



To protect and restore California Rivers by influencing public policy and inspiring citizen action.

## FRIENDS OF THE RIVER

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January 28, 2014

### VIA EMAIL

Sally Jewell, Secretary of the Interior

Penny Pritzker, Secretary of Commerce

Michael Connor, Commissioner, Bureau of Reclamation (Via Fax)

John Laird, Secretary, California Natural Resources Agency (Via Fax)

Mark Cowin, Director, California Department of Water Resources (Via Fax)

[BDCP.Comments@noaa.gov](mailto:BDCP.Comments@noaa.gov)

**Re: Demand to Cease and Desist Unlawful Viewpoint Discrimination and Denial of Public Access on BDCP Website, and Comment Letter re Same**

Dear Federal and California Officers and Agencies Carrying out the BDCP:

This Demand and Comment Letter is submitted to you by the following public interest organizations in an effort to protect the San Francisco Bay-Delta and California rivers: Friends of the River; Restore the Delta; and the Environmental Water Caucus, a coalition of more than 30 public interest organizations. This letter pertains to the California Resources Agency, California Department of Water Resources (DWR) and the Bureau of Reclamation's recent decision to stop posting public comment letters and other vital information on their jointly hosted Bay Delta Conservation Plan (BDCP) website ([baydeltaconservationplan.com](http://baydeltaconservationplan.com)) just after issuance of the public drafts of the BDCP Plan and Environmental Impact Report/Environmental Impact Statement (EIR/EIS) on about December 13, 2013.

When our country was formed, people peaceably assembled in order to hear each other's views on matters of public importance. Informed public debate is the hallmark of our democracy. The modern equivalent of the venerable town hall/public park assembly is the public comment process via the Internet on proposed major government actions. Americans have fought wars to retain these freedoms. The BDCP proponent agencies, however, seem intent upon wresting these hard-earned freedoms from the public. These freedoms have been suppressed by these agencies' decision to stop posting critical comment letters on the established project website. If we lived in

Communist China, we might expect thoughtful or critical public comment to be suppressed. We do not expect this in the United States of America.

The Water Tunnels BDCP is another effort by the same Governor and others to develop the old peripheral canal project that was defeated by a referendum vote by a margin of about 2 to 1 in June 1982. The Water Tunnels are identified as Alternative 4, DWR's Preferred Alternative. (BDCP Draft EIR/EIS, 3-3). The Water Tunnels are one of, if not the most, controversial proposed public works projects in California history.

### **Recent Website Change Regarding Posting of Comments**

The initial Friends of the River comment letter was submitted to the National Marine Fisheries Service (NMFS) as instructed by the BDCP website on January 14, 2014. Receipt was confirmed by reply email from NMFS that same date also advising that "Additional information can be found at [www.baydeltaconservationplan.com](http://www.baydeltaconservationplan.com) ." What can be found on the BDCP website are the 40,000 pages of the consultant prepared Plan and EIR/EIS documents which the federal Bureau of Reclamation, NMFS and United States Fish and Wildlife Service (USFWS), have previously called "advocacy" and/or "biased" documents for the BDCP Water Tunnels project. (Federal Agency Release, Bureau of Reclamation Comments p.1; NMFS Comments p.2); USFWS Comments p.1, July 18, 2013).

What cannot be found on the BDCP website is the January 14, 2014 Friends of the River initial comment letter explaining among other things that the Water Tunnels project "is not a permissible project under the Endangered Species Act (ESA) because it would adversely modify designated critical habitat for at least five Endangered and Threatened fish species." (p.1). What also cannot be found on the BDCP website is the December 19, 2013 Environmental Water Caucus (EWC) (a coalition of more than 30 public interest organizations) letter requesting that the public review and comment period be extended from April 14, 2014 to August 15, 2014. The EWC letter explains that "there are 40,214 actual pages of the released documents" and that "these documents represent 20% more pages than the 32 volumes of the last printed edition of the Encyclopedia Britannica."

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

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

posting of comments is a direct violation of the environmental full disclosure purposes of both the National Environmental Policy Act (NEPA) and the California Environmental Quality Act (CEQA).

### **The Closing of the Forum to Critical Comment Is Contrary to the Promise of Encouraging Public Participation**

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

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

Instead of encouraging public participation, the agencies are doing everything in their power to discriminate against and exclude views opposing the Water Tunnels from the public website forum they have created. This is part of a pattern of suppression of free speech that was displayed in the summer of 2013 when Caltrans employees trespassed on private property in the Delta to remove signs carrying the message “Save the Delta! Stop the Tunnels!” That thuggery by the State only stopped after it was brought to widespread public attention by media coverage and rallies protesting the sign removals; no legal basis for the sign removals was ever provided by Caltrans.

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

### **The Viewpoint Discrimination on the BDCP Website Violates the First Amendment**

The First Amendment of the United States Constitution provides in pertinent part that there shall be no law “abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” Similarly, the California Constitution commands that “A law may not restrain or abridge liberty of speech or press” and the people have the right to “assemble freely to consult for the common good.” Cal. Const., Art. 1, § 2(a); § 3(a). “In a public forum, by definition, all parties have a constitutional right of access and the state must demonstrate compelling reasons for restricting access to a single class of speaker, a single viewpoint, or a single subject. When speaker and

subject are similarly situated, the state may not pick and choose.” *Perry Educ. Assn. v. Perry Local Education Assn*, 460 U.S. 37, 55 (1983). “Any access barrier must be reasonable and viewpoint neutral [citations].” *Christian Legal Soc. Chapter of the University of California, Hastings College of the Law v. Martinez*, 130 S.Ct. 2971, 2984 (2010). “When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. [Citation.] Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationality for the restriction.” *Rosenberger v Rector and Visitors of University of Virginia*, 515 U.S. 819, 829 (1995).

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

### **The Denial of the Right of Access to Critical Comments Violates the California Constitution**

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

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

The complexity of the BDCP and the volume of documents being circulated for public review to explain that complexity make review challenging even for professionals. For an average member of the public, the job is almost impossible. The public’s ability to be informed regarding this project is facilitated by having access to comments being made by others during the review process, including non-profit environmental groups and other public agencies. The

refusal to publish comment letters on the website as they come in denies the public the right of access to the comments in violation of the California Constitution.

### **The Exclusion of Environmental Information Contrary to the Opinions of the Project Proponents Violates NEPA and CEQA**

NEPA and CEQA are both “environmental full disclosure laws.” *Silva v. Lynn*, 482 F.2d 1282, 1284 (1<sup>st</sup> Cir. 1973)(NEPA); *Communities for a Better Environment v. City of Richmond*, 184 Cal.App.4th 70, 88 (2010)(CEQA). Both laws require that an agency “use its best efforts to find out all that it reasonably can” about the subject project and its environmental impacts. *Barnes v. U.S. Dept. of Transp.* 655 F.3d 1124, 1136 (9<sup>th</sup> Cir. 2011)(NEPA); *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal. 412, 428 (2007)(CEQA).

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

CEQA provides that “notwithstanding any other provision of law” the record of proceedings “shall include, but is not limited to,” written documents submitted by any person relevant to findings and all written correspondence submitted to the respondent public agency with respect to compliance with CEQA or the project. Public Resources Code § 21167.6(e)(3), (7).

The NEPA Regulations require that federal agencies make comments received under NEPA available to the public pursuant to the provisions of the Freedom of Information Act and that they shall be provided without charge to the extent practicable. 40 C.F.R. § 1506.6(f). The CEQA Regulations provide that:

Public participation is an essential part of the CEQA process. Each public agency should include provisions in its CEQA procedures for wide public involvement, formal and informal consistent with its existing activities and procedures, in order to receive and evaluate public reactions to environmental issues related to the agency’s activities. *Such procedures should include, whenever possible, making environmental information available in electronic format on the Internet, on a web site maintained or utilized by the public agency.* 14 Code Cal. Regs § 15201(emphasis added).

Instead, the BDCP proponent agencies have selectively published environmental information favorable to the project on their website while concealing what they consider to be unfavorable information that they would rather not share with the public. Making the comments available only *after* the comment period has closed makes a mockery of the promise of a fair, transparent and open process. Members of the public will have no opportunity to learn information provided by those with concerns about the BDCP in time to help them develop their own timely comments, including suggested alternatives to the project. The exclusion of comments from the website violates the environmental full disclosure purposes of both NEPA and CEQA, and the CEQA regulation requiring the posting of environmental information on the agency’s website.

## CONCLUSION

The exclusion of public comments from the BDCP website makes the claim that the BDCP encourages public participation a lie, and violates the First Amendment, California Constitution, NEPA and CEQA. This blatant viewpoint discrimination will not be tolerated. We demand that your agencies immediately commence posting all comment letters received on the BDCP website as soon as they are received, and confirm in writing that you are now doing so.

Sincerely,

/s/ E. Robert Wright

E. Robert Wright

Senior Counsel, Friends of the River

Cc:

Gina McCarthy, Administrator, U.S. EPA

Chuck Bonham, Director, California Department of Fish and Wildlife

Congressman John Garamendi, Third District, California

Congresswoman Doris Matsui, Sixth District, California

All Members, Legislature of the State of California