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## FRIENDS OF THE RIVER

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**Re: COMMENT LETTER and REQUEST for EXTENSION OF TIME and NEW DRAFT PLAN and DRAFT EIR/EIS for PUBLIC REVIEW because of the Government's Failure to Release a Draft Implementing Agreement, Violating NEPA, ESA, CEQA, and NCCPA**

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

Despite releasing of the Draft Bay Delta Conservation Plan (BDCP) and its Draft Environmental Impact Report-Environmental Impact Statement (EIR/EIS) in December, 2013, the government has not released a draft Implementing Agreement (IA). The Natural Community Conservation Planning Act requires each conservation plan to include an IA which contains, among other things, "provisions for establishing the long-term protection of any habitat,"

“provisions ensuring implementation of the monitoring program and adaptive management program,” and “mechanisms to ensure adequate funding to carry out the conservation actions . . . .” Cal. Fish & G. Code § 2820(b).

For purposes of the BDCP, the IA is a commitment from each party under the BDCP specifying its contribution to the cost, construction, and operation of the proposed project. The IA is an integral and indispensable necessity to the development and function of the BDCP. However, the parties to the BDCP, water contractors who expect to benefit from the BDCP, have failed to enter an IA which establishes each party’s contribution to the cost, construction, and operation of the BDCP. Without the draft IA, it is not possible for the public to meaningfully review the draft BDCP and EIR/EIS. Accordingly, the absence of the draft IA has resulted in a violation of the National Environmental Policy Act (NEPA), NEPA regulation 40 C.F.R. § 1502.25, Endangered Species Act (ESA) regulations 50 CFR § 17.22(b)(1)(i); § 222.307(b)(4), the California Environmental Quality Act (CEQA), and the Natural Communities Conservation Planning Act (NCCPA).

Critical information is missing from the review process. For example, the BDCP proponents have been internally admitting the obvious to the State, that “The cost of the BDCP is high, and there is significant concern that it will increase. Recent experience shows that the cost of large public works projects tends to increase during construction. The cost of the BDCP is so high there is no room for any increase in cost.” We *attach* a copy of the May 13, 2014 letter to BDCP agency directors from the Natural Resources Defense Council, Defenders of Wildlife, American Rivers, The Nature Conservancy, and The Bay Institute requesting a 60 day extension of time for public comments based on several factors including the absence of the draft Implementation Agreement. That letter includes a one-page *attachment*, the Critical Issues document, edited by J. Maher (January 27, 2014). These examples including the above are taken from the *attached* Critical Issues document.

Another example is that the BDCP proponents seek a level of water supply assurances of “water supply reliability of approximately 75% for both SWP and CVP water service contractors.” (Critical Issues document). The water contractors also seek “Strong regulatory assurances [to] increase the willingness of local public agencies to fund the BDCP and construction of the new conveyance facilities [tunnels].” (Critical Issues document). Any commitments like those would significantly worsen the already horrendous impacts on

endangered fish species, the Sacramento River, and the San Francisco Bay-Delta resulting from operations of the massive BDCP Water Tunnels.

It is also not possible for the public to meaningfully review the draft BDCP and EIR/EIS because of the failures, violating both the ESA and NEPA, of the federal agencies to have prepared the Biological Assessments and Biological Opinions required by the ESA. These violations have been pointed out to you previously in our comment letters of June 4, August 13, September 25, and November 18, 2013, our comment letters of January 14, and March 6, 2014, and at our meeting with federal agency representatives in Sacramento on November 7, 2013.

This absence of the critical information for public review and review by the decision-makers that would be found in the missing Implementing Agreement, Biological Assessments, and Biological Opinions makes a mockery of the environmentally informed public and decision-maker review provisions and purposes of NEPA, CEQA, and the ESA. In addition, the absence of the essential information that would be furnished by the draft Implementing Agreement, Biological Assessments, and Biological Opinions unlawfully segments and postpones the review of those documents from the current review of the Draft BDCP Plan and Draft EIR/EIS.

### **Violation of NEPA**

Under NEPA, each EIS must contain a discussion of the “environmental impacts of the proposed action . . . .” 42 U.S.C. § 4332(C)(i). An EIS “shall provide full and fair discussion of significant environmental impacts and shall inform decision-makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts . . . .” 40 C.F.R. § 1502.1.

The Draft BDCP Chapters 6, 7, and 8 frequently refer to the IA as a regulatory force of the BDCP operations, ensuring that the project will operate in accordance with law. Nowhere does the Draft BDCP or EIR/EIS list the terms or specific provisions that the IA will contain. Thus, the IA’s terms and requirements are not available for the public or decision makers to review. Because the IA will contain information concerning impacts and mitigation, it is a critically important component of the environmental review mandated by NEPA. Without the IA, it is impossible for the EIS to provide a “full and fair discussion” of the impacts and mitigation measures. Consequently, the EIS is incomplete and insufficient to provide meaningful public review of BDCP impacts and mitigation measures.

### **Violation of NEPA Regulation 40 C.F.R. § 1502.25**

Under NEPA regulations, “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. Thus, agencies must prepare environmental impact review documents concurrently.

Because the BDCP is expected to result in the take of endangered and threatened species, the parties must acquire an incidental take permit (ITP) before implementing the BDCP. 16 U.S.C. § 1539(a)(1). A party applying for an ITP must submit a conservation plan that specifies, among other things, “what steps the applicant will take to *minimize and mitigate such impacts*, and the *funding that will be available to implement such steps . . . .*” 16 U.S.C. § 1539(a)(2)(A)(ii) (emphasis added). The Draft BDCP and EIR/EIS lack this information and suggest that it will appear in the IA.

Accordingly, the BDCP is incomplete without the IA because the BDCP does not specify any commitments the parties have made to fund and promote mitigation measures. As an impact analysis, the IA was required to have been prepared concurrently with the EIS. Nevertheless, the parties to the BDCP have failed to produce even a draft IA specifying their individual commitments to ensuring the integrity of the project. This has resulted in the staggered or piecemeal environmental review that NEPA Regulation 40 C.F.R. § 1502.25 prohibits.

### **Violation of ESA Regulations**

The BDCP is the heart of an application for an ITP. All applications for ITPs must include a “complete description of the activity sought to be authorized. . . .” 50 C.F.R. § 17.22(b)(1)(i). Further, all conservation plans must include “steps . . . that will be taken to monitor, minimize, and mitigate [the] impacts, and the funding available to implement such measures . . . .” 50 C.F.R. § 222.307(b)(5)(iii). Before approving a conservation plan, the government must provide notice of the application and an opportunity for the public to review the application. 16 U.S.C. § 1539(c).

The Draft BDCP fails to provide a complete description of the project because it does not specify the steps that will be taken to mitigate impacts and fund such mitigation. Instead, it insists that the IA will clarify details concerning mitigation measures and funding. Consequently,

the Draft BDCP and EIR/EIS lack critical information concerning how the conservation plan will address mitigation and funding requirements, rendering the review period inadequate under ESA Regulations.

### **Violation of CEQA**

Under CEQA, California agencies must make draft EIRs available for public review and comment. 14 CCR § 15087. An EIR “shall include a detailed statement setting forth . . . [a]ll significant effects on the environment of the proposed project” and “[m]itigation measures proposed to minimize significant effects of the environment . . . .” Cal. Pub. Res. Code § 21100(b). Regulations define *project* to mean “the *whole of an action*, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment . . . .” 14 CCR § 15378(a) (italics added). Before approving a proposed project, the “lead agency shall determine whether a project may have a significant effect on the environment based on *substantial evidence* in light of the whole record.” Cal. Pub. Res. Code § 21082.2(a) (italics added). *Substantial evidence* does not include “speculation” or “unsubstantiated opinion”; on the contrary, *substantial evidence* includes “facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.” Cal. Pub. Res. Code § 21082.2(c). Courts applying CEQA have held over and over that:

An accurate, stable and finite project description is the sine qua non [absolutely indispensable requirement ] of an informative and legally sufficient EIR. [Citation ]. However, a curtailed, and enigmatic or unstable project description draws a red herring across the path of public input. [citation] Only through an accurate view of the project may the public and interested parties balance the proposed project’s benefits against its environmental cost, consider appropriate mitigation measures, assess the advantages of terminating the proposal and properly weigh other alternatives.

*San Joaquin Raptor Rescue Center v. County of Merced*, 149 Cal.App.4th 645, 672 (2007) (internal citations omitted).

The IA is part of the project but has not even been placed before the public for review during the Draft EIR/EIS public review period. Because the IA will contain critical project information that is not in the Draft EIR/EIS, the Draft EIR-EIS does not describe the *whole of the action*. Consequently, the EIR-EIS fails to provide an “accurate view of the project” and the public is incapable of understanding how the proposed project will operate. Further, this missing information demonstrates that the incomplete EIR/EIS fails to support its conclusions as to the

impacts of the project. Whereas CEQA requires environmentally informed agency decisions, the absence of the IA prevents the agencies from forming valid decisions. Instead, the agencies rely on speculation as to what the terms of the IA might include.

### **Violation of NCCPA**

The NCCPA requires that any draft documents associated with an NCCP are made available for public review and comment. Cal. Fish & G. Code § 2815. As mentioned above, the NCCPA requires the NCCP to include an IA. Cal. Fish & G. Code § 2820(b). The Act further imposes a “requirement to make available in a *reasonable and timely manner* . . . planning documents associated with a natural community conservation plan that are subject to public review.” Cal. Fish & G. Code § 2815 (italics added).

Because the impact and mitigation analyses in the EIR/EIS rely on the IA, the government agencies needed to make the draft IA available at the same time as the draft EIR/EIS in order to meet the *reasonable and timely manner* requirement. Releasing the draft IA months after the Draft EIR/EIS is neither reasonable nor timely because the government could have waited for completion of the draft IA before releasing the draft EIR/EIS.

### **How to Remedy These Violations**

The government’s plans to hold a 60-day public comment period for the draft IA after the Draft BDCP and Draft EIR/EIS comment period closes will not cure these defects. Staggering the release and comment periods for BDCP documents deprives the public of adequate review opportunities in two ways. First, once the government releases the Draft IA containing specific details concerning BDCP operation, interested parties’ understanding of the project will change. It is likely that new information released in the IA will supersede comments received during the Draft BDCP and EIR/EIS comment period, undermining the integrity of the comment period. To ensure that interested parties have an adequate opportunity to review and comment on the project, all documents relating the BDCP need to be available for comment at the same time.

Second, a 60-day comment period is drastically insufficient to provide interested parties enough time to review the IA and its effects on BDCP operations. Interested parties will need to both review the draft IA and determine how it alters 40,000+ pages of BDCP documents. Accomplishing this type of review in a mere 60 days is impossible. Limiting the draft IA

comment period to 60 days will effectively ensure that interested parties are incapable of meaningfully reviewing the totality of the BDCP.

In order to provide meaningful public review, the BDCP federal and State agencies need to hold a new Draft BDCP comment period with *every* BDCP document -- Implementing Agreement, Biological Assessments and Biological Opinions, and Draft BDCP Plan and Draft BDCP EIR/EIS-- available for public review and comment during the same time period. Additionally, the new comment period must remain open for at least four months. NEPA regulation 40 C.F.R. 1502.7 declares that the text of an EIS for “proposals of unusual scope or complexity shall normally be less than 300 pages.” Here, there are already 40,214 pages of released documents which represent 20% more pages than the 32 volumes of the last printed edition of the Encyclopedia Britannica. The government’s original four month comment period and subsequent two-month extension tacitly conceded that extended public review periods are necessary for a project as massive as the BDCP.

### **Conclusion**

The absence of the Draft IA during the Draft BDCP and Draft EIR/EIS comment period has violated NEPA, CEQA, ESA, and NCCPA. These violations have rendered the comment period inadequate to support meaningful public review and comments. In order to remedy these violations, the government must release the Draft IA and open a new, four-month Draft BDCP comment period with every BDCP document available for public review and comment. Beyond these violations of law, the government must open a new public comment period to restore any public confidence in the integrity of the BDCP. It is absurd to expect the public to trust the BDCP process without full disclosure of the project’s impacts, costs, and who will pay those costs.

For these reasons, Friends of the River urges you to open a new public comment period on all BDCP documents, including the IA when it is released, for at least four months. Please call Robert Wright, Senior Counsel, Friends of the River at (916) 442-3155x 207 with any questions you may have.

Sincerely,

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(Encl. two attachments)

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