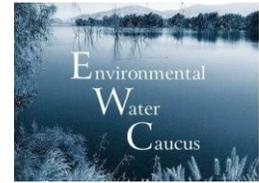




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September 4, 2014

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Additional Addressees at end of letter

**Re: Scoping of Reasonable Range of Alternatives in the recirculated BDCP Draft Plan, Draft EIR/EIS, Implementing Agreement and/or portions in 2015 including the Responsible Exports Plan Submitted by the Environmental Water Caucus**

Dear Federal and California Agencies, Officers, and Staff Members Carrying out the BDCP:

Friends of the River (FOR), the California Water Impact Network (C-WIN), the California Sportfishing Protection Alliance (CSPA), and the Environmental Water Caucus (EWC) (a coalition of over 30 nonprofit environmental and community organizations and California Indian Tribes) are relieved to learn that the Bay Delta Conservation Plan website announced on August 27, 2014 that the California Department of Water Resources “and the other state and federal agencies leading the Bay Delta Conservation Plan will publish a Recirculated Draft BDCP, Draft EIR/EIS , and Draft Implementing Agreement (IA) in early 2015.” The announcement also states that: “The scope of the partially recirculated draft documents will be announced in approximately six to eight weeks. The recirculated documents will include those portions of each document that warrant another public

review prior to publication of final documents.” We look forward to learning of the scope of the recirculated documents by mid- to late October of this year.

Our organizations have communicated several times with BDCP officials about analysis of alternatives in the BDCP process.<sup>1</sup>

The alternatives section (Chapter 3) of the Draft EIR/EIS and the Endangered Species Act (ESA) required Alternatives to Take section (Chapter 9) of the BDCP Draft Plan failed to include even one alternative that would increase water flows through the San Francisco Bay-Delta by reducing exports, let alone the NEPA, CEQA, and ESA required range of reasonable alternatives. These serious violations of law require corrective action during the upcoming new Draft BDCP process.

Your agencies have ignored EWC and FOR’s calls for consideration of alternatives reducing exports and increasing freshwater flows. Despite your agencies’ intransigence, the United States Environmental Protection Agency (EPA), and State Water Resources Control Board (SWRCB), have also called for consideration of alternatives that would increase freshwater flows through the Delta. Such an alternative is at the heart of the EWC’s Responsible Exports Plan. The United States Army Corps of Engineers reminds your agencies that *new conveyance* was *not* a part of the preferred alternative for CalFed. The Corps asks if the Draft EIR/EIS describes “why the reasons for rejecting new conveyance in CalFed are no longer valid?” The answer is simple. Your agencies have not revealed or discussed the Corps’ point. Your agencies need to do that now in disclosing and considering the Responsible Exports Plan alternative.

The BDCP omission of alternatives reducing exports to increase flows has been deliberate. A claimed purpose of the BDCP Plan is “Reducing the adverse effects on certain listed [fish] species due to diverting water.” (BDCP Draft EIR/EIS Executive Summary, p. ES-10). “There is an urgent need to improve the conditions for threatened and endangered fish species within the Delta.” (*Id.*). Alternatives reducing the exporting/diversion of water are an obvious direct response to the claimed BDCP purpose of “reducing the adverse effects on certain listed [fish] species due to diverting water.” Despite these mild rhetorical gestures implying the need for such alternatives, the omission of a range of reasonable alternatives reducing exports to increase flows violates NEPA, CEQA, and the ESA.

The California Department of Water Resources and other BDCP federal and State agencies<sup>2</sup> marched along for at least three years in the face of “red flags flying” deliberately refusing to develop and evaluate a range of reasonable alternatives, or indeed, any real alternatives at all, that

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<sup>1</sup> This letter follows on the Friends of the River (FOR) comment letter of May 21, 2014, and the joint Friends of the River and Environmental Water Caucus (EWC) May 28, 2014 comment letter focused on the failure of the Bay Delta Conservation Plan (BDCP) Draft plan and Draft Environmental Impact Report/Environmental Impact Statement (EIR/EIS) to identify and evaluate a range of reasonable alternatives that are the declared “heart” of both the National Environmental Policy Act (NEPA) and California Environmental Quality Act (CEQA) required EISs and EIRs. A detailed evaluation of the Draft EIR/EIS’s inadequate alternatives analysis was provided by the EWC in its comment letter of June 11, 2014, accessible online at <http://ewccalifornia.org/reports/bdcpcomments6-11-2014-3.pdf>.

<sup>2</sup> BDCP Applicants include San Luis Delta Mendota Water Authority, Westlands Water District, Kern County Water Agency, Zone 7 Water Agency, Metropolitan Water District of Southern California, and Santa Clara Valley Water District.

would increase flows by reducing exports. Three years ago the National Academy of Sciences declared in reviewing the then-current version of the draft BDCP that: “[c]hoosing the alternative project before evaluating alternative ways to reach a preferred outcome would be post hoc rationalization—in other words, putting the cart before the horse. Scientific reasons for not considering alternative actions are not presented in the plan.” (National Academy of Sciences, Report in Brief at p. 2, May 5, 2011).

More than two years ago, on April 16, 2012, the Co-Facilitators of the EWC transmitted a letter to then-Deputy Secretary of the California Natural Resources Agency Gerald Meral. The letter stated EWC’s concerns with BDCP’s current approach and direction of the [BDCP] project. (Letter, p. 1). Most of the letter dealt with the consideration of alternatives. The penultimate paragraph of the letter specifically states:

*The absence of a full range of alternatives, including an alternative which would reduce exports from the Delta. It is understandable that the exporters, who are driving the project, are not interested in this kind of alternative; however, in order to be a truly permissible project, an examination of a full range of alternatives, including ones that would reduce exports, needs to be included and needs to incorporate a public trust balancing of alternatives. (Letter, p. 2).*

On November 18, 2013, FOR submitted a comment letter in the BDCP process urging those carrying out the BDCP to review the “Responsible Exports Plan” proposed by the EWC:

as an alternative to the preferred tunnel project. This Plan calls for reducing exports from the Delta, implementing stringent conservation measures but no new upstream conveyance. This Plan additionally prioritizes the need for a water availability analysis and protection of public trust resources rather than a mere continuation of the status quo that has led the Delta into these dire circumstances. Only that alternative is consistent with the EPA statements indicating that more outflow is needed to protect aquatic resources and fish populations. The EWC Responsible Exports Plan is feasible and accomplishes project objectives and therefore should be fully analyzed in a Draft EIS/EIR. (FOR November 18, 2013 comment letter at p. 3, Attachment 4 to FOR January 14, 2014 comment letter).

The BDCP Draft EIR/EIS Alternatives (Chapter 3) and Draft Plan Alternatives to Take (Chapter 9) fail to include any distinctive alternatives. The EIR/EIS itself describes differences among the alternatives as “slight.” That is an undeniable fact established by reading those two chapters. The Water Tunnels would divert enormous quantities of water from the Sacramento River near Clarksburg, California. These waters presently flow through designated critical habitats for declining fish species in the Sacramento River and sloughs to and through the Bay-Delta. Should the Tunnels be completed, these waters would instead be exported through the north Delta intakes shortly after entering the Delta. All of the so-called project alternatives set forth in the Draft Plan and Draft EIR/EIS are largely the same project in different outfits. Each creates a capacity to divert more water from the Delta. And they do so contrary to Endangered Species Act Section 10 (prohibiting reduction of the likelihood of survival and recovery of listed species), ESA Section 7 (prohibiting federal agency actions that “result in the destruction or adverse modification of

[critical] habitat of [listed] species” 16 U.S.C. § 1536 (a)(2)), and California Water Code Section 85021 (requiring that importers reduce reliance on the Delta for water supply).

We expressly request “a range of reasonable alternatives” reducing exports both more and less than the reductions called for by the Responsible Exports Plan. The BDCP agencies must take this opportunity as part of the scoping of the recirculated EIR/EIS and other related documents to evaluate actions called for by the Responsible Exports Plan (attached hereto and also posted at <http://www.ewccalifornia.org/reports/responsibleexportsplanmay2013.pdf> ). These actions include: reducing exports to no more than 3,000,000 acre-feet in all years in keeping with State Water Resources Control Board (SWRCB) Delta flow criteria (for inflow as well as outflow); water efficiency and demand reduction programs including urban and agricultural water conservation, recycling, storm water recapture and reuse; reinforced levees above PL 84-99 standards; installation of improved fish screens at existing Delta pumps; elimination of irrigation water applied on drainage-impaired farmlands south of the Bay-Delta; return the Kern Water Bank to State control; restore Article 18 urban preference; restore the original intent of Article 21 surplus water in SWP contracts; conduct feasibility study for Tulare Basin water storage; provide fish passage above and below Central Valley rim dams for species of concern; and retain cold water for fish in reservoirs.

Responsible Exports Plan Alternatives could vary by how much time is allotted them to phase in export reductions over time. For instance, they could range from 10 to 40 years, which would comparatively span the same range of timelines provided, on one hand, for Tunnels construction, and on the other, the range of time provided for full implementation of habitat restoration projects under BDCP. Such comparisons would be useful for meaningful decision-making.

We are aware that BDCP proponents are driving the project. They do not want the public including environmental organizations to have a BDCP alternative that they could support. This concealment to this date of any alternatives that would reduce exports is calculated to increase the likelihood of the BDCP proponents getting what they want. That strategy is illegal under CEQA, NEPA, and the state and federal ESAs and the state’s Natural Communities Conservation Planning Act. Such a strategy promotes decision-making based on bad faith.

By this letter, the EWC, FOR, C-WIN, and CSPA repeat prior demands for consideration of the Responsible Exports Plan alternative and reasonable variants on that alternative. This demand follows up our similar requests which started back on April 16, 2012 but have to date been ignored in the BDCP process.

We also urge you to not load up the Responsible Exports Plan alternative with “poison pills” designed to make the alternative or variants on the alternative appear infeasible or undesirable. Our plan should be evaluated in good faith as a reduced exports/increased Delta inflow and Delta outflow alternative without prejudging its results. Our suspicions of future BDCP process intentional violations of NEPA, CEQA, and the ESA are heightened by the flat refusal of the BDCP agencies to develop or even consider a reasonable range of alternatives despite the clear warnings in this regard given by the National Academy of Sciences three years ago, and repeated by the EWC over the past three years.

Under NEPA Regulations, “This [alternatives] section is the heart of the environmental impact statement.” The alternatives section should “sharply” define the issues and provide a clear basis for choice among options by the decision-maker and the public. 40 C.F.R. § 1502.14. Moreover, if “a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion. The agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action.” § 1502.9(a). The Responsible Exports Plan must be among those alternatives in the recirculated Draft EIR/EIS for BDCP that helps to sharpen and clarify issues and enrich the basis for decision-making by the fishery agencies, the public, and all other public agencies that rely on the BDCP administrative record for their decision-making.<sup>3</sup>

The BDCP agencies have failed to produce an alternatives section that “sharply” defines the issues and provides a clear basis for choice among options as required by the NEPA Regulations, 40 C.F.R. § 1502.14. Again, those issues must include producing more Delta inflow and outflow through the estuary as habitat for listed fish species, and documenting the impacts on Delta ecosystems as called for in Water Code Section 85021. The choice presented must include increasing flows by reducing exports, not just reducing flows by increasing the capacity for exports as is called for by *all* of the so-called “alternatives” presented in the BDCP Draft Plan and EIR/EIS.

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

With respect to the ESA, we have repeated several times in 2013 and 2014 that the failure of the federal agencies to prepare the ESA required Biological Assessments and Opinions concerning the US Bureau of Reclamation’s activities with the Bay Delta Conservation Plan violates both the ESA Regulations (50 C.F.R. § 402.14(a) “at the earliest possible time” requirement and the NEPA Regulations (40 C.F.R. § 1502.25(a) “concurrently with and integrated with” requirement. ( FOR January 14, 2014 comment letter and its four attachments). The missing Biological Assessments and Biological Opinions are essential to any meaningful public review and comment on a project claimed to be responsive to declining fish populations.

As conceded by BDCP Chapter 9, Alternatives to Take, the analysis of take alternatives must explain “why the take alternatives [that would cause no incidental take or result in take levels

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<sup>3</sup> The EIS alternatives section is to “Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.” § 1502.14(a).

below those anticipated for the proposed actions] were not adopted.” (BDCP Plan, Chapter 9, pp. 9-1, 9-2). Here, the lead agencies failed to even develop let alone adopt alternatives reducing exports and increasing flows to eliminate or reduce take. The agencies ignored the Responsible Exports Plan alternative that was provided to them a full year *before* they issued the Draft Plan and Draft EIR/EIS for public review and comment.

No matter how badly the BDCP proponents want to maintain or increase Delta exports, the Draft NEPA, CEQA, and ESA processes mandate inclusion of alternatives increasing flows and reducing exports as part of a range of reasonable alternatives.

In short, the fundamental flaws in the alternatives sections in the BDCP Draft EIR/EIS and Chapter 9 of the BDCP plan have led to a Draft EIR/EIS and Alternatives to Take analysis “so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded.”<sup>40</sup> C.F.R. § 1502.9(a).

There is yet more. On August 26, 2014, the United States Environmental Protection Agency (EPA) issued its 40-page review of the Draft BDCP EIS. EPA declared that “we believe the NEPA process is well-suited to bring all of these considerations together, including the consideration of the environmental impacts of reasonable alternatives to the BDCP as it is currently proposed.” (Letter, p 1). However, EPA found in BDCP’s case that:

operating any of the proposed conveyance facilities. . . would contribute to increased and persistent violations of water quality standards in the Delta, set under the Clean Water Act, measured by electrical conductivity (EC) and chloride concentrations. We recommend that the Supplemental Draft EIS include one or more alternatives that would, instead, facilitate attainment of all water quality standards in the Delta. Specifically, we recommend that an alternative be developed that would, at minimum, not contribute to an increase in the magnitude or frequency of exceedances of water quality objectives, and that would address the need for water availability *and greater freshwater flow through the Delta*. Such an alternative should result in a decrease in the state and federal water projects’ contributions to the exceedance of any water quality objectives in the Delta. (*Id.*, p.2, emphasis added).

EPA’s letter also indicated that the Tunnels project and each of its BDCP alternatives would result in increased residence time of interior Delta waters, resulting in increased toxic contamination from methyl mercury, mercury, selenium, boron, and other constituents.

EPA further stated that “Data and other information provided in the Draft EIS indicate that all CM1 [Tunnels project] alternatives may contribute to declining populations of Delta smelt, Longfin smelt, green sturgeon, and winter-run, spring-run, fall-run and late-fall run Chinook salmon.” (p. 10). “We recommend that the Supplemental Draft EIS consider measures to insure freshwater flow that can meet the needs of those [declining fish] populations and ecosystem as a whole, and is supported by the best available science. We recommend that this analysis recognize the demonstrated significant correlations between freshwater flow and fish species abundance.” (*Id.*). These correlations were recently reviewed in the Delta Science Program/State Water Resources Control Board workshops on “Delta Outflows and Related Stressors” (held February 10-

11, 2014) and “Interior Delta Flows and Related Stressors” (held April 16-17, 2014).<sup>4</sup> “Other reasonable alternatives could be developed by incorporating a suite of measures, including Integrated Water Management, water conservation, levee maintenance, and decreased reliance on the Delta.” (*Id.* p. 3). In addition, EPA concluded that “The Draft EIS does not address how changes in the Delta can affect resources in downstream waters, such as San Francisco Bay, and require changes in upstream operations, which may result in indirect environmental impacts that must also be evaluated. We recommend that the Supplemental Draft EIS include an analysis of upstream and downstream impacts.” (*Id.*).

On July 29, 2014, the State Water Resources Control Board (SWRCB) issued its 38 page review of the Draft BDCP EIS/EIR. The SWRCB declared that the “environmental documentation prepared for the project must disclose the significant effects of the proposed project and identify a reasonable range of interim and long-term alternatives that would reduce or avoid the potential significant environmental effects.” (Letter, comment 9 pp. 11-12). Further, “The justification for this limited range of Delta outflow scenarios is not clear given that there is significant information supporting the need for more Delta outflow for the protection of aquatic resources and the substantial uncertainty that other conservation measures will be effective in reducing the need for Delta outflow. For this reason a broader range of Delta outflows should be considered for the preferred project.” (*Id.* comment 10 p. 12).

On July 16, 2014, the United States Army Corps of Engineers (Corps) issued comments on the BDCP Drafts. The Corps’ District Commander stated in crystal-clear language that: “I have determined the EIS/EIR is not sufficient at this time in meeting the Corps’ needs under the National Environmental Policy Act (NEPA). . . in particular with regard to the incomplete description of the proposed actions, alternatives analysis. . . and impacts to waters of the United States and navigable waters, as well as the avoidance and minimization of, and compensatory mitigation for, impacts to waters of the United States.” (Letter p. 1). Additional Corps comments include the absence in the EIR/EIS of “an acceptable alternatives analysis” (comment 4), “the document needs a clear explanation of a reasonable range of alternatives and a comparison of such, including a concise description of the environmental consequences of each” (comment 19), and “new conveyance was not a part of the preferred alternative for CalFed. Does this EIS/EIR describe why the reasons for rejecting new conveyance in CalFed are no longer valid?” (Comment 22).

EWC’s Responsible Exports Plan—completely ignored so far by DWR and the other BDCP applicant agencies—fits the EPA’s and SWRCB’s calls for alternatives that would increase freshwater flow through the Delta and the Corps’ call for an acceptable alternatives analysis. It is now time for the state and federal fishery agencies to terminate their abject submission to the dominance of the BDCP process by DWR and the other Section 10 applicants. It is also time to include among the range of reasonable alternatives required by law reduced Delta exports to increase freshwater flows through the Delta that are known to correlate with benefits to listed fish species. BDCP’s scoping announcement in six to eight weeks must address the alternatives comprehensively and faithfully reproduce the Responsible Exports Plan alternative as part of the reasonable range of alternatives that are included in the recirculated documents.

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<sup>4</sup> Workshop reports by their respective science panels are available from the Delta Science Program.

Please call 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 with any questions you may have.

Sincerely,

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Attachment: EWC Responsible Exports Plan, May 2013.

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