

**From:** Vonda K. Simmons <vksimmon@up.com>  
**Sent:** Tuesday, July 29, 2014 3:21 PM  
**To:** BDCP.comments@noaa.gov  
**Cc:** Brian W. Plummer; Robert C. Bylsma  
**Subject:** COMMENTS ON THE BDCP AND BDCP DRAFT EIR/EIS ATTACHED  
**Attachments:** 2014\_07\_29 Wulff, Ryan (Letter To) Submitting Comments on Bay Delta Conservation Plan.pdf

Good Afternoon -

Attached is correspondence dated July 29, 2014 from Brian, W. Plummer, Senior Trial Counsel, providing Union Pacific Railroad Company's comments on the Bay Delta Conservation Plan and the Draft Environmental Impact Report/Environmental Impact Statement for the BDCP. The original will follow via U.S. Mail.

Thank you.

~ Vonda

Vonda Simmons  
Secretary to Michael L. Johnson, Ast. General Solicitor and  
National Counsel Occupational Claims  
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BDCP 1680

# UNION PACIFIC RAILROAD COMPANY

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July 29, 2014

***Via U.S. Mail and Electronic Mail***  
**BDCP.comments@noaa.gov**

BDCP Comments  
Ryan Wulff  
National Marine Fisheries Service  
650 Capitol Mall, Suite 5-100  
Sacramento, CA 95814

Re: **Union Pacific Railroad Comments on BDCP and BDCP Draft EIR/EIS**

Dear Mr. Wulff:

This letter is submitted on behalf of Union Pacific Railroad Company ("Union Pacific") to provide comments on the Bay Delta Conservation Plan ("BDCP") and the Draft Environmental Impact Report/Environmental Impact Statement ("EIR/EIS") for the BDCP, which was prepared by the California Department of Water Resources, the U.S. Department of Interior, the Bureau of Reclamation, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service. Union Pacific appreciates the opportunity to comment on the BDCP and the EIR/EIS for the BDCP.

While the BDCP acknowledges that proposed construction and operations may disrupt rail service and proposes measures to address and mitigate impacts to rail operations from BDCP alternatives, the unfortunate fact is that by failing to consult with the Federal Railroad Administration, the Surface Transportation Board and rail transit stakeholders such as Union Pacific, the BDCP proponents have failed to meet their fundamental consultation obligations and properly evaluate impacts to rail freight and other operations.



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The proponents of the BDCP have also failed to take into account the controlling statutes, Constitutional protections and decisional authorities that preempt state regulatory agencies from actions that would interfere with national rail freight operations. Indeed, the State of California has itself invoked these principles of federal preemption of interference with rail service in connection with the high-speed rail project. *See Town of Atherton v. California High-Speed Rail Authority*, No. C070877 (3d. App. Dist., July 24, 2014).

In addition to failing to consult with appropriate railroad authorities and operators, the BDCP contains mistakes of fact as to Union Pacific's rail lines and freight operations, and significant and fundamental mistakes of law in proposing actions that are preempted by federal law. In addition, the BDCP's stated plans to mitigate impacts to rail service are neither lawful nor feasible. The BDCP project proponents must consult with the federal railroad authorities and Union Pacific to address the errors and unlawful railroad impacts, as more fully described below.

## **I. OVERVIEW**

### **A. Failure to Consult**

Despite the repeated EIR/EIS acknowledgements that nearly every alternative proposed in the BDCP results in potentially significant impacts to Union Pacific, it appears that the agency proponents of the BDCP failed to consult with the Federal Railroad Administration ("FRA"), the Surface Transportation Board ("STB") or Union Pacific. This is contrary to law (Cal. Pub. Res. C. § 21092.4) and the EIR/EIS's claim that "all transportation agencies directly affected by the BDCP alternatives were consulted" (EIR/EIS p. 19-37).

Union Pacific operates freight rail service in rights of way owned by Union Pacific and others, in California and twenty-two other states. The Union Pacific system includes rail lines formerly operated by Southern Pacific Transportation Company, and is part of a national freight rail network that forms a vital link in the nation's interstate and international commerce. Union Pacific's freight tracks, rail yards and other transportation facilities in California are located throughout the State and serve all of the State's major ports. *See Brief of Amicus Curiae Union Pacific Railroad Company, filed in Town of Atherton v. California High-Speed Rail Authority*, No. C070877 (3d. App. Dist., July 24, 2014)

The FRA regulates more than 760 railroads, including Union Pacific, to effect its mission of enabling the safe, reliable, and efficient movement of goods and people. To this end, the FRA regulates rail freight providers, like Union Pacific, in areas including transportation of freight, operating practices, track, and signal and train control (<http://www.fra.dot.gov/Page/P0010>). The FRA works to maintain current freight rail service and develop freight rail resources to meet the nation's growing freight transportation needs (<http://www.fra.dot.gov/Page/P0362>). The FRA has Regional Administrators – including in Sacramento, California – who are responsible for enforcing federal laws and regulations relating to rail transit safety. Similarly, the STB, which is the successor agency to the Interstate Commerce Commission, regulates railroad service issues and rail line transactions, including, but not limited to, line construction and line abandonment. 49 U.S.C. § 10501(a)(1); <http://www.stb.dot.gov/stb/about/overview.html>. Given the potentially significant impacts on Union Pacific and other providers of rail freight and passenger service that are disclosed in nearly every alternative set forth in the EIR/EIS, the FRA and STB – and Union Pacific – should have been consulted in preparation of the BDCP and the EIR/EIS. The failure to consult with the FRA and STB, as well as impacted rail transit providers including Union Pacific, contributed to the significant issues described below.

#### **B. Errors Regarding UPRR's Tracy Subdivision**

By failing to consult with impacted stakeholders such as Union Pacific, the BDCP and EIR/EIS include significant factual errors, including the repeated claim in the EIR/EIS that the Union Pacific Tracy Subdivision is not currently in service. *E.g.*, EIR/EIS p. 19-25. On the contrary, the portion of the Tracy Subdivision between Martinez and Pittsburgh is an active freight line. The remainder of the Tracy Subdivision line, although not currently being used for transport of freight in rail cars, is in active service for storage and switching of rail cars and equipment, and is being considered for restoration of active freight transportation service. In fact, the Tracy Subdivision provides necessary support and contingency routing for other active rail lines. For example, should disruption of service occur on the Union Pacific rail line between Martinez and Sacramento, freight traffic could be diverted to the Tracy Subdivision to provide service among the Port of Oakland, other Northern California rail customers and Union Pacific's vast national rail



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network east of the Sierra Nevada mountain range. This mistaken assumption about Union Pacific's operations on the Tracy Subdivision line exacerbates the significant problems with the BDCP's analysis of impacts and plans to mitigate impacts to rail operations on this line, as more fully described below.

## **II. SPECIFIC ALTERNATIVES AND MITIGATION APPROACHES**

### **A. Errors Regarding Mitigation Measures**

#### **1. Proposed Mitigation Measure TRANS-1a**

Mitigation Measure TRANS-1a references development of a traffic management plan ("TMP") in consultation with rail operators to minimize, among other things, operational impacts to rail service. More specifically, the EIR/EIS envisions development and implementation of a TMP to address: (1) daily construction time windows during which construction would be limited or rail traffic would be suspended for any activities within railroad rights of way; and (2) coordination with rail operators, including Union Pacific, "to develop alternative interim transportation modes (e.g., trucks or buses) that could be used to provide freight and/or passenger service during any longer term railroad closures." *E.g.*, EIR/EIS p. 19-52 – 19-54.<sup>1</sup>

First, both the short term and long term suspension of rail traffic for construction related to the BDCP are unlawful and are not impacts that can be mitigated to less than significant. To be clear, any suspension of freight service on Union Pacific rail lines would pose significant delays and constitute a disruption of interstate commerce in violation of the U.S. Constitution and federal law. The Commerce Clause assigns to Congress the authority to "regulate commerce between the several states." U.S. Const., art. I, § 8, cl. 3. For more than a century, Congress has used its Commerce Clause powers to exercise broad regulatory authority over railroads. *City of Auburn v. U.S. Government*, 154 F.3d 1025, 1029, 1033 (9th Cir. 1998); *People v. Burlington Northern Santa Fe R.R.*, 209 Cal. App. 4th 1513 (1st Dist. 2012). In 1995, Congress enacted the Interstate Commerce Commission

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<sup>1</sup> Mitigation Measure TRANS-1a is repeatedly identified in the EIR/EIS as the means of mitigating numerous additional impacts on rail transportation associated with the various BDCP proposed alternatives. Union Pacific's comment here on Mitigation Measure TRANS-1a applies to each and every reference to Mitigation Measure TRANS-1a in the EIR/EIS.

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Termination Act ("ICCTA"),<sup>2</sup> which broadly preempts all state action that "interferes with or frustrates railroad operations, transportation-related activities, or interstate commerce." Am. Jur. 2d § 184.

To be specific, the ICCTA expressly preempts any state or local regulation of matters that fall under the STB's exclusive jurisdiction, such as the construction, operation, and abandonment of rail lines, and railroad rates and service. 49 U.S.C. § 10501(b); *City of Auburn v. U.S. Government*, 154 F.3d at 1030-31; *Union Pacific R. Co. v. Chicago Transit Authority*, 647 F.3d 675 (7th Cir. 2011); *Adrian & Blissfield R. Co. v. Village of Blissfield*, 550 F.3d 533 (6th Cir. 2008); *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321 (5th Cir. 2008); *Town of Atherton v. California High-Speed Rail Authority*, No. C070877 (3d. App. Dist., July 24, 2014), slip op. at p. 12 ("The STB has exclusive jurisdiction over the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities..."). As the Court acknowledged in *Town of Atherton*, it "is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations." *Id.* That is, Congress did not intend for the states to have any role in the regulation of railroads. See *Town of Atherton*, slip op. at p. 15 (citing *City of Auburn*, 154 F.3d at 1031).

In addition, the ICCTA preempts state or local actions that would have the effect of preventing or unreasonably interfering with railroad transportation; in enacting the ICCTA, Congress was concerned about state and local regulations that might burden rail transportation. *Town of Atherton*, slip op. at p. 14. So the "ICCTA completely preempts state laws (and remedies based on such laws) that directly attempt to manage or govern a railroad's decisions in the economic realm." *Id.* And there is no distinction between economic and environmental regulations. "For if local authorities have the ability to impose 'environmental' permitting regulations on the railroad, such power will in fact amount to 'economic regulation' if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line." *Town of Atherton*, slip op. at p. 15 (citing *City of Auburn*, 154 F.3d at 1031).

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<sup>2</sup> Among other things, the ICCTA abolished the Interstate Commerce Commission, created the Surface Transportation Board, and granted the Board jurisdiction to regulate rail transportation in the United States. 49 U.S.C. § 10501(a)(1).

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In sum, state and local governments may not unreasonably burden interstate commerce or impede or restrict a railroad's ability to conduct its operation. See, e.g., *Elam v. Kansas City Southern Ry. Co.*, 635 F.3d 796 (5th Cir. 2011); *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 593 F. Supp. 2d 29 (D.D.C. 2008), aff'd, 602 F.3d 444 (D.C. Cir. 2010); *Association of American Railroads v. South Coast Air Quality Management Dist.*, 622 F.3d 1094, 1097-98. (9th Cir. 2010). Thus, the BDCP project proponents' plans involving short term and long term disruptions of rail service are unlawful and preempted, and there are no mitigation measures that can reduce or minimize the impacts of these disruptions, much less render such disruptions lawful.

Second, the mitigation measures suggested by the BDCP to minimize impacts from short term and long term disruptions of rail service are both unlawful and ineffective. As for impacts from construction within a railroad right of way, there are no mitigation measures that can reduce such impacts. Construction within a railroad right of way poses numerous safety challenges and risks that cannot simply be mitigated by time windows for BDCP-related construction activities or railroad operational windows (which are unlawful, as explained above). As discussed at length herein, numerous statutes, rules and standards apply to manage railroad safety, and the risks and dangers associated with BDCP-related construction activities proceeding within a railroad right of way cannot be easily or simply mitigated – and certainly not with unlawful railroad operational windows. Finally, the assumption that the impacts from disruptions to rail operations can be mitigated to less than significant with interim transportation modes such as “trucks or buses” to provide substitute freight service for “longer term railroad closures” is fundamentally mistaken. As discussed above, any interruption to freight rail service constitutes an unlawful disruption to interstate commerce in violation of the U.S. Constitution and federal law. Furthermore, given the enormous variety of freight that rail traffic transports, it is entirely infeasible, if not an unlawful violation of Federal law and numerous safety standards and regulations, to transfer freight from rail cars to trucks to address long-term suspension of freight rail operations.

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**B. Errors Regarding Impacts from BDCP Alternatives**

**1. Proposed Alternative 1A**

**a. Impact TRANS-5: Disruption of Rail Traffic During Construction**

The BDCP agency proponents are mistaken in claiming that proposed construction activities under the BDCP and EIR/EIS would be “unlikely to disrupt rail service” because the UPRR Tracy Subdivision is not currently in service. *E.g.*, EIR/EIS p. 19-72.<sup>3</sup> As noted above, the Tracy Subdivision between Martinez and Pittsburgh is an active freight line. Furthermore, the remainder of the Tracy Subdivision line, although not currently being used for transport of freight in rail cars, is in active service for storage and switching of rail cars and equipment, and is being considered for restoration of active freight transportation service. Furthermore, the Tracy Subdivision provides necessary freight routing options and must be available for such uses should a major disruption occur on other Northern California freight lines operated by Union Pacific.

Thus, Union Pacific is currently actively using for freight transportation services a major portion of the line, and is using the additional portions of the Tracy Subdivision line for rail management operations and contingency plans, such that construction activities associated with the BDCP and EIR/EIS would significantly disrupt rail service on the Tracy Subdivision line. The impacts to rail traffic would not be “minimal to non-existent” (EIR/EIS p. 19-72).<sup>4</sup>

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<sup>3</sup> The potential disruption of rail traffic during construction discussed in Alternative 1A Impact TRANS-5 is repeatedly identified in the EIR/EIS as the same potential for disruption of rail traffic during construction associated with the various other BDCP alternatives. Union Pacific’s comment here on Proposed Alternative 1A Impact TRANS-5 applies to each and every reference to Proposed Alternative 1A Impact TRANS-5 in the EIR/EIS.

<sup>4</sup> Indeed, the BDCP and EIR/EIS contain numerous, repeated references to the mistaken assumption that the UPRR Tracy Subdivision is not currently in service. Union Pacific’s comment on this issue applies to all such repeated allegations in the BDCP and EIR/EIS.

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In addition, for the reasons discussed above (Section II.A.1), implementation of Mitigation Measure TRANS-1a will not manage or mitigate these impacts.

**b. Impact TRANS-9: Permanent Alteration of Transportation Patterns During O&M**

The BDCP project proponents conclusively assume that impacts to rail operations from permanent alterations to transportation patterns would be minimal because BDCP project components “would be constructed as necessary to provide connectivity across canals (either bridges or siphons) for active railroads to cross without disruption” (EIR/EIS p. 19-77).<sup>5</sup> This assumption vastly underestimates and understates the complexities in railroad design and safety – not to mention the vast network of laws, regulations and standards that apply to the construction and design of rail track. Designing, constructing, operating and transporting freight rail across, over, through or around bridges, canals, siphons, etc. is not an impact that can be easily mitigated or minimized. Furthermore, as discussed above in Section II.A.1, the BDCP project proponents are preempted from demanding such re-routing of rail lines.

**2. Proposed Alternative 4**

**a. Impact TRANS-1: Increased Construction Vehicle Trips Resulting in Unacceptable LOS Conditions**

Here, the BDCP project proponents offer that delays and congestion may be created “during temporary realignment of Byron Highway/South Pacific Railroad, which is needed to construct the siphon connecting the new approach canal and Jones PP approach canal.” EIR/EIS p. 19-164; *see also* similar references at EIR/EIS p. 19-183. These references to realigning “South Pacific Railroad” are impermissibly vague and so lacking in description and clarity that Union Pacific’s only recourse is to note that these references must be more fully described and explained so as to enable meaningful response and comment.

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<sup>5</sup> The permanent alteration of transportation patterns during O&M discussed in Alternative 1A Impact TRANS-9 is repeatedly identified in the EIR/EIS as the same potential for alteration of transportation patterns during O&M associated with the various other BDCP alternatives. Likewise, even outside of reference to Alternative 1A Impact TRANS-9, the claim that project components such as bridges, siphons, conveyances, intakes and forebays would be constructed as necessary to provide rail traffic connectivity and continuity after construction to address permanent alterations of transport patterns during O&M is repeatedly alleged in the EIR/EIS. Union Pacific’s comment here applies to each and every reference to Proposed Alternative 1A Impact TRANS-9 in the EIR/EIS, and each and every claim that project components will be constructed as necessary to address rail continuity and connectivity in the EIR/EIS.

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Union Pacific appreciates this opportunity to present these points, authorities and corrections. We respectfully request that the BDCP proponents consider these comments, consult with the FRA, the STB and Union Pacific, and revise the BDCP and the EIR/EIS as necessary to avoid any disruption of Union Pacific rail operations and freight service.

Very truly yours,



BRIAN W. PLUMMER

BWP:vs  
Attachments

cc: Robert C. Bylsma  
Sr. Regional Environmental Counsel  
Union Pacific Railroad Company

**From:** Patrick Porgans <porgansinc@sbcglobal.net>  
**Sent:** Tuesday, July 29, 2014 2:55 PM  
**To:** BDCP.Comments@noaa.gov; pp@planetarysolutionaries.org  
**Subject:** Comments on BDCP and Draft EIR/EIS  
**Attachments:** BDCPpubliccomments.pdf

Ryan,

FYI: Comments attached. Please confirm receipt of email and assurance that the comments will be posted. If you have any questions, you can reach me by telephone (916) 833-8734 or by email. Thank you.

Patrick

PATRICK PORGANS & ASSOCIATES



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Tuesday, 29 July 2014

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

BDCP Comments

Ryan Wulff, NMFS

650 Capitol Mall, Suite 5-100

Sacramento, CA 95814

**Public Comments:** Submitted by *Patrick Porgans & Associates (P/A)* on behalf of *Planetary Solutionaries (PS)*, a nonprofit org.

**Re:** "UPDATED: Draft Bay Delta Conservation Plan (BDCP) and associated Draft Environmental Impact Report/Environmental Impact Statement (EIR/EIS).

Dear Sir:

Please enter Porgans & Associates and Planetary Solutionaries comments into the record. Also, we would appreciate confirmation that you have received this email communication. Thank you.

Sincerely,

Patrick Porgans, Solutionist

cc: Interested parties



**Public Comments:** Submitted by *Patrick Porgans & Associates (P/A)* on behalf of *Planetary Solutionaries (PS)*, a nonprofit org.

**Re: "UPDATED: Draft Bay Delta Conservation Plan (BDCP) and associated Draft Environmental Impact Report/Environmental Impact Statement (EIR/EIS).**

Neither time nor resources permit detailed comments pertinent to the contents of the 20,000-page draft BDCP and draft EIR/EIS, to do so could be construed as giving the report and the premise upon which it is being promoted a relative degree of credence; that is not the case. Rather, P/A and PS focus is on the "BIG Picture" to address the concept of the plan and the historical track-record of government's repetitive deception as to the "real cost" of water projects, and its failures to protect the Sacramento-San Joaquin Delta and the San Francisco Bay Estuary over the course of the last century, and for its success in the destruction of other invaluable delta estuaries. Therefore, we commence by referencing BDCP's lead-off quotations, which are the embodiment of a myriad of false assurances preface upon preconceived misconceptions espoused by the very government entities responsible for the existing and deplorable conditions of the Bay-Delta Estuary. Anyone with even the slightest clue of what has been going on within that ecosystem knows that history has shown, and public records attest, the Bay-Delta Estuary has been the victim of a litany of government broken promises, which have led to ecological collapse. Albeit, to place any level of confidence in the consortium of federal and state agencies, bureaus, boards, or commission, engaged in the train-wreck-in-the-making Delta Vision, would be delusory.

*"The BDCP is a comprehensive conservation strategy aimed at protecting dozens of species of fish and wildlife, while permitting the reliable operation of California's two biggest water delivery projects.*

*Why BDCP?*

*Securing California Water Supplies - Restoring the Sacramento-San Joaquin Delta Ecosystem*

*Addressing Climate Change - Planning for the Future"<sup>1</sup>*

**Comment:** State and federal officials have had more than a half-of-century, and expended tens-of-billions of public funds in a failed attempt to protect and restore the Bay-Delta Estuary and to ensure the reliability of the State's water supply.

**1957- The California Water Plan.** *"California is presently faced with problems of a highly critical nature --- the need for further control, protection, conservation and distribution of her most vital resource---water... Unless corrective action is taken---and taken immediately---the consequences may be disastrous."*<sup>2</sup> Source: Department of Water Resources.

**2009- Gov. Schwarzenegger,** *"California's Water: A Crisis We Can't Afford to Ignore."* However, as I have already said, when a crisis is at its worst the opportunity to reform it is at its greatest and this is why we had a good shot this time, Association of California Water Agencies."<sup>3</sup>

**2010-Fifty-three years and an estimated \$50 billion later --** *"Right now we have the most unreliable water system we ever had in California..."*<sup>4</sup> Source: Lester Snow, Director, Department of Water Resources.

**2012 - Gov. Jerry Brown's comment on the BDCP** *"I want to get "s\*\*t done."*<sup>5</sup>

**Comment:** More aptly stated; the BDCP is a comprehensive strategy which if implemented would be the final coup de gras for the last largest remaining ecosystem of its nature on the West Coast of the Americas. Keeping in mind, its predecessor, the Colorado River Delta fell prey to "Manifest Destiny," which included expansion of the West and the Bureau of Reclamation's conquest and damming of the Colorado River Basin and in so doing destroy one of the largest Delta estuaries in the world.

<sup>1</sup> <http://www.baydeltaconservationplan.com/Home.aspx>

<sup>2</sup> Department of Water Resources, *The California Water Plan*, Bulletin No. 3, Foreword, May 1957, p. v.

<sup>3</sup> Office of the Governor, *Governor's Remark Regarding Water Conservation & Rebuilding CA's Water System*, Guest Speaker At the California Association of California Water Agencies, 12 Dec 2009, p. 2-4.

<sup>4</sup> *Testimony of Lester A. Snow, Director*, California Department of Water Resources, Presented to Little Hoover Commission, Hearing on State Water Governance, 25 June 2009, p. 4.

<sup>5</sup> <http://blogs.kqed.org/climatewatch/2012/07/25/combatants-in-new-ca-water-war-dig-in/>

*Until the early 20<sup>th</sup> Century the Colorado River ran free from its headwaters in the Rocky Mountains of Colorado southwest into Mexico, where it flowed into the Gulf of California. Significant quantities of nourishing silt from throughout the Colorado River Basin were carried downstream, creating the vast Colorado River Delta.*

*Prior to the construction of major dams along its route, the Colorado River fed one of the largest desert estuaries in the world. Spread across the northernmost end of the Gulf of California, the Colorado River delta's vast riparian, freshwater, brackish, and tidal wetlands once covered 7,810 km<sup>2</sup> (1,930,000 acres) and supported a large population of plant, bird, and marine life. Because most of the river's flow reached the delta at that time, its freshwater, silt, and nutrients helped create and sustain a complex system of estuarial wetlands that provided feeding and nesting grounds for birds, spawning habitat for fish and marine mammals.*

*Today, conditions in the delta have changed. ... The construction of Hoover Dam in the 1930s marked the beginning of the modern era for the Colorado River Delta. ... The loss of freshwater flows to the delta over the twentieth century has reduced delta wetlands to about 5 percent of their original extent, and nonnative species have compromised the ecological health of much of what remains.<sup>6</sup>*

**Comment:** The "management and operation" of two of the California's largest water projects, the State Water Project (SWP) and the federal Central Valley Project (CVP), are the primary factors contributing to the precipitous decline and demise of anadromous and pelagic species dependent on the ecological sustainability of the San Francisco Bay and Sacramento-San Joaquin Delta Estuary.

Collectively, the California Department of Water Resources (DWR) delegated with the "responsibility" to operate and manage the SWP, the federal Bureau of Reclamation "responsible" for the operation of the CVP, and the State Water Resources Control Board (SWRCB), entrusted with the authority for permitting the use of the distribution of SWP and CVP water are at fault for California's government-induced water crisis effecting the Bay-Delta Estuary.

The BDCP is an extenuation of the underfinanced and contractually overcommitted SWP, which was sold to the public in 1960 as a project that "would pay-for-itself"; i.e., the recipients of the water and power would pay. P/A completed a series of fact-finding reports, forensic accounting of the SWP financing and repayment obligations, which served as the basis for a series of Senate hearings that substantiated the fact that the SWP has not, nor will it ever pay for itself as promised. Furthermore, the facts revealed that although DWR officials and Governor Edmund "Pat" Brown, Sr. assured the public the SWP would cost \$1.75 billion that was never true, which former Governor Ronald Reagan acknowledge during his term in office. The capital cost on the SWP has exceeded \$6.5 billion, and there is still about \$350 million in outstanding debt on the initial \$1.75 billion. Although there is no definitive amount as to what it will cost to "complete" the SWP, estimates exceed \$50 billion (includes principal and interest). Then, as is now, the government misinformed the public of the real cost of the SWP. (Refer to Attachment A for an overview of SWP financial and contractual shortcomings that have led up to the BDCP.)

**Federal agencies reviewing draft for proposal to re-plumb the Sacramento-San Joaquin Delta call it 'insufficient,' and 'biased' and 'confusing.'**

*In what would be the biggest water supply project constructed in California in half a century, the state is proposing to build a large diversion point on the Sacramento River in the north delta and send the water through two 35-mile tunnels to aqueducts serving the San Joaquin Valley and Southern California.*

*By adding the diversion point and restoring more than 100,000 acres of delta habitat, the south-of-the-delta urban and agricultural water contractors who have promised to pay for much of the project are hoping to get relief from environmental restrictions on their deliveries.*

*The project, estimated to cost about \$24 billion, must pass muster with federal fishery agencies that oversee endangered species protections for migrating salmon and the delta's imperiled native fish.<sup>7</sup>*

<sup>6</sup> [http://en.wikipedia.org/wiki/Colorado\\_River\\_Delta](http://en.wikipedia.org/wiki/Colorado_River_Delta)

<sup>7</sup> Bettina Boxall, *Los Angeles Times*, **Federal agencies reviewing draft for proposal to re-plumb the Sacramento-San Joaquin Delta call it 'insufficient' and 'biased,'** July 18, 2013.

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## 10. Who Will be Financially Liable for Restoration Costs, Capital and, O&M?<sup>8</sup>

*In order for BDCP to receive permits as a Habitat Conservation Plan<sup>9</sup> and a Natural Communities Conservation Plan<sup>10</sup> Federal and State laws require evidence that there is assured funding for the habitat restoration component of BDCP. BDCP is assuming that Federal and State taxpayers will pay just under \$4 billion for the capital costs of purchasing and restoring upwards of 145,000 acres of land.<sup>11</sup>*

*Department of Water Resources Director Cowin described the estimated cost of the BDCP plan as \$24.5 billion, of which \$14.5 billion would be for conveyance (the tunnels). The remaining costs are for habitat and operations and maintenance costs, Cowin said.<sup>12</sup>*

**Comment:** An estimated \$6.5 billion has been spent on Delta and Delta-related habitat and wetlands improvements, and \$500 million expended on buying water for fish! Those expenditures were primarily from the issuance of General Obligation Bonds sales, which are repaid with interest from the heretofore State's deficit-ridden General Fund. In addition, vast expenditures of public funds were used in government's failed attempt to double anadromous fish populations that migrate through the Bay-Delta Estuary. Fish populations are worst now than at any other time in history. Expending another \$10 billion on habitat improvement and taking 145,000 acres of Delta land out of production is unjustifiable. It is estimated that government already has more than 100,000 acres of Delta lands in its possession. SWP and CVP will benefit from the acquisition of those lands, as it will free up hundreds-of-thousands of acre-feet of water when those lands are no longer irrigated.

The 35-mile twin tunnels are essentially a prototype of the Mono-Lake-North-Sacramento-Valley-siphon system capable of re-routing up to 9000 cubic feet per second from the Sacramento River flow placing the central and southern portions of the Delta to even greater risk of salt water intrusion.

*In the latest episode in the sordid saga of the Bay Delta Conservation Plan "BDCP" to build the peripheral tunnels, two environmental groups revealed on June 20 [2104] that even an economist hired by BDCP officials won't sign off on the controversial project.*

*Dr. David Sunding, an economist on the faculty of the University of California-Berkeley and a principal with The Brattle Group, said at the recent Continuing Legal Education Water Law Conference in San Diego that "given the financial uncertainties if he were a water agency, he would not sign off" on the BDCP, according to a news release*

*"The recently released statements and documents from BDCP on the costs, and who will pay, are more of the same disingenuous statements that they have been making throughout the life of the project," said Barbara Barrigan-Parrilla, executive director of Restore the Delta (RTD). "These unsubstantiated claims show how desperate BDCP officials are to greenwash this project for the public. Documents from public record requests, and statements from their own officials and water agency officials, reveal that the project will be closer to \$67 billion in today's dollars, before cost over-runs."*

*Independent University of the Pacific economist Dr. Jeff Michael concludes that the average water ratepayer will end up paying between \$40 and \$80 per person per year.<sup>13</sup>*

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<sup>8</sup> Steve Kasower, SEACO, 11 Red Flags, <http://mavensnotebook.com/wp-content/uploads/2013/12/BDCP-Eleven-Red-Flags-2.pdf>

<sup>9</sup> Online: <http://www.fws.gov/endangered/what-we-do/hcp-overview.html>

<sup>10</sup> Online: <http://www.dfg.ca.gov/habcon/nccp/>

<sup>11</sup> Costs are cited from The Brattle Group, **Employment Impacts for Proposed bay Delta Water Conveyance facility and Habitat Restoration**, February 22, 2013, Table 3-1, page 18, online:

[http://baydeltaconservationplan.com/Libraries/Dynamic\\_Document\\_Library/Employment\\_Impacts\\_for\\_Proposed\\_BDCP\\_2-26-13.sflb.ashx](http://baydeltaconservationplan.com/Libraries/Dynamic_Document_Library/Employment_Impacts_for_Proposed_BDCP_2-26-13.sflb.ashx)

<sup>12</sup> IBID. Heather Hacking, MediaNews Group, **Final chapters of Bay Delta Conservation Plan Released**, 5/31/2013, online: [http://www.redbluffdailynews.com/ci\\_23361038/final-chapters-bay-delta-conservation-plan-released](http://www.redbluffdailynews.com/ci_23361038/final-chapters-bay-delta-conservation-plan-released)

<sup>13</sup> Dan Bacher, <http://www.calitics.com/diary/15526/even-bdcphired-economist-wouldnt-sign-off-on-browns-tunnel-plan> 6/22/2104.

## ATTACHMENT A: EXCERPTS FROM PATRICK PORGANS & ASSOCIATES WHITE PAPER: CRACKING CALIFORNIA'S WATER CODE

**TODAY'S "WATER CRISIS" GOT STARTED 50 YEARS AGO,** IN THE FORM OF A GENERAL OBLIGATION (GO) BOND MEASURE, AUTHORIZING THE FUNDING AND CONSTRUCTION OF THE CALIFORNIA STATE WATER PROJECT (SWP). UNFORTUNATELY, THE SWP, WHICH WAS MADE POSSIBLE BY AN INGENIOUS FUNDING SCHEME, HAS THREE MAJOR FLAWS: (1) OFFICIALS WILLFULLY AND KNOWINGLY MISINFORMED THE PUBLIC OF ITS TRUE COSTS, (2) CONTRACTED OUT MORE WATER THAN IT COULD PROVIDE (IN CERTAIN WATER-YEAR TYPES),<sup>ii</sup> "PAPER" WATER, A (3) IT WAS SOLD UNDER THE FALSE PRETENSE THAT IT WOULD COST \$1.75 BILLION AND WOULD "PAY-FOR-ITSELF"<sup>iii</sup> – IT NEVER HAS.<sup>iv</sup> IN ORDER TO STABILIZE DEFAULT BY SWP AGRICULTURAL CONTRACTORS, AND TO KEEP THE SWP "SOLVENT" DWR AND THE CONTRACTORS DEVISED THE 1994 MONTEREY AGREEMENT, WHICH, AMONG OTHER INGENIOUS SCHEMES. ESTABLISHED A "TRUST FUND" THAT SETS ASIDE \$10 MILLION A YEAR, BEGINNING IN 1997, FROM THE EARNED INTEREST OFF OF CALIFORNIA WATER FUND (OBTAINED FROM THE SALE OF PUBLICLY OWNED TIDELAND OIL RESERVES AND GENERAL FUND ALLOCATIONS), AND HUNDREDS OF MILLIONS OF DOLLARS OF THIS SAME MONEY WILL BE DISTRIBUTED TO SWP URBAN CONTRACTORS TO DO WHAT THEY WANT WITH THIS MONEY. *The Monterey Agreement increased the reliability of existing water supplies; providing strong financial management for the SWP; and increased water management flexibility; proving more tools for local water agencies to maximize use of existing facilities.*<sup>v</sup> (REFER TO PAGE 59, MONTEREY AGREEMENT ANOTHER BACKDOOR AGREEMENT IN THE "ERA OF TRANSPARENCY – COMPOSED BEHIND CLOSED DOORS.") [Appendix I, Exhibits 11, 12, 13 and 14.]

**Government Water Projects at the Crux of California's "Water Crisis" Inundating the State in an Era of Bonded Indebtedness:** Ironically, the SWP remains at the epicenter of the "crisis" that continues to cost Californians tens-of-billions of dollars of debt from the sale of GO Bond funds – bailouts. Since its inception, the SWP has been inundated with a series of unrelenting crises and the subject of decades of Legislative hearings in failed attempts to reconcile its inherent shortcomings.

As early as 1963 DWR recognized the SWP was going to be short of funds and resorted to issuing millions in revenue bonds. 1967: Governor Reagan's Water Task Force reported SWP had a \$300 million to \$600 million deficiency.<sup>vi</sup> [A-I, E15.]

1970: DWR appeals to Legislature for passage of Proposition 7; claimed that if it fail to pass it would cause the shutdown of SWP construction, causing a financial disaster.<sup>vii</sup> [A-I, E7 AND 16.]

1985: DWR reports agricultural contractors may not be able to pay their bills.<sup>viii</sup> [A-I, E17.]

1991: DWR exhausted SWP reserve funds to buy water to keep agricultural contractors solvent.<sup>ix</sup> [A-I, E18.]

1993: DWR resorted to Legislature to pass urgency law to keep SWP financially afloat, issues \$150 million in commercial paper notes, via Goldman Sachs, to buy water.<sup>x</sup> [A-I, E19.]

2000 through 2006: more than \$19.6 billion in GO water and water-related bonds were approved,<sup>xi</sup> [A-I, E20.] a significant portion had been used to keep the SWP afloat - Déjà vu. The interest payments on those GO bonds cost taxpayers another \$10 billion. In November 2014 voters may be asked to approve yet another \$11 billion GO bond Act bailout, being promoted under the guise it will ensure the State's water supply reliability, shore up its aging infrastructure, and restore the Bay-Delta Estuary. However, according to the Governor and other officials, those funds are only a "down Payment" or leverage for yet another \$30 to \$40 billion to "move forward" with other components of the project!<sup>xii</sup> [A-I, E21.] "Every time we've had a problem in the financing of the State Water Project, we've tried to take action to solve the problem,..."<sup>xiii</sup> [A-I, E22.]

It is apparent that if this bailout cycle is not reconciled, it will continue to add to the State's ever-increasing debt load, depletion of General Fund revenues, increase cost for State's borrowing, adversely effecting its credit rating, which was cut to the lowest of all 50 states,<sup>xiv</sup> [A-I, E23.] and jeopardized the Golden State's once promising economic prosperity as eighth-biggest economy<sup>xv</sup> in the world.<sup>xvi</sup> [A-I, E24 and 25.] Because of California's persistent fiscal problem, bond rating agencies assigned it the lowest rating; a few notches above junk bonds.<sup>xvii</sup>

## ENDNOTES

- <sup>i</sup> Porgans & Associates source data on the history of the California State Water Project, 1981..
- <sup>ii</sup> DWR, *Management of the California State Water Project, Bulletin 132-05, Dec. Executive Summary*, 2006, xxix.
- <sup>iii</sup> Rita Schmidt Sudman, *Western Water, State Water Project Cost Sharing*, November/December 1983, pp. 4, 5, and 6.
- <sup>iv</sup> Department of Water Resources, *California State Water Project, Volume 1, History, Planning, and Early Progress, Bulletin Number 200*, November 1974, p. 25.
- <sup>v</sup> Department of Water Resources, *Bulletin 132-02, Management of the California State Water Project, Monterey Agreement*, Jan 2004, Chapter 9, p. 107.
- <sup>vi</sup> California Senate Committee on Water Resources, State *Water Project Financing, Progress Report to the Legislature, 1968, Regular Session, Report No. 2*, p. 42.
- <sup>vii</sup> DWR, *California State Water Project, Bulletin 132-71*, June 1971, p. 3.
- <sup>viii</sup> DWR, *Management of the California State Water Project, Bulletin 132-86*, p. 52.\*
- <sup>ix</sup> DWR, *Management of the California State Water Project, Bulletin 132-92, Appendix A, June 30, 1992, Financial Report*, November 1992, p. 17.
- <sup>x</sup> *Goldman-Sachs, Commercial Paper Annual Memorandum, \$150,000,000, State of California, Department of Water Resources, Water Revenue Commercial Paper Notes, Series 1, Note Counsel, Orrick, Herrington & Sutcliffe, San Francisco, California, Co-Financial Consultants, Lehman Brothers, New York, New York, Whitefield Inc., Paulsbo, Washington, Issuing and Paying Agent, Bank of America National Trust Company, New York, New York, State Water Project data prepared by California Department of Water Resources*, 23 June 1993, p. 2.
- <sup>xi</sup> Legislative Analyst's Office, *California's Water: An LAO Primer, Chapter 4, How Do We Finance Water Projects*, Oct 2008.
- <sup>xii</sup> Office of the Governor, *Governor's Remark Regarding Water Conservation & Rebuilding CA's Water System*, Guest Speaker At the California Association of California Water Agencies, 12 Dec 2009, p. 2-4.
- <sup>xiii</sup> Patrick Porgans' Taped-recorded and Transcribed Interviews with Mr. Donald Sandison, Controller, California Department of Water Resources, 26 March 1982 and 23 April 1982.
- <sup>xiv</sup> The Los Angeles Times, *California's credit rating cut to lowest of all 50 states*, Money & Company, 2 Feb. 2009, [http://latimesblog.latimes.com/money\\_co/2009/02/California-cred.html](http://latimesblog.latimes.com/money_co/2009/02/California-cred.html)
- <sup>xv</sup> San Francisco, Reuters, Update 2-California looks into banks' role in underwriting, CDS, 30 March 2010. [www.reuters.com/article/idUSN3015057220100330?type=markeysNews](http://www.reuters.com/article/idUSN3015057220100330?type=markeysNews)
- <sup>xvi</sup> FACTS ON POLICY: *The California Economy*, Hoover Inst. Stanford University, December 16, 2008
- <sup>xvii</sup> San Francisco, Reuters, Update 2-California looks into banks' role in underwriting, CDS, 30 March 2010. [www.reuters.com/article/idUSN3015057220100330?type=markeysNews](http://www.reuters.com/article/idUSN3015057220100330?type=markeysNews)



*Making San Francisco Bay Better*

July 29, 2014

Ryan Wulff  
National Marine Fisheries Service  
650 Capitol Mall, Suite 5-100  
Sacramento, CA 95814

**SUBJECT:** Bay Delta Conservation Plan (BDCP) Draft Environmental Impact Report and Environmental Impact Statement

Dear Mr. Wulff:

Staff of the San Francisco Bay Conservation and Development Commission (BCDC) are pleased to commend the authors for BDCP's ground-breaking plan. As the first ever aquatic Habitat Conservation Plan/Natural Communities Conservation Plan (HCP/NCCP) in one of the most ecologically, legally and culturally complex areas in the world, the BDCP is an incredible first effort to craft a solution to many of the complex Bay and Delta issues.

In February 2014, Paul Helliker of the Department of Water Resources briefed BCDC Commissioners on the status of the multi-year BDCP project. In May, BCDC staff organized a panel discussion on the BDCP with Bay Area officials and experts (including Mr. Helliker) to highlight some of the concerns and questions the project raises with regard to resources found in San Francisco Bay and Suisun Marsh. Based on comments and questions during these events, the Commission's laws and policies, and staff review of the EIR/S prepared for the BDCP, staff prepared the following proposed comments on these environmental documents. On June \_\_, 2014, BCDC Commissioners considered staff's recommended comments on the BDCP EIR/S and endorsed the comments in this letter.

To be clear, BCDC is commenting on the EIR/S as a responsible agency under CEQA. Implementing any or all of the conservation measure projects located in the Suisun Marsh or San Francisco Bay envisioned by BDCP will require BCDC-issued permits or consistency determinations. BCDC's policies that apply to the BDCP are noted in the last section of this letter.

**Jurisdiction.** BCDC is responsible for granting or denying permits for any proposed fill (earth or any other substance or material, including pilings or structures placed on pilings, and floating structures moored for extended periods), extraction of materials or change in use of any water, land or structure within the Commission's jurisdiction. Generally, BCDC's jurisdiction over San Francisco Bay extends from the Golden Gate south to San Jose and northeast to the confluence of the San Joaquin and Sacramento Rivers. It includes: tidal areas up to the mean high tide, including all sloughs, and in marshlands up to five feet above mean sea level; a shoreline band consisting of territory located between the shoreline of the Bay and 100 feet landward and parallel to the shoreline; salt ponds; managed wetlands (e.g., areas diked from the Bay and managed as duck clubs); and certain waterways tributary to the Bay. The Commission can grant a permit for a project if it finds that the project is either (1) necessary to

the health, safety or welfare of the public in the entire Bay Area, or (2) is consistent with the provisions of the McAtter-Petris Act and the Suisun Marsh Preservation Act, and the San Francisco Bay Plan (Bay Plan) and the Suisun Marsh Protection Plan (Marsh Plan). The McAtter-Petris Act allows fill in the Bay for water-oriented uses in cases when there is no alternative upland location and requires that any fill that is placed in the Bay is the minimum that is necessary for the project. The McAtter-Petris Act also requires that proposed projects include the maximum feasible public access consistent with the project to the Bay and its shoreline.

Project components that extend into BCDC jurisdiction, including the Suisun Marsh, and may affect the waters and environmental resources farther downstream in San Pablo and San Francisco Bays, are subject to the BCDC policies and regulatory framework found in the McAtter-Petris Act, the Suisun Marsh Preservation Act, the Bay Plan, and the Marsh Plan where appropriate. In addition to any permits required under its state authority, BCDC must review federal actions, or federal permits and grants for actions, that affect the coastal zone pursuant to the federal Coastal Zone Management Act (CZMA), to determine their consistency with the Commission's federally-approved management program for the Bay.

**San Francisco Bay and Suisun Marsh Effects.** The EIR/S states that there would be no significant effects on San Francisco Bay. Commissioners, staff, other state agencies and members of the public raised concerns about possible project impacts west of the Delta in the Suisun Marsh and downstream in the San Francisco Bay. Some of these effects would be significant. Potential significant impacts include possible effects on salinity, sediment supply, and the consequences (intended and unintended) of various restoration programs, and their secondary impacts on Bay habitats and species. The Delta Stewardship Council's (DSC) Independent Science Board (ISB) concluded that more research and analysis is needed on areas west of the Delta to obtain a more complete picture of BDCP's cumulative effects. The ISB noted that "the hydrodynamic modeling needs to capture the entire domain of effects. The current Effects Analysis does not consider the influence of shifting timing of withdrawals on San Francisco Bay circulation patterns and ecology. This is a significant omission with ecologically important implications."

The ISB also noted that the BDCP did not evaluate areas downstream of the Delta (i.e., San Francisco Bay) even though the National Research Council (NRC) scientific review specifically stated that this area should be included. "Adequate justification for lack of consideration of impacts to San Francisco Bay was not provided ... in the document, although there are potential impacts. For example, the expected reduction in sediment supply has the potential impacts of: (1) tidal marshes in the Bay could be less resilient to sea level rise and; (2) increased water clarity in the Bay could render it more responsive to nutrient inputs." The EIR/S should better assess the potential effects on the Marsh and the Bay, identify potential impacts on salinity, sediment delivery and Bay species as potentially significant, and evaluate strategies to avoid or mitigate these effects. This analysis should establish clear standards and thresholds of significance, in consultation with scientific experts.

**Water Quality and Salinity.** Biological opinions from the National Marine Fisheries Service and the US Fish and Wildlife Service determined that habitat degradation in the Marsh for multiple sensitive species is due, in part, to reduced freshwater inflows from the Delta, yet the BDCP's analysis is lacking in this area. Current Delta fresh water outflows seem inadequate to support or recover endangered species. Studies project that the salinity in San Francisco Bay could increase by 0.30-0.45 practical salinity unit (psu) per decade due to the compounding effects of decreasing freshwater inflow and rising sea level (projected by Cloern et al. 2011 to rise approximately 4 inches per decade). Climate change will affect future Bay salinity and the restoration and conservation measures proposed in the EIR/S. Higher salinity in the Suisun

Marsh due to high diversion years would affect managed wetlands and the Bay's native species, such as the Dungeness Crab, that use the lower salinity of the Bay as a nursery. Also, waterfowl that rely on the lower salinity/freshwater of the Marsh as breeding habitat may be at risk, as higher salinity levels have been shown to be dangerous to ducklings. However, these species are not included in the BDCP's analysis.

The EIR/S states that the BDCP would be implemented using a "decision tree process, a focused form of adaptive management that will be used to determine at the start of new operations, the fall and spring outflow criteria that are required to achieve the conservation objectives of the BDCP for delta smelt and longfin smelt and to promote the water supply objectives of the BDCP. Other BDCP-covered fish species, including salmonids and sturgeon, may also be affected by outflow. Their outflow needs will also be investigated as part of the decision tree process." The EIR/S should clarify how the proposed pipelines will be managed in the long term (e.g., 50 years) given recurring droughts that require changes in future flow regimes. The BDCP should evaluate flow scenarios that provide greater freshwater flows to the Bay beyond the requirements of D1641<sup>1</sup> to recover declining fish populations. Decreased reliance on Delta freshwater diversions may become necessary to protect sensitive and threatened species. Scenario F (Alternative 8: pipeline/tunnel alignment, dual conveyance, intakes at 2, 3 & 5, with 9,000 cfs diversion) would increase Delta outflow up to 1.5 million acre-feet annually. A project alternative that provides for greater Delta outflows is likely necessary to meet the policy objectives in the *San Francisco Bay Plan* (Bay Plan) and the *Suisun Marsh Protection Plan* (Marsh Plan). Also, the EIR/S should evaluate potential impacts on non-listed Marsh and Bay species that rely on salinity levels characteristic of the Bay and the Marsh as required by current X2 standards.

**Conservation Measures.** Most Conservation Measures are discussed at a programmatic level, rather than at a project level in the EIR/S. The ISB noted that, "the difference in level of detail [of restoration project analyses] presented effectively treats the co-equal goals unequally. We are concerned that the merely programmatic analysis of habitat restoration provides too little basis for decision-making by the Delta Stewardship Council and other parties. Furthermore, the benefits of habitat restoration are assumed when a beneficial cumulative impact is concluded under NEPA or a less than significant cumulative impact is concluded under CEQA. Achieving beneficial conservation measures requires understanding limiting factors, ecosystem processes, sequencing, adaptive management responses, thresholds for certain actions, and interactions and other consequences of these actions...to describe how major uncertainties will be resolved." Also, the Effects Analysis recognizes that suspended sediment has been declining in the Sacramento River, but no analysis of the potential for corresponding increased algal blooms is addressed.

Specific locations for habitat improvements are not discussed in the restoration opportunity areas, including those in the Suisun Marsh. The EIR/S would benefit from further analysis of restoration patterns in the Marsh to determine how they affect salinity patterns in the Marsh and Delta. This may help focus the restoration efforts to specific regions of the Marsh to limit salinity intrusion. There is little discussion in the EIR/S of the effects of climate change on conservation measures. Some Conservation Measures that involve habitat restoration or enhancement should be addressed at a project level of detail in the EIR/S so that they can be implemented early in the project cycle, in timeframes consistent with Conservation Measure 1. Also, additional conservation measures may be needed to address project effects on the Marsh and the Bay, particularly those related to sediment management.

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<sup>1</sup> D1641 refers to a State Water Board water rights Decision of 2005 that set water quality (salinity) standards for various monitoring stations in the Bay and Delta and amends certain water rights by assigning responsibilities to the persons or entities holding those rights to help meet the salinity objectives.



**Sediment.** The BDCP EIR discusses a potential reduction in suspended sediment transport to the Suisun Marsh and San Francisco Bay of approximately eight to ten percent. The EIR/S does not characterize this change as a significant impact. The ISB report to the Delta Stewardship Council raises this as a significant issue. United States Geological Survey researchers have observed a steep reduction suspended sediment concentrations in the Bay and characterize San Pablo Bay as erosional. With projected sea level rise, further reduction in Bay sediment inputs should be considered significant, given Bay wetland restoration targets, current subsided diked-baylands, and the overall Bay-Delta sediment budget. Sediment settling in the new northern forebay, the relocation of flows from channels into underground pipes, new pumping regimes and proposed restoration conservation measures together and separately will alter sediment transport, delivery, and the rate of deposition downstream. Reduced suspended sediment in the Bay will exacerbate nutrient loading problems caused from the sewage treatment plants discharging into the Bay.

Construction of restoration projects, which are highly desirable in the Delta upstream of the Bay, likely will create sediment sinks, thus further reducing sediment flows to the Marsh and San Francisco Bay. The cumulative impacts analysis should consider all of these changes to the Bay sediment regime, using science-based thresholds of significance.

**Cumulative Effects.** There are several related projects that, cumulatively, could exacerbate the effects of BDCP and adversely affect the Bay and the Marsh that are not addressed in the EIR/S. These projects include, but are not limited to, dredging the Baldwin Ship Channel (between San Pablo Bay and the Port of Stockton) that may include constructing a sill in the Carquinez Strait; proposals to construct seasonal drought barriers or gates in the Delta; and, several proposed water storage projects on existing dams and reservoirs. The issue of storage should be addressed within BDCP, particularly planned projects. The EIR/S should address cumulative impacts of all relevant related projects.

#### ***BCDC's Relevant Policies and Related Agreements***

**Bay Plan Findings and Policies.** The Commission's Bay Plan recognizes the tremendous ecological value of the Bay-Delta estuary and the importance of fresh water inflows from the Delta to the survival of fish and wildlife in the Bay and Suisun Marsh. When revising the EIR/S to respond to the Commission's comments and concerns, the authors should consider these applicable findings and policies:

Bay Plan findings on Tidal Marshes and Tidal Flats state, in part, that "San Francisco Bay is a substantial part of the largest estuary along the Pacific shore of North and South America and is a natural resource of incalculable value" and that "the sheltered waters of estuaries support unique communities of plants and animals specially adapted for life in the region where rivers meet the coast."

Bay Plan findings and policies recognize the importance of fresh water inflows to the ecosystem of the Bay. Bay Plan findings on Fish, Other Aquatic Organisms and Wildlife state, in part, that "conserving fish, other aquatic organisms and wildlife depends, among other things, upon availability of ...proper fresh water inflows, temperature, salt content, water quality, and velocity of the water." Fresh Water Inflow Finding A states that "[f]resh water flowing into the Bay, most of which is from the Delta, dilutes the salt water of the ocean flowing into the Bay through the Golden Gate....This delicate relationship between fresh and salt water helps to determine the ability of the Bay to support a variety of aquatic life and wildlife in and around the Bay."

Bay Plan findings and policies also recognize the impact of pollutants passing through the Delta into the Bay. Bay Plan findings on Water Quality state, in part, that "water from approximately 40 percent of California drains into San Francisco Bay carrying with it pollutants from point and nonpoint sources" and that "harmful effects of pollutants reaching the Bay can be reduced by maximizing the Bay's capacity to assimilate, disperse, and flush pollutants by maintaining and increasing...the volume and circulation of water flowing in and out with the tides and in fresh water inflow."

The Bay Plan's Fresh Water Inflow policies require limits on water diversions, preservation of the Suisun Marsh, and cooperation with the State Water Board to ensure adequate fresh water inflow. Policy 1 states that "[d]iversions of fresh water should not reduce the inflow into the Bay to the point of damaging the oxygen content of the Bay, the flushing of the Bay, or the ability of the Bay to support existing wildlife." Policy 2 states that "[h]igh priority should be given to the preservation of Suisun Marsh through adequate protective measures, including maintenance of fresh water inflows." Finally, Policy 3 states, in part, that the "Bay Commission should cooperate with the State Board and others to ensure that adequate fresh water inflows to protect the Bay are made available."

**Suisun Marsh Preservation Act.** The Nejedly-Bagley-Z'berg Suisun Marsh Preservation Act of 1974 directed BCDC and the California Department of Fish and Game (CDFG) to develop the Suisun Marsh Protection Plan, which was codified into law as the Suisun Marsh Preservation Act of 1977. The Act recognizes the important role of the Suisun Marsh in providing wintering habitat for waterfowl using the Pacific Flyway and critical habitat for other wildlife, including rare and endangered species.

The Suisun Marsh, where salt and fresh water meet and mix, contains approximately 85,000 acres of tidal marsh, managed wetlands, and waterways in southern Solano County. It is an important part of the Bay-Delta ecosystem and requires adequate fresh water inflows to maintain its fish and wildlife habitat.

Section 29003 of the Act finds that continued wildlife use of Suisun Marsh requires, among other things, "[p]rovision for future supplemental water supplies and related facilities to assure that adequate water quality will be achieved within the wetland areas."

Section 29010 finds that "[w]ater quality in the marsh is dependent on the salinity of the water in sloughs of the marsh, which depends in turn on the amount of fresh water flowing in from the Delta."

**Suisun Marsh Protection Plan.** The Plan recognizes that Suisun Marsh contains "the unique diversity of fish and wildlife habitats characteristic of a brackish marsh." The Plan emphasizes the need to maintain adequate fresh water inflows to preserve this unique habitat.

Water Supply and Quality Finding 2 of the Plan states, in part, that "[t]he most important source of fresh water inflow to the Suisun Marsh is the outflow from the Sacramento-San Joaquin River Delta."

Finding 9 states, in part, that "[t]he State Water Resources Control Board in its Delta Decision, and the Environmental Protection Agency and the Regional Water Quality Control Board in the Water Quality Control Plan for the San Francisco Bay Basin, have set water and soil salinity standards for the Marsh."

Finding 10 states, in part, that "[a]ssuring that sufficient quantities of fresh water will be available to the Marsh to meet the standards and marsh management requirements is as important as determining appropriate water quality standards for the Marsh."

Water Supply and Quality Policy 1 states, in part, "there should be no increase in diversions by State or Federal Governments that would cause violations of existing Delta Decision or Basin Plan standards."

Policy 2 states, "Adequate supplies of fresh water are essential to the maintenance of water quality in the Suisun Marsh. Therefore, the State should have the authority to require the Bureau of Reclamation to comply with State and Federal water quality standards for the Delta and the Marsh. This should be accomplished through Federal legislation if necessary."

Policy 4 states, in part, that "[w]ater quality standards in the Marsh should be met by maintaining adequate inflows from the Delta."

Finally, BCDC staff want to thank you again for providing the Commission with such tremendously helpful opportunities to learn about BDCP. If you have any questions about the comments in this letter or any other matter, please do not hesitate to contact me at (415) 352-3653 (lgoldzband@bcdc.ca.gov), or Joe LaClair, Chief Planner at (415) 352-3656 (joel@bcdc.ca.gov).

Sincerely,



Lawrence J. Goldzband  
Executive Director

cc: Commissioners and Alternates  
Paul Helliker, Department of Water Resources  
Carl Wilcox, Department of Fish and Wildlife  
Dan Ray, Delta Stewardship Council

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**From:** Joe LaClair <joel@bcdca.gov>  
**Sent:** Tuesday, July 29, 2014 2:21 PM  
**To:** BDCP.comments@noaa.gov  
**Cc:** Dan Ray; Wilcox, Carl@Wildlife; Helliker, Paul@DWR; Larry Goldzband; Cody Aichele  
**Subject:** BCDC Comments on BDCP EIR/S  
**Attachments:** 7.29.14BDCPCommentsRD.pdf

Ryan Wulff, National Marine Fisheries Service

Attached are the comments of the San Francisco Bay Conservation and Development Commission on the Bay Delta Conservation Plan EIR/S. Thank you for the opportunity to comment.

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# *Tehama-Colusa Canal Authority*

P.O. BOX 1025 • 5513 HWY 162, WILLOWS, CA 95988 • Phone: (530) 934-2125 • Fax: (530) 934-2355

July 29, 2014

**Via U.S. Mail and E-mail (BDCP.Comments@noaa.gov)**

BDCP Comments  
Ryan Wulff, NMFS  
650 Capitol Mall, Suite 5-100  
Sacramento, CA 95814

**Subject:** Comments of the Tehama-Colusa Canal Authority on the Draft Bay-Delta  
Conservation Plan and EIR/EIS

Dear Mr. Wulff:

The Tehama-Colusa Canal Authority ("TCCA") is a joint exercise of powers agency comprised of 18 water districts and companies that receive water from the Central Valley Project ("CVP"). The TCCA service area is made up of 150,000 acres of irrigated farmland located along the west side of the Sacramento Valley, and includes the counties of Colusa, Glenn, Tehama and Yolo. TCCA was formed in order to operate and maintain the facilities necessary to supply water to the federal contractors within the Sacramento Canals Unit of the CVP and to preserve our rights to water originating in the Sacramento Valley.

TCCA has reviewed the Draft Bay Delta Conservation Plan ("BDCP" or "Plan") and the accompanying Draft Environmental Impact Report/Environmental Impact Statement ("EIR/EIS") that were released for public review last December. Because the BDCP states that the Plan and supporting documents are incorporated into the EIR/EIS, our comments on the BDCP should also be considered comments on the EIR/EIS. Further, these comments also address the more recently released BDCP Implementing Agreement.

TCCA hereby incorporates by reference and joins the comments on the BDCP Plan, the Implementing Agreement, and the EIR/EIS submitted by the North State Water Alliance (including all attachments to those comments) dated July 28, 2014 as though fully stated herein.

TCCA would like to take this opportunity to underscore several comments made in the North State Water Alliance comments, which are of particular importance for TCCA.

First, TCCA is gravely concerned that the proposed operations of BDCP Conservation Measure 1, the tunnels, will have the impact of draining north of Delta reservoirs on a much more frequent basis than at present, thereby diminishing the water supply reliability for both Sacramento River Settlement Contractors and TCCA, as discussed and demonstrated at length in the MBK report. Water users in the Sacramento Valley are protected by California's water right priorities and the "area of origin" statutes. The BDCP and the accompanying EIR/EIS are filled with statements to the effect that the BDCP will not interfere with these upstream uses of water. However, the proposed operations in the BDCP documents and an examination of the underlying modeling clearly refute these assertions. Under the current document, TCCA and the SRSCs could potentially be severely impacted by the operation of the tunnels. As such, TCCA seeks a simple and clear statement that the final BDCP will not cause the state and federal projects to operate in a way that *impacts* TCCA's present water supply reliability, and that does not have an adverse effect on fish and wildlife resources in the Sacramento Valley. TCCA requests the BDCP proponents amend the modeling by using the best available science, and work to redefine operations of the BDCP to address these shortcomings and comport with legal requirements to avoid impacts to upstream water users. Absent these assurances, TCCA cannot support the BDCP as currently formulated because of the clear impacts it would have on waters supply reliability for upstream areas. Further, as currently formulated, the BDCP will be unable to obtain the State Water Resources Control Board approvals for the changes in point of diversion necessary to implement the BDCP due to these concerns.

Second, as noted in the North State Water Alliance comments, in order for the federal regulatory agencies to approve the proposed Habitat Conservation Plan, there must be an enforceable set of funding commitments. To date, there is no such approved funding plan. Instead, it vaguely describes a funding plan comprised of future bond proposals, state and federal water contractors contributions (without defining the exact nature and amounts of those commitments), and unidentified state and federal funding and grants. Indeed, last week there were news stories across California indicating the State Water Contractors were considering financing their share of the BDCP through increases in property tax rates, thereby evading the constitutional limitations of Proposition 13 and Proposition 218. Until such a plan is developed and approved through the normal legal means, the BDCP is fatally flawed and should not proceed.

Further, any financing plan must adhere to the principle of "beneficiary pays." At present, the BDCP alleges it has commitments from State and Federal Water Contractors to pay for the project. All of TCCA's member agencies are federal water contractors, none of whom need or will benefit from the tunnels, and in fact, are likely to be negatively impacted by the tunnels proposal as it is currently formulated. As such, TCCA will not voluntarily contribute any funding to the BDCP, and objects to any effort to attempt to charge TCCA members for these efforts to implement the BDCP (it should be noted, federal law makes it very clear that an HCP is strictly a voluntary activity). Reclamation has indicated that the costs associated with providing water to south of Delta refuges would be treated as an operations and maintenance cost, and so would be chargeable to all federal contractors on annual basis. TCCA objects strongly to this proposed charge, on the ground that the proposed tunnels (and their associated capital and operations and maintenance costs) are not needed in order to move water to south of

Delta refuges. If it is Reclamation's desire to move such water through the proposed tunnels, then that charge is properly paid for by the United States, not federal water contractors.

Third, the centerpiece of the BDCP is the effort to provide regulatory assurances to the Department of Water Resources (and, by extension, to the State Water Contractors) under section 10 of the federal Endangered Species Act ("ESA"). However, section 10 of the federal ESA does not extend these types of protections to Reclamation. Instead, section 7 of the federal ESA imposes a continuing obligation on Reclamation to consult with the federal regulatory agencies to take actions that may be needed to conserve threatened and endangered species.

With this legal framework in mind, the BDCP lacks a clear demonstration how the regulatory assurances contemplated in the BDCP can protect "potentially regulated entities" without adversely affecting upstream stakeholders. Specifically, if the conservation measures identified in the BDCP prove inadequate in the eyes of either the National Marine Fisheries Service or the U.S. Fish & Wildlife Service, Reclamation will be legally obliged to re-engage in consultation with either of these agencies in order to take appropriate actions to conserve listed species. If either agency determines that additional conservation measures are appropriate, then Reclamation (and its contractors like TCCA's member agencies) will be required to implement (or alternatively, be potentially impacted by) those conservation measures or risk the loss of water supplies, fines and penalties for unauthorized take of listed species. By contrast, the Department of Water Resources and its contractors will be able to rely on the assurances contained in the Implementing Agreement.

Such a result – in which the "potentially regulated entities" are protected from additional mitigation obligations, but upstream stakeholders like TCCA and its members, are forced to meet those obligations – is unfair and violates the repeated claim that there will be no "redirected impacts" from the BDCP. Moreover, this result would also violate the provisions of the Coordinated Operations Agreement that require regulatory obligations to be shared among the state and federal project contractors. TCCA has voiced this concern to USBR and the BDCP proponents on countless occasions over the past few years during the development of the BDCP, but we have never received a simple and clear explanation of how the BDCP can evade the obligations imposed on Reclamation by section 7 of the federal Endangered Species Act. We have repeatedly heard from USBR that these are valid questions and concerns that are being investigated and that a response would be forthcoming, yet still no answers have been provided. With the release of the subject BDCP documents that are the subject of these comments, still no information or adequate response has been provided that addresses these important issues. TCCA requests that the final BDCP contain such an explanation.

Fourth, TCCA is concerned about the governance structure proposed for the BDCP. If the twin tunnels are ever constructed, there will be strong incentives from south of Delta interests to recoup their investment by moving as much water across the Delta as possible. In order to ensure that the BDCP does not literally drain Northern California, the BDCP governance structure must be revised to provide significant and meaningful representation for the Northern California stakeholders in regard to the operations of the BDCP.

Despite the concerns expressed here, TCCA does wish to highlight that we continue to be committed to working collaboratively with all statewide water interests in effort to find balanced

BUEP 1083

and equitable solutions for the Delta. We have made this sentiment clear throughout the BDCP process, to no avail. Despite voluminous materials being released, an assortment of public meetings being scheduled, to date, still no real collaborative process has yet to take place. As such, the resulting BDCP process has resulted in a proposal that clearly neglects to address any of the important concerns expressed herein and in the comment letter and attachments provided by the North State Water Alliance (to which TCCA hereby joins). It is the sincere belief of TCCA that an effort that were to truly include, not only the proponents of the BDCP whose sole purpose is moving more water south of the Delta, but also invites the participation of the potentially affected upstream stakeholders, would have a much better likelihood for success. TCCA is committed to working with all stakeholders on such a collaborative process.

Until that occurs, TCCA is left with no other alternative but to provide these critical comments on the BDCP documents that clearly fails to provide a project description of proposed (viable) operations, fails to describe a legally viable regulatory framework, and fails to meet the requirement of an enforceable funding plan. As such, not only does this plan fall far short of the requirements set forth under NEPA and CEQA, but it also fails to comply with state water law and the requirements under the federal and state ESAs necessary to permit the BDCP.

Thank you for the opportunity to provide these comments, and your attention to the same.

Please do not hesitate to contact me directly if you have any questions or concerns,

Very truly yours,



Jeff Sutton  
General Manager

cc: TCCA Board of Directors  
David Murillo, US Bureau of Reclamation  
Maria Rea, National Marine Fisheries Service  
Ren Lohofener, US Fish and Wildlife Service  
Mark Cowin, CA Department of Water Resources  
Chuck Bonham, CA Department of Fish and Wildlife



---

**From:** Jeff Sutton <[jsutton@tccanal.com](mailto:jsutton@tccanal.com)>  
**Sent:** Tuesday, July 29, 2014 2:22 PM  
**To:** [BDCP.Comments@noaa.gov](mailto:BDCP.Comments@noaa.gov)  
**Subject:** FW:  
**Attachments:** SCAN1572\_000.pdf

Dear Mr. Wulff

Attached, please find the TCCA's comments on the BDCP plan, the BDCP Implementing Agreement, and the BDCP EIS/EIR. Our comments also incorporate and join the comments submitted by the North State Water Alliance, along with the reports attached thereto from Dr. Vogel, Dr. Latour, and MBK.

Please do not hesitate to contact me if you have any questions or concerns.

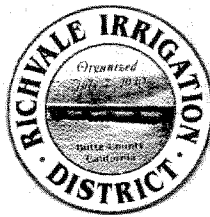
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**From:** rid <rid@pulsarco.com>  
**Sent:** Tuesday, July 29, 2014 1:32 PM  
**To:** BDCP.Comments@noaa.gov  
**Cc:** Dustin Cooper; Anna Whitfield  
**Subject:** Comment Letter  
**Attachments:** John Laird Comment Letter.doc

Thanks,

Sean Earley  
G.M. Richvale Irrigation District  
530-882-4243 office  
530-701-8181 mobile

**DIRECTORS**  
*LYLE JOB*  
*WALT MEYER*  
*GERALD MATTSON*



*SEAN EARLEY, SECRETARY/ MGR.*  
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**RICHVALE IRRIGATION DISTRICT**

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July 29, 2014

John Laird, Secretary for Natural Resources  
California Natural Resources Agency  
1416 Ninth Street, Suite 1311  
Sacramento, CA 95814

**Re: The Bay-Delta Conservation Plan (BDCP) and its Impacts on Regional Sustainability in the North State**

Dear Secretary Laird:

Richvale Irrigation District supports the comment letter dated 7/28/2014, submitted on behalf of the North State Water Alliance, which contains comments on the Bay Delta Conservation Plan, and its associated Implementation Agreement and draft Environmental Impact Statement and Environmental Impact Report. By and through this letter, Richvale Irrigation District adopts each comment and objection in the 7/28/2014 letter as its own, along with all exhibits and attachments to that letter, and incorporates herein by this reference all such comments, objections, and documents.

Thank you,

A handwritten signature in black ink, appearing to be "Sean Earley", written in a cursive style.

Sean Earley  
Richvale Irrigation District

**From:** Anjanette Shadley Martin <anjanette@westerncanal.com>  
**Sent:** Tuesday, July 29, 2014 1:02 PM  
**To:** BDCP.Comments@noaa.gov  
**Subject:** Comments on BDCP  
**Attachments:** BDCP.WCWD.7.29.14.xps

Please see attached comment letter. <<...>>

~ASM

---

Anjanette Shadley Martin

Special Projects Manager & Interim Office Manager

*Western Canal Water District*

*P.O. Box 190, Richvale, CA 95974*

*530.342.5083 - office | 530.342.8233 - fax*

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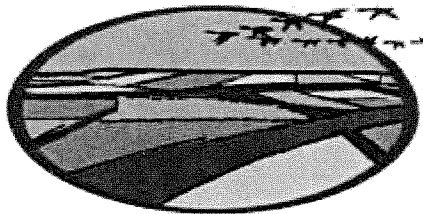
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TED TRIMBLE

ATTORNEY  
DUSTIN COOPER  
MINASIAN LAW FIRM

July 29, 2014

John Laird, Secretary for Natural Resources  
California Natural Resources Agency  
1416 Ninth Street, Suite 1311  
Sacramento, CA 95814

**RE: The Bay-Delta Conservation Plan (BDCP)**

Dear Secretary Laird:

Western Canal Water District (WCWD) supports the comment letter dated July 28, 2014, submitted on behalf of the North State Water Alliance, which contains comments on the Bay-Delta Conservation Plan, and its associated Implementation Agreement and draft Environmental Impact Statement and Environmental Impact Report. By and through this letter, WCWD adopts each comment and objection in the July 28, 2014 letter as its own, along with all exhibits and attachments to that letter, and incorporates herein by this reference all such comments, objections, and documents.

Sincerely,

Ted Trimble  
General Manager

**From:** Michelle Bracha <mbracha@somachlaw.com>  
**Sent:** Tuesday, July 29, 2014 12:39 PM  
**To:** BDCP.Comments@noaa.gov  
**Cc:** Debbie Webster; Tess Dunham  
**Subject:** BDCP Comments  
**Attachments:** 7-29-14 CVCWA Comments re BDCP & EIR-EIS.pdf

Good afternoon,

The attached comment letter is submitted on behalf of the Central Valley Clean Water Association for your consideration.

Thank you.



**Michelle Bracha** | *Legal Secretary*

500 Capitol Mall, Suite 1000 | Sacramento, CA 95814

**Office** 916.446.7979 | **Direct** 916.469-3816 | **Fax** 916.446.8199 | [mbracha@somachlaw.com](mailto:mbracha@somachlaw.com)

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# CVCWA

## Central Valley Clean Water Association

*Representing Over Fifty Wastewater Agencies*

MICHAEL RIDDELL – Chair, City of Riverbank  
CASEY WICHERT – Secretary, City of Brentwood

TERRIE MITCHELL – Vice Chair, Sacramento Regional CSD  
TONY PIRONDINI – Treasurer, City of Vacaville

July 29, 2014

Via Electronic Mail

BDCP Comments  
Ryan Wulff, NMFS  
650 Capitol Mall, Suite 5-100  
Sacramento, CA 95814  
[BDCP.comments@noaa.gov](mailto:BDCP.comments@noaa.gov)

**SUBJECT: Comments on Bay Delta Conservation Plan (BDCP) and  
Environmental Impact Report/Environmental Impact Statement  
(hereinafter collectively referred to as “EIR/EIS”)**

Dear Sirs:

The Central Valley Clean Water Association (CVCWA) appreciates the opportunity to provide comments on the BDCP and EIR/EIS.

CVCWA is a nonprofit association of Publicly Owned Treatment Works (POTWs) throughout the Central Valley whose primary mission is to represent wastewater agencies in regulatory matters while balancing environmental and economic interests. CVCWA members have a deep commitment to the protection of beneficial uses in the waters of the Central Valley, and have a special interest in the recovery of the Delta ecosystem. Many of CVCWA's members will be directly impacted by the BDCP and have a significant interest in its development and implementation.

## Context for CVCWA Comments

CVCWA members are impacted by an impaired Delta ecosystem. Regulatory pressures are intense because of the Pelagic Organism Decline (POD) and other ecosystem problems. CVCWA therefore has an interest in ensuring that the BDCP will remedy past impacts associated with the operations of the Central Valley Project (CVP) and State Water Project (SWP) that have contributed to a degraded Delta ecosystem. Further, CVCWA has an interest in ensuring that the proposed BDCP project will not, under any circumstances, make conditions in the Delta worse. CVCWA's comments on the EIR/EIS are intended to address this interest.

It is acknowledged in the EIR/EIS (Section 31, p. 31-5) that current water project operations have caused "long standing adverse environmental consequences associated with...diversions from the South Delta, such as...fish losses from entrainment."

Facts that are commonly recognized are:

- Reduced exports from the South Delta result in reduced entrainment and reduced losses of fish during low flow conditions.
- Reduced use of the South Delta facilities during certain critical periods will improve fish survival.
- Migrating salmon have less chance of survival if diverted into the Central Delta, where predation pressure and entrainment are greatest.

It is also understood within the Delta scientific community that current water project operations have increased hydraulic residence times in the Delta, altered salinity regimes, changed the annual hydrograph, and caused indirect loss of productivity. These changes have led to various impacts, including the proliferation of invasive species, changes in the Delta food web, and increased predation of covered fish species.

CVCWA is concerned that the EIR/EIS does not directly address these impacts of past water project operations on covered fish species and the Delta ecosystem. Such information represents the foundation for assessment of future impacts of changed water project operations under the proposed project. CVCWA is concerned that the failure to establish this foundation limits the ability to project the future impacts of the proposed project. Additionally, the EIR/EIS does not clearly identify or distinguish the differences in export volumes that are currently occurring, versus the export volumes that will be accommodated by the proposed project. Since the impact of current exports is clearly tied to impacts on covered fish species, lack of clarity in the EIR/EIS on this point creates a lack of confidence in the overall impact assessment.



The BDCP is supposed to improve the Delta ecosystem, consistent with the co-equal goals of the Delta Plan. The BDCP intends to improve the Delta ecosystem through reduced entrainment in the South Delta and improved ecosystem health through wetlands creation. A high degree of uncertainty exists regarding the ability of the proposed project to deliver on this intent.

The burden of proof is on the BDCP to clearly identify the positive and negative impacts it will have on the Delta ecosystem and to ensure that the advertised benefits are realized. This burden is intensified since the BDCP would propose to operate under a 50-year take permit.

Finally, CVCWA is very concerned that the proposed BDCP invests inordinate authority to the agencies seeking the 50-year take permit in the implementation of adaptive management, a cornerstone of the BDCP proposal. On the one hand, the proposed BDCP recognizes the great uncertainties regarding the impact of the project on the Delta ecosystem and the actual benefits that may be realized by future, uncertain restoration projects. Yet, on the other hand, the BDCP is definitive in restricting the imposition of future constraints on the permittees and grants those parties significant leverage in resisting such future requirements, which may be essential to protecting the health of the Delta ecosystem.

## Major Comments

CVCWA is concerned regarding numerous inadequacies of the BDCP and EIR/EIS, as follows:

- 1. A dramatically impaired fishery and ecosystem in the Delta seriously impacts Central Valley POTWs** – BDCP documents fail to adequately address the impacts of water project operations on the Delta fishery, including past and future impact of entrainment and the loss of hundreds of millions of larval, juvenile and adult fish over the next 50 years as a result of the proposed project and associated take permit. Most problematic, the BDCP and its documents fail to ensure that the Delta fishery will be restored or even that it will not continue to be in crisis or worsen under the proposed project. The BDCP and its documents are fundamentally flawed in their failure to provide an adequate assessment of the current project operations on the Delta ecosystem.
- 2. Adaptive Management Deficiencies** – The BDCP fundamentally relies on “adaptive management” to address many uncertainties associated with the proposed project. However, the BDCP governance structure restricts, rather than promotes, effective adaptive management. The BDCP fails to establish the science foundation/baseline or proper future monitoring requirements to allow for

adaptive management to properly function or for the future impacts of the BDCP project operations to be determined (and managed). BDCP monitoring and research commitments by the project proponents are largely absent, and, where present, are weak. Monitoring and research, performed by neutral science experts, should itself be a BDCP conservation measure, not a loose end.

3. **BDCP is one sided and inequitable** – The BDCP guarantees certainty to the construction of Sacramento intakes and conveyance and ensures 50-year certainty regarding water operations, but it restricts the ability to adaptively regulate project operations, and fails to ensure Delta restoration, including the wetlands areas so vital to the achievement of the “dual goals,” as articulated in the 2009 Delta Reform Act.
4. **Serious problems with the BDCP governance structure** – The proposed structure provides undue power to the State Water Contractors and does not allow effective input from many Delta and Central Valley stakeholders, or a fair process for regulating the water contract operations for the next 50 years.
5. **Unbalanced assessment of BDCP impacts on nutrient levels and nutrient-related effects** – The BDCP and EIR/EIS fail to address the effects of the proposed BDCP project in comparison to nutrient impacts from other sources, i.e. the BDCP documents allege that nutrients from BDCP restoration wetlands are beneficial, whereas nutrients from municipal and other sources are detrimental. The EIR/EIS fails to provide a mass balance of nutrients in the Delta that would allow for the fair assessment of various sources.
6. **Inadequate assessment of the BDCP on residence times and temperature in the Delta** - The EIR/EIS fails to adequately consider the effects of residence time and temperature changes associated with the proposed project and related effects in encouraging invasive macrophytes, *Microcystis*, and other harmful aquatic species.
7. **Fails to adequately address the impact of the BDCP on the Delta food web, including significant loss of productivity with the exports** – The BDCP documents provide inadequate consideration of invasive clam effects on the Delta food web and the proposed future wetlands restoration projects.

8. **Inadequate analysis of compliance with federal antidegradation policy** – The EIR/EIS contains grossly inaccurate findings of consistency with the federal antidegradation policy with regard to Clean Water Act (CWA), section 303(d) (hereafter referred to as “303(d)”) listed parameters such as EC and mercury in the Delta. The significant degradation of EC and mercury in the Delta associated with the proposed project are *not allowed* under the federal antidegradation policy provisions of the CWA. The EIR/EIS fails to describe mitigation measures that would avoid these unallowable changes in mercury and EC levels in the Delta.
9. **Fails to adequately evaluate future Delta flow scenarios/alternatives as mandated by the Delta Reform Act** – The BDCP documents largely ignore the Delta flow criteria that have been identified as necessary to support a healthy ecosystem by State Water Resources Control Board (State Water Board) in its August 2010 report. These inadequacies in the BDCP documents represent a fundamental flaw that, unless corrected, should prevent the adoption of the BDCP as an element of the Delta Plan.
10. **Inadequate and unbalanced assessment of potential positive and negative impacts of restoration wetlands on mercury, nutrients, pathogens and other water quality parameters** – The proposed restoration wetlands are promoted in the BDCP as largely beneficial actions. The EIR/EIS fails to adequately address the potential adverse effects and required mitigation associated with those effects.

CVCWA has additional detailed comments, which are included as Attachment A.

We appreciate your consideration of these comments. If you have any questions or if CVCWA can be of further assistance, please contact me at (530) 268-1338 or [eoofficer@cvcwa.org](mailto:eoofficer@cvcwa.org).

Sincerely,



Debbie Webster,  
Executive Officer

## **Attachment A**

### **CVCWA's Detailed Comments**

#### **Bay Delta Conservation Plan and EIR/EIS**

##### **I. Comments Regarding Compliance With Delta Reform Act**

The Delta Reform Act in California Water Code section 85320(b), states that the BDCP will not be incorporated into the Delta Plan if it does not meet the Delta Reform Act's requirements. The EIR/EIS fails to adequately address specific requirements of the Delta Reform Act in the following major areas:

- The EIR/EIS is to provide a comprehensive analysis of a reasonable range of flow criteria, rates of diversion, and other operational criteria. This range is to include flows necessary for recovering the Delta and restoring fisheries under a reasonable range of hydrologic conditions. This range is to include the flow criteria developed by the State Water Board in August 2010, which identified flow conditions and operational requirements to provide fishery protection under the existing Delta configuration.
- Using the above information, the EIR/EIS is to identify the remaining water available for export and other beneficial uses.
- The Delta Reform Act requires that construction of a new Delta conveyance facility shall not be initiated until arrangements have been made to pay for the cost of mitigation required for construction, operation, and maintenance of any new Delta conveyance facility. Accordingly, the mitigation measures need to be clearly specified and linkages to impacts of the proposed project should be plainly identified so that the financial obligations are apparent.

The EIR/EIS either fails to include or fails to clearly address these major requirements of the Delta Reform Act. Therefore, the BDCP cannot be incorporated into the Delta Plan unless these flaws are remedied.

Additionally, the Delta Plan requires that actions be taken to reduce reliance on the Delta as a water supply. The California Environmental Quality Act (CEQA) requires that the EIR/EIS give proper consideration to measures that would reduce reliance on the Delta, including improved water use efficiency, increased storage, and local/regional water supply projects (e.g. desalination). These measures should be addressed either as an alternative to the proposed plan or as proposed mitigation measures to address significant impacts of the proposed project. The EIR/EIS fails to consider or properly address these measures as alternatives to the proposed project.

## **II. Section 3, Define Existing Conditions**

### **A. Appendix 3D, Defining Existing Conditions, No Action Alternative, No Project Alternative, and Cumulative Impact Conditions**

- Appendix 3D.2.1 (Existing Conditions), 3D.2.2 (No Action Alternative) and 3D.2.3 (No Project Alternative)

The selection of two different baselines for the CEQA and the National Environmental Policy Act (NEPA) elements of the BDCP analysis of project impacts is confusing and unnecessary. It makes it virtually impossible for the public to understand the impact analysis or to discern the incremental impacts of the proposed project. Additionally, the decision to choose future conditions (projected to the year 2060) in one of the baselines introduces such variability and uncertainty into the baseline as to render the impact analysis effectively impossible for the average citizen to interpret or understand.

CEQA guidelines encourage the use of “existing conditions” as a baseline for the impact analysis. In fact, under CEQA, the use of a future baseline is only permissible under specific conditions, i.e. where use of an existing conditions analysis would be misleading or without informational value (as stated on page 3D-2 in Appendix 3D of the subject document). As a result, the BDCP impact analysis under CEQA is purportedly based on existing conditions. However, since numerous assumptions about the impacts of a multitude of other ongoing programs were made, the “existing conditions” baseline is not distinct and is not a helpful basis for the assessment of incremental changes.

Under NEPA guidelines, there is no requirement to use a baseline other than the existing conditions. Despite this fact, a decision was made by the preparers of the BDCP analysis to select a baseline for impact analysis based on the “No Action” alternative, which includes projected future conditions in the year 2060. No information is presented to defend or rationalize this decision. Instead, text is provided to state that “nothing in NEPA or NEPA case law precludes NEPA lead agencies...from including anticipated future conditions in the impact assessment.”

Given the choice of greatest clarity and simplicity (in terms of providing an EIR/EIS impact analysis that can be more readily understood), the choice was made to go in the opposite direction – i.e. to choose to use different baselines for CEQA and NEPA, which reflect different time frames with different sets of assumptions used to define baseline conditions. This choice creates a tremendous lack of clarity and greatly impedes the public’s ability to understand the impact of the proposed project.

- Appendix 3D.3, Descriptions for the EIR/EIS

In all the assumptions listed to “describe” the baseline conditions (e.g. in Table 3D-2 and 3D-4), at least one major ongoing effort was noticeably absent – that effort is the 2010

action by the State Water Board to adopt Delta flow objectives and to potentially restrict Delta exports through the proposed BDCP project. These tables in the EIR/EIS fail to mention the August 2010 Delta flows report that was issued by the State Water Board in specific response to a mandate under the Delta Reform Act of 2009. The EIR/EIS also fails to mention the multiple workshops that have been held by the State Water Board to develop scientific information that will be used in the final adoption of Delta flow requirements or the schedule for adoption of Delta flow standards by the State Water Board.

In a July 2013 letter by Delta Stewardship Council staff and consultants, the requirements in the Delta Reform Act of 2009 to address Delta flow requirements in the EIR/EIS were re-emphasized, having been previously raised in letters submitted in April 2012 and June 2010. The July 2013 letter states that the Delta Reform Act requires that the EIR/EIS include a comprehensive analysis of a reasonable range of flow criteria, rates of diversion, and other operational criteria to meet the requirements for approval of an Natural Communities Conservation Plan (NCCP). The 2013 letter also reiterated that the EIR/EIS must take into account the State Water Board August 2010 "*Development of Flow Criteria for the Sacramento/San Joaquin Delta Ecosystem*." The Delta Reform Act intended that the results of that 2010 State Water Board study would be used to inform planning decisions for the BDCP. The 2013 letter further asked that the State Water Board's 2010 flow criteria be addressed directly in the EIR/EIS.

Review of the EIR/EIS indicates that the State Water Board 2010 Delta flow criteria were briefly mentioned in Chapter 3 and that one alternative (Alternative 8) considered a "version" of the recommendations that the State Water Board made in its report. It is not clear that the evaluation of Alternative 8 was adequate to meet the requirements of the Delta Reform Act. The EIR/EIS should describe how it provides the comprehensive analysis required under that act.

### **III. Chapter 8, Water Quality Impacts**

- Chapter 8, Section 8.1.6

The use of two different baselines (the CEQA and NEPA baselines) and the evaluation of water quality impacts in 2060 yields information that is extremely difficult to understand or verify. A simple analysis of near term water quality changes from existing ambient water quality is needed to provide the public with understandable information and to provide context/grounding for the long term impacts that are presented and to allow a proper assessment of compliance with state and federal antidegradation policies.

- Inadequate Consideration of Federal Antidegradation Policy

In various places in the EIR/EIS (e.g. in Chapter 8 and in Table 31-1), it is stated that significant unavoidable increases in concentrations of salt as measured by electrical

conductivity (EC) and/or total dissolved solids (TDS) and methylmercury will occur in the Delta as a result of the implementation of the proposed project (Alternative 4) as embodied in control measure (CM) 1, the Water Facilities and Operations control measure evaluated in the BDCP Effects Analysis.

The EIR/EIS predicts significant increases in current ambient concentrations of EC and methylmercury at various Delta locations. Under federal CWA authority, the Delta is currently listed as impaired for EC and methylmercury, a federal listing which means that water quality objectives are not attained and beneficial uses are impaired. (Such authority is found in 303(d).) The projected increased concentrations associated with CM 1 represent significant degradation in water quality, which would exacerbate impairment of already impaired beneficial uses in the Delta.

Under the federal antidegradation policy, "major federal actions" that affect water quality (pursuant to NEPA and the Endangered Species Act) trigger the application of the federal antidegradation policy and requirements. Those requirements **prohibit actions that would lower water quality in areas where existing water quality objectives are not attained** (e.g. in so-called "Tier I" waters). (See USEPA, Region 9, 1987, Guidance on Implementing the Antidegradation Provisions of 40 CFR 131.12, June 3.)

The EIR/EIS has failed to adequately articulate or address the federal antidegradation requirements, which place significant constraints on the proposed project and associated mitigation. The "key questions" to be addressed by the surface water quality impact assessment (Chapter 8, Section 8.4.1, page 8-127, lines 37-40 and page 8-128 lines 1-4) do not adequately address the requirements of the federal antidegradation policy. The "key questions" add a threshold consideration ("to cause or substantially contribute to significant adverse effects on the beneficial uses of water in these areas of the affected environment") which does not exist in the federal antidegradation policy or address the constraints imposed under that policy. As such, the evaluation contained in the EIR/EIS fails to properly address the fact that significant degradation of water quality in 303(d) listed waters is prohibited under the federal policy. The acknowledged degradation of EC, which will occur in 303(d) listed areas such as Suisun Bay and portions of the Delta, is not allowed under the federal policy. The proposed EC mitigation measures (WQ-11, WQ-11a and WQ-11b) that are described in the EIR/EIS are inadequate in that they will not ensure that the EC levels will be maintained in 303(d) listed waters.

Similar arguments apply to the "significant and unavoidable" degradation of methylmercury levels that is predicted to occur in the 303(d) listed Delta as a result of implementation of "habitat restoration projects" associated with the proposed project. The Delta is 303(d) listed for mercury – actions which cause significant degradation of mercury levels in the Delta are prohibited. The proposed control measure for mercury, CM 12, does not adequately assure that water quality associated with mercury will be maintained or that unallowable degradation of mercury levels in the Delta will be prevented.

- Failure to Fulfill requirements of the Delta Reform Act

The Delta Reform Act requires that the EIR/EIS provide special attention to water quality impacts. A number of water quality impacts identified in the EIR/EIS are deemed to be significant and unavoidable. Such impacts include increased levels of EC, chloride, methylmercury, and increased violations of water quality objectives. The EIR/EIS does not provide or describe specific and effective mitigation to avoid or reduce such impacts.

Many of the proposed water quality mitigation measures contained in the EIR/EIS are non-specific, are not clearly enforceable and are deferred to the future. For instance, the Draft EIR/EIS fails to identify the number of acres of farmland in the Delta that would be impacted by the degradation of water quality (e.g. EC) resulting from the project. The absence of such information prevents the development of adequate mitigation.

Instead, the EIR/EIS relies on vague statements and non-commitments. For example, the proposed mitigation measure for salinity (WQ-11) states “proposed mitigation requires a series of phased actions to identify and evaluate existing and possible feasible actions, followed by development and implementation of the actions, if determined to be necessary.”

This can hardly be described as a clear commitment to mitigate the significant impacts that the proposed project will create on Central and West Delta salinity. The failure to propose definitive mitigation measures that would directly offset the projected impacts is a significant flaw in the EIR/EIS, and contradicts the mandate under the Delta Reform Act and federal antidegradation policy.

- Chapter 8, Section 8.3.2.13, Central Valley Drinking Water Policy

The paragraph describing the Central Valley Drinking Water Policy should be deleted or drastically modified to reflect the contents of the recently adopted Water Quality Control Plan for the Sacramento-San Joaquin River Basins (July 2013) (Basin Plan) amendment into the Basin Plan. (See Section 8.3.2.13, p. 8-123.) The existing paragraph is outdated and places undue emphasis on organic carbon and disinfection by-products, which were found to be adequately addressed by existing Basin Plan language. The adopted policy includes new narrative water quality objectives and an implementation plan for *Cryptosporidium* and *Giardia*.



## **BDCP**

### **I. Chapter 5, Effects Analysis**

- Overarching Comments
  1. The chapter is difficult to review and comprehend because it is poorly organized, inconsistent, and suffers from inadequate cross-referencing. The chapter makes the interpretation of net effects of BDCP implementation difficult, at best. The Independent Panel charged with review of the Effects Analysis has stated that it “universally believes that by itself, Chapter 5... inadequately conveys the fully integrated assessment that is needed to draw conclusions about the Plan...” (Delta Science Program Independent Review Panel Report (DSP-IRP Report), BDCP Effects Analysis Review, Phase 3, March, 2014, p. 5.)
  2. Chapter 5, and most importantly the conclusions stated in Chapter 5, do not appropriately reflect the high uncertainty regarding the project effects that were described in the technical appendices supporting the chapter. In particular, the Chapter 5 summary did not recognize the critical uncertainties associated with the presumed beneficial effects of tidal wetland restoration. Rather, conclusions were reached that tend to overstate the positive effects of the project. Competing hypotheses are not offered or considered.
  3. The objectivity of the analysis captured in Chapter 5 needs to be improved. The chapter does not contain an integrated assessment of net effects of the proposed project. The DSP-IRP has called for the net effect assessment approach to be revamped. While considerable effort has been made to document the complex information that needs to be considered in determining net effects, a coherent synthesis of that information using a systematic approach was not presented. Rather, “professional judgment” was relied upon, which often resulted in a one-sided opinion regarding the net positive effect of the project. As a result, the chapter conveys an unsatisfying message of “trust us.” The assumed effects developed through “professional judgment” are more accurately portrayed as working hypotheses of the relationship between actions, stressors, and biological outcomes.
  4. The chapter asserts the beneficial effects of the BDCP conservation measures in the face of extensive uncertainty, which is acknowledged in the chapter and its associated appendices. The net effects analysis tends to overstate conclusions of positive benefits for covered fish species. In large part, given that the alleged benefit of the BDCP is weakly supported in many respects, the BDCP acknowledges that it must rely on effective adaptive management to ensure that the predicted benefits will occur. However, the proposed adaptive management framework and governance structure is inadequate, non-rigorous, inadequately

transparent and inclusive, and lacking true commitment. The adequacy of the BDCP therefore rests on the uncertain application of adaptive management to ensure that alleged benefits are attained through a progressively refined plan. The DSP-IRP has strongly recommended that a commitment be made under BDCP to create and implement a much-improved, exceedingly rigorous adaptive management approach that includes adequate monitoring and independent science review. (DSP-IRP Report, p. 9.) The Panel also recommends the identification and inclusion of numeric triggers as part of the adaptive management structure.

5. Only one configuration of Restoration Opportunity Areas (ROAs) were modeled using hydrodynamic models. The locations of the modeled ROAs are not available. Given the potential impact of such areas on hydrodynamics, tidal volumes, and hydraulic residence times in the Delta, the actual BDCP project may have a much different effect on hydrodynamics, fish populations, and water quality than has been described in the BDCP Effects Analysis. As a result, it is not possible to evaluate the sensitivity of these factors and outcomes over a range of different placements of ROAs. This must be remedied in the BDCP Effects Analysis and the EIR/EIS.
6. According to the DSP-IRP, the effects of the BDCP water operations may be to expand the populations of invasive clams in the Delta. In addition, *Microcystis* blooms are projected to be unchanged or slightly worse under the BDCP. Water operations that reduce flow, increase water residence time and increase temperatures may promote *Microcystis*. (DSP-IRP Report, pp. 17, 34, 70.) The BDCP Effects Analysis and EIR/EIS must be modified to reflect these findings.
7. The effect of clams on the aquatic food web is not incorporated into the food web analyses presented in Chapter 5. This is a significant deficiency, based on the current scientific information, which indicates that the 1987 clam invasion had a significant impact on the Delta food web. (DSP-IRP Report, pp. 34, 37, 59, and 70.) The BDCP Effects Analysis must be modified to address this finding.
8. Restoration actions are likely to increase the production, mobilization and bioavailability of methylmercury. (Appendix 5d-24, lines 41-44; DSP-IRP Report, p. 67.) The EIR/EIS must provide commitments to implement mitigation measures that avoid such detrimental effects.
9. Wetlands restoration could result in increases in ammonia via sediment re-mineralization or clam excretion. Wetlands could also be a sink for ammonia in creating enhanced opportunity for nitrification and denitrification. (See DSP-IRP Report, p. 67.) The BDCP Effects Analysis must be modified to address this finding.

10. The BDCP Effects Analysis includes an assumption of no entrainment of covered fish at the proposed North Delta Diversion (NDD) facilities. Alternative assumptions should be evaluated. Additionally, the assumption that no predation will occur at the NDD facilities does not agree with the observed conditions at other similar facilities, including the Glenn-Colusa fish screens. The impacts of predation at each intake structure must be evaluated in the BDCP Effects Analysis and the EIR/EIS. (See DSP-IRP Report, p. 37.)

- 5.1.1 Basis for Evaluation

The first paragraph states that the effects analysis, which is a fundamental, required element of the BDCP, is based on an extensive body of monitoring data, scientific investigation, and analysis of information on the Delta compiled over several decades. (BDCP, Chapter 5, p. 5.1-1.) Long term monitoring and research programs conducted by the Interagency Ecological Program, state and federal resource agencies, and academic investigators with the specific intent of assessing the effect of the water project operations has contributed to this information base. However, despite this wealth of information, a clear presentation and description of the effects of the existing water project operations on covered species is missing from the BDCP effects analysis and EIR/EIS. Such information is vital to the understanding of the historical impacts on the Delta ecosystem and the projected future impacts of the proposed BDCP project. This is a fundamental flaw in the Effects Analysis that should be corrected prior to the approval of the BDCP by state and federal fisheries agencies.

## II. Appendix 5.D, Contaminants

- Appendix 5.D.0 Executive Summary

The first sentence in the Executive Summary alleges that contaminants have been associated with the POD. (Appendix 5.D, p. 5.D-i.) In making this allegation, a number of references are cited as support for this statement. It is instructive to consider these references, one-by-one, to illustrate the absence of veracity of this allegation.

The first cited document, Baxter et al 2010, is an IEP document that lists a number of possible factors that have been identified in connection with the POD. There is no definitive information in this reference that raises the role of contaminants in the POD above that of a loose working hypothesis.

Brooks et al 2012 contains no definitive information that links contaminants to the POD. The article provides a loose collection of information that poses questions and suggestions regarding the potential role of contaminants but provides no definitive analysis and reaches no supportable conclusions.

Johnson et al 2010 directly and extensively examined the possible role of contaminants in the POD and found nothing to support such a conclusion. The report suggested the need for further monitoring and research to continue to examine this question.

Glibert 2010 is a paper that alleged a specific linkage of contaminants (in particular, ammonia) on the POD based on a CUSUM statistical analysis. That analysis and the associated conclusions reached in the paper were heavily criticized by respected members of the Delta scientific community. This paper does not establish the alleged linkage.

Glibert et al 2011 is a paper that advances the theory of ecological stoichiometry as a suggested working hypothesis for the Bay-Delta ecosystem. As acknowledged in the paper, the hypothesis is untested in the Bay-Delta system. The paper itself acknowledges the need for significant additional research to validate the theories proposed in the paper. It is clearly not a definitive work establishing a link between contaminants and the POD.

In summary, none of the source cited in Appendix 5.D. establish a direct or indirect linkage between the POD and contaminant concentrations or other water quality conditions in the Delta. As a result, the subject language should be eliminated.

- Appendix 5.D.0

In the first paragraph, last sentence, it is implied that sublethal levels of contaminants in Delta fish have been observed to cause various effects, including impaired growth and reproduction and increased susceptibility to disease. (Appendix 5.D., p. 5.D.-i.) The citation provided to support this statement (Werner et al 2008) does not directly support this statement and does not demonstrate the existence of such conditions as a result of contaminant levels in the Delta. Instead the cited reference mentions these effects as potential issues and points to further research to assess their possible occurrence. The sentence in question must be modified to clarify this difference between "observation" and "hypothesis."

We appreciate your consideration of these comments. If you have any questions or if CVCWA can be of further assistance, please contact me at (530) 268-1338 or [eoofficer@cvcwa.org](mailto:eoofficer@cvcwa.org).

Sincerely,



Debbie Webster,  
Executive Officer

**From:** Debby Jones <djones@ducks.org>  
**Sent:** Tuesday, July 29, 2014 12:48 PM  
**To:** BDCP.comments@noaa.gov  
**Cc:** Mark Biddlecomb  
**Subject:** Bay Delta Conservation Plan Draft BDCP and BDCP Draft ERI/EIS  
**Attachments:** BDCP Comments DU.PDF

**Importance:** High

Mr. Wulff –

Please find comments from Ducks Unlimited attached. Should you have any questions, please contact Mark Biddlecomb at the number listed below. An original copy of this letter will be mailed today 7/29/14.

Thank you,

Deb Jones



**DEB JONES**  
**Executive Assistant**  
**Ducks Unlimited, Inc.**

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July 29, 2014

BDCP Comments  
Ryan Wulff, NMFS  
650 Capitol Mall, Suite 5-100  
Sacramento, CA 95814

**Subject: Bay Delta Conservation Plan Draft BDCP and BDCP Draft EIR/EIS**

Dear Mr. Wulff,

Ducks Unlimited (DU) submits the following comments on the Bay Delta Conservation Plan (BDCP) Draft Environmental Impact Report/Environmental Impact Statement (DEIR/EIS) and the Draft Bay Delta Conservation Plan (BDCP). DU is considered a worldwide leader in conserving, restoring and managing wetlands and associated habitats for North American waterfowl. As part of the BDCP document, DU provided significant documentation and expert scientific evaluation as to the direct effects of the BDCP proposed project on wetlands and waterfowl, which were ultimately adopted as part of the DEIR/EIS, as well as the plan itself.

However, the indirect effects of the proposed project and resulting potential impacts were outside our scope of work. As a result we have a number of comments and concerns related to those indirect effects, which are listed as follows:

**Comment 1:**

Ducks Unlimited agrees with the Delta Stewardship Council that each chapter should have a comparative summary. In addition, all significant and significant unavoidable impacts of the proposed alternative, Alternative 4, should be documented in one location so the reviewer does not have to extract them out of a several-thousand page document. Chapter 30 appendix C provides a fair comparison of the summary of impacts and mitigation measures. We recommend this type of comparison table or similar to be utilized in the other chapters as well.

**Comment 2:**

Conservation Measure (CM) 1 has been developed to a higher level of specificity in the DEIR/EIS, whereas the other Conservation Measures are developed to a lesser extent within the plan at a program level. Many of the subsequent Conservation Measures are outlined as needing further details at a later time through additional research, development of implementation plans and development of adaptive management teams, which are to be developed at an unknown future date.

These additional details should be provided prior to implementation and be made available for public review consistent with the EIR/EIS process. This is essential as a component of the DEIR/EIS to determine the physical impacts on the environment and species. Due to the multitude of Conservation Measures, it would be impossible to determine the cumulative impact of the plan to species and the environment without more refined project level details in all Conservation Measures. The complexity of the hydraulics, interspatial connectivity, species reliance on affected habitats, and the significant proposed change to the plan area all warrant such additional details. Project level detail for all Conservation Measures is a minimum requirement under the ESA since 50 year take authority is being issued based on the DEIR/EIS.

**Comment 3:**

It is uncommon to allow a project to be built without its mitigation measures in place. Conservation Measures 2-22 should be implemented in concert or prior to the installation and operation of CM 1, or at a minimum, a surety bond and/or clear funding sources should be in place (not just identified) prior to construction of CM 1. In all cases, a higher level of detail for programmatic elements should be provided, and should include feasibility analyses, contingency plans, monitoring and adaptive management plans, all of which should be complete prior to the start of construction on Conservation Measure 1.

**Comment 4:**

It is unclear how feasible it will be to implement a number of the conservation strategies and mitigation measures. As example, CM 2 involves flooding the Yolo Bypass for an extended period of time; however, the feasibility of getting fish to naturally move onto the bypass is unclear in its current description. This is concerning because the level of detail provided for CM 2 is greater than that provided for many of the other Conservation Measures, and yet is inadequate.

Mitigation measures such as "further studies" are not mitigation measures. A study does not lessen the impact to the environment and should therefore not be considered a mitigation measure. The studies should be conducted prior to DEIR/EIS approval and the Mitigation Measures should then be clearly identified prior to any implementation of the Plan in any form. Experience tells us mitigation measures themselves may have significant impacts that require additional mitigation, which would also need to be identified prior to implementation.

**Comment 5:**

The DEIR/EIS evaluates the Suisun Marsh, Delta and to some lesser degree areas north and south of the Plan area. However, the geographic scope of the DEIR/EIS does not extend to include San Pablo Bay and San Francisco Bay. The Delta outflow has been shown to have an increase of salinity (noted as an increase of Bay) and result in salinity changes in the Delta and Suisun Marsh, which are to be adaptively managed by the Projects in order to meet the D-1641 standards. However, the consequences of BDCP actions undertaken within the Plan Area will extend downstream to affect San Pablo Bay particularly, and to a lesser extent, San Francisco Bay. Likewise, ongoing restoration changes in the Bays (e.g., tidal wetland restorations) will

affect tidal fluxes and salinity intrusion into the Delta. Ducks Unlimited recommends looking at the future cumulative impacts of the BDCP if the "*Baylands Ecosystem Species and Community Profiles*" goals are met, as this is the standard in which restoration in the Bay is being conducted.

**Comment 6:**

Significant capital investment in relationship to the Conservation Measures requires levee stability throughout the Delta. However, the DEIR/EIS does not evaluate the long term levee maintenance requirements and funding entities to maintain the status quo or to improve levee stability. The consequence of levee failure would put many of the Conservation Measures at risk of failure themselves. The DEIR/EIS should include a chapter on levee risk analysis, emergency measures and evaluation of levee breaks and their effects on the proposed conservation measures. Chapter 6, SW-8 identifies wind fetch as a significant impact. Levee failure for non BDCP related levees have potentially significant impacts to Conservation Measures. Further evaluation and analysis is needed to identify long term levee stability funding mechanisms to ensure long term protection of Conservation Measures.

**Comment 7:**

In the absence of the BDCP, water deliveries from the State Water and Central Valley Projects are expected to decline because of the combined effects of climate change and sea level rise. Several of the CALSIM model scenarios that relate to Conservation Measure 1 (Operation of Project Facilities) predict that water deliveries can be maintained or increased compared to existing conditions. In essence, CM 1 will increase the operational flexibility of the SWP and CVP and allow more water to be delivered despite the increasingly negative impacts that climate change and sea level rise are expected to have on California water supplies. The model results associated with CM 1 are at least partially based on assumptions about climate change and sea level rise, and their presumed effects on California water supplies. By their very nature, predictions about climate change and sea level rise are associated with a high degree of uncertainty. This is compounded by uncertainty about the actual effects of climate change and sea level rise on water supplies.

Uncertainty is inherent to any modeling exercise. However, there is no discussion of the uncertainty associated with CALSIM results as they relate to CM 1 alternatives. To quote from the DEIR/EIS, "Time will tell whether current predictions of conditions in 2060 (as they relate to climate change and sea level rise) will prove to be too optimistic or pessimistic." This is hardly reassuring. Much of the justification for the BDCP is predicated on the results of these CALSIM scenarios. Yet the reader is left with no idea about the uncertainty that may accompany these results.

What if the increased operational flexibility and water deliveries promised by the BDCP do not materialize because we were too "optimistic" in our CALSIM model assumptions? While some of the consequences are obvious (e.g. reduced water deliveries compared to existing conditions despite massive taxpayer investment), some may be less obvious.



Considering the issue of water transfers; the project most certainly will increase the physical capacity for water transfers and may also facilitate transfer and allow project operators to more easily sidestep biological opinions that partially keep transfers in check. Further, CALSIM predictions could prove too "optimistic" and climate change and sea level rise could largely negate any gains in operational flexibility and water deliveries. Given BDCP promises under the current set of model assumptions, is there a benefit resulting from an increased ability to transfer water, but less water available for delivery? What might this mean for agriculture in the Sacramento Valley that supplies much of the habitat for waterfowl and other wetlands dependent birds? The demand for water transfers will be very high under such a scenario if the facilities exist to do so, regardless of the policy or biological implications and current decision points adopted at the time of project investment and development.

The DEIR/EIS must do a better job of informing the reader about the uncertainty associated with the CALSIM results, and explore the possible consequences associated with this uncertainty.

**Comment 8:**

Further evaluation must be conducted to determine the potential increase of private water transfers that would be made available as a result of the proposed project, including pre-1914 rights. As example, water rights that are transferable but currently do not have mechanisms to export south of the Delta that would then be made available as a result of the Alternatives and/or Conservation Measures must be evaluated. Specifically, impacts to Sacramento Valley habitats and agriculture as a result need to be identified and addressed.

**Comment 9:**

Implementation of the BDCP will result in a loss of 4,956 acres of protected managed wetlands in the Plan Area. Although conservation easements are beneficial, they do not provide the functions and values (services) of wetlands, and therefore do not provide adequate mitigation for loss of habitat. Adequate mitigation measures (such as restoration and enhancement) and monitoring protocols must be provided for loss and increased mitigation ratios for temporal loss. Many species protected under the Migratory Bird Treaty Act (MBTA) rely heavily on managed wetlands within the Suisun Marsh and Sacramento-San Joaquin Delta. Therefore, any reduction of functions and as a result of habitat reductions could be a violation of the MBTA. We recommend a no net loss of habitat acreage and a no net loss of functions and services.

**Comment 10:**

Several chapters speak to the potential effects of changes of salinity within the DEIR/EIS project area. The close correlation between aquatic species, terrestrial species and agriculture relies heavily on a fundamental understanding of freshwater and salt water mixing. The analysis on salinity changes in the plan area, as well as the lack of discussion of salinity outside the plan area, fall short of providing any confidence that adequate analysis has been completed.

**Comment 11:**

Section 3.4.1.2.1 - If there is uncertainty in the "biological consequences" of out flow variability, how can this be monitored and measured, then adaptively managed? Monitoring protocols need to be identified.

**Comment 12:**

The BDCP envisions impacts to Delta water quantity and quality, but water supply to the Delta was not analyzed. The BDCP analysis shows a change in Delta water elevations, but does not analyze the impacts of this change on Delta agricultural water diversions, or recreational fishing and boating. Agricultural water quantity is mentioned as a significant and unavoidable impact. The DEIR/EIS acknowledges that water losses related to construction dewatering may not be replaced with supplies sufficient to meet the preexisting demands or planned demands of the affected parties. In addition, the feasibility and effectiveness of phased actions to reduce salinity levels is uncertain.

Water quality impacts to Delta water supplies include both an increase in dissolved organic carbon (affecting municipal supplies pumped from the Delta) and salinity (affecting both agriculture and municipal supplies). These impacts are listed as significant and unavoidable, and the only mitigation suggested is a vague description of assistance that, "may take the form of financial contributions, technical contributions or partnerships." This suggested mitigation is inadequate. Further analysis must be performed to either revise the alternative or provide a full range of detailed mitigation measures. Additionally, the significant unavoidable impacts should be further evaluated to provide additional quantifying elements.

**Comment 13:**

Changes in salinity in the Bay, Suisun, Delta, North of Delta and South of Delta are discussed in various locations within several chapters in the DEIR/EIS. Changing salinity appears to be most prevalently covered in Chapter 5, Chapter 8 and Chapter 29 of the DEIR/EIS, while also noted in Chapters 6 (Surface Water), Chapter 11 (Fish and Aquatic Resources), Chapter 12 (Terrestrial Biological Resources), Chapter 14 (Agriculture), and Chapter 15 (Recreation) to a minimal extent. Salinity should be discussed as a component of Chapter 7 (Groundwater) as well.

Given the multi-parameter affects of salinity as described in the above chapters, Ducks Unlimited has serious concerns for the persistence of agricultural and freshwater managed seasonal wetlands within the Suisun Marsh and Delta. These freshwater habitats are critical to support listed species in addition to non-listed terrestrial species such as waterfowl that rely upon them. Impacts and related mitigation measures should be identified in the final document.

**Comment 14:**

Modeling and analysis should clearly identify salinity levels, location, and duration for all scenarios in one cohesive manner. The analysis should include baseline levels in both flow and salinity and critical thresholds for agriculture and species thresholds. If elements are to be

adaptively managed to reduce either flow or salinity below a threshold, specific details as to how it will be accomplished should be included.

**Comment 15:**

Ducks Unlimited recommends the Appendices of Chapter 8 directly correlate to the content of the chapter and should utilize consistent units. As an example, from Chapter 8.4.3.9 ... Effects of the Alternative on Delta Hydrodynamics:

"Long-term average annual Delta outflow is anticipated to decrease under Alternative 4 by between 864 (scenario H1) and 5 TAF (scenario H4) relative to the No Action Alternative, due only to changes in operations. The result of this is increased sea water intrusion in the west Delta. The increase in sea water intrusion (represented by an increase in San Francisco Bay (BAY) percentage) can be seen, for example, in Appendix 8D, ALT 4, H3–Sacramento River at Mallard Island for ALL years (1976–1991)."

This statement documents the changes in reduction of Delta outflow in TAF and then asks the reviewer to understand that as a percentage of existing conditions as it relates to an increase of "Bay" as the source water of reduced Delta outflow in Appendix 8D. It is inappropriate to use TAF as an output of data, when the data provided to the reviewer is a percentage of existing conditions without giving the Existing Conditions actual flow data in TAF.

**Comment 16:**

As a reviewer, DU has not seen the modeling data assumptions and does not understand, in detail, the limitations. As an example, "Therefore, DSM2 results may show an exceedance of D-1641 standards when, in these cases, this is a modeling anomaly and not reflective of an actual violation." This statement is unsubstantiated as to why the results are a modeling anomaly and not a real affect. Please explain why this is an anomaly and not a real affect and site the model assumptions/data that support such a statement.

**Comment 17:**

Salinity Units vary in the document between psu, TDS, ppt, EC, g/L, mg/L,  $\mu\text{S}/\text{cm}$  and a % of Bay. Salinity measurements should be standardized throughout the document and the document should provide a conversion table for the reader.

**Comment 18:**

Relatively small changes in salinity could result in large scale changes across the San Pablo Bay and Delta as species communities shift from peat forming freshwater cattails and tules to more saline species with less above and belowground biomass. In both Suisun and San Pablo Bays, the reduction in below ground organic matter inputs related to increased salinities resulting from the project, coupled with accelerating rates of sea level rise could seriously impede the ability of wetlands to develop and/or keep pace with sea level rise. This should be addressed in the cumulative effects section. Chapter 29, Climate Change, should also include areas beyond the identified plan area that may be affected by plan implementation, such as San Pablo Bay, and that resiliency with and without the project should be assessed for San Pablo Bay.

**Comment 19:**

Salinity should be addressed in Chapter 14. Slight variations in salinity can have a dramatic affect on crop types. Although it is difficult to determine what the future cropping will be within the timeline of the 50 year plan, it is possible to determine whether there are salinity thresholds that would impact existing crop uses in the Delta. An economic analysis as well as terrestrial species impact analysis should be conducted for existing agricultural land uses and the likely change in agricultural production.

In addition, many species covered under the Migratory Bird Treaty Act (MBTA) rely heavily on crops within the Delta. Therefore, any significant changes to cropping patterns as a result of salinity or water diversion reductions or as a production of water transfers could be a violation of the MBTA. We recommend further evaluation to determine what these thresholds could be and to determine if the project as proposed would exceed them.

**Comment 20:**

*Ducks Unlimited agrees with the following comment from the Delta Protection Commission and adopts this comment as our comment 20.*

The primary mitigation measure for agricultural impacts is the proposed Agricultural Lands Stewardship Plan (ALSP – Mitigation Measure AG-1). While the recent draft version of the ALSP includes a variety of useful and well-thought mitigation strategies that would benefit agriculture, it also includes measures that appear designed more to facilitate restoration of agricultural land for the benefit of listed species. The Commission recommends that the Delta agricultural community be invited to select a preferred administrator for the agricultural mitigation funding, and allow this administrator to work with the full range of ALSP strategies to determine the best measures to mitigate for the loss of Delta farmland.

Thank you for taking the time to review and respond to our comments. We look forward to further dialogue with regard to the comments above, and are available at your convenience for any follow-up or clarification as necessary. However, due to the highly complex nature and multitude of recommendations, we request that a revised Draft EIR/EIS, and Draft BDCP document be prepared and re-circulated for additional public comments, taking into consideration many of the elements that we address above.

Respectfully,



Mark E. Biddlecomb  
Director of Operations  
Western Region

**From:** Jon Clancy <jclancy@olaughlinparis.com>  
**Sent:** Tuesday, July 29, 2014 12:28 PM  
**To:** BDCP.Comments@noaa.gov  
**Subject:** Comments re: Draft BDCP EIR/S from San Joaquin Tributaries Authority  
**Attachments:** SJTA BDCP EIRS COMMENTS 7 29 14.pdf

Please see attached the comments submitted on behalf of the San Joaquin Tributaries Authority.

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O'Laughlin & Paris LLP

Attorneys at Law

**SENT VIA EMAIL**

July 29, 2014

BDCP Comments  
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Re: **Comments on the Bay-Delta Conservation Plan (EIR/EIS)**

Dear Mr. Wulff:

The San Joaquin Tributaries Authority ("SJTA") provides the following comments on the Bay Delta Conservation Plan ("BDCP") Environmental Impact Report/Statement ("EIR/S"). The SJTA generally supports projects that increase water reliability and benefit the ecosystem. The SJTA's primary concerns regarding the BDCP is the potential impacts it may have upon SJTA member operations and their respective water supply reliability. Despite the volume of the EIR/S, it remains unclear how the BDCP will affect the members of the SJTA. The BDCP EIR/S does not provide a sufficient description of the BDCP project or the impacts the BDCP project will have on upstream water right holders. The SJTA requests the EIR/S be revised to include the analysis more fully described below and recirculate the EIR/S for public review.

**Chapter 1 – Introduction**

The role and the responsibility of the Bureau of Reclamation ("Reclamation") in participating, benefiting and funding the BDCP is unclear. The introduction states Reclamation is a necessary party to the implementation of the BDCP. (EIR/S, at 1-26.) However, Reclamation is not a project proponent, despite the fact that many Central Valley Project ("CVP") contractors are project proponents. (*Id.*, at 1-1, fn. 1.) Furthermore, the BDCP Implementation Agreement states that "Reclamation will enter into a Memorandum, or similar agreement, with the Parties that sets out Reclamation's roles and responsibilities pursuant to the BDCP and establishes processes to ensure that Reclamation's actions are implemented in a manner consistent with the Plan," but does not disclose what actions Reclamation will take, what role Reclamation will play in the BDCP or how Reclamation will be bound to the Agreement. Without this information, the public cannot meaningfully understand and consider the issues raised by the proposed project. The failure to disclose and analyze

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Reclamation's role violates the California Environmental Quality Act ("CEQA") disclosure requirements. (See *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47, Cal.3d 376, 405.)

The Plan Area is too narrow. It is clear that Reclamation will be required to modify its operation of the CVP as part of the BDCP project. Despite this, CVP facilities upstream of the Plan Area are not included within the Plan Area and, thus, are not analyzed by the EIR/S. The failure to include areas upstream of the Delta in the Plan Area prevents the public from meaningfully understanding and considering the issues raised by the BDCP, as many potential environmental impacts will be overlooked.

The Project Area is unclear, rendering the project description inadequate. The EIR/S notes that "the project area consists of the following three geographic regions, as shown in Figure 1-4." (EIR/S, at 1-11.) First, no "Figure 1-4" is included with the Draft BDCP EIR/S. This statement likely refers to "Figure 1A-4;" and if so, the text should be corrected. Second, Figure 1A-4 includes a map of most of the State of California, with no boundary lines for the Project Area. It is unclear if the whole map is included, just the highlighted waterworks, or the highlighted water works and certain areas surrounding them. Furthermore, the project description does not include a written description of boundaries for the Project Area, such that a member of the public cannot understand whether they are inside or outside the Project Area with any degree of certainty. The map should be changed so that it accurately shows the Project Area, or an adequate written description should be included. "An accurate, stable, and finite project description is the Sine quo none of an informative and legally sufficient EIR." (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 193.) As it stands, the current description of the Project Area is not legally adequate.

## Chapter 2 – Project Objectives and Purpose and Need

The EIR/S does not disclose which water right permits will need to be modified in order to facilitate the operation of the BDCP. In addition, the EIR/S does not analyze whether such permit changes will cause injury to other legal users of water. The EIR/S notes that one of the objectives of the BDCP is to increase water supply reliability. (EIR/S, at 2-6.) The Department of Water Resources ("DWR") and Reclamation will be required to modify their water right permits in order to alter their project operations to provide additional water supply reliability and water to diverters. To the extent the EIR/S will be relied upon as the environmental analysis sufficient to support the State Water Resources Control Board's ("State Water Board") review and potential change to DWR and CVP water right permits, this analysis must be included. The EIR/S should disclose which permits will be required to be modified to operate the BDCP. The EIR/S should be revised to include the impact of the changes to water right permits, including the analysis of injury to other legal water users.

The EIR/S does not disclose what changes to water quality control objectives or other regulations would be necessary for the implementation and operation of the BDCP. The EIR/S recognizes the State Water Board will be reviewing the existing water quality objectives. The EIR/S must explicitly disclose the changes it anticipates for the water quality objectives and how these changes will affect the BDCP. To the extent the implementation or operation of the BDCP relies upon increased flows from the changes to water quality objectives, the EIR/S must analyze the impacts of these changes to the upstream water users. Without this information, the public cannot meaningfully understand and

consider the issues raised by the proposed project, as the future regulatory regime under which the State Water Project ("SWP") and CVP will be operated is unclear.

### Chapter 3 – Description of Alternatives

It is unclear from the information presented in the EIR/S how the BDCP will function after it is built and implemented. For instance, it is not disclosed as to how much additional water will be available for export, how much additional water will actually be exported, which parties will benefit from the additional water, and to what extent, if at all, the south Delta intakes will continue to be used. Without this information the public cannot meaningfully understand and consider the issues raised by the proposed project.

The EIR/S discusses two categories of actions that are occurring under the BDCP – covered activities and associated federal actions. (EIR/S, at 3-17.) It is unclear whether the environmental impacts from both of these categories of actions are covered by the EIR/S. Without this information, the EIR/S is confusing and unclear.

The EIR/S is unclear as to whether it analyzes the environmental impacts of the proposed alternatives under the regulations affecting the export of water alone or in addition to expected changes to these regulations. The EIR/S discusses the various regulations impacting the export of water from the Delta. (*Id.*, at 3-31 through 3-33.) However, the EIR/S indicates these regulations are likely to change in the future. (See *Id.*, at 3-34; 5-34.) Furthermore, the 2009 National Marine Fisheries Service Biological Opinion ("NMFS BiOp") discussed in the EIR/S is currently on appeal; it is likely the requirements in the BiOp will change substantially. The EIR/S should state whether it is analyzing environmental impacts under the regulations as they currently stand, or under the regulations as they are likely to be once the BDCP is approved and implemented. If it is not analyzing environmental impacts under the probable future regulatory regime, the EIR/S must be revised to include this analysis. Without this information, the public cannot meaningfully understand and consider the issues raised by the proposed project, because they will not understand how the BDCP will be operated, and the environmental impacts that operation will cause in the regulatory environment that will exist when the BDCP is actually implemented.

The adaptive management and monitoring program is neither formal, nor transparent, and thus fails to meet the requirements of the Water Code. The Delta Plan will incorporate the provisions of the BDCP, including the adaptive management plan. (See Water Code, § 85320; See also <http://deltacouncil.ca.gov/delta-plan-and-bdcp>.) The Water Code requires that the adaptive management strategy in the Delta Plan be "science-based, transparent, and formal". (Water Code, § 85308(f).) The adaptive management program is not described in any detail in the EIR/S. Furthermore, the BDCP document, itself, does not describe a formal process by which adaptive management will take place, nor does it describe with any level of certainty what actions will be taken in response to certain events or conditions precedent, and thus the program is not transparent. The EIR/S must be modified to include a full description and analysis of the adaptive management program, and the adaptive management program must be more fully fleshed out to meet the Water Code's requirements of transparency and formality.

### Chapter 5 – Water Supply



It is unclear how DWR and Reclamation will coordinate operations of the SWP and CVP under the BDCP. The EIR/S discusses the Coordinated Operations Agreement (“COA”), under which the SWP and CVP are currently operated. (EIR/S, at 5-20 and 5-33.) It is unclear whether the changes to these systems based on the construction and implementation of the BDCP will require the COA to be modified or replaced. Without this information, the public cannot meaningfully understand and consider the issues raised by the proposed project.

It is unclear whether water transfers are part of the BDCP or planned future actions, and the degree to which these transfers are considered in the environmental analysis. The EIR/S indicates that water transfers are planned after the implementation of the BDCP. (See *Id.*, at 5-40 and 5-41.) The EIR/S also indicates that more water will be exported by the SWP and CVP after construction and implementation of the BDCP. (See *Id.*, at 8-408.) However, the EIR/S states that any potential transfer will have its own separate EIR/S. (*Id.* at 5-40 and 5-41.) If the potential transfer of water is necessary for the implementation or operation of the BDCP, the impact of the transfers should be analyzed in the EIR/S. In the alternative, the EIR/S should make clear how the environmental analysis will be tiered from the EIR/S. Without this information the public cannot meaningfully understand and consider the issues raised by the proposed project.

The EIR/S discusses the 2006 Bay-Delta plan, but does not discuss the ongoing review of the Bay-Delta plan; these impending regulations should be discussed and analyzed. The State Water Board has released a draft modification and draft environmental documentation for the first phase of the ongoing review of the Bay-Delta Plan. This draft modification will have significant impacts on the Sacramento and San Joaquin Rivers, and the Delta systems, and would potentially provide more water for export. The consideration of these modified regulations in the EIR/S’s analysis could substantially change the conclusions of that analysis. Without this information, the public cannot meaningfully understand and consider the issues raised by the proposed project because it will not understand how the BDCP will likely operate, and the environmental effects of that operation, in the regulatory environment that will exist when the BDCP is actually implemented.

The EIR/S must be revised to analyze impacts to water users upstream of the Delta. The EIR/S states, “the water supply analysis addresses impacts to DWR, Reclamation, and SWP and CVP contractors, as opposed to other water right holders, as the BDCP does not include any regulatory actions that would affect any such water right holders.” (*Id.*, at 5-43.) This conclusion is not supported by information and analysis included in the EIR/S. Construction and implementation of the BDCP will, according to the EIR/S, allow for increased exports of water. It is unclear where this increased supply will come from. Assuming it could decrease the amount of water available to upstream water right holders, the EIR/S must be modified to discuss and analyze these potential impacts to upstream water users. Without this information, the public cannot meaningful understand and consider the issues raised by the proposed project.

The EIR/S should include a separate analysis, considering and explaining the effects of climate change, alone, on the project area. The EIR/S notes that climate change is expected to significantly change the hydrology and ecosystem of the Plan Area. (See *Id.*, at 5-48.) Many of the environmental impacts found under the proposed alternatives are attributed solely to climate change. (See *Id.*, at 7-85.) It is unclear why these impacts are identified as solely caused by climate change. If the EIR/S included the

environmental analysis on the effects of climate change alone, readers would be able to compare this analysis to the analysis of the alternatives, and understand why the EIR/S found a significant impact to be the result of climate change alone. The methodology for this analysis should also be included in the EIR/S. Without this information the public cannot meaningfully understand and consider the issues raised by the proposed project.

The alternatives considered all improperly include the Vernalis Adaptive Management Plan ("VAMP") flows, which renders the EIR/S's environmental analysis incorrect and inadequate. Table B-18 in the EIR/S shows VAMP flows being a part of each alternative's modeling assumptions. The VAMP ended and the regulatory requirements of that program are no longer in effect. Including VAMP flows in the modeling assumption for environmental impacts renders this analysis incorrect and inadequate, as these flows are no longer being met and, thus, the projected environmental impacts may be more or less severe.

The BDCP increases reliance on the Delta, and thus is inconsistent with the terms of Water Code section 85021. Water Code section 85021 states, in part, that "[t]he policy of the State of California is to reduce reliance on the Delta in meeting California's future water supply needs..." The EIR/S, however, indicates that after construction and implementation of the BDCP the SWP and CVP will likely export more water from the Delta. (See *Id.*, at 8-408.) Increasing exports from the Delta appears to place greater reliance on the Delta region for California's water supply. The EIR/S should be modified to explain how increasing exports from the Delta region is reducing reliance on the Delta region, and thus, how the BDCP is consistent with Water Code section 85021.

#### Chapter 6 – Surface Water

Neither Chapter 5 nor Chapter 6 analyzes the impact to entities upstream of the Delta resulting from the depletion or reduction of surface water that could occur due to the implementation of the BDCP or changes in DWR or Reclamation's water right permits. If no impact to these entities of this kind will occur, the EIR/S should state so, and explain the reason no such impact will occur. Without this information members of the public cannot meaningfully understand and consider the issues raised by the proposed project.

#### Chapter 7 – Groundwater

Over the past six months, the California Legislature has been working to develop legislation to regulate the management and extraction of California's groundwater resources. Legislation will be finalized in a matter of months. This legislation will have a great impact on all water users, all water systems operations and, most significantly, the operation of the SWP and CVP under the BDCP. This great impact could lead to environmental impacts. The EIR/S does not identify or analyze potential environmental impacts of the BDCP cumulatively with groundwater regulation. In addition, the BDCP does not analyze the impacts that future groundwater legislation will have on the viability of the BDCP project. Without this analysis the public cannot meaningfully understand and consider the issues raised by the proposed project.

#### Chapter 8 – Water Quality

The EIR/S assumes that San Joaquin River outflow will increase as a result of the BDCP or concurrent with the implementation of the BDCP. (*See* EIR/S, at 8-408.) The statement that San Joaquin River flows will increase into the Delta is not explained or supported, and the impacts of this assumption are not analyzed. Providing the environmental analysis for the effects of climate change, for example, as discussed above, may demonstrate to readers whether or not climate change will actually play a role in increasing San Joaquin River outflow. Because the EIR/S does not contain an explanation for this projected increase in San Joaquin River outflow, the environmental analysis based on increased San Joaquin River outflow is not supported. Without this analysis the public cannot meaningfully understand and consider the issues raised by the proposed project.

The EIR/S indicates that Reclamation will unavoidably violate chloride and electrical conductivity ("EC") water quality objectives under Alternative 4. (*Id.*, at 8-428 and 8-439.) These water quality objectives are legally binding on Reclamation, and their ability to divert water pursuant to their water right is conditioned upon their meeting these objectives. The EIR/S cannot simply assume Reclamation will violate these standards as a long-term method of operating. Instead, the EIR/S must discuss what steps it will take to modify these water quality objectives or consider the impacts to service providers resulting from Reclamation being prohibited from diverting water because they are failing to meet the chloride and EC water quality objectives. Without this analysis the public cannot meaningfully understand and consider the issues raised by the proposed project.

#### Chapter 11 – Fish and Aquatic Resources

The EIR/S contains no analysis concerning the estimated effectiveness of habitat restoration. In addition, the EIR/S fails to disclose or outline the actions that will be taken if the habitat restoration activities are not fully effective. The EIR/S assumes that habitat restoration activities will be fully effective. (*See* EIR/S, at 11-5.) The EIR/S also analyzes the environmental impacts if the habitat restoration was completely ineffective. (*See Id.*, at 11-265.) Despite the fact that the EIR/S acknowledges some reasonable possibility that habitat restoration will fail, the EIR/S does not analyze the possibility of this occurring, nor what actions will be taken if it does. Without this analysis the public cannot meaningfully understand and consider the issues raised by the proposed project, because the public will not know how likely the environmental analysis is to be correct, nor what actions will be taken, if any, if it is not.

#### Chapter 21 – Energy

The EIR/S is deficient because it does not analyze the impacts to energy based upon season or timing. The EIR/S's analyses impacts to energy resources based on the net energy used on a monthly or annual basis. (EIR/S, at 21-26.) This analysis fails to take into account the realities of California's energy grid, and patterns in the public's usage of energy. Energy usage peaks during particular times of year and during particular times of the day. The EIR/S should be modified to contain the impacts to energy resources during these peak periods. Without this analysis, the public cannot meaningfully understand and consider the issues raised by the proposed project.

The EIR/S's analysis of impacts to energy resources is inadequate because it only considers impacts caused by additional energy consumption, and fails to consider impacts caused by changes in river flows and hydrogenation. The EIR/S only considers impacts to energy resources caused by additional

pumping by the SWP and CVP. (*Id.*, at 21-26.) There are many other factors affecting the production of energy resources. As recognized by the EIS/S, a great deal of energy in the State is generated via hydroelectric power. Hydroelectric plants depend on river flow and hydrogenation to operate. The BDCP will likely impact the stream flow and hydrogenation of the rivers, but it's not considered as a factor impacting energy resources in the EIS/S. Without this analysis the public cannot meaningfully understand and consider the issues raised by the proposed project, because the environmental analysis does not consider factors which could potentially have a substantial impact on energy resources.

Level of Environmental Analysis is Inconsistent

The EIR/S provides a program level analysis of some impacts, and a project level analysis to others; this inconsistency obscures the true impacts of the project. The EIR/S must be amended to analyze all impacts at a project level.

Funding Disclosure and Analysis is Deficient

The EIR/S fails to provide any disclosure regarding how the BDCP project will be funded. It has been reported recently that the BDCP could be funded through property tax revenues without a public vote. (See [http://www.mercurynews.com/science/ci\\_26198239/property-taxes-could-pay-25-billion-delta-tunnels](http://www.mercurynews.com/science/ci_26198239/property-taxes-could-pay-25-billion-delta-tunnels).) The EIR/S must be amended to disclose and explain how each component of the BDCP will be funded. Included in this analysis, the EIR/S must disclose which parts of the project will be funded by the specific project proponent, the general schedule, the method of funding and which project components will be funded by bond or other public funding mechanisms.

Very truly yours,

**O'LAUGHLIN & PARIS LLP**

  
VALERIE C. KINCAID

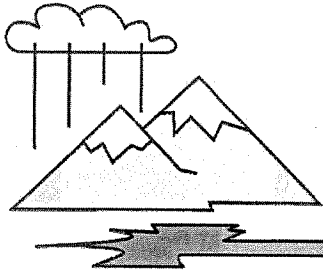
VCK/jac

cc: San Joaquin Tributaries Authority

# L # BDCP1689

- ☐ Unused
- ☐ Duplicate of \_\_\_\_\_
- ☐ Out of Scope
- ✓ Other: Superseded by  
BDCP1805\_\_\_\_\_

(replace original)



**DIRECTORS** **BDCP1690.**  
TED BAMBINO BOB NASH  
JIM SMITH JEFF O. STEPPAT  
LEIMONE WAITE

DAVID J. COXEY  
Secretary/Treasurer/General Manager

## BELLA VISTA WATER DISTRICT

11368 E. STILLWATER WAY • REDDING, CALIFORNIA 96003-9510  
TELEPHONE (530) 241-1085 • FAX (530) 241-8354

July 29, 2014

SENT VIA U.S. MAIL and EMAIL: [BDCP.comments@noaa.gov](mailto:BDCP.comments@noaa.gov)

Ryan Wulf  
National Marine Fisheries Service  
650 Capital Mall, Suite 5-100  
Sacramento, Ca 95814

Re: Comments on the Draft Bay Delta Conservation Plan and /Associated Draft Environmental Impact Report/Environmental Impact Statement

The Bay Delta Conservation Plan (BDCP or Plan) is a comprehensive plan designed to improve water quality and reliability, protect threatened and endangered natural communities and species, improve the Delta ecosystem, and restore natural floodplains and tidal marshes through a series of Conservation Measures (CM's), operational changes, and river flow and diversion alterations. The cornerstone of these flow and diversion alterations is the proposed construction of three upstream intakes and two tunnels on the Sacramento River which will bypass the existing natural intakes through the Delta for the State Water Project (SWP) and Central Valley Project (CVP) South of the Delta water diversions. The project limits run from north of Sacramento, south along the Sacramento River corridor through the confluence with the San Joaquin River to below the Delta pumps and west through Suisun Bay.

The BDCP's proponents are the Department of Water Resources (DWR) and six SWP and CVP water contractors. These proponents are applying for "incidental take" permits (ITP's) from the United States Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) as required by the Endangered Species Act (ESA) and authorization from the California Department of Fish and Wildlife (DFW). ITP's are required because of the potential impact on threatened and endangered species caused by the actions of the proponent's water diversion and delivery systems. The BDCP Draft Environmental Impact Report/Environmental Impact Statement is the required environmental document needed in order to apply for these permits.

The plan offers 15 alternative proposals for review with a number of differing operational parameters. The recommended alternative is alternative 4 which proposes a three intake, two-tunnel upstream diversion on the Sacramento River with a maximum 9,000 cubic foot per second (cfs) diversion. Additionally, there are 22 proposed CM's designed to improve the water facilities operations, habitats, natural communities, ecosystems, tidal zones and marshes for threatened and endangered species.

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It is proposed that the Plan be implemented and managed through a process known as “adaptive management”. This process relies on the review of data and results, exploring new alternatives, predicting new outcomes, and implementing one or more of the alternatives and continuing this review as an iterative process. Many of the parties outside the project, including Bella Vista Water District, are skeptical of this approach because it does not appear to address the impact of unintended consequences well beyond the physical boundaries of the project. An example is the loss of “carriage water” that was to be presumably made available for other uses but has been lost to other areas by adaptive management.

The river flow modeling software uses reservoir Dead Pool<sup>1</sup> level as the cutoff for its computations. Dead Pool at Lake Shasta is elevation 737.75 feet which is below the lowest freshwater intake for the City of Shasta Lake (750 elevation), Mountain Gate Community Services District (intake at elevation 916 feet), and Jones Valley County Service Area (intake at 802 feet). There is no discussion of the impacts of this probability in the plan for these agencies and the Redding region. There are other surface diverters immediately below Shasta Dam, including, but not necessarily limited to, Bella Vista Water District, the City of Redding, and the Anderson-Cottonwood Irrigation District that would be impacted by the dramatically reduced flows brought about by the reservoir drawdown needed to meet proposed bypass flow requirements. Clearly, there are domestic and irrigation water users that will be impacted at much higher upstream water elevations outside of the BDCP plan boundaries, and this needs to be factored into the analysis.

The minimum lake level at which water can be safely taken into the penstocks for electric generation is 840 feet. Below that level vortexing begins at the penstock intakes which can cause cavitation and damage the turbine runners. Loss of hydropower generation will have a significant financial impact on the CVP and the Western Area Power Administration (WAPA) customers that have Base Energy allocation. At “no- generation” operation at Shasta Dam, these entities will not only have to procure replacement power on the open market for their own use, they will have to pay for any supplemental energy needed for Project Use facilities such as pumps and the like. WAPA energy allocations provide that Project Use facilities have first priority for any CVP generation. If there is no generation or not sufficient generation to serve Project Use loads, Base Resource Customers must pay for the purchase of the replacement power as a condition of their contracts.

Nearly half of Shasta County’s population is dependent in one way or another on the United States Bureau of Reclamation (USBR) for water. The Bella Vista Water District is almost entirely dependent on USBR surface diversions and transfers. The Plan is silent to the issue of water rights and Area of Origin principles. It sets requirements for river flows to meet the environmental, ecological, and natural resource goals of the plan within the plan area, without regard to the upstream consequences. The Butte County Board of Supervisors have stated: *“We appreciate the commitment that, “implementation of the BDCP will not result in any adverse effects on water rights of those in the watershed of the Delta, nor will it impose any obligations on water users upstream of the Delta to supplement flows in and through the Delta. These principles honor the importance of water rights and area of origin water rights to the northern Sacramento Valley region. Future circumstances and other considerations could undermine the commitment made to the region. We recommend the BDCP lead agencies develop an enforceable means to ensure that these principles will be honored by BDCP lead agencies. Additionally, BDCP lead agencies should aggressively promote these operational principles to other agencies that have authority over water rights including the state Water Resources Control Board.”* We concur.

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<sup>1</sup> Dead Pool refers to water in a reservoir that cannot be drained by gravity through a dam’s outlet works. Water that is in the Dead Pool cannot be considered part of the conservation pool.

Agriculture, recreation, and tourism are significant economic drivers in Shasta County. The plan does little to assess the economic impact of the changes in river flow patterns and reservoir levels outside the plan area caused by changes imbedded in the plan. In a 1997 analysis, CH2M Hill determined that recreational opportunities afforded by Shasta Lake add \$45 to 50 Million to the local economy. With the loss of much forest and mining based industry, the value of recreation today is far greater, yet it apparently does not rise to a level of significance worth examination in the Plan.

The cumulative impacts of the BDCP and other projects, including the Shasta Lake Water Resources Investigation (enlargement of Shasta Dam and reservoir), other planned reservoir projects (Sites Reservoir, and Upper San Joaquin River Basin Storage), and the State Water Resources Control Board's proposed revised flow criteria for the Sacramento-San Joaquin Delta have not been adequately analyzed on the DIER/DEIS.

Few disagree regarding the importance of having a healthy and vibrant Bay Delta. However, its return to health should not be at the expense of the north state.

If you have any questions, please contact David Coxey, General Manager, Bella Vista Water District at (530) 241-1085, extension 106.

Sincerely,



Jeff O. Steppat, President, Board of Directors  
Bella Vista Water District



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**From:** Debbie Dias <ddias@bvwd.org>  
**Sent:** Tuesday, July 29, 2014 1:56 PM  
**To:** 'BDCP.comments@noaa.gov'  
**Subject:** Comments on the Draft Bay Delta Conservation Plan  
**Attachments:** 140729 T-R. Wulf at National Marine Fisheries Serv. re Comments on Bay Delta Conservation Plan.pdf

Greetings,

Attached here within is the Bella Vista Water District's comments on the Draft Bay Delta Conservation Plan and Associated Draft Environmental Impact Report. If there are any questions, please contact our office at 530-241-1085.

Cordially,

Debbie Dias  
Administrative Assistant  
Bella Vista Water District  
(530) 241-1085 ext. 105

**From:** mei <birdygirly10k@gmail.com>  
**Sent:** Saturday, July 26, 2014 12:45 PM  
**To:** bdcg.comments@noaa.gov  
**Subject:** BDCP comments

Mr. Ryan Wulff, NMFS  
650 Capitol Mall, Suite 5  
Sacramento, CA 95814

## RE: Public Comments regarding the BDCP EIR

I oppose all alternatives in the BDCP that propose construction of new diversions and tunnels under the Delta, particularly the "Twin Tunnels", which are not mentioned by name, interestingly, but maybe I missed that in the 40K pages of documentation.

Before I convey my objections, let me tell you MY suggestion for a viable alternative:

### **DESALINIZATION.**

While most of the users of the Delta (and northern CA) water are the San Joaquin irrigators who are not on the Coast, I think it would be more viable to have Central Coast desal plants and build a pipeline or tunnels or whatever water conveyance that makes sense via or through the Coast Range. While building anywhere of course has environmental consequences, I think it would be less devastating there than to the fragile Delta, which has been suffering for decades. This State has already spent BILLIONS studying the water and environmental issues IN the Delta; let us UTILIZE what we have learned, or could or should have learned, from examining or re-examining the data that has already been collected and analyses that have already been done by projects/studies there, going back to those from the CalFED years and subsequent incarnations..

Sincerely,  
Marti Ikehara  
CITIZEN of California

I oppose the proposed project because:  
It is too costly (up to \$54 billion with interest and other hidden costs) and the general public should not have to cover any of this outrageous, including habitat restoration costs. These should be paid by those who receive the water (since the Delta diversions degraded the habitat in the first place).

Operation of the diversions and tunnels threaten to deplete major upstream reservoirs in northern California and reduce downstream river flows, to the detriment of fish, wildlife, recreation, and other public trust values. Diversion and tunnel facilities would adversely impact too much Delta farmland and habitat, harm Brannan Island State Park, infringe on the Stone Lakes National Wildlife Refuge, and degrade other essential conservation lands. You cannot restore Delta habitat without first determining how much fresh water the Delta needs to survive and thrive. Restoration of fresh water flows from the San Joaquin River in the south Delta are particularly important. The tunnels will need more upstream storage facilities to feed fresh water into them. These include raising Shasta Dam, building the Sites Reservoir, and possibly reviving the Auburn Dam on the American River and the Dos Rios Dam on the Eel. The environmental, cultural, and financial impacts of these controversial projects are a significant foreseeable but ignored impact of the BDCP.

I believe that the BDCP should include, and I would support, an alternative that significantly reduces Delta exports and focuses instead on restoring habitat and threatened and endangered species in the Delta, improves Delta water quality by providing sufficient fresh water inflow from both the Sacramento and San Joaquin Rivers, and that includes a pragmatic plan to sustainably meeting California's water needs. This can be done by increasing agricultural and urban water use efficiency, capturing and treating storm water, recycling urban waste water, cleaning up polluted groundwater, and reducing irrigation of desert lands in the southern Central Valley with severe drainage problems.

**From:** Johnson, Patricia <pjohnson@eid.org>  
**Sent:** Tuesday, July 29, 2014 4:18 PM  
**To:** 'BDCP.comments@noaa.gov'  
**Cc:** # Board of Directors; Abercrombie, Jim; Cumpston, Tom; Poulsen, Brian; Corcoran, Daniel  
**Subject:** Comments on Bay Delta Conservation Plan and Draft EIR/EIS  
**Attachments:** 20140729153301.pdf  
  
**Importance:** High

Dear Mr. Wulff:

Please find attached comments from the El Dorado Irrigation District regarding the Bay Delta Conservation Plan and Draft EIR/EIS.

Regards,

*Patricia A. Johnson  
Paralegal to Office of General Counsel  
Tel: 530-642-4144  
Fax: 530-622-1995  
Email: [pjohnson@eid.org](mailto:pjohnson@eid.org)*

*Please Note: EID is currently in a Stage 2 Water Warning due to the ongoing drought. As a result all customers are requested to reduce their water usage by 30%. For more information please visit <http://www.eid.org/drought>*

**ATTENTION**

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Alan Day – *President*  
Division 5

George W. Osborne – *Director*  
Division 1

Greg Prada – *Director*  
Division 2



Bill George – *Vice President*  
Division 3

Dale Coco, MD – *Director*  
Division 4

Jim Abercrombie  
*General Manager*

Thomas D. Cumpston  
*General Counsel*

In reply refer to: L2014-024

July 29, 2014

Mr. Ryan Wulff  
National Marine Fisheries Service  
650 Capitol Mall, Suite 5-100  
Sacramento, CA 95814

*Also via email to [BDCP.comments@noaa.gov](mailto:BDCP.comments@noaa.gov)*

Re: Comments on Bay Delta Conservation Plan and Draft EIR/EIS

Dear Mr. Wulff:

These comments on the Bay Delta Conservation Plan (“BDCP”) and its draft Environmental Impact Report/Environmental Impact Statement (“Draft EIR/EIS”) are submitted on behalf of El Dorado Irrigation District (“EID”). EID serves more than 100,000 residents of El Dorado County, entirely from surface water supplies in the South Fork American River and Cosumnes River basins.

EID has vital interests at stake in this proceeding. In addition to very senior water rights associated with its upstream reservoirs and diversions in both river basins, EID relies heavily on Folsom Reservoir for multiple supplies. Specifically, at Folsom Reservoir EID has a water service contract for up to 7,550 acre-feet annually of Central Valley Project (“CVP”) water supplies, a Warren Act contract to take up to 4,560 acre-feet annually of its own supplies, and water rights permit issued under state area-of-origin laws for 17,000 acre-feet annually. Also, EID expects to be the beneficiary in the near future of a subcontract for all or a portion of the El Dorado County Water Agency’s pending 15,000 acre-foot water service contract for CVP water supplies. Like the North State Water Alliance (“NSWA”), EID is closely monitoring and assessing the BDCP’s development and environmental analysis for their conformance to the core principles of regional self-reliance, the protection of senior and area-of-origin water rights, avoidance of redirected impacts upstream of the Delta, and promotion of the co-equal goals.

Regrettably, we conclude that as currently formulated, the BDCP and Draft EIR/EIS either do not conform to these core principles, or fail to provide sufficient information by which to judge their conformance. EID calls on the BDCP’s proponents and coordinating agencies to address the fundamental flaws and omissions in the documents, and to recirculate them for public comment, before proceeding further toward implementing this massive and enduring undertaking.



Ryan Wulff  
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EID adopts and incorporates by reference the concurrent and detailed comments of NSWA and the American River Water Agencies ("ARWA"). To avoid repetition, EID's comments in this letter focus on summarizing the NSWA and ARWA comments about issues that bear most directly upon EID's interests.

First and foremost, the operational and hydrologic modeling in the BDCP and Draft EIR/EIS are fundamentally flawed. Because this modeling serves as the cornerstone of the documents' analyses of surface water, socioeconomic, and in-Delta aquatic impacts these impact analyses are deficient under the California Environmental Quality Act ("CEQA") and the National Environmental Policy Act ("NEPA").

Specifically, as explained by both NSWA and AWRA, the modeling does not employ the most current and correct methodologies. Nor does it realistically forecast future Folsom Reservoir operations, because (contrary to common sense and actual events in 2014) it assumes that CVP operations would not adapt to changing hydrological conditions. Projections of future water demands in the American River basin are inconsistent with both state-generated population projections and local water supply plans. Further, the in-Delta operations actually modeled differ from the narrative descriptions of those operations. These differences fail to meet CEQA's standard of an accurate, stable, and finite project description, which has long been understood to be the *sine qua non* of a legally adequate EIR. (See, e.g., *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 192.)

The virtually unbounded agency discretion and lack of defined performance standards in the BDCP's plan for adaptive management is an equally fundamental failure to provide an adequate project description or adequate impacts analysis. While adaptive management is a beneficial concept, the BDCP's and Draft EIR/EIS's over-reliance on future adaptations improperly "assumes away" reasonably foreseeable project impacts (see *Laurel Heights Improvement Ass'n v. Regents of the University of California* (1988) 47 Cal.3d 376, 396), and the failure to define adequately the "triggers," performance standards, and "bookends" of future adaptations improperly defers the formulation of feasible and effective mitigation measures for those impacts. (See CEQA Guidelines § 15126.4(a)(1)(B); *Endangered Habitats League v. County of Orange* (2005) 131 Cal.App.4<sup>th</sup> 777, 793.)

The failure to model BDCP operations both without climate change assumptions compounds the inadequacy of the project's impacts analysis (and therefore, its mitigation measures), because it makes it impossible to differentiate between impacts caused by the project, and impacts caused by climate change. (See *Neighbors for Smart Rail v. Metro Line Construction Authority* (2013) 57 Cal.4<sup>th</sup> 439, 456; *Environmental Planning and Information Council v. County of El Dorado* (1982) 131 Cal.App.3d 350.)



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Conversely, the ill-defined “decision tree” mechanism for determining Delta flows creates a mathematical multiplicity of potential project alternatives, yet the BDCP and Draft EIR/EIS confine their analysis to a fraction of those scenarios (focused on preferred Alternative 4), despite the acknowledgement that “hybrid” scenarios are also possible. This too-narrow focus stultifies and analysis of potential project impacts and again betrays that the project description is uncertain.

EID is greatly troubled by the prospect of redirected impacts, and particularly impacts on its senior, upstream, area-of-origin water rights. Tellingly, the Draft EIR/EIS does not even attempt to assess the BDCP’s socioeconomic impacts outside of the statutory Delta. This voluntary donning of analytical blinders bodes ill for a plan that is supposed to avoid redirected impacts. Likewise, the BDCP and Draft EIR/EIS take a speculative and dismissive approach to project funding, notwithstanding the Endangered Species Act’s requirement that there be assured funding sufficient to implement a habitat conservation plan.

Both of these approaches suggest that, inevitably, upstream interests will be called upon to bear a share of the BDCP’s burdens, in the form of CVP contract charges, water foregone, or both. Indeed, the BDCP states, at page 8-82, that “[t]he financial support of the state and federal contractors is essential in order to implement the plan,” even though neither the United States Bureau of Reclamation, EID, nor many other federal contractors are parties to the draft Implementation Agreement. Further, the BDCP assumes that state funds earmarked for regional watershed projects will be redirected toward the BDCP. (See BDCP at p. 8-89.) EID participates in two Integrated Regional Water Management (IRWM) Plans; in neither does EID or any other member entity propose to dedicate any IRWM funds to implement the BDCP.

Finally, by providing overreaching regulatory assurances to its water-purveyor participants, the BDCP inevitably ensures that non-participants like EID will have to make up any shortfalls in, for example, environmental water flows, through subsequent water-right, endangered-species, and other regulatory processes after the BDCP is adopted and in place. In other words, the BDCP’s proposed regulatory assurances under the Endangered Species Act clearly set the stage for the future usurping senior and area-of-origin water rights, because the junior, export water-right interests will have acquired immunity to further regulatory impacts.

EID fully recognizes the need for a comprehensive, fair, and lasting solution to the myriad problems associated with the Delta. EID is committed to the co-equal goals. EID can and will support a program that advances those goals, and that supports regional self-reliance, protects senior and area-of-origin water rights, and avoids redirecting impacts to third parties. As currently formulated, the BDCP and the Draft EIR/EIS are emphatically not that program. Even if the documents were not marred by numerous and fatal analytical flaws, they would not detail a program that EID could support. The remedy, therefore, is not simply to attempt to correct the technical flaws and maintain the current course. EID calls on the BDCP participants to step

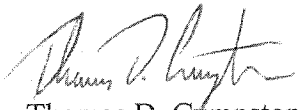


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July 29, 2014  
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back, reconsider, redraft, and recirculate for public review a plan and environmental documentation that can earn the support of upstream, area-of-origin interests.

Sincerely,



Thomas D. Cumpston  
General Counsel

TDC:pj

cc: EID Board of Directors  
Jim Abercrombie, EID General Manager  
Brian Poulsen, EID Deputy General Counsel  
Dan Corcoran, EID Environmental Manager



**From:** Tricia Raymond <traymond@cityofripon.org>  
**Sent:** Tuesday, July 29, 2014 4:20 PM  
**To:** BDCP.Comments@noaa.gov  
**Subject:** BDCP - Comment  
**Attachments:** BDCP Comment.pdf

Mr. Wulff,

Please see the City of Ripon's attached PDF response letter in regards to the Bay Delta Conservation Plan.

If you have any questions, please contact our office.

Thank you,

**Tricia Raymond**  
Assistant Deputy City Clerk  
City of Ripon  
259 N. Wilma Ave.  
Ripon, CA 95363  
(209) 599-0215 direct  
(209) 599-2685 fax  
[traymond@cityofripon.org](mailto:traymond@cityofripon.org)

*\*Please note: City Hall is open 7:30 a.m. to 5:30 p.m., Monday through Thursday.*

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# City of Ripon

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Phone 209 599-2108 • Fax 209 599-2685

[www.cityofripon.org](http://www.cityofripon.org)

July 29, 2014

BDCP Comments

Ryan Wulff NMFS

650 Capitol Mall, Suite 5-100

Sacramento, CA 95814

The City of Ripon is writing in opposition to the Bay Delta Conservation Plan.

The Bay Delta Conservation Plan (BDCP) states it is being developed as a 50-year habitat conservation plan with the goals of restoring the Sacramento-San Joaquin Delta ecosystem and securing California water supplies. The BDCP would secure California's water supply by building new water delivery infrastructure and operating the system to improve the ecological health of the Delta. The BDCP also would restore or protect approximately 150,000 acres of habitat to address the Delta's environmental challenges.

After reviewing the BDCP website and materials, reports from other agencies, plus having discussion amongst our City Council, we feel the BDCP building high capacity tunnels to remove large amounts of fresh water from the Delta will have significant damaging impacts to our region, including:

- **BDCP Negatively Impacts the Economy in our Region.** The San Joaquin County Delta covers over 730,000 acres and is one of the most productive agricultural regions in the United States, with 80% of the Delta being prime farmland, compared to 20% for all of California. The Delta also has a large economic impact providing over 9,700 jobs and \$1.4 billion in economic output from the five surrounding counties. The recreation in the Delta generates over \$250 million in visitor spending yearly, with recreation and tourism supporting 3,000 jobs in the five Delta counties.
- **BDCP Diminishes Water Supplies in our Region.** The Delta water supply is not easily or cheaply replaced. The California Department of Water Resources estimate that roughly 24 percent of the California's economic activity is connected to the water supplied by the federal and state water projects in the Delta.

MAYOR

*Chuck Winn*

VICE MAYOR

*Elden "Red" Nutt*

COUNCIL MEMBERS

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*Jake Parks*

*Dean Uecker*

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CITY ENGINEER

*Kevin Werner*

CITY ATTORNEY

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*Lisa Roos*

DIRECTOR OF PLANNING &  
ECONOMIC DEVELOPMENT

*Ken Zuidervaat*

DIRECTOR OF PUBLIC WORKS

*Ted Johnston*

RECREATION DIRECTOR

*Kye Stevens*

- **BDCP will Destroy the Ecosystem and Fisheries.** The building of the twin tunnels will cause further decline of native Delta fish species towards extinction, increased water pollution in the Delta, and the loss of tens-of-thousands of acres of rich Delta farmland and wildlife habitat. Moving more water out, will not help replenish what's existing or protected.

The BDCP has a vague plan for financing the project. The estimated price tag for the BDCP is nearly \$25 billion, but reports of hidden costs take that number to \$64 billion over a 50 year span. The federal government and taxpayers will be responsible for much of the BDCP's habitat restoration costs in the long run. There are less expensive and more effective ways than the twin tunnels and BDCP to address the legitimate water needs in the State of California without needlessly sacrificing the Delta and surrounding counties.

Sincerely,



Chuck Winn  
Mayor

Cc: Vice Mayor Elden R. Nutt  
Council Member Leo Zuber  
Council Member Jake Parks  
Council Member Dean Uecker

**From:** David Weisenberger <dweisenberger@banta-carbona.org>  
**Sent:** Tuesday, July 29, 2014 4:52 PM  
**To:** BDCP.comments@noaa.gov  
**Subject:** Comments on BDCP Draft  
**Attachments:** BDCP Public Comment Letter July 29 2014 BCID.pdf

Please find attached our comment letter on the BDCP Draft documents. Thank you for your consideration of our comments.

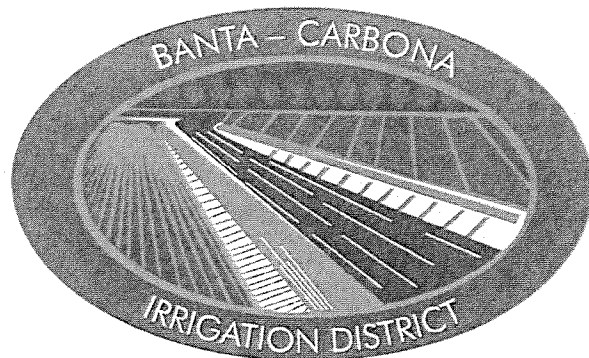
David Weisenberger  
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Banta-Carbona Irrigation District  
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BDCP 1694

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BDCP Comments  
Ryan Wulff, NMFS  
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BDCP.COMMENTS@NOAA.GOV

July 29, 2014

Mr. Wulff:

We respectfully submit the following comments on the BDCP Draft documents. We did not find any discussion in the document that seriously considered using control structures to minimize the waste of fresh water outflows in order to control salinity intrusion into the Delta. We believe that the use of control structures in the Carquinez Strait could greatly expand the freshwater habitat for delta smelt into the Suisun Bay area and provide higher velocity fresh water outflows for migrating salmon at the appropriate times of day and year. By using control structures in the Carquinez Strait such as the Dutch Gates used in Holland or tidal gates, or some other such appropriate control structure, salt water from the bay can be blocked from entering the delta. By using physical features to control salinity intrusion stored water already in reservoirs would be conserved not only in drought years but in all years. In addition, the freshwater habitat for delta smelt and salmon smolts would be greatly increased thus enhancing the preservation of both species if not allowing for increased populations for both species over time. By using tidal control structures in the Carquinez Strait a higher quality of fresh water would be mixed in San Pablo Bay thus expanding the area for delta smelt to use for the part of their life cycle where they prefer a more brinish solution to live in.

Delta smelt and salmon smolt survival as well as salinity control in the delta are three major issues that limit the ability of the pumps on the CVP and the State Water Project to

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operate in accordance to their respective water rights. These three issues currently require an excessive amount of fresh water to be released from storage and be wasted to the ocean. To manage these issues we believe that increased water delivery reliability can be attained for both Projects through the use of tidal control structures or some other engineered control structure in the Carquinez Strait. We believe that the above proposed alternative was not given appropriate attention or addressed at all in evaluating alternatives to increase delta smelt habitat, enhancing salmon smolt migration or for controlling salinity intrusion into the delta. The tidal control structure alternative would provide a mechanism to imitate a more natural fresh water condition that existed before the 1920's in the Suisun Bay and San Pablo Bay.

For the above reasons we believe that the current Draft BDCP documents are incomplete and should be expanded to include the above recommended alternative before a decision is made by lead agencies to select a preferred alternative.

Sincerely,

A handwritten signature in cursive script, appearing to read "David Weisenberger".

David Weisenberger  
General Manager