

SOLURI MESERVE

A Law Corporation

1822 21. Street, Suite 202
Sacramento, California 95811
916.455.7300 (telephone)
916.244.7300 (facsimile)
www.semlawyers.com

BDCP1717

May 14, 2009

Via Hand Delivery and Email (delores@water.ca.gov)

Ms. Delores Brown
Division of Environmental Services
California Department of Water Resources
901 P. St., Bonderson Bldg., 4th Fl.
P. O. Box 942836
Sacramento, CA 95814

Re: Comments on NOP for Revised BDCP EIRiEIS

Dear Ms. Brown:

This firm represents Reclamation District 999 ("District"), which is within the Clarksburg District of the Delta with respect to the development of the Bay Delta Conservation Plan ("BDCP" or "Project"). This letter provides the District's comments on the Revised Notice of Preparation ("NOP") for the joint Environmental Impact Report/Environmental Impact Statement ("EIRiEIS") on the BDCP pursuant to the California Environmental Quality Act ("CEQA") and the National Environmental Policy Act ("NEPA").³ The Project as described in the NOP is an extremely broad suite of potential actions within the Delta aimed at meeting the water supply goals of the Potential Regulated Entities ("PREs").

Provision of these comments should not be interpreted as an indication of acceptance of the premise that the suite of actions generally referenced in the NOP and in BDCP materials⁴ are, on the whole, appropriate given the numerous considerations relevant to management of water and other resources of the Sacramento San Joaquin Delta. In particular, the District is concerned that the BDCP is being planned without

¹ Pub. Resources Code, §§ 21000 et seq.

² 42 U.S.C. § 4321 et seq.

³ The District's previous comments on the BDCP, dated April 30, 2008 and May 26, 2008, are attached as Exhibit A.

⁴ In addition to the NOP itself, these comments are also informed by materials generated by the BDCP process. Even with these supplemental materials, there is still no clear description of the far-reaching actions being contemplated.

serious consideration of the impacts it will have on the environment and communities within the Delta.

I. Background Information Regarding the District

Formed in 1913, and chartered by the Legislature in 1919, Reclamation District 999 includes a complex network of channels that provide drainage in the winter and water for agriculture in the dry months,⁵ and a perimeter of levees to prevent flooding from the Sacramento River, the Deep Water Ship channel, and the Delta. Within the District's 26,136 acre area, approximately 1,500 people are protected by the 32.4 miles of levees.⁶ Communities within the District include the town of Clarksburg, and the south-eastern Yolo County and a small portion of Solano County, as well as residents of marinas and moorings on the Sacramento River.

The modern history of the Clarksburg area began with the settlement of Merritt Island by farmers in the 1850's, and has become a rich mosaic of small and large farmsteads. The agricultural community ranges from the famous Bogle vineyards and winery to the historic Sugar Mill. Of special economic and cultural value to the community is the Clarksburg wine appellation, spanning over 64,000 acres within Sacramento, Solano and Yolo counties.

Aquatic and terrestrial habitat within the rural District also hosts a wealth of native species. Wildlife is readily found throughout the community, from Swainson's hawks to river otters. The valley riparian forest is also relatively intact and forms a nearly continuous belt to the adjacent Delta waterways. In recognition of these valuable natural communities, the District is proactive in use of environmentally friendly levee control projects (e.g. use of Brush Boxes and establishment of vegetation along the waters edge). The District has also taken strides to protect smelt and salmon by installing a state-of-the-art fish screen on its Sacramento River diversion. Looking forward, the District intends to continue carefully stewarding the natural resources of this unique area, which are the bedrock of the community's quality of life and economic vitality.

⁵ All water used within the District, except water lost to evaporation, remains within the watershed.

⁶ Unlike certain levees in the South and Central Delta, levees within the North Delta are not considered particularly vulnerable to damage from static conditions, seismic activity and predicted sea level rise. Lands within the District are also not associated with peat bodies and associated subsidence.

II. Overall Comments on BDCP Planning Process

The District recognizes the intense effort that is being dedicated to this Project by public and private entities alike with the goal of receiving 50-year incidental take permits ("ITP") for the covered species that authorize take related to operation of the State Water Project ("SWP") and Central Valley Project ("CVP") Delta facilities. ITP coverage would facilitate continued and increased exports of water over current levels for use out of the Delta watershed with "No Surprises" assurances under the Endangered Species Act.⁷

Despite the proposed dramatic and permanent changes to the Delta landscape and waterscape, and the proposed 50-year duration of "take" coverage, the BDCP process has not included significant outreach to and incorporation of feedback from local communities within the Delta. While Steering Committee representation of entities other than the Potentially Regulated Entities ("PRE") has grown, the Planning Agreement for the BDCP squarely provides ultimate decision-making authority regarding the Project to the PREs.⁸ A prerequisite to Steering Committee membership is also an agreement with the Planning Goals formulated in 2006, which do not include any specific references to the protection, or even consideration, of core in-Delta interests (e.g. protection of in-Delta beneficial uses of water and land and minimization of disturbances to existing communities). As a result of these and other factors, Steering Committee membership is not considered a reasonable option by many representatives of interests within the Delta.

The District finds the repeated references to a "collaborative process" in BDCP materials misleading because such a description indicates participation by all affected parties in a consensus-driven process. However, fundamental decisions regarding the components and direction of the BDCP were made well before the District (and likely any other entities within the Delta) began participating in the BDCP process.¹⁰

⁷ Under the No Surprises policy, the commitment of additional land, water or financial compensation or additional restrictions on the use of land, water or other natural resources beyond the level otherwise agreed upon could not be required without the consent of the PREs. (See 50 C.F.R., §§ 17.22, subd. (b)(5), 17.32, subd. (b)(5), 222.307, subd. (g).)

⁸ See Bay Delta Conservation Plan, Planning Agreement (October 6, 2006, rev'd March 19, 2009), § 7.4.1.1.

⁹ See generally, Wondollek et al., *Making Collaboration Work: Lessons from Innovation in Natural Resource Management* (2000).

¹⁰ For example, the selection of "the main new physical feature of [the] conveyance system includes the construction of a new point (or points) of diversion in the north Delta on the Sacramento River and an isolated conveyance facility around the Delta." (The Bay Delta Conservation Plan: Points of Agreement for Continuing into the Planning Process (November 16, 2007), at p. 3.) The casting of this massive structure with correspondingly massive impacts

Though some improvements have occurred since the BDCP process began (e.g., accessibility of meeting materials, although handouts are often withheld until the meeting and copies are not always provided to all audience members), a greater understanding of local concerns and actual responses to those directly impacted by the Project must occur to garner local support for this Project.

In addition to practical reasons to consult with the affected communities regarding development of such an enormous and far reaching project, close consultation with affected entities such as the District is legally required. Under CEQA, the District has management authority over several resources affected by the project and requests that its concerns be carefully considered.¹¹ Under NEPA, an EIS must be conducted "in cooperation with State and local governments" and other agencies with jurisdiction by law or other special expertise.¹² Consultation under CEQA and NEPA is thus formally requested at this time.

III. Comments on Scope of Environmental Review

A. Project Description

Significant work still needs to be undertaken to develop a proper Project description that would properly support an adequate environmental review process. A NOP must include "sufficient information describing the project and the potential environmental effects to enable the responsible agencies to make a meaningful response. At a minimum, the information shall include: (A) Description of the project, (B) Location of the project [], and (C) Probable environment effects of the project."¹³ The lack of detail regarding the Project being proposed, including the interchangeability of major Project components that would dramatically change the scope and location of impacts severely constrains the District's ability to provide detailed NOP comments at this time.

Moreover, it is unclear from the NOP what level of review is contemplated for the various proposed actions. For instance, the NOP does not explain the level of review (i.e., project or program) that elements of the BDCP will be analyzed. A "program EIR should be explicit about what level of review is contemplated for project-level

on habitats and species not previously affected by PRE diversions as a "conservation measure" occurred subsequently in the process.

¹¹ Tit. 14 Cal. Code Regs., div. 6, ch. 3 ("CEQA Guidelines"), § 15086, subd. (a)(3).

¹² 42 U.S.C., §§ 4331, subd. (a), 4332, subd. (C)(iv).

¹³ CEQA Guidelines, § 15082, subd. (a)(l).

approvals."¹⁴ The public must be apprised, in particular, of those aspects of the Project that will not receive additional environmental review.

Given the far-reaching effects of the Project under consideration as well as the underlying statutory mandates associated with development of Habitat Conservation Plans, one would expect that a sound scientific basis would support the currently proposed components of the BDCP. This scientific basis is, however, completely lacking in many respects. For example, biological goals and objectives for the BDCP still have not been established, and certainly had not been established prior to selection of the project components.¹⁵ Without such objectives, the process of weighing the efficacy of proposed components to meet ESA requirements is not well grounded.

Additionally, it is not clear that the development of the BDCP project description (conservation measures/actions) comport with ESA guidance regarding the priority of avoiding, minimizing and mitigating impacts to covered species. "Mitigation actions under HCPs usually take one of the following forms: (1) avoiding the impact (to the extent practicable); (2) minimizing the impact; (3) rectifying the impact; (4) reducing or eliminating the impact over time; or (5) compensating for the impact."¹⁶ The BDCP project description must be developed based on these underlying ESA principles, which provides more emphasis on avoidance of take in the first place, especially where compensation or mitigation for a given impact will lead to take of additional species and new environmental effects.¹⁷

With respect to the Project objectives/statement of purpose and need from a CEQA/NEPA perspective, project applicants are typically afforded a measure of flexibility to select project objectives and components.¹⁸ In this instance, however, the participation of public entities with statutory responsibilities to the public, along with the

¹⁴ Remy et al., *Guide to the Environmental Quality Act*, 11th ed. (2007), at p. 654, discussing *Citizens for Responsible Equitable Environmental Development v. City of San Diego Redevelopment Agency* (2005) 134 Cal. App. 4th 598.

¹⁵ According to the U.S. Fish and Wildlife Service's Five Point Policy, biological goals and objectives "create parameters and benchmarks for developing conservation measures, provide the rationale behind the HCP's terms and conditions, promote an effective monitoring program, and, where appropriate, help determine the focus of an adaptive management strategy." (Final Addendum to the Handbook for Habitat Conservation Planning and Incidental Take Permitting Process, 65 Fed. Reg. 35251-35251 (June 1, 2000)).

¹⁶ *Habitat Conservation Planning and Incidental Take Permit Processing Handbook* (1996) ("HCP Handbook"), at p. 3-19; see also 16 U.S.C., § 1539, subds. (a)(2)(A)(ii-iii), (a)(2)(B)(ii).

¹⁷ See HCP Handbook, at p. 7-2 (describing circumstances under which take associated with mitigation activities may be authorized.)

¹⁸ See, e.g., CEQA Guidelines, § 15124, subd. (b); 40 C.F.R., § 1502.13.

far-reaching scope and effects of the project dictates a more careful inspection of foundational assumptions underlying the selection of Project components. The ongoing and probable future public financing of development and implementation of the BDCP also creates a heightened responsibility for development of objectives that also serve a broader public interest beyond the interests of the PREs.

Given the long time horizons for the sought take coverage as well as the certainty that conditions will change over time, a rigorous adaptive management program is crucial to long term improvements in Delta ecosystems and viability of special status species. The adaptive management component of the BDCP must be carefully developed and articulated with enough specific details to understand what it means to the District. As with other foundational components of this Project, a complete description, of an effective adaptive management plan has yet to be developed. Technical comments on the draft Adaptive Management Plan made available thus far are attached for the consideration of the Project team members. (Exhibit B: Adaptive Management and Public Participation Comments.)

B. Project Baseline

Under CEQA and NEPA, an EIR must include a description of the physical environmental conditions in the vicinity of the project from both a local and regional perspective. An accurate description of the environmental setting of the Project is critical because it establishes the baseline physical conditions against which a lead agency can determine whether an impact is significant.²⁰ The EIRJEIS must thus include detailed description of Delta communities and the surrounding environment.

Equally important, the baseline for the EIR/EIS must account for current export levels (as modified by recent ESA and CESA litigation and related regulatory actions). It may not be assumed that SWP and CVP contract water amounts are already being fulfilled. Thus, current export levels are the appropriate environmental baseline against which to measure impacts of the Project.²¹

C. Project Impacts

Several probable components of the BDCP would have major environmental and other impacts within the District. It is unclear, however, whether and exactly how these components of the Project will ultimately be pursued. In light of this incomplete and

¹⁹ Ibid; 40 C.F.R., § 1502.15.

²⁰ CEQA Guidelines, § 15125, subd. (a).

²¹ See *Save Our Peninsula v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 121 (impacts of project must be measured against real conditions on the ground).

shifting Project description, the District is only able to provide general comments at this time.

The District recommends consideration of the following impacts associated with the potential western alignment of an isolated conveyance facility:

- Impacts from conversion of farmland to canal and associated facilities. In agricultural areas such as the District, conversion of farmland leads to other indirect environmental and social effects that also must be disclosed, and to the extent required by law, mitigated.
- Impacts from destruction of habitat for riparian and terrestrial species.
- Impacts from incompatibilities of canal and associated facilities with existing local land use plans.
- Impacts associated with ancillary facilities for the canal, such as power supply and access roads.

The District also urges analysis of impacts of all Project components on the availability of water within the Delta for beneficial uses. Any isolated conveyance facility and northern intake point(s) would reduce the amount of freshwater within the Delta. Potential results of changes in water quality on the environment, special status species, and beneficial in-Delta uses of water must be carefully analyzed. ²

A major component of the BDCP is restoration²³ of tidal and shallow water habitats, some of which may occur within the District²⁴ in order to increase primary production²⁵ of food for species sought to be covered by the Habitat Conservation Plan. It has been postulated in the BDCP that additional nutrients provided by increased primary production would benefit the listed fish species, but the requirements for additional primary production to aid in listed fish species growth rate improvement is a complicated issue. The type (and availability), size, location and timing of that food resource provided are critical in the actual value of that resource. Furthermore, it is

²² Water rights within the Delta are afforded priority over the SWP and CVP. (See, e.g., Wat. Code, § 12203; see also Wat Code, § 11460 (area of origin protections).)

²³ The use of the term "restoration" here should not be considered an acceptance of the premise that these activities would actually restore areas to a previously historic condition.

²⁴ This comment is based upon materials provided in the BDCP process, not the NOP itself. These materials have typically included only low quality maps that depict constantly shifting proposals described by constantly changing nomenclature. As discussed in section III.A above, an intelligible and stable project description is necessary to an NOP that adequately informs the public.

²⁵ Primary production is the conversion of sunlight into food energy by plants or aquatic plant-like organisms (phytoplankton).

possible that increasing primary production may not yield the desired effect. (See Exhibit C, Terrestrial Species and Habitats Comments.)

For instance, there is no indication that the addition of more nutrients (eutrophication) or primary producers in the system would benefit fish. Eutrophication can have significant negative site-specific and regional impacts, which can vary both in space and time. The proposed management of the Delta does not have any mechanism for fine-tuning, managing, or otherwise controlling the degree and transformation of nutrients in this system. This well-intentioned, but undeveloped idea could by itself lead to extinction of rare aquatic species, the potential for which must be analyzed in the EIR/EIS.

The contemplated restoration activities, because of the potential to release and dislodge mercury within subsurface soils, would also create the potential for release of mercury that would otherwise continue to be sequestered underground. (See Exhibit D, Mercury Issues Comments.) The EIR/EIS must fully analyze the impacts of mercury releases that would occur as a result of soil disturbance from restoration activities on human and natural communities. This analysis should recognize the use of Delta waterways for subsistence fishing as well as the potential for contamination of drinking water supplies for use within and outside of the Delta.

The magnitude of the Project also makes essential a full analysis of cumulative impacts. In particular, the District is concerned about the impacts of the BDCP in combination with another proposed Project that would potentially bifurcate and disrupt lands within the District: the Transmission Agency of Northern California Transmission Project ("TIP"). One alternative route of the TTP includes massive transmission lines through the District. The TIP, in combination with components of the BDCP, would result in cumulative environmental impacts that must be carefully considered.²⁶ For instance, the combination of the TTP and a western conveyance facility would interfere with the ability of farmers within the District to continue agricultural activities. Together, these massive infrastructure projects would also disturb important habitat areas relied upon by myriad species. Moreover, we are aware that the TIP proponents have been in communication with the Department of Water Resources, given the need for power along any new conveyance route. To the extent that these projects are interrelated and interdependent, they must be reviewed in tandem.²⁷

²⁶ See CEQA Guidelines, § 15130; 40 C.F.R., § 1508.25, subd. (c)(3).

²⁷ See CEQA Guidelines, § 15378, subd. (a); 40 C.F.R. § 1508.25, subd. (a)(3).

D. Mitigation Measures to Address Significant Impacts Associated with Project

Once a detailed Project description is complete, an effective program to mitigate potentially significant effects to the extent feasible will be critical to the local communities where components of the Project are located. Mitigation will be necessary both during construction and operation of the Project. While the lack of a detailed Project description constrains the ability to make specific suggestions, the District recommends consideration of the following measures:

- Measures that would protect local soils and water from mercury contamination resulting from conversion of any upland areas within or upstream of the District to tidal or seasonal wetland habitat.
- Measures to compensate for direct and indirect loss of agricultural productivity in the area, such as programs to develop markets for agricultural products that are grown within the region.
- Measures to reduce water losses during transport.
- Measures to decrease the energy use and related carbon footprint associated with the Project.

E. Alternatives to Project

Given the major environmental and community impacts that could result from implementation of a Project of this magnitude, the District urges inclusion of a detailed discussion of a broad array of Project alternatives in the EIR/IEIS. As noted above, the District does not agree with, and did not participate in, the initial selection of Project components. Had the District had an opportunity to participate in the development of the Project, the District would have urged that components be selected based both on established biological goals and objectives, with major consideration being given to minimization of disturbance to existing communities within the Delta. Though this did not occur during project development, the EIR/IEIS must, as a minimum, consider alternatives that would address special status species requirements and avoid or minimize impacts on Delta ecosystems and communities.

As recognized by the state and federal courts that have considered the issue and the existence of the BDCP process itself, the Project's diversion of water from the Delta watershed results in take of special status species. Reductions in exported water would reduce take of special status species and other water quality impacts. Thus, alternatives that would reduce water exports should be given primary consideration as a means to conserve special status species. Specifically, serious consideration of the ability of water use efficiency and conservation, and development of alternative supplies to meet water

supply objectives of the PREs, must be provided in the EIR/EIS. Such alternatives include but are not limited to: desalinization, wastewater re-use, rainwater collection, groundwater banking, conjunctive use, and additional storage.

Because the bulk of water exported from the Delta is used for agricultural purposes, water use efficiency and related options must also focus on the San Joaquin agricultural sector. As District landowners are primarily farmers, the District appreciates the importance of maintaining a productive agricultural sector to the state and the nation. However, when agriculture relies on water exported from a watershed that is facing multiple challenges caused in large part by the exports themselves, special considerations arise. Agriculture served by Delta water can and must move forward on measures that use water more efficiently, while continuing to provide essential foods and agricultural products.²⁹ These measures must be included in the EIR/EIS.

IV. CONCLUSION

The District hopes that the significant public and private investment dedicated thus far to addressing Delta issues through the BDCP leads to tangible improvements that ultimately benefit all those reliant upon Delta resources. Because the Delta contains irreplaceable natural resources and is also the water hub of California, informed decision making is essential. As the BDCP is refined, emphasis should be placed on options that avoid a situation where the "solution" creates significant (and perhaps unanticipated) consequences, such as the current SWP/CVP pumping configuration. The imperiled status of endangered and threatened species within the Delta is yet another indication that watersheds do have a carrying capacity for water exports. With a growing state population that is removed from our largest fresh water supplies, simply continuing to transfer more and more water from one part of the state to another is not a viable long term plan.

The District looks forward to participating in the BDCP process to ensure that the District's longstanding stewardship of Delta resources may continue. Please feel free to

²⁸ In addition to removing water from the Delta ecosystem, San Joaquin Valley agricultural users also contribute contaminated return flows back into the Delta, exacerbating water quality and other impacts related to the initial diversion. Indeed, one of the primary benefits of a new northern diversion point is the ability of the SWP and CVP to divert water that does not contain "used" SWP and CVP water.

²⁹ See, e.g., The Pacific Institute, *More with Less: Agricultural Water Conservation and Efficiency in California- A Special Focus on the Delta* (September 2008). Though questions have arisen as to the feasibility of some of the measures discussed in this report, the report clearly indicates that agriculture can use water more efficiently.

Ms. Delores Brown
May 14, 2009
Page 11

BDCP1717

BDCP1717

contact me or Erik Ringelberg (Erik Ringelberg erikringelberg@wallace-kuhl.com) with any questions about the information contained in this letter.

Very truly yours,

SOLURI MESERVE
A Law Corporation

(}flm1z_

By:

Osha R. Meserve

Enclosures

- Exhibit A: Prior Scoping Comments on BDCP by Reclamation District 999
- Exhibit B: BDCP Adaptive Management and Public Participation Comments: Areas of Concern to RD 999 (May 11, 2009 draft)
- Exhibit C: BDCP Terrestrial Species and Habitats: Areas of Concern to RD 999 (September 27, 2008 draft)
- Exhibit D: Mercury Issues Paper: Areas of Concern to RD 999 (January 30, 2009 draft)

cc: Senator Lois Wolk, 5th District
Senator Joseph Simitian, 11th District
Supervisor Mike McGowan, Yolo County District 1
Melinda Terry, North Delta Water Agency
Robin Kulakow, Executive Director, Yolo Basin Foundation
Robert Webber, Manager, Reclamation District 999
Erik Ringelberg, Director of Ecological Services, Wallace Kuhl and Associates