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Sent: Tuesday, July 29, 2014 5:53 PM
To: BDCP.Comments@noaa.gov
Cc: 'Stephan Volker'; 'M. Benjamin Eichenberg'
Subject: Comments of NCRA et al on the Draft BDCP and DEIR/DEIS and Exhibits 1-2
Attachments: Comments of NCRA et al on Draft BDCP and DEIR-DEIS 7-29-14.pdf

Mr. Wulff,

Attached to this email please find the Comments of the North Coast Rivers Alliance, Winnemem Wintu Tribe, San Francisco Crab Boat Owners Association, Inc. and Pacific Coast Federation of Fishermen's Associations on the Draft Bay Delta Conservation Plan and the Bay Delta Conservation Plan Draft Environmental Impact Report and Environmental Impact Statement. The two exhibits to the Comments are also included in the attached PDF. We have also mailed you a complete hard copy of the Comments today via U.S. Mail.

Please make these Comments a part of the public record in the Bay Delta Conservation Plan proceeding.

If you have any difficulty opening the attached document, please contact our office.

Thank you,

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Federation of Fishermen's Associations

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July 29, 2014

VIA EMAIL AND U.S. MAIL

BDCP Comments
Ryan Wulff, NMFS
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Re: Comments of the North Coast Rivers Alliance, Winnemem Wintu Tribe, San Francisco Crab Boat Owners Association, Inc. and Pacific Coast Federation of Fishermen's Associations on the Draft Bay Delta Conservation Plan and the Bay Delta Conservation Plan Draft Environmental Impact Statement and Environmental Impact Report.

Dear Mr. Wulff:

The North Coast Rivers Alliance, Winnemem Wintu Tribe, San Francisco Crab Boat Owners Association, Inc. and Pacific Coast Federation of Fishermen's Associations (collectively, "Conservation Groups") appreciate the opportunity to comment on the California Department of Water Resources' ("DWR's"), the Bureau of Reclamation's ("Reclamation's"), the U.S. Fish and Wildlife Service's ("USFWS"), and National Marine Fisheries Service's ("NMFS") (collectively, "Agencies") Draft Bay Delta Conservation Plan ("Draft BDCP") and joint Draft Environmental Impact Report and Environmental Impact Statement ("DEIR/DEIS") thereon, which were concurrently published for public review on December 13, 2013.

I. INTRODUCTION

The largest and most productive estuary system on the west coast of North and South America – the Sacramento-San Joaquin River Delta – is collapsing for two principal reasons. First, agricultural diverters have discharged and continue to discharge too much contaminated agricultural run-off and return flows into the Delta. Second, the Central Valley Project ("CVP") and the State Water Project ("SWP") have diverted too much of the Delta's fresh water flows. These unsustainable levels of diversions and discharges greatly decrease fresh water flows while increasing salinity and the concentration of herbicides, pesticides, and toxic agricultural run-off in the Delta.

These two threats to the Delta's health have grown steadily over the past five decades, and the resulting environmental devastation has pushed the Delta's imperiled fisheries to the

BDCP and DEIR/DEIS Comments of NCRA *et al.*

July 29, 2014

Page 2

brink of extinction. Seventeen species of fish endemic to the Delta have already gone extinct; just twelve indigenous species remain. Critical habitat for the endangered Sacramento River winter run Chinook salmon, Central Valley steelhead and spring run Chinook, the Delta smelt, and the Southern Distinct Population Segment (“DPS”) of the Northern American green sturgeon suffers progressively worsening degradation.¹ The proposed project outlined in the Agencies’ Draft BDCP and associated DEIR/DEIS, which includes three new North Delta water pumping and conveyance facilities each with an “intake capacity” of 3,000 cubic feet per second (“cfs”), might push those and other species to extinction. DEIR/DEIS at 3-12 (describing the “Proposed Project”).

The Draft BDCP is a draft Habitat Conservation Plan (“HCP”) under the federal Endangered Species Act (“ESA”), 16 U.S.C. section 1531 *et seq.*, and a draft Natural Community Conservation Plan (“NCCP”) under the California Natural Community Conservation Planning Act, California Fish & Game Code section 2800 *et seq.* The BDCP and its associated permits and activities would last for 50 years, and have the dual purported goals of restoring the Sacramento-San Joaquin Bay-Delta ecosystem and securing reliable water supplies for California. In reality, however, while the proposed BDCP actions would help “[r]estore and protect the ability of the SWP and CVP to deliver up to full contract amounts” (i.e. up to several times the amount ever delivered on an annual basis to date), they would likely worsen rather than improve the Delta ecosystem and further imperil numerous fish species.

While the Draft BDCP proposes a number of activities aimed at restoring or protecting approximately 145,000 acres of Delta habitat, its centerpiece is the construction and operation of three new water intake facilities on the Sacramento River (just south of Clarksburg) that would connect to a dual-bore, 40-foot-diameter, 30-mile-long pipeline diverting up to 9,000 cfs (though likely more in the long term) around the Delta to the existing pumping facilities in the South Delta for export to Central Valley agricultural and industrial users and cities in southern California and parts of Santa Clara County. Draft BDCP at 4-7 to 4-21. As a result of these new intake and conveyance facilities (collectively, the “Peripheral Tunnels”), water that currently

¹Winter run Chinook salmon were declared threatened under the federal Endangered Species Act (“ESA”) in 1990 (55 Fed.Reg 46515), and then due to continuing population declines, declared endangered in 2005 (70 Fed.Reg 37160). Their critical habitat in the Sacramento River and its tributaries was designated in 1993. 58 Fed.Reg. 33212. Spring run Chinook salmon were declared threatened, and their critical habitat designated under the ESA in 2005. 70 Fed.Reg. 37160, 52488. Central Valley steelhead were declared threatened in 2000 (65 Fed.Reg. 52084) and their critical habitat was designated in 2005 (70 Fed.Reg 52488). The Southern DPS of North American green sturgeon was declared threatened in 2006 (71 Fed.Reg 17757) and its critical habitat was designated in 2008 (73 Fed.Red 52084). Delta smelt were declared endangered in 1993 (58 Fed.Reg. 12854) and their critical habitat was designated in 1994 (59 Fed.Reg. 65256).

BDCP and DEIR/DEIS Comments of NCRA *et al.*

July 29, 2014

Page 3

flows through the Sacramento River and sloughs to and through the Delta would be diverted, further reducing freshwater flows through the sloughs and Delta. These diversions would also likely necessitate changes in reservoir management in northern California, including on the Trinity, Shasta, Folsom, and Oroville Reservoirs, and as a result reduce flows in the Trinity, Sacramento, American, and Feather Rivers. With less water in the rivers and more water in the pipes of water exporters, the fish and the Delta ecosystem will suffer, while the wasteful and polluting practices of many of those who use the exported Delta water will be allowed to continue, if not expand.

As discussed in more detail below, there is a fundamental logical flaw to a plan that aims to restore ecosystems that have been degraded by freshwater diversions by building new infrastructure enabling diversion of *even more* fresh water. This flaw pervades the Draft BDCP and the DEIR/DEIS and, along with other deficiencies discussed below including the Agencies' failure to complete the consultation and review required by the ESA, renders the DEIR/DEIS fatally inadequate under the National Environmental Policy Act ("NEPA"), 42 U.S.C. sections 4321 *et seq.*, and the California Environmental Quality Act ("CEQA"), California Public Resources Code section 21000 *et seq.* For these reasons and others, Conservation Groups oppose the Peripheral Tunnels and the "Proposed Project" identified in the BDCP and the DEIR/DEIS.

II. THE DEIR/DEIS DOES NOT COMPLY WITH CEQA OR NEPA.

The "heart of CEQA" is the environmental impact report ("EIR"). *Citizens for Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564. "The EIR, with all its specificity and complexity, is the mechanism prescribed by CEQA to force informed decision making and to expose the decision making process to public scrutiny." *California Native Plant Society v. City of Santa Cruz* ("*California Native Plant Society*") (2009) 177 Cal.App.4th 957, 978 (quoting *Planning & Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 910). Similarly, the environmental impact statement ("EIS") "serves NEPA's 'action-forcing' purpose" by ensuring that the agency "will have available, and carefully consider, detailed information concerning significant environmental impacts" and "guarantee[ing] that the relevant information will be made available to the larger audience." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

Here, however, the DEIR/DEIS' analysis of the BDCP fails to foster informed decisionmaking or to expose the decisionmaking process to the public. *California Native Plant Society*, 177 Cal.App.4th at 978. CEQA and NEPA require more.

A. The DEIR/DEIS Fails to Describe and Analyze the Whole of the Action.

CEQA and NEPA require that "[t]he entirety of the project must be described" in the EIR/EIS, "not some smaller portion of it." *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 654 (quote); 40 C.F.R. § 1508.25. Here, the DEIR/DEIS

BDCP and DEIR/DEIS Comments of NCRA *et al.*

July 29, 2014

Page 4

fails to describe and analyze the “whole of [the] action” in at least two respects. CEQA Guidelines § 15378(a).

First, despite the fact that Natural Community Conservation Planning Act requires each NCCP (which the BDCP is supposed to be) to include an Implementation Agreement containing, 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,” the DEIR/DEIS *entirely fails* to describe and analyze any Implementation Agreement for the BDCP. Cal. Fish & Game Code § 2820(b). Nor could it have. The Agencies did not publish the draft Implementation Agreement until *May 30, 2014*, more than *five months after* they published the DEIR/DEIS. By failing to describe and analyze this critical feature of the BDCP, the DEIR/DEIS fails to analyze the “whole of [the] action” and violates CEQA and NEPA. CEQA Guidelines § 15378(a); 40 C.F.R. § 1508.25.

Second, while the DEIR/DEIS describes the “*intake capacity*” of the proposed project’s Peripheral Tunnels, it fails to describe the likely far greater carrying capacity of the tunnels themselves. DEIR/DEIS at 3-12; Draft BDCP at Sections 4.2.1.1 and 4.2.1.2 (likewise failing to describe the carrying capacity of the conveyance tunnels). Nor does it discuss the likelihood that the intake screens would be enlarged and pump capacity increased in the future to export additional water using any such extra capacity in the tunnels. This failure to discuss reasonably foreseeable future uses of the project violates CEQA and NEPA. *City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, 1455; 40 C.F.R. § 1508.25.

B. The DEIR/DEIS Unduly Constrains the Project Objectives and Fails to Analyze a Reasonable Range of Alternatives.

Both CEQA and NEPA require that the EIR/EIS analyze a reasonable range of alternatives to the proposed project. “CEQA requires that an EIR, in addition to analyzing the environmental effects of a proposed project, also consider and analyze project alternatives that would reduce adverse environmental impacts.” *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1162-1163 (citing Cal. Pub. Res. Code §§ 21061, 21001(g), 21002, 21002.1(a), 21003(c)). 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 . . .” 14 Cal. Code Regs. [(“CEQA Guidelines”)] § 15126.6 (a). Alternatives that would lessen significant effects should be considered even if they “would impede to some degree the attainment of the project objectives, or be more costly.” Guidelines § 15126.6(b); *California Native Plant Society v. City of Santa Cruz* (“CNPS”) (2009) 177 Cal.App.4th 957, 991. The range of alternatives considered must “foster informed decisionmaking and public participation.” Guidelines § 15126.6(a); *CNPS*, 177 Cal.App.4th at 980, 988. Alternatives may only be eliminated from “detailed consideration” when substantial evidence in the record shows that they

BDCP and DEIR/DEIS Comments of NCRA *et al.*
July 29, 2014
Page 5

either (1) “fail[] to meet most of the basic project objectives,” (2) are “infeasibl[e],” or (3) do not “avoid significant environmental impacts.” Guidelines § 15126.6(c).

Under NEPA, the alternatives analysis “is the heart of the environmental impact statement.” 40 C.F.R. § 1502.14. An EIS must “[r]igorously explore and objectively evaluate all reasonable alternatives” so that “reviewers may evaluate their comparative merits.” *Id.* “The existence of a viable but unexamined alternative renders an environmental impact statement inadequate.” *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1038 (9th Cir. 2008). Furthermore, because a project’s purpose and need statement “dictates the range of ‘reasonable’ alternatives,” the agency may not frame the purpose and need statement narrowly “to avoid the requirement that relevant alternatives be considered.” *City of Carmel-by-the-Sea v. United States Department of Transportation*, 123 F.3d 1142, 1155 (9th Cir. 1997) (first quote); *National Parks & Conservation Association v. U.S. Bureau of Land Management (“NPCA v. BLM”)*, 606 F.3d 1058, 1070 (9th Cir. 2010) (second quote) (“[a]n agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative among the environmentally benign ones in the agency’s power would accomplish the goals of the agency’s action, and the EIS would become a foreordained formality”).

Here, the DEIR/DEIS violates both CEQA and NEPA because it unduly constrains the project purposes and objectives and fails to analyze a reasonable range of alternatives. The fundamental purpose of the BDCP is to “restore and protect ecosystem health [in the Delta], water supplies of the SWP and CVP south-of-Delta, and water quality within a stable regulatory framework, consistent with statutory and contractual obligations.” DEIR/DEIS ES-8. This purpose “reflects the intent to advance the *coequal* goals set forth in the Sacramento-San Joaquin Delta Reform Act of 2009 (Delta Reform Act) of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem.” *Id.* at ES-10. Yet the Agencies appear to interpret these *coequal* goals as instead *prioritizing* water supply reliability *over* ecosystem restoration and requiring them to “[r]estore and protect the ability of the SWP and CVP to deliver up to full contract amounts,” which the Agencies adopted as a primary project objective. DEIR/DEIS at ES-8, 10. As discussed below, the Agencies’ interpretations and assumptions are not only wrong, they impermissibly constrained the Agencies’ selection and analysis of alternatives such that *none* of the 15 action alternatives the Agencies examined in the DEIR/DEIS would reduce water exports from the Delta, and only *one* of them excludes the Peripheral Tunnels.

The Agencies’ interpretations and assumptions underlying their stated project objective of restoring and protecting “the ability of the SWP and CVP to deliver up to full contract amounts” are wrong for at least three reasons. DEIR/DEIS at ES-10. First, *coequal* goals are *coequal*. The plain language admits of no other interpretation, and the Agencies do not have the authority to prioritize one over the other. Yet by focusing on alternatives that would “[r]estore and protect the ability of the SWP and CVP to deliver up to full contract amounts,” *i.e.* *increase* Delta exports, the Agencies impermissibly do just that, since “*increasing* freshwater flows [in the

Delta] is essential for protecting resident and migratory fish populations.” DEIR/DEIS at ES-8, 10 (first quote); Environmental Protection Agency letter to California State Water Resources Control Board, March 28, 2013, p. 2-3 (second quote; emphasis added) (attached hereto as Exhibit 1); NMFS, July 2014, *Recovery Plan for the Evolutionarily Significant Units of Sacramento River Winter-Run Chinook Salmon and Central Valley Spring-Run Chinook Salmon and the Distinct Population Segment of California Central Valley Steelhead* (“2014 Recovery Plan”), p. 127 (one of the first listed priority Delta recovery actions is to “[d]evelop, implement, and enforce new Delta flow objectives that mimic historic natural flow characteristics, including *increased freshwater flows (from both the Sacramento and San Joaquin rivers) into and through the Delta* and more natural seasonal and interannual variability” (emphasis added)).²

Second, the Agencies’ assumption that they could *ever* ensure the “ability of the SWP and CVP to delivery up to full contract amounts” ignores the stark reality that the hydrologic conditions and requirements of state and federal law have *never* allowed the delivery of full contract amounts. *See, e.g., Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 913 (“There is . . . no question that the SWP cannot deliver all the water to which contractors are entitled under the original contracts. It does not appear that SWP has ever had that ability. Nor do defendants suggest that full delivery of entitlement water is likely within the life of the contracts.”).

Third, it blinks at reality to assume that Delta Reform Act’s coequal goals – improving California’s water supply reliability and “protecting, restoring, and enhancing the Delta ecosystem” – can only be achieved by increasing Delta water exports or building the Peripheral Tunnels. *Id.* at ES-10. There are many ways to achieve both goals without increasing Delta water exports *or* building the Peripheral Tunnels. The Environmental Water Caucus’ “Responsible Exports Plan,”³ for example, does just that. Instead of building the Peripheral Tunnels and increasing water exports, the Responsible Exports Plan would, among other things, reduce exports to a maximum of 3,000,000 acre-feet, institute and improve water efficiency and demand reduction programs, including water recycling and stormwater capture and reuse, eliminate irrigation of drainage-impaired farmlands south of the Delta and institute numerous measures to protect fish and otherwise improve the Delta ecosystem. Exhibit 2.

² The 2014 Recovery Plan is available for download as a PDF here: www.westcoast.fisheries.noaa.gov/publications/recovery_planning/salmon_steelhead/domains/california_central_valley/final_recovery_plan_07-11-2014.pdf

³ The Responsible Exports Plan is attached hereto as Exhibit 2. The Plan has also been previously submitted to the Agencies, including as an attachment to Friends of the River’s May 21, 2014 Comment Letter re Failure of BDCP Draft Plan and Draft EIR/EIS to Include a Range of Reasonable Alternatives Including the Responsible Exports Plan Submitted by the Environmental Water Caucus.

BDCP and DEIR/DEIS Comments of NCRA *et al.*

July 29, 2014

Page 7

Other proffered alternatives would also achieve those coequal goals while reducing California's reliance on water exports from the Delta. For example, the alternative developed by state Senator Lois Wolk, Chair of the Senate Select Committee on the Sacramento-San Joaquin Delta and member of the Senate Natural Resources and Water Committee, and crystalized as SB42, includes investments in ecosystem restoration and protection and flood control, while focusing on improving water supply reliability through recycling, expanded groundwater storage, desalination, and conservation. The Natural Resources Defense Council's "Portfolio" alternative likewise focuses on water recycling, conservation and other non-Delta-export mechanisms to improve water supply reliability in the State. Despite having a copy of these reasonable and feasible alternatives well before they published the Draft BDCP and DEIR/DEIS, the Agencies failed to consider *anything like them* in those documents, and thereby violated CEQA and NEPA.

By including as a project purpose and objective of "[r]estor[ing] and protect[ing] the ability of the SWP and CVP to deliver up to full contract amounts," the Agencies unduly constrained their selection of alternatives to exclude reduced export and other viable alternatives in violation of NEPA and CEQA. DEIR/DEIS at ES-8 (quote), 10 (same); *NPCA v. BLM*, 606 F.3d at 1070. By failing to analyze the Responsible Exports Plan and other "viable but unexamined alternative[s]," the Agencies "render[ed]" the DEIR/DEIS "inadequate." *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d at 1038 (quote); 40 C.F.R. § 1502.14; CEQA Guidelines §§ 15126.6(a), (b).

C. The DEIR/DEIS Remains Incomplete Due to Its Long List of Unresolved Issues.

As prescribed by NEPA and CEQA, the DEIR/DEIS includes a list of 13 issues representing "areas of known controversy and issues to be resolved." ES-41 through ES-43; 40 C.F.R. § 1502.12; Guidelines § 15123. The issues listed are complex, broad, and so important that the BDCP cannot be effectively evaluated until they are resolved. For example, one of the issues listed is "biological resources," for which the DEIR/DEIS notes that "the complexity of the BDCP raises many concerns over environmental consequences" for aquatic and terrestrial ecosystems and species, "changes in existing land uses and habitats," and "adverse effects on sensitive resources." ES-41. Another set of issues is "water supply, surface water resources, and water quality," which the DEIR/DEIS admits "remain highly controversial for a wide array of stakeholders." ES-41. Other unresolved issues include flood management, how the BDCP will affect agriculture, and "the potential conflict between conservation goals" and economic development. ES-41 through ES-42. CEQA and NEPA do not allow such critical issues to be simply listed and left unresolved.

Unacceptable levels of uncertainty pervade other sections of the DEIR/DEIS as well. For example, the DEIR/DEIS made "no determination" findings on whether the water tunnels, even after mitigation, would have adverse impacts on spawning, incubation habitat, and migration conditions for endangered Chinook salmon, steelhead, and green sturgeon. DEIR/DEIS ES-73, ES-75, ES-77, ES-79, ES-81, ES-83.

Programmatic environmental impact documents may be prepared for a series of related actions “that can be characterized as one large project” under CEQA (Guidelines § 15168), or “connected actions” that “[a]re interdependent parts of a larger action” under NEPA. 40 C.F.R. § 1508.25(a)(1). Program EIRs may omit site-specific information, but “[d]esignating an EIR as a program EIR . . . does not by itself decrease the level of analysis otherwise required.” *Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency*, 82 Cal.App.4th 511, 533 (2000). Therefore, the EIR still must “be prepared with a sufficient degree of analysis to provide decisionmakers with information which enables them to make a decision which intelligently takes account of environmental consequences.” *Id.* at 534. Similarly, while a programmatic EIS may decline to fully evaluate site-specific impacts “until a critical decision has been made to act,” it must still “provide ‘sufficient detail to foster informed decision-making.’” *Friends of Yosemite Valley v. Norton*, 348 F.3d 789, 800 (2003) (quoting *Northern Alaska Environmental Center v. Lujan*, 961 F.2d 886, 890-891 (9th Cir. 1992)). The DEIR/DEIS here is so lacking in basic and essential information that it fails to meet this standard.

As further discussed below, the Delta Science Program Independent Review Panel also noted unacceptable levels of uncertainty in the DEIR/DEIS. *See, e.g.*, Delta Science Program Independent Review Panel Report, BDCP Effects Analysis Review, Phase 3 (“DSP Report”), p. 5 (“most of the potential BDCP effects carry a relatively high level of uncertainty,” but the effects analysis “did not sufficiently acknowledge or articulate this reality”).

D. The Agencies’ Treatment of Endangered and Threatened Species Violates Both NEPA and the ESA.

The Agencies violated NEPA and the ESA because they issued the DEIR/DEIS without first preparing and incorporating the required Biological Assessments and Biological Opinions analyzing how the proposed BDCP actions would affect the critical habitat of at least five listed fish species. The omission of this critical step means that the BDCP does not constitute an adequate HCP, and renders the DEIR/DEIS essentially useless as a disclosure document under NEPA. 40 C.F.R. § 1502.25(a) (“[t]o the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with” analyses or studies requires by the ESA); 50 C.F.R. § 402.14(a).

By enacting the ESA, “Congress intended endangered species to be afforded the highest of priorities.” *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 174 (1978). “The plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, *whatever the cost.*” *Id.* at 184 (emphasis added.) The ESA’s goal is to ensure not only that species survive, but that their populations recover to the point that they can be removed from the endangered and threatened lists. *Alaska v. Lubchenko*, 723 F.3d 1043, 1054 (9th Cir. 2013).

BDCP and DEIR/DEIS Comments of NCRA *et al.*

July 29, 2014

Page 9

Therefore, the ESA requires that federal agencies⁴ ensure that their actions, or actions that they fund or authorize, are “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) (quote); *Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059, 1076 (9th Cir. 2004) (“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).

To ensure that projects do not “tip a species from a state of precarious survival into a state of likely extinction,” agencies must review their actions “at the earliest possible time to determine whether any action may affect listed species or critical habitat.” *National Wildlife Federation v. National Marine Fisheries Service*, 524 F.3d 917, 929-930 (9th Cir. 2008) (first quote); *Karuk Tribe of California v. U.S. Forest Service*, 681 F.3d 1006, 1020 (9th Cir. 2012) (second quote), *cert. denied*, 133 S.Ct. 1579 (2013). “If such a determination is made, formal consultation [with the U.S. Fish and Wildlife Service (“FWS”) and/or the National Marine Fisheries Service (“NMFS”)] is required.” 50 C.F.R. §§ 402.14(a), 402.12(a) (a biological assessment determines whether the action will adversely affect listed species or their critical habitats, “and is used in determining whether formal consultation is required”).

At the conclusion of formal consultation, FWS prepares a Biological Opinion discussing whether the proposed action and its cumulative effects are “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); *see also Center for Biological Diversity v. Bureau of Land Management*, 422 F.Supp.2d 1115, 1144-45 (N.D. Cal. 2006). If the biological opinion concludes that the action may adversely affect a species or its critical habitat but will not jeopardize its continued existence, it can include an incidental take statement permitting a specific level of take, and prescribing mandatory “reasonable and prudent measures” designed to minimize harm to the species. 50 C.F.R. § 402.14(i)(5).

For nonfederal applicants, such as the state agencies here, FWS or NMFS may issue “incidental take permits” under section 10(a)(1)(B) of the ESA. An applicant for an incidental take permit must submit a “habitat conservation plan” (“HCP”) (such as the BDCP is supposed to be) describing the potential impacts of the project and the taking, and mitigation measures to minimize the taking of the species. The HCP must ensure that the “taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild,” and it must be adequately funded. 16 U.S.C. § 1539(a)(2)(B)(iii)-(iv). A similar provision exists under state law, California Fish and Game Code section 2835, which provides for take of protected species “whose conservation and management is provided for in [an approved] natural community

⁴ The ESA’s provisions for federal agencies apply here because the Bureau of Reclamation is a federal agency taking action with respect to the proposed water tunnels. *See* BDCP 1-6.

