve the Water Tunnels in a vacuum, in the absence of reasonable and prudent alternatives that they wish to avoid but which are required by the ESA. Reasonable and prudent alternatives are also necessary to provide the NEPA required analysis of a range of reasonable alternatives. The range of *reasonable alternatives* required by NEPA will necessarily include the *reasonable and prudent alternatives* required by the ESA. We are pleased to offer EWC's *A Sustainable Water Plan for California*, discussed in our July 22, 2015 letter, as one example of a reasonable and prudent alternative to the Water Tunnels.⁹

One remedy for this unlawful process is for Reclamation to proceed to prepare a Biological Assessment and request consultation with USFWS and NMFS, and then issue a new Draft EIR/EIS for public review and comment concurrently with and integrated with the resulting Biological Opinions prepared under the ESA. The only other lawful remedy open to Reclamation and DWR is also eminently sensible: drop the Water Tunnels proposed action and focus on intelligent 21st century water solutions such as recycling, drip-irrigation, conservation, and retirement of drainage impaired lands in the San Joaquin Valley from production.

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 and RDEIR/SDEIS are 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 Cal. Code 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, including the reasonable and prudent alternatives required by the ESA.

Should you have any questions, please contact Conner Everts, Co-Facilitator, Environmental Water Caucus at (310) 394-6162 ext. 111 or Robert Wright, Senior Counsel, Friends of the River at (916) 442-3155 ext. 207 or bwright@friendsoftheriver.org.

Sincerely,

⁹ <http://ewccalifornia.org/reports/ewcwaterplan9-1-2015.pdf>.

/s/ Conner Everts
Co-Facilitator
Environmental Water Caucus

/s/ E. Robert Wright
Senior Counsel
Friends of the River

/s/ Carolee Krieger
Executive Director
California Water Impact Network

/s/ Bill Jennings
Executive Director
California Sportfishing Protection Alliance

/s/ Barbara Barrigan-Parilla
Executive Director
Restore the Delta

/s/ Jeff Miller
Conservation Advocate
Center for Biological Diversity

Additional Addressees, all via email:

Maria Rea, Assistant Regional Administrator
National Marine Fisheries Service

Michael Tucker, Fishery Biologist
National Marine Fisheries Service

Larry Rabin, Acting, Field Supervisor, S.F. Bay-Delta
U.S. Fish and Wildlife Service

Lori Rinek
U.S. Fish and Wildlife Service

Mary Lee Knecht, Program Manager
U.S. Bureau of Reclamation

Patty Idloff
U.S. Bureau of Reclamation

Deanna Harwood
NOAA Office of General Counsel

Kaylee Allen
Department of Interior Solicitor's Office

Jared Blumenfeld, Regional Administrator
U.S. EPA, Region IX

Tom Hagler
U.S. EPA General Counsel Office

Tim Vendlinski, Bay Delta Program Manager, Water Division
U.S. EPA, Region IX

Stephanie Skophammer, Program Manager
U.S. EPA, Region IX

Erin Foresman, Bay Delta Coordinator
U.S. EPA

Lisa Clay, Assistant District Counsel
U.S. Army Corps of Engineers

Michael Nepstad, Deputy Chief, Regulatory Division
U.S. Army Corps of Engineers

Zachary M. Simmons, Senior Regulatory Project Manager
U.S. Army Corps of Engineers

Diane Riddle, Environmental Program Manager
State Water Resources Control Board

Attachment 1

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The BDCP identifies several threats and stressors to the Central Valley Spring-Run Chinook Salmon, which include flow reductions causing increased water temperature and habitat elimination or degradation due to water conveyance systems. (BDCP EIR-EIS Administrative Draft, 11A-83, 11A-76 (March 2013)). The BDCP Plan admits that adverse effects of the proposed north Delta diversions on juvenile Spring-Run Chinook Salmon include near-field (physical contact with the screens and aggregation of predators) and far-field (reduced downstream flows). (Plan, ch. 5, 5. 4-16; see also RDEIR/SDEIS, p. 4.3.7-79, lines 15-17). “Plan Area flows have considerable importance for downstream migrating juvenile salmonids and will be affected by the proposed north Delta diversions . . . Because of the north Delta diversions, salmonids migrating down the Sacramento River generally will experience lower migration flows compared to existing conditions. . . As with winter-run Chinook salmon, it was assumed with high certainty that Plan Area flows have critical importance for migrating juvenile spring-run Chinook salmon.” (Plan, ch. 5, 5. 4-17; BDCP Appendix 5C, Tables C.A-41 and C.A-42; see also RDEIR/SDEIS, Figures 4.3.2-7 and 4.3.2-8). Other admitted adverse effects caused by operations of the north Delta diversions include reduced attraction flows in the Sacramento River for migrating adult spring-run Chinook salmon. (Plan, ch. 5, 5. 4-19). “Lower river flow downstream of the north Delta intakes under the BDCP may reduce survival of juvenile spring-run Chinook salmon during downstream migration along the Sacramento River and also could negatively affect upstream migration of adult spring-run Chinook salmon by changing attraction flows/olfactory cues.” (Plan, ch. 5, 5. 4-20). The RDEIR/SDEIS again delivers bleak prospects for the survival of this federally-protected species: “Under Alternative 4A (including climate change effects), there are flow and storage reductions, as well as temperature increases in the Sacramento River that would lead to biologically meaningful increases in egg mortality rates and overall reduced habitat conditions for spawning spring-run and egg incubation.” (RDEIR/SDEIS, 4.3.7-98).

The BDCP states that threats and stressors to the Steelhead include water storage and conveyance systems as well as flow reductions contributing to increased water temperatures. (BDCP EIR-EIS Administrative Draft, 11A-129, 11A-133 (March 2013)). The Plan admits near-field (physical contact with the screens and aggregation of predators) and far-field (reduced downstream flows leading to greater probability of predation) effects of the north Delta diversions on juvenile Sacramento River Region Steelhead. (Plan, ch. 5, 5. 6-11; see also RDEIR/SDEIS, p. 4.3.7-199, lines 1-6). The plan also admits that “Sacramento River attraction flows for migrating adult Sacramento River region steelhead will be lower from operations of the north Delta diversions under the BDCP.” (Plan, ch. 5, 5. 6-13; BDCP Appendix 5C, Tables C.A-41 and C.A-42; see also RDEIR/SDEIS, Figures 4.3.2-7 and 4.3.2-8). The Plan admits that respect to the Feather River, “the reduction in flows in the high-flow channel due to BDCP would reduce conditions in an already unsuitable habitat.” (Plan, ch. 5. 6-16). The RDEIR/SDEIS states: “In general, Alternative 4A would degrade the quantity and quality of rearing habitat for steelhead relative to Existing Conditions.” (RDEIR/SDEIS, 4.3.7-22).

The BDCP identifies increased water temperatures and habitat loss as threats and stressors to the Green Sturgeon. BDCP EIR-EIS Administrative Draft, 11A-162 – 65 (March 2013). With respect to admitted adverse effects, the Plan admits that flow changes will reduce transport and migration flows in the Feather River and Plan area. (Plan, ch. 5. 8-17 through 8-24). “As such [reduction in early fall releases], average in stream flows during some months of the three periods identified above (June-September, August-October, August-June) are expected

to substantially decline in the Feather River at Thermalito and moderately decline in the Sacramento River at Verona under the BDCP, especially for the LOS [low-outflow scenario] (Appendix 5.C, flow, passage, salinity, and turbidity, section 5.C.5.3.3, High Outflow and Low Outflow Scenarios).” (Plan, ch. 5, 5. 8-18). Also, the plan admits that “there is [on the Feather River] the potential for appreciable change in the Feather River as a result of operational differences between the BDCP scenarios and future conditions without the BDCP (EBC2_LL1).” (Plan, ch. 5, 5. 8-24). The RDEIR/SDEIS states: “In general, Alternative 4A would reduce the quantity and quality of rearing habitat for larval and juvenile green sturgeon relative to Existing Conditions.” (RDEIR/SDEIS, 4.3.7-296).

The BDCP identifies several threats and stressors to the Delta Smelt, including water exports and increased water temperature. (BDCP EIR-EIS Administrative Draft, 11A-8-11 (March 2013)). Admitted adverse effects caused by the BDCP north Delta intakes include reducing the quantity of sediment entering the Plan Area thus increasing water clarity and negatively affecting delta smelt. (Plan, ch. 5, 5. 1-30; see also RDEIR/SDEIS, p. 4.3.7-26, 4.3.7-29). Greater water residence time from changes in water operations will likely increase the toxic blue-green alga *Microcystis* having both direct and indirect effects on the smelt. (Plan, Chapter 5, 5. 1-32; BDCP, Appendix 5C, p. 5.4-14; RDEIR/SDEIS, Chapter 8, Table 8-60a). North Delta intakes' operations will introduce and increase entrainment and impingement of Delta smelt as well as introduce and increase predation hotspots in and around the new intakes (RDEIR/SDEIS, p. 4.3.7-24, lines 4-7).