



October 14, 2015

**Attention: Imported Water Committee**

**Comment letter on the Bay Delta Conservation Plan/California WaterFix Partially Recirculated Draft Environmental Impact Report/ Supplemental Draft Environmental Impact Statement. (Presentation)**

**Purpose**

This report transmits the Water Authority's formal comment letter on the partially recirculated environmental documents for the Bay Delta Conservation Plan/California WaterFix.

**Background**

Included in last month's Imported Water Committee agenda was a written report summarizing staff's findings related to the Bay Delta Conservation Plan (BDCP)/California WaterFix Partially Recirculated Draft Environmental Impact Report and Supplemental Draft Environmental Impact Statement (PRDEIR/SDEIS). Last month's report is included as Attachment 1 and contains key identified subject areas of the California WaterFix compared to staff's review of the BDCP released in 2014.

The PRDEIR/SDEIS provides the public and interested agencies with an updated environmental analysis that addresses certain revisions to the draft BDCP, including several new sub-alternatives, select issues raised in comments received on the draft BDCP and its accompanying environmental documents, and engineering refinements made to the water conveyance facilities. The PRDEIR/SDEIS identifies Alternative 4A, also known as the California WaterFix, as the new preferred alternative.

A key change proposed in California WaterFix is the mechanism for achieving compliance with the Federal and State Endangered Species Act (ESA). Rather than pursuing long-term permits under the BDCP, the California Water Fix will operate under a permitting regime that is identical to that currently used for the State Water Project (SWP) and Central Valley Project (CVP) (i.e., Section 7 of the Federal ESA and Section 2081 of the State ESA). The issuance of ESA permits is a discretionary action subject to the California Environmental Quality Act (CEQA) and National Environmental Policy Act (NEPA). Both CEQA and NEPA are designed to ensure that the potential environmental impacts of proposed activities are disclosed to decision-makers and the public before the activities are approved.

*Previous Board Action: On March 19, 2014, the Board authorized the General Manager to submit a formal comment letter on the BDCP Draft EIR/EIS.*

**Discussion**

The Department of Water Resources released the PRDEIR/SDEIS for a 51-day public review and comment period commencing on July 10, 2015. On July 22, 2015, the public review period of the PRDEIR/SDEIS was extended another 60 days. Staff intends to submit a formal comment letter by the newly set October 30, 2015 deadline. Attachment 2 is a draft of the General Manager's comment letter on the PRDEIR/SDEIS.

The draft comment letter is based on Board input on both policy and technical concerns with the environmental documents. Over the past two years, the Board has received numerous briefings on various aspects of the BDCP and now the California WaterFix. One central question the Board has consistently expressed was how much water the San Diego region would gain from the project and how much it would cost its ratepayers. In August, Secretary John Laird and Deputy Secretary Karla Nemeth acknowledged the Water Authority's concern and made clear to the Board that the state would not ask any agency to "*support a project when it does not yet have a financing plan and complete understanding of the cost.*" They also reported that cost allocation discussions continue among the SWP and CVP contractors and state and federal entities.

Among the questions the Water Authority raised in the prior comment letters was also the requirement under the federal Habitat Conservation Plan (HCP) and the state Natural Community Conservation Plan (NCCP) regulations that ask the BDCP to demonstrate that it has funding assurances from those expected to pay – including the state and federal governments. The Water Authority was concerned that even though assurances are theoretically offered under the HCP/NCCP, the certainty of those assurances lacked specificity regarding the financial commitments required to approve the BDCP and to issue any necessary incidental take permits. The revised permit method envisioned under the California WaterFix now significantly increases the level of export uncertainties. For example, one selling point of the BDCP – if permits were to be obtained – was the promise of a long-term regulatory assurance that would prevent the reduction of exports to 3.5 million acre-feet. Under a Section 7 ESA scenario, it is unclear what assurances can be provided to the Contractors after the tunnels are built -- and if species continue to degrade – that no new/additional regulations will decrease water exports to 3.5 million acre-feet.

Moreover, Senate Bill X7-1, also known as the Delta Reform Act, enacted in 2009 directs that the Bay-Delta be managed with dual goals of water supply reliability and ecosystem protection. It also mandates the Delta Stewardship Council to adopt and oversee implementation of a comprehensive Bay-Delta management plan (Delta Plan). The BDCP and its associated environmental documents were originally to be developed explicitly as an HCP/ NCCP and, under SB X7-1, would have to have been directly incorporated into the Delta Plan without amendment by the Delta Stewardship Council. With the emergence of the stand-alone California WaterFix effort – the ecosystem restoration was moved to a separate effort under California EcoRestore – it is unclear if the California WaterFix will automatically be determined to be consistent with the 2009 Delta Reform Act, and what might be the consequence to the water exports if the California WaterFix is not determined to be consistent with statutory requirements and the Delta Plan.

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Larry Purcell, Water Resources Manager

Reviewed by: Glenn A. Farrel, Government Relations Manager  
Amy Chen, Director of MWD Program

Approved by: Dennis A. Cushman, Assistant General Manager

Attachments:

Attachment 1 – Board Memo on PRDEIR/SDEIS, dated September 16, 2015

Attachment 2 – DRAFT Comment Letter on PRDEIR/SDEIS



September 16, 2015

**Attention: Imported Water Committee**

**Review of the Bay Delta Conservation Plan/ California WaterFix Partially Recirculated Draft Environmental Impact Report/ Supplemental Draft Environmental Impact Statement.  
(Discussion)**

**Purpose**

This report presents the issues identified during review of the Bay Delta Conservation Plan (BDCP)/California WaterFix Partially Recirculated Draft Environmental Impact Report and Supplemental Draft Environmental Impact Statement (PRDEIR/SDEIS).

**Background**

On December 13, 2013, the Department of Water Resources (DWR) along with other lead and cooperating agencies released the BDCP document and draft Environmental Impact Report/Environmental Impact Statement (EIR/EIS) for a 180-day public review period ending on June 13, 2014. The BDCP, at that time, was planned as a joint Habitat Conservation Plan/Natural Communities Conservation Plan (HCP/NCCP) intended to meet the state-mandated co-equal goals of restoring and protecting ecosystem health, water supply and water quality within a stable regulatory framework. The BDCP was to obtain 50-year State and Federal Endangered Species Act (ESA) permits for the operation of the State Water Project (SWP) and Central Valley Project (CVP). The Water Authority, under the overview of the Imported Water Committee, conducted extensive review of the BDCP and subsequently submitted a formal comment letter on the draft EIR/EIS in May 2014, followed by a comment letter on the draft Implementing Agreement in July 2014<sup>1</sup> (Attachment 1 and 2, respectively).

After receiving more than 10,000 comment letters through the environmental review process, including concerns raised by the federal fishery agencies, it became clear to DWR and the lead agencies that the HCP/NCCP path presented insurmountable legal, regulatory, political and practical implementation challenges. On April 30, 2015, Governor Brown announced a new approach that de-coupled the BDCP's water conveyance and ecosystem restoration objectives into two distinct efforts – California WaterFix and California Eco Restore – with the intention of “accelerating” the projects and overcoming the identified implementation challenges.

The PRDEIR/SDEIS was released for a 51-day public review and comment period commencing on July 10, 2015. The intent is to provide the public and interested agencies with an updated environmental analysis to address revisions to the draft BDCP, to introduce new sub-alternatives, and to address some issues raised in comments received on the draft BDCP and its accompanying

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<sup>1</sup> On May 30, 2014, the BDCP released a draft Implementing Agreement for public review. The implementing Agreement is typically executed among the ESA permittees and the wildlife agencies, and is intended to describe their respective roles and responsibilities in implementing the BDCP. Of particular interest are obligations related to funding, governance, and regulatory assurances.

Imported Water Committee  
 September 16, 2015  
 Page 2 of 3

environmental documents. The recirculated documents also include engineering refinements made to the BDCP water conveyance facilities and introduce Alternative 4A, also known as the California WaterFix, as the new preferred alternative. Rather than pursuing long-term 50-year permits to operate the proposed conveyance facilities, the California Water Fix is proposed to operate under Section 7 of the Federal Endangered Species Act and corresponding state regulations, similar to the current permit mechanism under which the SWP and CVP operate. On July 22, 2015, the public review period was extended another 60 days, with public comments due no later than October 30, 2015.

*Previous Board Action: On March 19, 2014, the Board authorized the General Manager to submit a formal comment letter on the BDCP Draft EIR/EIS.*

### **Discussion**

The Board has received numerous briefings on various aspects of the BDCP and California WaterFix over the past two years, including last month's update on the state's perspective of the California WaterFix and California Eco Restore by John Laird, Secretary of California Natural Resources Agency, and Deputy Secretary Karla Nemeth. Secretary Laird described the state's need for the project and how the revised plan would help move the project forward. One central issue the Water Authority had on the prior plan – the BDCP – was the lack of specificity on how much water the San Diego region would gain from the project and how much would it cost its ratepayers. Deputy Secretary Nemeth made it clear, last month, that the state would not ask any agency to “support a project when it does not yet have a financing plan and complete understanding of the cost.” Deputy Secretary Nemeth also shared that the cost allocation discussions between the state and federal entities are still on-going and have not yet been finalized.

The BDCP and associated environmental documents remain as part of the PRDEIR/SDEIS. While the BDCP contained 22 separate Conservation Measures (CM), the draft EIR/EIS only analyzed CM1 (Water Facilities and Operations) in sufficient detail to allow construction and operation. The remaining 21 CMs are examined programmatically and require additional CEQA and/or NEPA review before implementation. With the release of the PRDEIR/SDEIS, the new CEQA/NEPA preferred alternative – the California WaterFix, or Alternative 4a – replaced Alternative 4 in the BDCP, but includes the same basic water conveyance changes that are in the BDCP. As outlined in the PRDEIR/SDEIS, the new preferred alternative shifts from the BDCP effort that pursued combining water conveyance facilities and ecosystem improvements under a single long-term permit framework to a proposal for operating water conveyance facilities only under the ESA section 7 federal biological opinions and Section 2081(b) of the state's ESA. The public review PRDEIR/SDEIS consists of about 48,000 pages of information.

Because the BDCP/California WaterFix documentation is extensive, the PRDEIR/SDEIS is under review by staff using the inter-departmental, multi-disciplinary approach employed during the review of the BDCP. Water Authority reviewers of the PRDEIR/SDEIS focused on the sufficiency of the document in identifying and analyzing possible impacts on the environment and ways in which the significant effects of the BDCP/California WaterFix might be avoided or mitigated. Key subject areas identified under staff's review of the BDCP were used to compare changes made under the California WaterFix Preferred Alternative (Attachment 3 for comparison). Staff intends to

Imported Water Committee

September 16, 2015

Page 3 of 3

return to this committee in October with a draft letter for review, and discussion. Upon the Board's review, staff will submit a formal comment letter by the October 30, 2015 deadline.

None of the comments submitted by the Water Authority in its May 30, 2014 formal letter, or in any of the prior correspondence specifically related to finance, cost-benefits, and governance issues, have been addressed in the PRDEIR/SDEIS.

### *Next Steps*

Following the close of the public review period, the lead agencies will consider all comments received and prepare a written response to each. The responses will be incorporated into the Final EIR/EIS and made available for public review prior to certification/adoption of the document. Once the Final EIR/EIS is certified/adopted, the lead agencies must decide whether or not to approve the Final BDCP/California WaterFix.

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Reviewed by: Glenn A. Farrel, Government Relations Manager  
Amy Chen, Director of MWD Program

Approved by: Dennis A. Cushman, Assistant General Manager

### Attachments:

Attachment 1 – Water Authority Comment Letter, dated May 30, 2014

Attachment 2 – Water Authority Comment Letter, dated July 28, 2014

Attachment 3 – Key Subject Areas for BDCP/California WaterFix



## San Diego County Water Authority

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May 30, 2014

**Mr. Ryan Wulff**  
National Marine Fisheries Service  
650 Capitol Mall, Suite 5-100  
Sacramento, California 95814  
ATTN: BDCP Comments

### MEMBER AGENCIES

Coronado  
Municipal Water District

City of Del Mar

City of Escondido

City of National City

City of Oceanside

City of Poway

City of San Diego

Fallbrook  
Public Utility District

Helix Water District

Lakeside Water District

Clivansham  
Municipal Water District

Gray Water District

Padre Dam  
Municipal Water District

Camp Pendleton  
Marine Corps Base

Rainbow  
Municipal Water District

Rancho  
Municipal Water District

Rincon del Diablo  
Municipal Water District

San Diego Water District

Santa Fe Irrigation District

South Bay Irrigation District

Vallecitos Water District

Valley Center  
Municipal Water District

Vista Irrigation District

Yuma  
Municipal Water District

### OTHER REPRESENTATIVE

County of San Diego

**Re: Draft Environmental Impact Report/Environmental Impact Statement for the Proposed Bay Delta Conservation Plan, Alameda, Contra Costa, Sacramento, Solano and Yolo Counties, California**

**Dear Mr. Wulff:**

The San Diego County Water Authority (Water Authority) is submitting the following comments on the joint Draft Environmental Impact Report (EIR) Draft Environmental Impact Statement (EIS) prepared by the U.S. Department of Interior, Bureau of Reclamation (Reclamation), and U.S. Department of Interior, Fish and Wildlife Service; the U.S. Department of Commerce, National Oceanographic and Atmospheric Administration, National Marine Fisheries Service; and the California Department of Water Resources (DWR) for the proposed Bay Delta Conservation Plan (BDCP). The BDCP has been developed to support issuance of long-term incidental take permits that meet the requirements of Section 10(a)(1)(B) of the federal Endangered Species Act, as well Section 2800 *et seq.* of the California Fish and Game Code, for certain actions proposed within the statutorily defined Sacramento-San Joaquin Delta (Delta) for a term of 50 years.

The BDCP proposes to make physical and operational improvements to the State Water Project (SWP) system in the Delta necessary to restore and protect ecosystem health, water supplies of the SWP and Central Valley Project (CVP) south-of-Delta, and water quality within a stable regulatory framework, consistent with statutory and contractual obligations. This comprehensive species conservation strategy generally consists of 22 separate conservation measures that will contribute to the preservation and recovery of 56 species of plants and animals.

The Water Authority is a local governmental entity responsible for providing a safe and reliable imported water supply to 24 member agencies serving the San Diego region's \$191 billion economy and its approximately 3.1 million residents. The Water Authority, by State legislative mandate, is the authoritative expert on the San Diego regions' water supply reliability and long-term water supply planning. The Water Authority imports up to 90 percent of the water used in the San Diego region through



Ryan Wulff  
May 30, 2014  
Page 2 of 19

five larger diameter pipelines. The source of imported water is the SWP and Colorado River. Highly dependent on imported supplies, the Water Authority has historically and consistently been a strong advocate for the Delta and for the co-equal goals of providing a more reliable water supply for California, while protecting, restoring and enhancing the Delta ecosystem.

The Water Authority's goal for providing written comments is to ensure that the Final EIR/EIS, Final BDCP, and any resulting incidental take permits, provide a comprehensive and lasting solution to the conflicts between water supplies and ecosystems in the Delta that have made water supplies less reliable. However, the Water Authority is also convinced that any solution to Delta conflicts must be cost-effective, that the costs be shared equitably among beneficiaries of the improvements, and that beneficiaries be required to make firm commitments to pay their share of constructing and maintaining improvements to the Delta.

#### GENERAL COMMENTS

1. As has been noted in previous BDCP correspondence to the California Natural Resources Agency dated August 28, 2012, July 30, 2013, and October 7, 2013 (attached and incorporated as additional comments), the Water Authority remains concerned that the financing components of the BDCP have not been explicitly described. As the largest customer of the largest state water contractor – the Metropolitan Water District of Southern California – the Water Authority's ratepayers have a great deal at stake in the BDCP process and its financing plan. Chapter 8 of the current BDCP does not provide the detailed information necessary for potential participating agencies to evaluate individual agency cost-benefit (or feasibility) of the proposed project. The Final BDCP should contain details on: how participating water contractors intend to guarantee the revenue necessary to pay for the BDCP; the provisions for "step-up" should individual water contractor's default on funding obligations; and a legal analysis of relying on property taxes as a back-up security for project debt.
2. A necessary component that is missing from BDCP public review documents is the proposed Draft Implementing Agreement, which will be signed by the U.S. Fish and Wildlife Service, National Marine Fisheries Service, California Department of Fish and Wildlife, California Department of Water Resources, and certain water contractors (Authorized Entities). Public review of this document is crucial to understanding exactly what assurances and commitments are being agreed to, and how the various financial and implementation obligations will be distributed among the signatories and, ultimately, ratepayers. The proposed Draft Implementing Agreement should be distributed for a minimum 60-day public review period. If necessary, the public comment period for the Draft EIR/EIS and BDCP documents should be extended, or re-opened, to include sufficient time for public review of the Implementing Agreement.

Ryan Wulff  
May 30, 2014  
Page 3 of 19

## DETAILED COMMENTS

### **Draft EIR/EIS Document**

#### Executive Summary

1. Page ES-6, Table ES-1 lists Lead, Cooperating, Responsible, and Trustee Agencies.

*Comment:* The table listing is incomplete. All water contractors will be required to consider the Final EIR as part of their decision to participate in BDCP implementation as permittees (Authorized Entities). The Final EIR/EIS should list the water contractors that must approve the Final EIR/EIS as responsible agencies.

2. Page ES-8, line 22 lists Mirant LLC as an applicant for an incidental take permit, yet a footnote states they are no longer an active participant.

*Comment:* To avoid confusion, all references to Mirant LLC as a BDCP participant should be deleted from the Final EIR/EIS.

#### Chapter 4 – Approach to Environmental Analysis

3. Page 4-4, line 33 states that the CEQA baseline consists of those “facilities and ongoing programs that existed as of February 13, 2009 (publication date of the most recent NOP...)”.

*Comment:* While this approach is consistent with CEQA Guidelines, the exclusive use of this baseline is confusing when the Draft EIR/EIS analysis is compared to the baseline and analysis presented in BDCP Chapter 9 (Economic Analysis Report). We understand that the development and use of these two very different baselines is for different purposes: one to meet CEQA requirements, and the other to reflect assumed additional, potentially severe, regulatory agency restrictions on water exports that will greatly affect the financial viability of the BDCP. However, the much more restrictive conditions in Chapter 9 could actually represent the future “without BDCP” based on preliminary indications from the regulatory agencies. It would be helpful if the Final EIR/EIS also included an impact analysis, for reference only, using a baseline that matched the conditions assumed in the BDCP Economic Analysis Report. This would allow easy comparisons of the potential environmental impacts of the less restrictive CEQA baseline to the more restrictive BDCP Economic Analysis baseline. Such a comparison would highlight the true potential impacts and benefits of the BDCP.



Ryan Wulff  
May 30, 2014  
Page 4 of 19

### Chapter 30 – Growth Inducement and Other Indirect Effects

4. Page 30-126, line 19 states that "...unavoidable impacts would still be expected to occur".

*Comment:* The basis for this statement is unclear. Neither DWR nor Reclamation have land use authority and cannot approve or deny development projects other than their own. Planning for, and approving, future public and private growth and development in areas served by SWP or CVP contractors is the responsibility of various land use agencies (e.g., cities or counties). The Draft EIR/EIS conclusion that unavoidable impacts would occur, especially when the location, magnitude, and timing of future development is unknown, is unsupported by the included information. The Final EIR/EIS should be revised to conclude that future development decisions are the responsibility of appropriate land use jurisdictions and that, in the absence of specific development proposals, it is speculative to make a determination as to the significance of environmental impacts resulting from any future growth in areas served by SWP and CVP contractors.

### **Draft BDCP Document**

#### Chapter 1 – Introduction

5. Page 1-8, lines 23-25 state that "The BDCP is intended to meet the regulatory requirements for the issuance of Section 10 permits... to allow for the incidental take of the species... resulting from implementation of covered activities by DWR and certain SWP and CVP contractors (e.g., the Authorized Entities)."

*Comment:* It is unclear if SWP and CVP water contractors that decline to participate in BDCP implementation will continue to receive water under terms of existing contracts pursuant to existing Biological Opinions. It is also not clear if existing contractors deciding to "opt out" of the BDCP can obtain "third party beneficiary" status (and receive the benefits of HCP coverage) through a separate agreement with an entity that does receive a HCP take authorization through BDCP participation. The Final BDCP should explain what happens to any existing in-Delta Biological Opinions (e.g., remain in force, terminate, etc.) should the BDCP be approved, as well as the ability of non-participating entities to obtain HCP coverage through execution of side agreements with a BDCP permittee, or through a separate Section 7 consultation process.

6. Page 1-11, lines 17-18 state that "... DWR and certain water contractors are seeking permits from CDFW that authorize the take of species covered under the Plan..."

*Comment:* It is unclear if SWP and CVP water contractors that decline to participate in BDCP implementation will continue to receive water under terms of existing contracts pursuant to existing CESA authorizations. It is also not clear if existing contractors deciding to "opt out" of the BDCP can obtain "third

Ryan Wulff  
May 30, 2014  
Page 5 of 19

party beneficiary” status (and receive the benefits of NCCP coverage) through a separate agreement with an entity that does receive a NCCP take authorization through BDCP participation. The Final BDCP should explain what happens to any existing in-Delta CESA permits (e.g., remain in force, terminate, etc.) should the BDCP be approved, as well as the ability of non-participating entities to obtain NCCP coverage through execution of side agreements with a BDCP permittee, or through a separate Section 2081 permit process.

### Chapter 3 – Conservation Strategy

7. Page 3.4-2, line 26 states that a “structured scientific approach” will be taken to reduce uncertainty about the fall and spring outflow decision trees.

*Comment:* The specific timing and description of the research necessary to test the fall and spring outflow uncertainties is lacking. The process by which the decision tree outflow and export yield will be determined is important in understanding the value of the BDCP to water contractors. The Final BDCP should include a detailed description of the specific scientific research hypotheses, proposed methods, and schedule that will be undertaken to address the flow uncertainties incorporated into the decision tree.

8. Page 3.D-2, Table 3.D.1, CM1 Water Facilities Operation, Compliance Monitoring Action will “Document compliance with the operational criteria using flow monitoring and models implemented by the Implementation Office. [Details of monitoring to be developed...]”.

*Comment:* The details of compliance monitoring to document flow criteria are lacking. The importance of outflow monitoring cannot be overstated as it forms the basis for the decision tree export yield. The water contractors must have a clear understanding of the research deemed necessary to resolve the fall and spring outflow uncertainties. Stating that “details of monitoring to be developed” is inappropriate given its importance in helping frame whether water contractor participation in the BDCP is warranted. Outflow requirements are the most important issue for water contractors; to defer development of this essential research to a later time does not provide the information needed by water contractors to evaluate the science proposed to resolve decision tree uncertainty. The Final BDCP should provide greater detail on the likely magnitude and scope of research contemplated for the decision tree process.

9. Page 3.D-28, Table 3.D.3, CM1 Water Facilities Operation, Potential Research Actions states that “[Studies necessary to evaluate this uncertainty.... have not yet been determined.]”

*Comment:* Similar to Comment #7 above. The research necessary to determine the outcome of the decision tree is of the utmost importance to water

Ryan Wulff  
May 30, 2014  
Page 6 of 19

contractors. At a minimum, the general scope of these studies should be developed and included in the Final BDCP so water contractors can more fully evaluate the benefits and risks of participation.

#### Chapter 6 – Plan Implementation

10. Page 6-5, Table 6-2 provides a very aggressive implementation schedule for CM3 (24,396 acres), CM4 (19,150 acres), CM9 (98 acres), and CM10 (900 acres) during the near-term, especially the first 5 years.

*Comment:* The level of information included in the BDCP does not provide adequate support that restoration of these very large acreages can be achieved within the established time frames. For example, it is very difficult to envision how over 9,500 acres of tidal natural community restoration can be completed within 5 years given the time needed to properly plan, design, permit, and construct this habitat type. At a minimum, additional specific information on the location of identified parcels and conceptual design/planting plans for these near-term lands should be included in the BDCP and FEIR/EIS document to validate the assertion that these acreage targets can be achieved within the identified schedule. If the BDCP intends to rely on one or more interim action projects listed in Table 6-4 (page 6-14) to meet the implementation schedule, then the BDCP should identify those projects where a firm funding commitment has been, or will likely be made. Should restoration take longer than anticipated, legally binding assurances must be provided to permittees that water yields will not be reduced below the minimum described in the decision tree process.

11. Page 6-8, CM4 Tidal Natural Communities Restoration, states that the initial 4,000 acres will take “less time to plan and permit... because... is likely to be implemented first on public lands.”

*Comment:* We believe this timing assumption to be overly optimistic. The Water Authority’s experience for a 40 acre wetland restoration project on public land took three years just to obtain all necessary federal, state, and local approvals to commence construction. Because tidal natural community habitat type is critical to fish species being considered in the decision tree process, the BDCP and FEIR/EIS should examine the effects on ultimate BDCP success if a longer implementation schedule is required for this initial restoration increment. Should restoration take longer than anticipated, legally binding assurances must be provided to permittees that water yields will not be reduced below the minimum described in the decision tree process.

12. Page 6-29, lines 6-7 state that “...these measures do not involve additional financial commitments or resource restrictions without the consent of the Permittee...”

Ryan Wulff  
May 30, 2014  
Page 7 of 19

*Comment:* This text should be changed to read "...these measures do not involve additional land, water, or financial compensation commitments, or additional restrictions on the use of land, water, or other natural resources ~~restrictions~~ without the consent of the Permittee...". This change is consistent with the regulatory assurances provided by the "no surprises" rule.

#### Chapter 7 – Implementation Structure

13. Pages 7-3 and 7-4, Table 7-1: A significant level of decision-making authority would be granted to the Authorized Entity Group under the proposed BDCP governance framework. For many of the decisions outlined in Table 7-1, the Authorized Entity Group is identified as having a primary decision-making authority role. Additionally, for many BDCP implementation issues, it appears that the Authorized Entity Group is being granted substantial decision-making authority. Even for those decisions where the Authorized Entity Group is not identified as the party making decisions on implementation issues in Table 7-1, the dispute resolution process proposes to grant substantial deference to the Authorized Entity Group.

*Comment:* Given that the Authorized Entity Group is granted such broad decision-making deference, it would seem that a significantly larger group than is currently contemplated within the BDCP governance framework is warranted. A more inclusive governance model – providing for all permittees to be members of the Authorized Entity Group – would ensure more balanced decision-making by the body. The Final BDCP should revise membership of the Authorized Entity Group to include all BDCP permittees.

14. Page 7-10, line 39 states that "The Authorized Entity Group will consist of the Director of DWR, the Regional Director for Reclamation, and a representative of the participating state contractors and a representative of the participating federal water contractors..."

*Comment:* Similar to Comment #13 above. The four-member Authorized Entity Group is inadequate to fully represent the interests of all Authorized Entities. As stated on page 7-9, line 14, Authorized Entities includes "...those state and federal water contractors that receive take authorizations...". The relationship between the very limited membership of the Authorized Entity Group and the much larger group of SWP and CVP Authorized Entities is unclear. Because SWP and CVP Authorized Entities will have been issued permits and maintain a substantial direct financial interest in BDCP implementation, the Authorized Entity Group should include every SWP or CVP contractor that receives a take authorization. An example of this more-inclusive governance model can be found by examining the functions of the Steering Committee for the Lower Colorado River Multi-Species Conservation



Ryan Wulff  
May 30, 2014  
Page 8 of 19

Program administered by Reclamation. The Final BDCP should expand membership of the Authorized Entity Group to include all SWP and CVP Authorized Entities.

15. Page 7-12, lines 17-21 state that “The Authorized Entity Group will institute procedures with respect to public notice of and access to its meetings and its meetings with the Permit Oversight Group....All meetings will be open to the public.”

*Comment:* The Water Authority appreciates that all meetings of the Authorized Entity Group will be conducted in public. However, the BDCP is silent with respect to the requirements under California’s open meeting and records laws, the Federal Advisory Committee Act, the California Public Records Act and the Federal Freedom of Information Act (FOIA), and the applicability of those statutes to the activities and undertakings of the Authorized Entity Group. The Final BDCP should clearly delineate the state and federal statutes relevant to the activities of the Authorized Entity Group.

16. Pages 7-13, lines 9-27 state that “The Permit Oversight Group will be composed of the state and federal fish and wildlife agencies... will be involved in certain decisions relating to the implementation of water operations, and other conservation measures, actions proposed through the adaptive management program or in response to changed circumstances, approaches to monitoring and scientific research.”

*Comment:* The BDCP document is completely silent with respect to whether or not the Permit Oversight Group must comply with state or federal public meeting and records laws. The Final BDCP should clearly delineate the state and federal statutes relevant to the activities of the Permit Oversight Group.

17. Page 7-13, line 37 states that the Permit Oversight Group will have “decision making regarding real-time operations”. This section goes on to state that the “roles ... are still under consideration and will be addressed in Chapter 3, Conservation Strategy”.

*Comment:* We could not find a detailed explanation of the Permit Oversight Group role in Chapter 3. Understanding the role of the regulatory (i.e., HCP/NCCP permits) agencies during implementation of the BDCP is critical. Most HCP/NCCP’s that the Water Authority is familiar with have the regulators as strictly advisory, without the ability to impose unilateral actions unless the species are in danger of extinction. This places sole responsibility for BDCP success on the permittees. If the regulators have unilateral decision making authority for one or more aspects of BDCP implementation, they then accept some level of responsibility for the ultimate outcome by virtue of any decisions they impose. Keeping the regulators outside the decision process, but in a close

Ryan Wulff  
May 30, 2014  
Page 9 of 19

advisory role, allows the permittees to freely implement the BDCP that they voluntarily developed. If the regulators believe the permittees are not acting in compliance with BDCP permits, the Implementing Agreement would normally contain provisions to suspend or revoke the HCP and/or NCCP permits (however, as noted above, there was no Implementing Agreement included in review documents). The Final BDCP should remove all BDCP implementation decision making authority from the Permit Oversight Group.

18. Page 7-16, line 40 through Page 7-17, line 2 states that "The Adaptive Management Team will hold public meetings... noticed and open to the public."

*Comment:* The Water Authority appreciates that all meetings of the Adaptive Management Team will be conducted in public. However, the BDCP is silent with respect to the requirements under California's open meeting and records laws, the Federal Advisory Committee Act, the California Public Records Act and the Federal Freedom of Information Act (FOIA), and the applicability of those statutes to the activities and undertakings of the Adaptive Management Team. The Final BDCP should clearly delineate the state and federal statutes relevant to the activities of the Adaptive Management Team.

19. Page 7-17, line 17 states that "In the event that the Authorized Entity Group and the Permit Oversight Group are unable to resolve the issue at hand, the entity with decision-making authority... will make the final decision".

*Comment:* Similar to Comment #17 above regarding the appropriate role of the permitting agencies. Regulatory agencies should not be in a decision making role unless they are prepared to accept responsibility for the eventual outcome of the BDCP. Once the regulatory agencies issue the HCP and NCCP authorizations (i.e., permits), their role is to verify compliance with the BDCP and Implementing Agreement. If permittees are not in compliance, the regulatory agencies can initiate permit suspension or revocation procedures (which should be detailed in the Implementing Agreement). Therefore, all decisions related to BDCP implementation should be made by the Authorized Entity Group (composed of all permittees), in consultation with the Permit Oversight Group. The Final BDCP should be revised to clarify that regulatory agencies provide guidance and advice to the Authorized Entity Group, but do not have BDCP implementation decision making authority.

20. Page 7-20, lines 21-22 state that "Stakeholder Council meetings will be open to the public."

*Comment:* The Water Authority appreciates that all meetings of the Stakeholder Council will be conducted in public. However, the BDCP is silent with respect to the requirements under California's open meeting and records laws, the



Ryan Wulff  
May 30, 2014  
Page 10 of 19

Federal Advisory Committee Act, the California Public Records Act and the Federal Freedom of Information Act (FOIA), and the applicability of those statutes to the activities and undertakings of the Stakeholder Council. The Final BDCP should clearly delineate the state and federal statutes relevant to the activities of the Stakeholder Council.

21. Page 7-21, lines 6-26 state that “Any member of the council, however, will have the right to object to any proposal of the Program Manager... If the dispute is not resolved within the 60 day period, the issue will be elevated to the Authorized Entity Group... If the issue remains unresolved... for over 90 days, it will be referred for decision by the entity with the locus of responsibility...recognizing that multiple entities may have some relevant responsibility.”

*Comment:* This provision needs additional clarification and structure to ensure that the dispute resolution process does not become a de facto delay process for those opposed to BDCP implementation. Gridlock could easily occur if not only prospective, but also prior implementation actions may be challenged at any time. The Final BDCP should include provisions to ensure that multiple or repeated objections do not result in significant disruption of the program.

22. Page 7-27, lines 29-31 state that “The Program Manager, through the Implementation Office... will generally be responsible for the planning, oversight, implementation of actions set out in the conservation strategy.”

*Comment:* While charged with implementing the BDCP, there is no discussion of the appropriate legal framework within which the Implementation Office, proposed BDCP governance structure, and associated coordinating and dispute resolution mechanisms would be effectuated. Would the legal framework require legislation, a memorandum of understanding/agreement, bylaws, a joint powers authority, or some other structure? The Final BDCP should explain the legal documentation and processes necessary to allow participating entities to fund and implement the BDCP. Again, Reclamation’s Lower Colorado River MSCP provides an example of a legal framework that is working to successfully implement a complex multiple species conservation plan.

#### Chapter 8 – Implementation Costs and Funding Sources

23. Page 8-1, lines 36-39 state that “Consistent with the ‘beneficiary pays’ principle and in recognition of public benefits associated with environmental restoration of this important region, it is assumed that a state and federal investment will be available and necessary to implement the BDCP, as described in Section 8.3, *Funding Sources*.”

Ryan Wulff  
May 30, 2014  
Page 11 of 19

*Comment:* BDCP was conceived as a “beneficiary pays” project. However, the BDCP does not include a detailed financial plan. Instead, the public draft relies on the projected benefits afforded to the exporters to gauge funding support for the conveyance facilities (i.e., CM1). Until a detailed financial plan is finalized and cost allocation formula agreed upon by participants, there will continue to be questions and concerns regarding what “beneficiary pays” means in terms of precise cost obligations. Is “beneficiary pays” based on the value the water provides to a specific contractor? Does “beneficiary pays” mean every contractor pays the same unit cost for water received? As envisioned by the BDCP, the water quantity available for export will vary depending on hydrology; how would the benefits be calculated and unit costs be derived for each “beneficiary” under constantly changing hydrological conditions? Many water suppliers in Southern California are seeking to reduce their demand for imported water from the Delta. What happens if contractors’ needs for the water decrease in the future? How would the costs be allocated then? More importantly, how would costs be allocated pursuant to state and federal laws – including, without limitation, the cost-of-service requirements of California Constitution Article XIII A and C (Proposition 26)? Both the HCP and NCCP regulations require the BDCP to demonstrate that it has funding assurances from those expected to pay - including the state and federal governments – rather than relying on assumptions. The Final BDCP should address these issues to ensure the BDCP’s ability to be funded.

24. Page 8-2, lines 22-24 state that the chapter is not a financing plan...“nor does it establish the final allocation of cost or repayment responsibility; rather financing plans will be prepared separately by various funding agencies and through future discussions between state and federal agencies.”

*Comment:* The final BDCP must make fiscal sense and also be both affordable and financeable. Potential participants in the BDCP must have sufficient detailed information to evaluate the cost-benefit (or feasibility) of participating in the project on the individual participant level. Lack of disclosure on how costs will be shared by beneficiaries does not allow existing water contractors to make an informed decision to invest in the BDCP. This analysis should be included in the Final BDCP.

25. Page 8-66, Footnote “a” states that “...funding estimates from state and federal agencies do not represent commitments and are subject to grant awards, annual appropriations from Congress, and passage of water bonds by the voters of California.”

*Comment:* The reliance on the funding history of yet to be appropriated federal sources and future water bonds makes it unclear if the project will receive an adequate public share of the funding. To match the comprehensiveness of

Ryan Wulff  
 May 30, 2014  
 Page 12 of 19

BDCP as a planning process, it is important to identify how the public share of the funding source may be composed and from whom the funds may be derived. The Final BDCP should provide greater detail and explain how funding assurances required by HCP/NCCP permits will be achieved given the uncertain nature of future state and federal funds.

26. Page 8-73, lines 5-7 state that “State and federal water contractors that are participating in the development of the BDCP have committed to fund construction, operation, and construction-related costs for implementation of *CM1 Water Facilities and Operation*, the new water conveyance facilities.”

*Comment:* Contrary to this statement, there is nothing in the EIR/EIS or BDCP documents that confirms that any state or federal water contractor has made a commitment to fund the project. The Water Authority is not aware of any such commitments. In fact, the Board of Directors of the Metropolitan Water District of Southern California – the largest State Water Project contractor, with an approximate 46-percent share of the existing State Water Project – has never voted to fund construction of any portion of the proposed project (CM1). Necessary contractual agreements for individual SWP and CVP contractors to fund CM1 are unclear and the process for revising SWP and CVP cost allocations if individual contractors decline to participate, or drop out later, is not defined. To ensure the BDCP is fully funded, any BDCP financing plan must include enforceable agreements to pay for the project, not only from state and federal water contractors directly, but also from the member agencies or units that provide their revenues. It is unclear whether the SWP contractors can rely on the taxing authority afforded to them under the existing SWP project to pay for the BDCP. The projected costs are too high to have confidence that the contractors’ water sales are adequate to cover the BDCP’s costs now or in the future. Specific areas requiring more detail in the Final BDCP include:

- Contractors that are wholesale water agencies should demonstrate that their customers will pay for the project, either through take-or-pay contracts or other enforceable, long-term financial commitments to pay the fixed costs of the project commensurate with the term of the contractors’ BDCP obligation;
- Analysis is needed on the impacts of “step-up” provisions – pledges that require other BDCP participants to assume the debt obligations of defaulting participants;
- Legal analysis should be undertaken to examine the feasibility and appropriateness of relying upon property taxes as additional back-up security for contractors’ BDCP debt; and
- Legal and financial analyses should be undertaken to examine the financial risks to the state of California if bonds issued to fund construction of the project (CM1) are backed by the full faith and credit of the state.

Ryan Wulff  
May 30, 2014  
Page 13 of 19

27. Page 8-84, lines 18-21 state that "...the BDCP is expected to secure a large portion of the funds allocated to Delta sustainability, as well as smaller portions of funds allocated to conservation and watershed protection. The water bond will support the public benefits of Plan implementation, particularly natural community restoration and other stressors conservation measures."

*Comment:* Firm commitments to ensure state and federal funding for CM 2-22 are lacking. The BDCP expects almost 90 percent of the costs for ecosystem restoration and program administration to be shared by state and federal funding. Most state funding is anticipated to be provided by future water bonds, including one or more bonds scheduled for the November 2014 ballot. A majority of federal funding is expected to be provided by congressional appropriation, which has uncertain support. The uncertainty that voters and Congress would approve the water bonds and federal appropriation, respectively, leads to the question as to whether, and how much, the contractors will be expected to help pay for the costs to obtain the envisioned water supply benefits. If the public funding envisioned does not materialize, will the contractors be expected to fund these costs? If funding is unavailable for restoration, would CM1 operations be changed from those presented in the BDCP? The Final BDCP needs to include a discussion of alternate funding sources, as well as potential impact on available exports, should bonds for CM 2-22 not be approved by the voters.

28. Page 8-80, lines 16-17 state that "Contractors more distant from the Delta provide more funding than contractors close to the Delta because of the capital cost of the California Aqueduct and increased pumping and O&M costs."

*Comment:* While this statement may be true for existing SWP contractors, it is unclear whether this same logic is being applied to BDCP funding. Since all Delta improvements will occur upstream of the Banks Pumping Plant at Clifton Court Forebay and will not affect existing south-of-Delta facilities or operations, distance from the Delta has no bearing on BDCP implementation cost. The Final BDCP should clarify that funding obligations for water contractors south of Banks Pumping Plant will not contain any differential based on distance from the Delta.

29. Page 8-99, lines 17-21 state that "...potential federal funding sources are divided into four categories. First, existing federal appropriations relevant to BDCP are expected to continue in amounts and for durations described below. Second, new federal appropriations would be needed to support BDCP. Third, several federal grant programs are expected to provide funding to support BDCP actions. Finally, other federal funding sources are described."

*Comment:* See above comment #27.



Ryan Wulff  
May 30, 2014  
Page 14 of 19

30. Page 8-122, lines 13-15 state that "...the Authorized Entities will not be required to provide land, water, or monetary resources beyond their commitments in this Plan in the event of a shortfall in state or federal funding."

*Comment:* Provisions to ensure adequate funding by participants required for HCP/NCCP approval are lacking. It is unclear how CM 1 would be operated as a result of a shortfall in public funding. What operational scenarios and how much export water would be made available absent public funding (and associated reduction in restoration) should be disclosed in the Final BDCP and before HCP/NCCP permits are issued.

#### Appendix 9A – Economic Benefits of the BDCP and Take Alternatives

31. Page 9.A-7, line 36 states that "Seawater desalination is another supply that is relied on during drought periods."

*Comment:* The Water Authority concurs with the acknowledgement that seawater desalination can be an important and reliable water supply during both normal and drought periods, as well as with the incorporation of the Carlsbad Desalination Project in the analysis.

32. Page 9.A-12, lines 9-13 and Footnote 5 state that "...models incorporate projections... provided by... San Diego Association of Governments (SANDAG)"

*Comment:* The SANDAG Series 12 growth forecasts used in the analysis are outdated and do not account for updated Census data and the 2007 recession. Utilizing old growth forecast information likely results in a higher water demand forecast in the initial years. Analysis in the Final BDCP should incorporate the updated SANDAG forecast released last year (Series 13). This forecast incorporates data from the 2010 Census and captures the effects of the 2007 recession.

33. Page 9.A-14, Footnote 6 states that "...SANDAG employment projections were developed before the 2007 recession..."

*Comment:* The employment projections use an outdated SANDAG growth forecast (Series 12), which doesn't take into account the updated Census data and 2007 recession. Utilizing old growth forecast information likely results in a higher employment (and water demand) forecast in the initial years. Analysis in the Final BDCP should incorporate the updated SANDAG forecast released last year (Series 13). This forecast incorporates data from the 2010 Census and captures the effects of the 2007 recession.

Ryan Wulff  
May 30, 2014  
Page 15 of 19

34. Page 9.A-28, lines 36-40 state that "...historical consumption and rate data...were collected directly from retailers with the exception of... San Diego County Water Authority, for which data was acquired from annual surveys conducted by the wholesale member agencies."

*Comment:* The Water Authority has not prepared an annual survey of water rates since 2004. The Final BDCP should clarify how the Water Authority's service area retail rate information was derived, and include the date and title of any reference document in the literature cited section.

35. Page 9.A-33, lines 8-14 state that "The cost of the water supply increase resulting from the BDCP Proposed Action is also well below the cost of other alternative supply alternatives. ...the implicit water supply cost... ranges from \$238 to \$321 per acre foot<sup>9</sup>."

*Comment:* Although we understand that the range of unit costs represents the cost of the incremental yield for the BDCP Proposed Action High-Outflow and Low-Outflow Scenarios relative to the Existing Conveyance High-Outflow and Low-Outflow Scenarios, it is unclear how the \$238/AF to \$321/AF unit costs were derived or what the exact meaning of "implicit water supply cost" is. We recognize Appendix 9A is an economic analysis to quantify BDCP benefits on an average yield basis. However, the reliance on incremental yield in calculating those economic benefits should be placed into the context of what contractor allocations under Table A will look like post-BDCP implementation. Actual unit costs will vary widely given the expected swings in yield and the fixed cost nature of the contracts. It is also unclear why unit costs are being included in the water supply alternatives discussion because, (as noted in Footnote 9) the costs cannot be used to directly compare other supply alternatives. If the intent of the included alternatives analyses is to compare the implicit water supply cost of the BDCP Proposed Alternative to local supplies, the Water Authority suggests that a unit cost can be developed that is comparable to the local supply cost being cited. Such a unit cost can be calculated based on the following:

$$\text{Unit Cost} = \frac{\text{Annual amortized capital cost for CM1} + \text{Annual operating cost}}{\text{Expected yield expressed in the same year dollars as the local supply cost}}$$

This approach would allow the BDCP to more adequately benchmark its cost to local supply costs, and is more consistent with the method water suppliers (like the Water Authority) use to compare alternative supplies. The Final BDCP should provide more detailed information on the derivation of the unit costs, a definition of implicit water supply costs, and describe why they are being included in this section, especially if the cited unit costs cannot be used to



Ryan Wulff  
May 30, 2014  
Page 16 of 19

compare the supply alternatives. To support the analytical conclusions, the Final BDCP should provide a unit cost that can be used to compare supply alternatives.

36. Page 9.A-36, lines 7-11 state that "...costs of... short-term conservation are at the low end of... water supply alternative costs. Because short-term conservation is a feasible option, and because the costs of alternatives cannot be known with precision for any individual agency, for planning purposes it is appropriate to measure BDCP benefits using mandatory short-term conservation costs."

*Comment:* It is unclear why other alternative water supply costs are discussed in this section when short-term conservation is assumed as the appropriate measure of BDCP benefits. The Final BDCP should clarify the purpose of Section 9.A.2.4.4 and how the alternative water supply volumes and costs are utilized in the economic benefits analysis.

37. Page 9.A-36, lines 14-15 state that "... the analysis of urban water supply benefits... is based on an assumed build-out of alternative water supplies."

*Comment:* It is unclear how build-out of alternative water supplies is utilized in the BDCP economic benefits analysis. The Final BDCP should clarify how the costs for alternative water supply build-out and mandatory conservation were used in the economic benefits analysis, and the distinction between the two uses.

38. Page 9.A-49, lines 14-17 state that "The BDCP Proposed Action...assumed 3.8 MAF of water supplies under post-earthquake conditions."

*Comment:* There is no backup information to support the assumptions on water supply availability under post-earthquake conditions. The Final BDCP should provide information to support the supply yields assumed to be available from existing conveyance, BDCP Proposed Action, and other take alternatives under post-earthquake conditions.

### **Draft Conceptual Engineering Report**

The Conceptual Engineering Report (CER) does not lend itself to the "page and line" comment format as in the above documents. Therefore, the following comments have been grouped in general topical areas. Because these topics are not confined to a single location and are scattered throughout the report, any comment should be considered applicable to every appearance of that topic in the report.

### **Schedule**

39. The project's schedules included as part of the CER's Executive Summary and Appendix C are not the same.

Ryan Wulff  
May 30, 2014  
Page 17 of 19

*Comment:* These schedules need to be reconciled and the text clarified to discuss any assumptions used in the schedule.

40. The Appendix C schedule contains a number of fixed, or constrained, task completion dates.

*Comment:* The CER does not include the schedule logic to determine if these constrained dates are achievable or reasonable. At the preliminary engineering stage of a project, completion dates should not be constrained so it can be determined if the schedule is reasonable. All constraints should be removed from the task completion dates and the schedule logic should be provided to determine whether that logic, and therefore the schedule, is appropriate and reasonable.

41. Appendix C of the CER includes an item for property acquisition necessary to complete the project.

*Comment:* Appendix C provides no detail on how the BDCP team intends to acquire land rights from the hundreds of impacted property owners along the route of the tunnels, at the forebays, the intake facilities, and impacted by the installation or relocation of utilities and roads necessary for the project. A comprehensive property acquisition plan should be included to identify the nature of property rights to be acquired, the schedule for doing so, and the staff or consultant resources necessary to complete this task.

#### Project Risks

42. The BDCP infrastructure is subject to a considerable number of risks that could negatively impact the project's cost and schedule.

*Comment:* While mostly identified in the CER, these risks must be adequately addressed during the design and construction of the project. The most significant of these risks include:

- Lack of geotechnical information. The CER repeatedly states that additional geotechnical information is needed to adequately design the project's tunnels, intake pumping facilities, levees, tunnel muck disposal sites and forebays.
- Tunnel construction methodology. The tunnel methodology is highly dependent on the geologic conditions along the tunnel routes but must address the likelihood of variable soil conditions.
- Available Resources. The project as proposed and ancillary efforts such as utility relocation will require numerous specialized engineers, geologists, right of way agents, tunnel boring machines, tunnel boring machine operators, specialized underground contractors, lawyers, court resources (in support of right of way acquisition efforts) and various technical experts. It

Ryan Wulff  
May 30, 2014  
Page 18 of 19

is unclear of these resources can be obtained in a timely manner to meet the project's schedule.

- Power requirements. The CER is undecided on how the power will be provided to the project both during construction and during operations and by how many electrical companies. The CER indicates power may be provided to each site by multiple electrical companies. The cost and time associated with a second power source to each project location has not been addressed.
- Access and utility conflicts. The project will require the relocation of roads and utilities. It is uncertain whether those conflicts will be addressed by the BDCP or the utility or public agency that owns the utility. The extent of relocations, their cost and how long it will take to resolve utility and road conflicts are not thoroughly defined in the CER.
- Property rights acquisition. See item under Schedule above. Property acquisition via the eminent domain process allows the property owner to challenge the project proponent's right to take their property via eminent domain. Linear projects, such as the BDCP infrastructure, are particularly vulnerable to costly reroutes and delays if a right to take challenge is upheld by the courts. The value of the rights to be acquired can also vary greatly. This uncertainty should be thoroughly detailed in the CER.
- Recent Court rulings. On March 13, 2014 the Third Appellate District Court of Appeal ruled the BDCP's efforts to obtain additional geotechnical and environmental information resulted in a permanent property acquisition (take) from impacted property owners. This contradicts long-standing law that allows public agencies access to private property for study purposes and pay the owner if there are any damages. This ruling, if not overturned, will result in unknown and potentially significant delays to the project.

A comprehensive Risk Registry that identifies risks that could adversely impact the project's schedule, and cost and how those risks will be mitigated during future design or construction, should be included in the final CER and updated on a regular basis as the design and construction progresses.

#### Estimate Accuracy and Project Contingency

43. The CER (Chapter 8) notes the accuracy of the construction estimate ranges from is +50% to -25%; however, the project cost estimate includes only a 36% contingency.

*Comment:* The CER is unclear on the rationale used to determine the cited accuracy range or the selection of the specific cost estimate contingency. Subsequent communication (February 26, 2014 letter from Mr. Charles R. Gardner Jr., CEO Hallmark Group) noted the construction estimate accuracy had been improved to +30% to -20% and therefore the contingency of 36% was more than adequate. However, no information on how the "more accurate" cost

Ryan Wulff  
May 30, 2014  
Page 19 of 19

estimate was prepared has been provided since the October 2013 release of the CER. The final CER should disclose the methodology, including an analysis of project risks, used to derive a project contingency of 36%. It should also disclose and explain the information that allowed a more accurate cost estimate to be prepared. Absent this information the Water Authority believes the project contingency should be set at 50% based upon the upper range of the cost estimate's accuracy.

The Water Authority appreciates the opportunity to review the proposed project and provide comments on the Draft EIR/EIS and associated documents. As noted above, the Water Authority requires additional information to determine if the BDCP Proposed Action as described and analyzed in the Draft EIR/EIS is a cost-effective long-term solution to Delta water supply and ecosystem conflicts.

Please retain the Water Authority on your mailing list to receive future notifications or documents regarding this project. If you have questions or wish to discuss any of the above concerns in greater detail, please contact Larry Purcell, Water Resources Manager at (858) 522-6752, or by email at [lpurcell@sdewa.org](mailto:lpurcell@sdewa.org).

Sincerely,



Maureen A. Stapleton  
General Manager

Attachments: (1) Meral ltr of 08/28/12  
(2) Meral ltr of 07/30/13  
(3) Laird ltr of 10/07/13



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## MEMBER AGENCIES

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$$J \in \mathbb{R}^{n \times n}$$

Fig. 4. Magnitude of  $\sigma_{\text{eff}}$ .

W. J. 2000-21

Fig. 4. P (mm)

## Keywords

Waste Disposal

**Table 1**

Received 14 June 2006  
 Accepted 12 July 2006

Name: \_\_\_\_\_

Major Components:

Manuscript Word: **100**

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Walt

Ann. Appl. Biol. 2000, 136, 239-246

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100%  $\text{Fe}^{2+}$  (aq)  $\rightarrow$  100%  $\text{Fe}^{3+}$  (aq)

Bay Bridge

Index      Note      11

1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 2680, 26

FALL 2004 VOL. 31, NO. 4

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Chief among the Water Authority's concerns is the need to define the various components of the financing plan for the BDCP and the recently announced decision-tree concept in a manner that allows potential participants to evaluate the cost-benefit (or feasibility) of participating in the project. We believe the financing plan must include enforceable agreements to pay for the project, not only from state water contractors directly, but from the member agencies or units

Dr. Gerald Meral  
August 28, 2012  
Page 2

that provide their revenues. The costs are simply too great to rely on the hope that there will be enough water purchasers over the long-term to pay the project's costs.

As the largest customer of the largest state water contractor – the Metropolitan Water District of Southern California (MWD) – the Water Authority's ratepayers have a great deal at stake in the BDCP process and its financing plan. The Water Authority must be able to assess not only that the project will provide sufficient benefits to be affordable by our ratepayers, but also that they are not at risk of paying BDCP costs associated with the water supplies of other MWD member agencies or state contractors. The Water Authority is already in litigation with MWD over how it allocates its current State Water Project costs.

The Water Authority is concerned that all of the progress that has been made in bringing the BDCP to this point will be stymied, and that the BDCP will fail if participants are not able to evaluate the cost-benefit of the project or reasonably limit the risk their ratepayers are being asked to assume. It is in this light that we offer the following brief comments on the administrative draft of Chapter 8 – *Implementation Costs and Funding Sources*.

#### **Comments**

As the largest state water contractor, MWD is the foundation for financing the project. And yet, MWD itself has been struggling over the past several years to pay its current fixed costs – let alone a substantially larger cost associated with the BDCP. The reason is simple: more than 80 percent of MWD's costs are fixed while less than 20 percent of its revenues are paid from fixed charges. More than 80 percent of MWD's revenues come from water sales. Yet, MWD's member agencies are not required to purchase *any* water from MWD. With its member agencies unwilling to sign take-or-pay contracts or make any other firm financial commitments to MWD to cover its fixed obligations, the agency remains heavily dependent on revenues from variable water sales. MWD's water sales have declined approximately 30 percent since 2008, with its firm sales declining to less than 1.3 million acre-feet in fiscal year 2012. MWD's member agencies – including the Water Authority – have also experienced significant reductions in sales. A direct consequence of these declining sales is sharply higher imported water rates that have made additional local water supply investments economically competitive. As a consequence, MWD's member agencies – and their sub-agencies – are doing what they have been asked to do over the past 20 years: reducing reliance on water supplies imported from the Delta.



Dr. Gerald Meral  
 August 28, 2012  
 Page 3

We are concerned that the BDCP will become the kind of "big ticket project" that MWD board members vocally and enthusiastically support – at the same time their agencies are unwilling to make enforceable commitments to pay for the project.

A final note on the subject of risk: because the project is anticipated to be financed through project revenues, we are informed that bond underwriters are expected to require a "step up" provision by which each BDCP participant in BDCP-related bonds pledges to assume the obligations of defaulting participants.<sup>1</sup> The current draft of Chapter 8 is silent on this issue, yet it is conceivable that some of the BDCP participants may default, which would cause remaining participants, including MWD, to assume a greater portion of the debt. It is important that Chapter 8 analyze the possible effects of the "step up" provisions on MWD and the other participants in the BDCP.

Some have suggested that property taxes may provide the ultimate security for BDCP payment obligations of individual contractors. Putting aside the question whether property taxes levied under the authorization of the Burns-Porter Act may be used to pay for new projects contemplated by the BDCP, it is important to remember that MWD's taxing authority is further limited by the provisions of the MWD Act.<sup>2</sup> Although the Act contains override ability in the event of a fiscal crisis as determined by the MWD board (one year at a time<sup>3</sup>), it effectively limits MWD's ability to levy taxes to pay its SWP obligations. It is also unclear whether changes to this limit would require voter approval. Thus, a careful legal analysis of MWD taxing authority should be included in the BDCP due diligence process if taxes are contemplated as additional back-up security for project debt.

To effectively evaluate the finances available for the BDCP, the drafters of Chapter 8 need to conduct comprehensive due diligence on all of the facts and

<sup>1</sup> Under Section 50(h) of MWD's current State Water Project contract, non-defaulting contractors can be assessed to cover payments not made by defaulting contractors, up to 25 percent of the payment not made. Under Section 49(l) of its East Branch Extension of the State Water Project contract, MWD is obligated to cover a default by any and all other participants.

<sup>2</sup> Section 124.5 of the Metropolitan Water District Act limits MWD's property tax levy to "the composite amount required to pay (1) the principal and interest on general obligation bonded indebtedness of the district and (2) that portion of the district's payment obligation under [the SWP contract] which is reasonably allocable, as determined by the district, to the repayment by the state of principal and interest on [SWP bonds] as of [January 1, 1985] and used to finance construction of facilities for the benefit of the district."

<sup>3</sup> In such an event, the State of California would be relying upon an annual vote of MWD's Board of Directors in which it "...finds that a tax in excess of these restrictions is essential to the fiscal integrity of the district...."

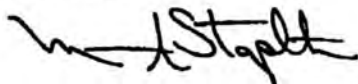
Dr. Gerald Meral  
August 28, 2012  
Page 4

circumstances described in this letter. Without such due diligence, the BDCP faces a potential cascading collapse of funding. At a minimum, state water contractors that are wholesale water agencies must demonstrate that their customers – the member agencies or units that buy their water and provide their revenues – have take-or-pay contracts or other enforceable commitments to pay the fixed costs of the project commensurate with the term of the BDCP obligation. The Water Authority continues to stand ready to make such a commitment to MWD that provides benefits commensurate with its payments.

Ultimately, the full faith and credit of the State of California will back up the bonds issued to build the conveyance project. Failure to secure enforceable financial commitments from the member agencies or units of water wholesale contractors could place all of California at significant risk of having tens of billions of dollars of new outstanding debt without sufficient water contractor payments to cover the debt service. This is why all California taxpayers have a stake in ensuring that there is a solid foundation and financing plan for the BDCP going forward.

Thank you again for providing the opportunity to comment on the administrative draft of Chapter 8 of the BDCP. We are committed to working with you and all parties to address and resolve these issues.

Sincerely,

A handwritten signature in black ink, appearing to read 'Maureen A. Stapleton', with a stylized, cursive script.

Maureen A. Stapleton  
General Manager

Enclosure: Water Authority Bay-Delta Policy Principles

**Attachment 2**

## San Diego County Water Authority

4677 Overland Avenue • San Diego, California 92123-1233  
(858) 522-6600 FAX (858) 522-6568 [www.sdcwa.org](http://www.sdcwa.org)

July 30, 2013

Dr. Gerald Meral  
Deputy Secretary  
California Natural Resources Agency  
1416 Ninth Street, Suite 1311  
Sacramento, CA 95814

### MEMBER AGENCIES

Imperial Valley District

San Jacinto Valley District

San Jacinto Valley District

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Dear Jerry:

Thank you for the efforts that you, your state and federal agency colleagues, and the Administration have made to bring the BDCP to the point where it stands today. We appreciate the opportunity that the release of an administrative draft of the BDCP affords us to provide comments and questions that should be addressed in the next draft. This letter is a follow-up to the Water Authority's previous correspondence on BDCP Chapter 8, and conversations we have had with you over the past year.

Like many other stakeholders, the San Diego County Water Authority anticipated the May 29 release of the final chapters of the administrative draft of the BDCP document and believed, based upon earlier representations, it would address the questions and concerns the Water Authority has raised over the past several years over project financing. In particular, we were anxious to review the new draft of Chapter 8 in light of the correspondence we sent you 11 months ago (attached), in which we raised a series of BDCP financing issues and concerns. Our subsequent conversations led us to believe these concerns would be addressed in the most current iteration of Chapter 8. Instead, and disappointingly, Chapter 8 begins with this jarring admission:

*"Details of the financing... are still being determined through on-going discussion between the state and federal governments and between the government, the state and federal water contractors and other interests."*

After reviewing the newly-revised Chapter 8 of the BDCP administrative draft, seven years into the BDCP planning process, and nearly a year after commenting on the prior draft, the most critical financing issues confronting the BDCP have yet to be addressed.

As we shared with you previously, potential participants in the BDCP must have sufficiently detailed information to evaluate the cost-benefit (or feasibility) of participating in the project. We recently heard David Sunding report to the Metropolitan Water District of Southern California's (MWD) Board of Directors that a cost-benefit analysis has been produced for all urban and agricultural water contractors, and that it includes an urban cost-benefit analysis for all MWD member agencies. Would you please send a copy of the complete report to me in advance of Dr. Sunding's Sept. 12 appearance before our Board's Imported Water Committee?

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Dr. Gerald Meral  
 July 30, 2013  
 Page 2

As we have consistently stated, the Water Authority believes that any BDCP financing plan must include enforceable agreements to pay for the project, not only from state water contractors directly, but also from the member agencies or units that provide their revenues. The costs are far too high to simply rely on the hope that the contractors' water sales will be adequate over the long-term to pay the project's costs.

As the largest customer of the largest state water contractor – MWD – the Water Authority's member agency ratepayers have a great deal at stake in the BDCP process and its financing plan, its risks and contingencies. The Water Authority must be able to assess that the preferred alternative advocated by the BDCP program will provide sufficient benefits to be affordable for our member agency ratepayers. We also must ensure that our ratepayers are not at risk of paying BDCP costs associated with the water supplies of other MWD member agencies or other state or federal water contractors. The Water Authority is already in litigation with MWD over how it allocates its *current* State Water Project costs.

The Water Authority is concerned that future progress of the BDCP and efforts to resolve seemingly intractable conflicts in the Delta will falter if those expected to be participants in the BDCP are not able to evaluate the cost-benefit of the various alternatives or reasonably limit the risk that their ratepayers will be expected to assume. In this context, we renew our request that our comments and concerns raised in our August 28, 2012 correspondence regarding Chapter 8 of the BDCP administrative draft – *Implementation Costs and Funding Sources* – be addressed in the next draft.

#### **Comments**

In our August 28, 2012 correspondence, we identified three specific issue areas as lacking necessary discussion within Chapter 8:

- State water contractors that are wholesale water agencies should demonstrate that their customers – the member agencies or units that purchase their water and provide their revenue – have take-or-pay contracts or other enforceable, long-term commitments to pay the fixed costs of the project commensurate with the term of the BDCP obligation.
- It is important to analyze the possible effects of “step up” provisions – those bond pledges that may require other BDCP participants to assume the obligations of defaulting participants – on MWD and other participants in the BDCP.
- A careful legal analysis should be undertaken of MWD taxing authority within the BDCP due diligence process, to examine the feasibility and appropriateness of relying upon property taxes as additional back-up security for project debt.

#### **Take-Or-Pay Contracts/Enforceable Commitments**

As we have previously pointed out in discussions with you, MWD – which, as the largest state water contracting agency, is the foundation for financing the BDCP project – has been struggling over the past several years to pay its current fixed costs, let alone a substantially larger new cost associated with the BDCP. More than 80 percent of MWD's costs are fixed – however, less than 20 percent of MWD's revenues are paid from fixed charges. Conversely, more than 80 percent of MWD's revenues are from water sales – a variable revenue source – and those sales have



Dr. Gerald Meral  
 July 30, 2013  
 Page 3

declined by 30 percent since 2007. Furthermore, MWD's member agencies are not required to purchase *any* water from MWD. The variability of water sales – and thus uncertain future water sales revenues – coupled with Southern California water agencies' current and future planned actions to implement the State's policy to reduce reliance on water supplies imported from the Delta, creates significant uncertainty regarding long-term financing of BDCP obligations. This should be a major concern for the State of California, whose full faith and credit will be expected to back up the financing of the project. And yet, Chapter 8 makes no mention of this material, foundational risk to BDCP financing.

The Water Authority believes that, at a minimum, state water contractors that are wholesale water agencies must demonstrate that their customers have take-or-pay contracts or other enforceable long-term commitments to pay the fixed costs of the BDCP project corresponding to the term of the BDCP obligation. The Water Authority continues to be prepared to make such a commitment to MWD as long as the Water Authority gets the water supplies in return for its payments. We also believe that the willingness to make a financial commitment to a Delta solution will largely determine the demand for Delta water supply, and therefore help inform the best sizing for the conveyance facility. It would not be in the state's best interest to construct a facility only to have it stranded because no one is willing to pay for it, or hoped-for water sales necessary to pay for it do not materialize.

#### "Step-Up" Provisions

Existing State Water Project contracts contain provisions under which non-defaulting contractors can be assessed to cover payments not made by defaulting contractors, up to 25 percent of the defaulting contractors' obligations. Additionally, the East Branch Extension of MWD's State Water Project contract has a provision obligating MWD to cover default by any and all other participants. These State Water Project contract stipulations are known as "step-up" provisions.

We are informed that bond underwriters for the BDCP project are expected to require a "step-up" provision by which each BDCP participant in BDCP-related bonds pledges to assume the obligations of defaulting participants. In fact, the newly-released Chapter 8, at Section 8.10.1.1.1 (page 8-81) provides that:

*"Existing water contracts would need to be amended to include the new costs of the BDCP assigned to the state water contractors and the repayment schedule."*

Since "step-up" provisions are already embodied within, and apply to, MWD's State Water Project contract, it would appear that such provisions would apply to the "new costs of the BDCP assigned to the state water contractors." Given those "step-up" provision obligations, we renew our request that Chapter 8 fully analyze the possible financial and economic effects of the "step-up" provisions on MWD and the other participants in the BDCP.

#### Property Taxes

Some have suggested that property taxes may be contemplated as back-up security for BDCP payment obligations of individual state water contractors. There are very clear and significant limitations in MWD's existing taxing authority under the provisions of the MWD Act:

- The Act limits MWD's ability to levy taxes to pay its State Water Project obligations.

Dr. Gerald Meral  
July 30, 2013  
Page 4

MWD is limited to levying taxes for *“the composite amount required to pay (1) the principal and interest on general obligation bonded indebtedness of the district and (2) that portion of the district’s payment obligation under [the SWP contract] which is reasonably allocable, as determined by the district, to the repayment by the state of principal and interest on [SWP bonds] as of [January 1, 1985] and used to finance construction of facilities for the benefit of the district.”*

- Although the Act contains override ability in the event of a fiscal crisis, as determined by the MWD board, the override is limited to only one year at a time. In such an event, the State of California and bondholders would be relying upon an annual vote of MWD’s Board of Directors in which it *“...finds that a tax in excess of these restrictions is essential to the fiscal integrity of the district....”*
- It is unclear whether changes to the limitations provided under the MWD Act would require voter approval and/or new legislation. Chapter 8 should address and answer these questions.

Given these limitations and uncertainties, it is difficult to consider MWD’s existing taxing authority as a meaningful back-up security for BDCP payment obligations. It is also highly questionable whether the financing of BDCP can be – or should be – backed by taxing authority that was authorized by voters decades ago, when the program was much different than is being discussed today. A careful legal analysis of MWD taxing authority should be included in the BDCP due diligence process if taxes are going to be relied upon as additional back-up security for BDCP project debt. The newly-released version of Chapter 8 is silent on this issue.

Based on the assurances that you previously provided to the Water Authority, we expected that the full consideration and analysis of the issues we have raised would be integrated in to the Chapter 8 analysis and conclusions. And yet, the current version of Chapter 8 of the BDCP administrative draft does not comprehensively or adequately conduct due diligence on all of the facts and circumstances described in this letter and our previous correspondence. We remain concerned that a potential cascading collapse of funding could occur if the proper due diligence is not undertaken in a timely manner.

We appreciate the opportunity to provide comments on the newly-released Chapter 8 of the BDCP administrative draft. We remain committed to working with you and all parties to evaluate, address, and resolve these critical financing issues.

Sincerely,



Maureen A. Stapleton  
General Manager

Attachment: August 28, 2012 letter



## Attachment 3



## San Diego County Water Authority

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October 7, 2013

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

### MEMBER AGENCIES

Carlsbad  
Municipal Water District  
City of Del Mar  
City of Escondido  
City of National City  
City of Oceanside  
City of Poway  
City of San Diego  
Fallbrook  
Public Utility District  
Helix Water District  
Lakeside Water District  
Olivewood  
Municipal Water District  
Otay Water District  
Padre Dam  
Municipal Water District  
Camp Pendleton  
Marine Corps Base  
Rainbow  
Municipal Water District  
Ramona  
Municipal Water District  
Rincon del Diablo  
Municipal Water District  
San Diego County Water District  
Santa Fe Irrigation District  
South Bay Irrigation District  
Vallecitos Water District  
Valley Center  
Municipal Water District  
Vista Irrigation District  
Yuima  
Municipal Water District

### OTHER REPRESENTATIVE

County of San Diego

Dear Secretary Laird:

On behalf of the San Diego County Water Authority (Water Authority), thank you for your September 11, 2013 letter to Chair Wornham and me responding to a January 2013 multi-agency letter requesting analysis of the Natural Resources Defense Council's portfolio approach to statewide water management and the Bay-Delta Conservation Plan (BDCP).

We look forward to working with you to help develop a BDCP project that achieves the co-equal goals and is affordable. As the largest member agency of the largest State Water Contractor, the Metropolitan Water District, the Water Authority and its ratepayers are being counted upon to pay the second-largest share of BDCP costs.<sup>1</sup> Yet, we have been relegated to the status of an outside observer who may have no financial stake in the BDCP. Accordingly, we request the opportunity to become more directly engaged in the BDCP cost allocation discussions and negotiations process – and be part of the solution. The stakes are sufficiently high for the San Diego region to be afforded the opportunity to be at the cost allocation negotiating table.

As you know, the Water Authority has not endorsed any alternative that has been considered by the BDCP program or advanced by others, including the Natural Resources Defense Council's Portfolio Alternative and the Delta Vision Foundation's BDCP-Plus. However, we firmly believe that a thorough and comprehensive analysis of Delta fix alternatives is critical to help inform the ultimate selection of an implementable plan for achieving the co-equal goals.

The Water Authority is committed to helping find a Delta solution, and to that end, is continuing its multi-year effort to inform our Board of Directors and civic and business leaders in our region on a variety of issues associated with the Delta. In addition, over the past several months, the Water Authority Board and staff have been engaged in an intensive, comprehensive review of BDCP-related alternatives to assess how various options may improve the San Diego region's water supply reliability along with risks associated with each. This review process is ongoing, and is scheduled to continue into 2014. We were disappointed to learn from Natural Resources Agency Deputy Secretary Jerry Meral at our September 12 Board workshop that determinations regarding the cost allocation among contractors will not be concluded when the BDCP and its environmental documents are released for public review next month. Although we plan to

<sup>1</sup> Among MWD's member agencies, and second only to the Kern County Water Agency.

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Secretary John Laird  
 October 7, 2013  
 Page 2

submit a formal comment letter during the BDCP environmental review process, the allocation of BDCP costs and the resultant rate impacts on San Diegans will remain a central element in our Board's consideration of which option to support.

While we had hoped that your Agency's evaluation of the Portfolio Alternative would be helpful to the Water Authority's ongoing review and analysis, some of the information contained in your September 11 letter raises more questions than it answers.

- The letter states that a single-tunnel, 3,000 cfs conveyance facility (which is proposed in the Portfolio Alternative) would cost \$6 billion less than the BDCP preferred alternative (9,000 cfs twin tunnels) - \$8.5 billion compared to \$14.5 billion. However, on September 16, a corrected version of the evaluation was posted on the BDCP website, which indicates that the 3,000 cfs single-tunnel conveyance facility would only cost \$3 billion less than the BDCP preferred alternative. Further, none of these numbers match Dr. David Sunding's economic benefit analysis, which he shared with us at our September 12 Board of Directors workshop, which identified the cost at \$10 billion.

Many entities that are undertaking review and analysis of the Delta fix options, like the Water Authority, would benefit from reliable cost estimates for the conveyance features of the Portfolio Alternative. The lack of clarity in the cost estimate has made it challenging to have a meaningful cost comparison of the various conveyance feature sizes. Could you please provide an apples-to-apples cost comparison of the 3,000 (single tunnel), 6,000 and 9,000 cfs conveyance project sizes?

- In terms of the benefit cost ratio of alternatives, your evaluation indicates that *"the 3,000-cfs tunnel has a negative benefit cost ratio, largely because the cost of the 3,000-cfs tunnel is approximately two thirds of building the proposed 9,000-cfs twin tunnels but the water yield is much smaller."* The evaluation may be accurate; we are not attempting to dispute or refute the calculations and findings. However, with the numerous cost estimates for the conveyance features included in your own evaluations it is difficult to definitively understand the benefit cost ratio at which the evaluation arrives. A more comprehensive evaluation and identification of the appropriate assumptions would be valuable for those seeking to undertake independent analysis of cost-related information.
- The evaluation regarding the potential water supply yield in water recycling and water use efficiency projects that could be achieved from a \$3B investment in local and regional water supply projects requires additional analysis. Your evaluation indicates, that with respect to investments in local and regional water recycling projects and water conservation projects, *"it is doubtful that a \$3 billion investment would produce even 100,000 acre-feet of reliable new water supply in urban areas, and would do nothing for agricultural users."* This evaluation appears at odds with the Department of Water Resources' California Water Plan Update, which provides an analysis from which it may be concluded that a \$3 billion investment in water recycling projects could actually



Secretary John Laird  
October 7, 2013  
Page 3

produce approximately 400,000 acre-feet of new water supplies (2009 Water Plan Update, Page 11-10). In addition, data developed by the Water Authority on local project costs and implementation also indicates that BDCP's estimate is very low. We believe this warrants additional analysis to better understand how your evaluation arrived at a potential yield of 100,000 acre-feet or less. We would be happy to share the Water Authority's data and our observations on local supply development with your staff.

- The evaluation with respect to the ability to export water from the south Delta following a significant seismic event stated that, *"It may take from one to 10 years to rebuild enough Delta levees to once again allow substantial exports from the south Delta."* While certainly more work remains to be completed in terms of the efforts that have been undertaken through the Delta Emergency Rock and Transfer Facilities Project and the Delta Emergency Response Program to secure water supply reliability following a significant seismic event, it is our understanding that significant progress has been made to reduce the worst-case export outage. A more comprehensive analysis on this issue would be beneficial.

We look forward to working with you to consider a BDCP project that is implementable, achieves the co-equal goals, and improves water supply reliability and is affordable within the San Diego region and the rest of the state. In addition, we look forward to arranging a meeting with you in the near-term to explore avenues for additional information sharing and the Water Authority's participation in the cost allocation negotiation process.

Sincerely,



Maureen A. Stapleton  
General Manager

Attachments:

1. January 2013 multi-agency letter regarding NRDC Portfolio Alternative
2. September 11, 2013 correspondence and Portfolio Alternative evaluation from Secretary John Laird



## San Diego County Water Authority

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(858) 522-6600 FAX (858) 522-6568 [www.sdcwa.org](http://www.sdcwa.org)

July 28, 2014

**Mr. Ryan Wulff**

**National Marine Fisheries Service**  
**650 Capitol Mall, Suite 5-100**  
**Sacramento, California 95814**  
**ATTN: BDCP Comments**

**Re: Draft Environmental Impact Report/Environmental Impact Statement for the Proposed Bay Delta Conservation Plan, Alameda, Contra Costa, Sacramento, Solano and Yolo Counties, California – Additional Comments on Draft Implementing Agreement**

**Dear Mr. Wulff:**

The San Diego County Water Authority (Water Authority) is submitting the following additional comments on the joint Draft Environmental Impact Report (EIR) Draft Environmental Impact Statement (EIS) prepared by the U.S Department of Interior, Bureau of Reclamation (Reclamation), and U.S. Department of Interior, Fish and Wildlife Service (USFWS); the U.S Department of Commerce, National Oceanographic and Atmospheric Administration, National Marine Fisheries Service (NMFS); and the California Department of Water Resources (DWR) for the proposed Bay Delta Conservation Plan (BDCP).

While these comments are directed to the Draft Implementing Agreement (IA) dated May 30, 2014, the inter-related nature of the Implementing Agreement, the BDCP and the Draft EIR/EIS make these comments equally applicable to all three documents. Therefore, this letter should be considered a supplement to the previous Water Authority letter dated May 30, 2014.

### GENERAL COMMENTS

1. While the extension of the review period to accommodate release of the Draft Implementing Agreement is appropriate and appreciated, the Water Authority believes there is a substantial lack of specificity regarding the financial commitments required to approve the BDCP and issue any necessary incidental take permits. The IA provides no additional clarity on how these legally binding funding commitments are expected to be made and the timeline by which they are expected to be executed. We believe the IA should address whether existing water contracts will contain such language, or whether some other type of

#### MEMBER AGENCIES

Carlsbad  
Municipal Water District

City of Del Mar

City of Escondido

City of National City

City of Oceanside

City of Poway

City of San Diego

Imperial  
Public Utility District

Imperial Water District

Imperial Water District

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 National Marine Fisheries Service  
 July 28, 2014  
 Page 2 of 19

funding agreement (that includes back-stop and assurances for long-term financial commitments) will be developed and executed by the BDCP participants. The Final IA should specify how firm funding commitments with all participants will be assured.

2. The commitment of individual State Water Project (SWP) or Central Valley Water (CVP) contractors to participate in the BDCP has not been determined, and it is possible that some contractors will decline. The Final IA should specify the criteria to be used by DWR and Reclamation in determining how to coordinate and allocate water between the SWP and CVP, and among the BDCP participants and non-participants.
3. The Draft IA specifically notes that neither the state nor federal government can commit to providing funds in the amounts expected or within the established BDCP implementation schedule. Yet, state and federal funding contributions remain crucial to overall BDCP success. Without such commitments, it remains unclear how the funds required to fully implement the BDCP will be obtained. The Final IA should explain the process that will be followed to make up for any sporadic or prolonged shortfall in BDCP funding by the state or federal governments.

#### DETAILED COMMENTS

1. Page vi: The Table of Contents lists the exhibits attached to the BDCP Draft IA.

*Comment:* None of the listed exhibits were attached to the public review draft. The exhibits form an integral part of the commitments and assurances made by the participants. Please attach the completed exhibits to the Final IA.

2. Page 1, Section 1: Lists the parties to the IA, but does not list the individual State Water Contractor or Central Valley Project contractor agencies that would be signatories.

*Comment:* It is not possible to determine BDCP financial impacts or overall viability without the full list of participating agencies. The Final IA and Final BDCP should list the individual contractor agencies that have financially committed to, and their level of financial participation in the BDCP.

3. Page 2, Section 2.1.6: States that "Reclamation is not a permit applicant... under the ESA or NCCPA".

*Comment:* This position is further reinforced by the statement on page 1, section 1 that Reclamation has "no obligations" established in the IA. It is

Ryan Wulff  
 National Marine Fisheries Service  
 July 28, 2014  
 Page 3 of 19

unclear how an agency can participate in the BDCP, yet not be bound by implementation commitments established in the IA. This would seem to suggest that Reclamation can act independent of implementation actions taken by BDCP participants. The Final IA needs additional clarification describing Reclamation's commitments to conform to the terms of the BDCP while not being a signatory to the IA.

4. Page 3, Section 2.1.8: States that "...the BDCP...provides an allocation of responsibility among the Parties for BDCP requirements.....".

*Comment:* The term "Parties," especially as it relates to individual SWP or CVP contractors, is not specifically defined. Does it mean the signatories to the IA, or is there some broader list of agencies that will participate in BDCP implementation without signing the IA? This term should be defined in the Final IA, and include the list of agencies that have committed to sign the IA. Additionally, the "allocation of responsibility" presumably includes funding obligations. To date, no state or federal water contractor has formally committed, in writing, to fund any aspect of the BDCP. As such, the structure of financing the underlying credit for long term debts, and the sources of funds for day-to-day operations are not defined. Without such legally binding commitments, it is unclear how the BDCP can be approved and long-term endangered species act permits can be issued.

5. Page 3, Section 2.1.10: States that "DWR and the participating SWP/CVP Contractors have submitted the BDCP....".

*Comment:* This indicates that individual SWP/CVP contractors have executed and submitted the appropriate permit applications to the federal and state wildlife agencies on behalf of their respective agencies. If so, the individual SWP/CVP agencies that are requesting HCP/NCCP permits should be listed in the Final IA.

6. Page 5, Section 3.1: Describes the membership and roles of the Adaptive Management Team (AMT), including voting members.

*Comment:* It is unclear exactly what the AMT will "vote" on or if the "vote" is expected to be binding on the IA signatories. Implementation of the BDCP is the sole responsibility of those entities receiving incidental take authorizations through the ESA and NCCPA permit process (i.e., an expanded Authorized Entity Group consisting of all permit holders). It is one thing to have the AMT vote to submit a proposed management change to the Authorized Entity Group (the permittees) for consideration. It is quite another if the AMT can unilaterally impose management changes without the consent of the permit holders. The

Ryan Wulff  
 National Marine Fisheries Service  
 July 28, 2014  
 Page 4 of 19

Final IA and Final BDCP should clarify that the AMT acts strictly in an advisory capacity to the permit holders.

7. Page 7, Section 3.18: States that: "Coordinated Operation Agreement means the agreement... for the coordinated operation of the Central Valley Project and the State Water Project dated November 24, 1986."

*Comment:* Given that both the SWP and CVP operations will be modified under the BDCP, the Final IA should describe how operations under the BDCP will be coordinated between the two projects and how the Coordinated Operation Agreement will be modified as a result.

8. Page 9, Section 3.46: States that "Permittees means DWR and SWP/CVP Contractors".

*Comment:* Since the permit applications have been submitted to the wildlife agencies (see Section 2.1.10 above), the individual contractor agencies that have requested incidental take authorization should be listed in the Final IA.

9. Page 10, Section 3.55: States that "Supporting entity...performs task at the request of the Program Manager...".

*Comment:* Since a supporting entity will not be a BDCP permit holder, implementation of BDCP actions will need to be authorized by a permit holder. Yet, the Program Manager is not a signatory to the IA and is not a permit holder. The Final IA will need to explain how the non-permitted Program Manager can authorize permit coverage for another non-permitted entity.

10. Page 10, Section 3.56: States that "SWP/CVP Contractors means the individual water agencies that hold water delivery contracts... and that have executed this Agreement."

*Comment:* The listed definition of "SWP/CVP Contractors" also includes joint exercise of power agencies that execute the IA. However, it is unclear how a joint exercise of power agency can be granted a permit unless it has also submitted a permit application and committed to fund, on behalf of all its member agencies, BDCP implementation. In this case, the member agencies of the joint exercise of powers agency will need to have developed and executed a legally binding cost-sharing agreement to ensure adequate funding as required by the ESA and NCCPA permit processes. The Final IA should clarify if any joint exercise of power agency has formally committed to fund and participate in BDCP implementation and include a copy of the actual funding agreement.

Ryan Wulff  
 National Marine Fisheries Service  
 July 28, 2014  
 Page 5 of 19

11. Page 15, Section 7.1: States that "... Authorized Entities will fulfill all of their respective obligations..."

"• Participating in the Authorized Entity Group...."

*Comment:* As noted in our May 30 comment letter, because permit holders are funding BDCP implementation and are responsible for ultimate success, the Authorized Entity Group should consist of all permit holders, not just the limited subset currently defined in the Draft BDCP and Draft IA. The Final BDCP and Final IA should be revised to state that the AEG includes all individual permit holders.

"• Conferring with the... Permit Oversight Group... and obtaining approval ...where required."

*Comment:* As noted in our May 30 comment letter, the POG should not have any unilateral BDCP implementation decision authority. Implementation is rightfully the sole obligation of the BDCP permit holders. The POG role is limited to ensuring compliance with the BDCP and permits, and providing implementation advice to the Authorized Entity Group. The Final IA and Final BDCP should be revised to reflect this more appropriate compliance oversight role for the POG.

12. Page 17, Section 8.1.1: States that "... take authorizations will cover the Permittees, including all of their respective officers, directors, employees, agents, subsidiaries, member agencies, contractors, and the Supporting Entities ....who engage in any Covered Activity. All contracts... will require compliance with the Permits...".

*Comment:* While this addresses permit compliance for contractual relationships, it is silent on other relationships. For example, what sort of written documentation, if any, is required for an agent, subsidiary, member agency, or Supporting Entity to claim permit coverage? The Final IA should clarify that to obtain take authorization coverage through an existing permit holder, an entity must have a legally binding agreement stating that the entity is acting directly for, and on behalf of the permittee.

13. Page 18, Section 8.2: States that "An Other Authorized Entity will receive take authorization... after executing a Certificate of Inclusion that meets minimum requirements... set forth in Exhibit C... to ensure compliance with... Plan and Permits."



Ryan Wulff  
 National Marine Fisheries Service  
 July 28, 2014  
 Page 6 of 19

*Comment:* Exhibit C was not attached to the Draft IA, so it is not possible to comment on the specifics contained in the “Certificate of Inclusion” or its applicability to covered activities contemplated by non-SWP/CVP contractors. In particular, it is not clear if the Certificate of Inclusion is the only mechanism available to non-SWP/CVP contractors to allow the use of SWP or CVP facilities for water transfers. The Final IA needs to address the process for non-SWP/CVP contractors to implement water transfers; specifically from willing sellers north of the Delta to willing buyers south of the Delta.

14. Page 20, Section 8.9: The third paragraph duplicates text in the first two paragraphs.

*Comment:* The Final IA should be revised to delete redundant text.

15. Page 21, Section 9.1: States that “Covered Activities and Associated Federal Actions encompass all actions that are proposed for coverage under Take Authorizations to be issued by the Fish and Wildlife agencies on the basis of the BDCP.”

*Comment:* It is unclear, since Reclamation is not a signatory to the IA, how a federal agency can, or even needs to obtain state take authorizations under the NCCPA. It is typical for federal agencies to obtain take coverage for their actions through a federal ESA Section 7 process; for the BDCP, this has been described as the Integrated Biological Opinion. The BDCP permits to be issued pursuant to the IA will provide take authorizations to non-federal agencies pursuant to ESA Section 10 and NCCPA Section 2835. The Final IA should explain how Reclamation will obtain state and federal ESA coverage through issuance of the BDCP permits when that agency is not signatory to the IA.

16. Page 22, Section 9.5: States that “... If CDFW determines....”

*Comment:* The entire section should be revised to replace all occurrences of “CDFW” with “the fish and wildlife agencies”, and the remaining text modified accordingly. The current text is specific to the CDFW process, with no mention of a parallel process for the federal wildlife agencies. This text change is suggested to make it clear that both the state and federal wildlife agencies are included in the conference process. Alternately, a new IA section that mimics this wording, but focuses specifically on the federal agencies (USFWS and NMFS) should be added.

17. Page 25, Section 10.2.1.1: States that “... the applicants propose a project with operational and flow criteria intended to achieve the biological goals and

Ryan Wulff  
National Marine Fisheries Service  
July 28, 2014  
Page 7 of 19

objectives...". It further states that "It is expected that the USFWS, CDFW, and NMFS will issue Permits for....the high outflow scenario...".

*Comment:* While the range of outflow criteria proposed by the BDCP are intended to achieve the biological goals and objectives for the smelt, there is no certainty that those goals will be achieved, even with the proposed "decision tree" process. Page 23, Section 10.1 states that "failure to achieve biological goals and/or objectives shall not be a basis for a determination ... of non-compliance with the Plan or for the suspension or revocation of Permits...". The Final IA should specifically state that the high spring and fall outflow scenarios as described in the BDCP are the maximum and will not be increased even if biological goals and objectives are not met.

18. Page 26, Section 10.2.1.2 (3): States that "Completion and peer review....will be administered by the Implementation Office under the direction of the Adaptive Management Team."

*Comment:* The Implementation Office is the focal point for BDCP implementation. All implementation decisions need to be distributed from this single office. None of the support groups, whether it be the Permit Oversight Group or Adaptive Management Team, can have independent decision making authority for implementation or the BDCP is no longer that same one submitted by the permit applicants. For this reason, the following text should be revised as shown:

"This step will be administered by the Implementation Office in coordination with ~~under the direction of~~ the Adaptive Management Team".

19. Page 26, Section 10.2.1.2(4): States that "... the Implementation Office will provide the report... to the Authorized Entity Group and the Permit Oversight Group for decision pursuant to....).

*Comment:* Once Permits are issued, the Permit holders are legally responsible for BDCP implementation. Consequently, this group retains sole decision making authority for all aspects of implementation. The POG should have no independent decision making authority when it comes to BDCP implementation. The role of the permitting agencies is to ensure compliance with the terms of the BDCP and Permits, and to provide advice and guidance to the Permit holders on implementation issues. The decision making role of the POG is a repeating theme throughout the Draft IA and Draft BDCP. The Final IA and Final BDCP should be changed to reflect a more limited Permit oversight and compliance role for the POG.

Ryan Wulff  
 National Marine Fisheries Service  
 July 28, 2014  
 Page 8 of 19

20. Page 26, Section 10.2.1.4: States that “The outflow criteria applicable to CM1 may be within the range of outflow criteria analyzed in the decision tree...”.

*Comment:* The BDCP was developed by the Permit applicants with a very specific range of proposed outflow criteria. No outflow should exceed the maximum contemplated in the BDCP. For this reason, the following text should be revised as shown:

“The outflow criteria applicable to CM1 will ~~may~~ be within the range of outflow criteria...”

21. Page 26, Section 10.2.1.5: States that “...changes to the outflow requirements of CM1 associated with these other fish species...”

*Comment:* This provision infers that the maximum outflows contemplated in the BDCP can be increased beyond those in the “decision tree” to encompass other fish species. As already noted in Section 10.1, “failure to achieve biological goals and/or objectives shall not be a basis for a determination ... of non-compliance with the Plan or for the suspension or revocation of Permits...” It is important that the outflows not exceed the amounts proposed in the BDCP, even if all biological goals are not achieved. The Final IA and Final BDCP should state that alternate management methods will need to be considered if flows beyond those in the BDCP are suggested.

22. Page 27, Section 10.2.2.1: States that “The primary BDCP agencies (CDFW, USFWS, NMFS, DWR, and Reclamation will collaborate in making real time operational adjustments.”

*Comment:* This approach excludes the permit holders from any decision making regarding implementation of this aspect of the BDCP. If Permit holders are excluded, then additional language needs to be added to the Final BDCP and Final IA that relieves the Permit holders of responsibility for any adverse effects on BDCP implementation that result from decisions in which they have been excluded from making.

23. Page 27, Section 10.2.2.2.1: States that “The RTO Team will also include one representative of the SWP contractors and one representative of the CVP contractors, who will serve as non-voting members.”

*Comment:* This organizational structure precludes the SWP and CVP contractors from meaningful involvement in deciding how the BDCP will be implemented. Yet, Permit holders are solely responsible for BDCP implementation success. As noted above, if Permit holders are excluded from

Ryan Wulff  
National Marine Fisheries Service  
July 28, 2014  
Page 9 of 19

the decision making process, then additional language needs to be added to the Final BDCP and Final IA that relieves the Permit holders of any responsibility for any adverse effects on BDCP implementation that result from decisions in which they have been excluded from making.

24. Page 27, Section 10.2.2.2.2: Describes the functions of the RTO Team.

*Comment:* The RTO Team was not fully described in the Draft BDCP (as noted in the preamble to Section 3.4.1.4.5). Consequently, the applicability of state and federal open meeting laws that pertain to this Team have not been described. The Final BDCP should describe this Team in greater detail and reflect that it is bound by the same open meeting laws as all other groups that are assisting in BDCP implementation. It should also clarify how the 1986 Coordinated Operation Agreement will be modified as a result of RTO decisions.

25. Page 28, Section 10.2.2.2.3: States that "The RTO Team shall operate by consensus..."

*Comment:* This is in conflict with Section 10.2.2.2.1 which lists SWP and CVP contractors as non-voting members. It is not clear if SWP/CVP contractor representatives on the RTO Team will be part of the consensus process or not. The Final IA needs to be revised to reflect that SWP and CVP contractors that are part of the RTO Team have the same roles and rights as other team members. It should also describe the process to follow if consensus could not be reached by the RTO members.

26. Page 29, Section 10.3.2.1: States that "The Adaptive Management Team....shall have authority to make decisions..."

*Comment:* As noted repeatedly, the Permit holders (represented by an expanded Authorized Entity Group that includes all permit holders), are solely and legally responsible for the successful implementation of the BDCP and compliance with issued permits. Having the Adaptive Management Team function autonomously from the entities legally responsible for BDCP implementation is inappropriate and could undermine overall program success. The Adaptive Management Team should only provide implementation recommendations to the Authorized Entity Group (i.e. permit holders) for decision, and should not be authorized to make any decisions unilaterally. The Final BDCP and Final IA should be revised to reflect this supporting role.

27. Page 30, Section 10.3.2.3: States that "On a periodic basis, the Adaptive Management Team shall open its meetings to the Public."



Ryan Wulff  
 National Marine Fisheries Service  
 July 28, 2014  
 Page 10 of 19

*Comment:* To maximize transparency and provide the greatest public involvement, all meetings of the Adaptive Management Team should be open to the public and follow all state and federal open meeting laws. The Final IA should be revised to reflect that all meetings will be open to the public.

28. Page 32, Section 10.3.5.1.1: States that "...decisions of the Adaptive Management Team shall not be subject to review and consideration of the Authorized Entity Group and Permit Oversight Group..."

*Comment:* See above comment 26. All decisions that can affect BDCP implementation must to be made by those entities legally responsible for BDCP implementation and compliance with permits. No other group should be making unilateral decisions that affect the BDCP or the permits. Every group or team formed to assist in BDCP implementation, whether the Permit Oversight Group, Adaptive Management Team, RTO Team or any other body, are all supporting the permit holders in implementing the BDCP. The Final BDCP and Final IA should be revised to reflect that all BDCP implementation and permit compliance decisions must be made by the permit holders.

29. Page 33, Section 10.3.5.1.1: States that "... if the Authorized Entity Group and the Permit Oversight Group are unable to reach agreement, the Permit Oversight Group will decide the matter."

*Comment:* See above comments 26 and 28. The Permit Oversight Group should only be responsible for ensuring compliance with the permits. If the Authorized Entity Group (permit holders) takes an action that the permit issuing agencies believe violates permit terms and conditions, the IA contains specific permit suspension and revocation procedures to force compliance. Only the permit holders can, and should, make decisions regarding BDCP implementation; they are the ones legally and financially responsible. The Final BDCP and Final IA should be revised throughout to note this more limited role for the Permit Oversight Group.

30. Page 36, Section 10.3.5.1.1: States that "In the event that the Authorized Entity Group and the Permit Oversight Group are unable to reach agreement....the appropriate Fish and Wildlife Agency official with authority over the matter... shall decide..."

*Comment:* See above comments 26, 28, and 29. The Draft BDCP and Draft IA contain multiple and repeated references to groups, teams or individuals other than the permit holders being authorized to make decisions that affect BDCP implementation. This approach is entirely inappropriate. The BDCP is a voluntary plan prepared and submitted by the permit applicants. Therefore, the

Ryan Wulff  
National Marine Fisheries Service  
July 28, 2014  
Page 11 of 19

only entities responsible for funding and implementing the BDCP are the permit holders. If another entity/agency demands decision authority, then that entity or agency must be willing to accept responsibility for the outcome of those decisions. However, by doing so, the permit holders will be relieved of any responsibility for future consequences of those decisions. The Final BDCP and Final IA should be revised to remove all references to decisions made by any entity other than the permit holders. If not, additional text needs to be added to the Final BDCP and Final IA that relieves the Permit holders of responsibility for any adverse effects on BDCP implementation that result from decisions not made by them.

31. Page 37, Section 10.3.7.3.2: States that "... the Supplemental Adaptive Management Fund may be used at any time, provided the following actions have occurred or determinations have been made....".

*Comment:* The text then goes on to list six bulleted items necessary to trigger use of the supplemental fund. However, it is unclear if all six of the bullets have to be satisfied to access funds, or just one. Recommend changing the text as shown below:

"... may be used at any time, provided one or more of the following actions...."

32. Page 39, Section 10.4.2: States that "The Adaptive Management Team, shall have primary responsibility....".

*Comment :* To reinforce that all entities working on BDCP implementation recognize the overall responsibility of the permit holders, the text change shown below is recommended:

"Under the direction of the Authorized Entity Group, the Adaptive Management Team shall have primary..."

33. Page 39, Section 10.4.3: States that "In the event the Authorized Entity Group and the Permit Oversight Group are unable to reach agreement,... the Permit Oversight Group will determine whether the proposed plan... will be adopted."

*Comment:* See above comments 11, 19, 29, and 30. It is inappropriate for any entity other than the permit holders to make decisions regarding BDCP implementation.

Ryan Wulff  
National Marine Fisheries Service  
July 28, 2014  
Page 12 of 19

34. Page 40, Section 11.1: States that “The Implementation Office will ensure that the Conservation Measures are implemented substantially in accordance with the Implementation Schedule, Exhibit D.”

*Comment:* None of the exhibits referenced, including Exhibit D, were included in the Draft IA. All exhibits should be included in the Final IA.

35. Page 40, Section 11.1.1: States that “If Conservation Measures are implemented in accordance with the Implementation Schedule..., Rough Proportionality will be considered by CDFW to be maintained...”.

*Comment:* Rough proportionality is only discussed in the context of CDFW NCCPA permits. The Final IA should also indicate if the USFWS and NMFS will also follow this Rough Proportionality standard in evaluating BDCP implementation under their ESA Section 10 permits. Further, it is unclear if Rough Proportionality can be maintained if federal or state funding commitments are not met. The Final IA should include text that suspends the Rough Proportionality requirement if state or federal funding obligations are not met.

36. Page 42, Section 11.4.1: States that “The Fish and Wildlife Agency(ies).... shall respond to the Implementation Office within sixty (60) days.”

*Comment:* To minimize potential implementation delays, text should be revised as shown below:

“The Fish and Wildlife Agency(ies)... shall respond to the Implementation Office within sixty (60) days or such revision shall be deemed approved.”

37. Page 45, Section 13.0: States that “... the State and federal governments have committed to provide additional funding to implement the Plan.”

*Comment:* It is unclear how the state or federal governments can legally commit to fund their portions of the BDCP in advance of actions by the Legislature or Congress to appropriate and allocate funds. Without such legally binding commitments, it is unclear how the BDCP can be approved and long-term endangered species act permits can be issued. The Final BDCP and Final IA should cite provisions in the NCCPA and ESA regulations that allow Permits to be issued in the absence of assured funding.

38. Page 46, Section 13.1.2: States in a note to reviewer that “... while the United States has been engaged in development of this draft Agreement, there is no

Ryan Wulff  
National Marine Fisheries Service  
July 28, 2014  
Page 13 of 19

federal position... regarding potential funding obligations... The Parties anticipate reaching agreement on a federal and state cost share.”

*Comment:* This sentence conflicts with the statement on page 45 where the state and federal governments have definitively committed to provide additional funds for the BDCP. The cost share eventually agreed to by the state and federal governments should be included in the Final IA, as well as a description of how long-term state and federal funding will legally be assured. Without such assurances, we are unsure how the BDCP can be approved and long-term endangered species act permits can be issued. The Final BDCP and Final IA should cite provisions in the NCCPA and ESA regulations that allow Permits to be issued when funding is uncertain.

39. Page 48, Section 14.0: States that “The State and federal agencies may use a variety of tools at their disposal... to ensure the needs of species affected by unforeseen events are adequately addressed.”

*Comment:* To provide assurances to the Authorized Entity Group (all permit holders) that no additional funds or resources will be required, the Final IA should include text that protects the Authorized Entity Group (permittees) from being subject to new or revised regulations or fees, the intent of which is to obtain the funding or resources necessary to address unforeseen events.

40. Page 53, Section 15.1: States that “The implementation of the BDCP will generally be effectuated through an Implementation Office, which will be... governed by the Authorized Entities through the Authorized Entity Group”.

*Comment:* Consistent with our prior comment letter, we strongly believe that all permit holders must be included in the Authorized Entity Group; a small subset cannot truly represent the interests of all permit holders or provide for the broadest public interest.

41. Page 53, Section 15.1: States that “Through the Permit Oversight Group, the Fish and Wildlife Agencies will be involved in certain specified implementation decisions...”

*Comment:* It is important that the POG and Fish and Wildlife Agencies provide input into relevant decisions, but they should not be making the actual decision. All decisions related to BDCP implementation are the purview of the permit holders. Once the permits are issued, the POG and wildlife agencies role is to ensure that the permit terms are met. The Final BDCP and Final IA should be clear that neither the POG nor Fish and Wildlife Agencies make decisions related to BDCP implementation.



Ryan Wulff  
National Marine Fisheries Service  
July 28, 2014  
Page 14 of 19

42. Page 55, Section 15.2.1: States that “The Implementation Office shall not administer the Adaptive Management and Monitoring Program.”

*Comment:* While it is appropriate to have the Adaptive Management Team administer the monitoring program, the Implementation Office should provide overall direction for the adaptive management effort. The Adaptive Management and Monitoring Program is a key component of BDCP implementation. Having an entity other than the Implementation Office, which is charged with BDCP implementation through the Authorized Entity Group, direct this work is inappropriate and counterproductive to BDCP success. The Final BDCP and Final IA should be revised to reflect that the Implementation Office will provide overall direction in the administration of the Adaptive Management and Monitoring Program.

43. Page 58, Section 15.2.4.4: States that “The Implementation Office shall be responsible for... implementation of Conservation Measures... and will not require the approval... of the Authorized Entities, the Fish and Wildlife Agencies, or the Adaptive Management Group.”

*Comment:* The Implementation Office should not act unilaterally. The permit holders (i.e., Authorized Entities) are responsible for all aspects of BDCP implementation, including all the Conservation Measures. Consequently, no actions should be undertaken by the Implementation Office or any other group without the approval or concurrence of the Authorized Entities (permit holders). This presumably can be accomplished through approval of the annual work plan. The Final BDCP and Final IA should be revised to reflect Authorized Entities approval is required for any implementation action.

44. Page 60, Section 15.3.3: States that “The Authorized Entity Group will meet....at a minimum on a quarterly basis. ...On a periodic basis, the Authorized Entity Group will hold meetings that are open to the public.”

*Comment:* All, not just some, meetings of the Authorized Entity Group should be open to the public and comply with state and federal open meeting laws. The Final IA and Final BDCP should be revised to state that all meetings of the AEG will be open to the public and comply with open meeting laws.

45. Page 60, Section 15.4.1: States that “... the Fish and Wildlife Agencies will retain responsibility for monitoring compliance with the BDCP, approving certain actions, and enforcing the terms and conditions of their respective regulatory authorizations.”

Ryan Wulff  
 National Marine Fisheries Service  
 July 28, 2014  
 Page 15 of 19

*Comment:* Having the Fish and Wildlife Agencies responsible for monitoring BDCP compliance, and the terms and conditions of the permits is entirely appropriate once permits are issued. However, having them make unilateral decisions on BDCP implementation actions is not appropriate. As noted previously, once permits are issued, the sole responsibility for BDCP implementation belongs to the permit holders. Consequently, the permit holders should be making all decisions that affect BDCP implementation. If the Fish and Wildlife Agencies (issuers of the permits) disapprove of action taken by the permit holders, there are permit suspension and revocation procedures in the IA to ensure permits are not violated. The Final BDCP and Final IA should be revised to remove any reference to the Fish and Wildlife Agencies “approving certain actions”.

46. Page 61, Section 15.4.1: States that “The Permit Oversight Group will have the following roles...

- Participate in decision-making regarding real-time operations....”.

*Comment:* It is appropriate for the Permit Oversight Group to provide guidance to the permit holders in the decision making process, but that involvement should strictly be advisory. The permit holders are ultimately responsible for all aspects of BDCP implementation. No other group should be making unilateral decisions regarding BDCP implementation. The Final BDCP and Final IA should be revised to make it clear that the permit holders make all decisions, with other groups providing guidance and advice.

47. Page 66, Section 15.8.1: States that “With respect to implementation matters for which the Authorized Entity Group and Permit Oversight Group have joint-decision making authority...”

*Comment:* There should be no joint-decision making authority when it comes to BDCP implementation. Once the permits are issued, the permit holders have sole and complete responsibility to meet the terms and condition of the permits. There are no further decisions for the Permit Oversight Group to make once the permits are issued. The POG’s role is to ensure compliance with terms of the permits. There is already a procedure in the IA for the Fish and Wildlife Agencies to follow if the permit holders are not in compliance with the permits. The Final BDCP and Final IA should be revised to note that the POG provides guidance and advice to ensure compliance with the permits.

48. Page 66, Section 15.8.2: States that “If... the matter remains unresolved, the entity with decision-making authority... will make the final decision.”

Ryan Wulff  
 National Marine Fisheries Service  
 July 28, 2014  
 Page 16 of 19

*Comment:* The only entity with decision making authority should be the Authorized Entity Group (i.e., permit holders). There should be no need for a review process to challenge a decision by the permit holders. The Permit Oversight Group can certainly provide advice and guidance to the permit holders, but the ultimate decision belongs to those who have been issued permits and are responsible for BDCP compliance. The Final BDCP and Final IA should be revised to delete any reference to any BDCP implementation decisions being made by the Permit Oversight Group. As a result, there is no need for Section 15.8 and it should be deleted in its entirety.

49. Page 72, Section 17.2.2: States that "... the Permit Oversight Group... will provide written concurrence...that the draft plan... makes adequate provisions for... joint decision of the Authorized Entity Group and the Permit Oversight Group or decisions of an agency with authority over the matter."

*Comment:* As has been stated repeatedly throughout these comments, the only entity authorized to make BDCP implementation decisions should be the permit holders. They are the ones ultimately responsible for BDCP implementation and permit compliance. The Final BDCP and Final IA should be revised to state conclusively that the permit holders are the final decision making authority for all BDCP implementation actions.

50. Page 72, Section 17.2.3: States that "...implementation of the applicable joint decisions of the Authorized entity Group and the Permit Oversight Group or decisions of an agency with authority over the matter."

*Comment:* See above comments 47 and 49. The only entity authorized to make BDCP implementation decisions should be the permit holders. They are the ones ultimately responsible for BDCP implementation and permit compliance. The Final BDCP and Final IA should be revised to state conclusively that the permit holders are the final decision making authority for all BDCP implementation actions.

51. Page 79, Section 21.4: States that "In the event of withdrawal by DWR, the Permits will be terminated."

*Comment:* This proposal is unwarranted. It is unclear why withdrawal by DWR would trigger termination of all other permits, especially if the BDCP is being implemented by other permit holders in accordance with the permits. The DWR is only one of many permit holders; each has legal responsibility for BDCP implementation. Terminating all permits without cause may be in direct conflict with provisions of the "Permit Revocation Rule" and "assurances" authorized under ESA Section 10 and NCCPA permits. The withdrawal of DWR should be

Ryan Wulff  
 National Marine Fisheries Service  
 July 28, 2014  
 Page 17 of 19

handled no differently than the withdrawal of any other permit holder. The Final IA should be revised to allow all other permits to remain in force even if DWR withdraws.

52. Page 79, Section 21.4.1: States that “As a condition of withdrawal, the withdrawing Party(ies) shall remain obligated to ensure implementation of... Conservation Measures required under this Agreement, the BDCP and the Permits...”

*Comment:* It is appropriate for withdrawing parties to remain obligated for impacts of take caused by their actions prior to withdrawal. However, if DWR withdraws, and all permits are terminated as currently proposed in Section 21.4, then DWR should bear the sole burden of, and responsibility for, meeting all obligations of the permit holders that did not request to withdraw and had permits unilaterally terminated. The Final IA should be revised to reflect this additional obligation of DWR should it choose to withdraw without the concurrence of the other permit holders.

53. Page 80, Section 22.0: States that “... none of the parties will be liable in damages to any other Party or to any other person or entity for any breach of this Agreement...”

*Comment:* If there is no penalty for non-compliance, why would a participant place a priority on performing? If Parties fulfilling their obligations are hindered, or incur greater costs because one or more other Parties are not performing as expected, damages should be recoverable from the non-performing Parties. The Final IA should be revised to allow for damages claims against non-performing parties.

54. Page 80, Section 22: States that “The Authorized Entities use their best efforts to remedy their inability to; and”

*Comment:* This sentence is incomplete. Text should be revised as shown below:

“The Authorized Entities use their best efforts to remedy their inability to perform; and”

55. Page 86, Section 23.2.1: States that “The Fish and Wildlife Agencies... may submit comments on the proposed minor modification.... The Authorized Entities must agree to any proposed minor modification.”



Ryan Wulff  
National Marine Fisheries Service  
July 28, 2014  
Page 18 of 19

*Comment:* This paragraph can be interpreted several ways. To make it clear that the Authorized Entities have approval authority for minor modifications, the text should be changed as follows:

**“The Authorized Entities must agree to any proposed minor modification before it is incorporated into the Plan.”**

56. Page 87, Section 23.3: States that “Formal amendments include, but are not limited to... • Changes to Biological Goals.”

*Comment:* Requiring a formal amendment for changes to biological goals directly conflicts with the conservation strategy (page 24, Section 10.1.2), which specifically allows biological goals to be modified through the adaptive management process. This is a significantly streamlined process when compared to the formal amendment process. In keeping with the relatively informal adaptive management process, the Final IA should move “Changes to Biological Goals” from the Formal Amendment process to the Minor Modification process.

57. Page 91, Section 24.15: States that “Nothing in this Agreement is intended or shall be construed to require the ... expenditure of funds by the United States....Nothing in this Agreement will be construed by the Parties to require... expenditure of any money from the Treasury of the State of California...”

*Comment:* This section allows the State and Federal governments to avoid funding commitments if monies are not appropriated by their respective authorizing bodies. To make it clear that permits will not be revoked or suspended by the lack of state or federal funds, the Final IA should add language as follows:

**“Failure of the federal or state to provide funds as required to implement the BDCP will not be justification to initiate permit suspension or revocation.”**

The Water Authority appreciates the opportunity to review and provide comments on the Draft Implementing Agreement. As noted above and in a prior comment letter, the intention of our comments is to obtain additional information and clarification in the Final environmental documents to determine if the Proposed Action as described in the Draft BDCP and Implementing Agreement, and analyzed in the Draft EIR/EIS, is a cost-effective, long-term solution to Delta water supply and ecosystem conflicts.

Please retain the Water Authority on your mailing list to receive future notifications or documents regarding this project. If you have questions or wish to discuss any of the

Ryan Wulff  
National Marine Fisheries Service  
July 28, 2014  
Page 19 of 19

above concerns in greater detail, please contact Larry Purcell, Water Resources Manager at (858) 522-6752, or by email at [lpurcell@sdewa.org](mailto:lpurcell@sdewa.org).

Sincerely,

A handwritten signature in blue ink, appearing to read 'Maureen A. Stapleton', with a stylized flourish at the end.

Maureen A. Stapleton  
General Manager

### Key Subject Areas for BDCP/California WaterFix Comment Letter

2014 Draft BDCP		California WaterFix Preferred Alternative PRDEIR/SDEIS
<b>✗ = Not Addressed in Revised Environmental Documents</b>		
<b>Governance</b>		
Permit Oversight Group	Active participation of permitting agencies in day-to-day decision-making, including having veto authority, during implementation is inappropriate.	Not relevant with Preferred Alternative
Responsible Agencies	All HCP/NCCP permit applicants should be listed as CEQA responsible agencies.	
Authorized Entity Group	Current membership is too limited; must include all HCP/NCCP permit holders.	
Implementation Office	Unclear how this new governmental office would be organized; extent of authority is confusing.	✗
<b>Implementation</b>		
CM1	Lack of a minimum guaranteed supply yield resulting from Decision Tree Process.  Discussion on non-contractor access to facilities for water transfers is lacking.	Reduced supply certainty when compared with prior permitting framework
CM4	Permit timing assumptions for tidal community restoration on public lands seem unrealistically optimistic without further substantiation. Additional time to implement restoration affects timing and availability of potential supply yields.	Relationship between project level mitigation and Eco Restore is unclear
CM3, CM4, CM 9, CM10	Implementation schedule to restore over 44,000 acres of habitat in first five years seems unrealistically optimistic without further substantiation. Additional time to implement restoration impacts timing and availability of potential supply yields.	
Implementation Agreement	Proposed Implementing Agreement that HCP/NCCP permit recipients must sign is missing and should be included in Final document.	Not relevant with Preferred Alternative
<b>Funding</b>		
Contractor Obligations	Necessary contractual agreements for individual SWP and CVP contractors to fund CM1 is unclear; process for revising SWP/CVP allocations if individual contractors decline to participate is not defined.	✗
State/Federal Obligations	Firm commitments to ensure state and federal funding for CM 2-22 is lacking.	Not relevant with Preferred Alternative; now part of Eco Restore



## Attachment 3, Page 2 of 4

Public Obligations	Discussion of alternate funding sources should bonds for CM 2-22 not be approved by the public is missing.	Not relevant with Preferred Alternative; now part of Eco Restore
HCP/NCCP Findings	Provisions to ensure adequate funding by participants as required for HCP/NCCP approval are lacking.	Not relevant with Preferred Alternative
<b>Economic Benefits</b>		
Unit Costs	Calculation of unit cost of BDCP Alternative and alternate supplies appear to be based on different cost methodologies.  Cost comparison between BDCP and alternate supplies should be on “apples to apples” basis e.g. annual debt service plus operating costs divided by annual yield.	Cost details are not provided with WaterFix and other new alternatives’ project descriptions
Alternative Water Supplies	The purpose of incorporation of alternative water supplies in benefits analysis is unclear and may lead to a comparison that is not “apple to apples” in terms of what makes up the costs.	
Reduced Seismic Risk	The basis for the estimated amount of water supply available for post-earthquake scenario is not included in the document and the assumptions used need to be detailed.	✗
Demand Forecast	Analysis uses outdated SANDAG growth forecast which likely overestimates future demand in early years. Updated Series 13 forecast should be used in final document.	✗

<b>2014 Draft EIR/EIS</b>		<b>California WaterFix Preferred Alternative PRDEIR/SDEIS</b>
<b>Environmental Analysis</b>		
Growth Inducement Impacts	Significant findings not supported by analysis, which details unknowns concerning when and where growth will occur and lack of state jurisdiction over land use decisions. Speculative to determine significance with so much uncertainty.	✗
Water Use by Hydrologic Region	Water use estimates used in Growth Inducement analysis do not have most up to date demographic forecast, which affects demand forecast model output.	✗

## Attachment 3, Page 3 of 4

<b>Environmental Baseline</b>		
Multiple Baselines	Use of different baselines for CEQA/NEPA and economic analysis is confusing and requires better explanation as to the purpose, basis and use of each baseline.	✗
<b>Decision Tree</b>		
Future Studies	Timing and extent of future scientific studies to determine spring and fall outflows is not defined.	Unclear; Adaptive Management approach under Preferred Alternative
Water Operations	Incomplete information on timing and extent of studies and monitoring required ensuring flow compliance.	

<b>2014 Conceptual Engineering Report</b>		<b>California WaterFix Preferred Alternative PRDEIR/SDEIS</b>
<b>Schedule</b>		
Proposed Schedules	The schedules in the Summary and Appendix C are inconsistent	✗
Constrained Project Tasks	Several of the tasks identified in the Appendix C schedule have their completion dates constrained.	✗
<b>Cost Estimate Accuracy</b>		
Contingency	Cost estimate accuracy is listed as +50 percent to -25 percent accurate, yet 36 contingency percent is stated. Inappropriately low contingency estimate given current 10% level of design.	✗
<b>Project Risks</b>		
Risk Matrix	Project risks should be identified and managed using a risk matrix.	✗
Property Acquisition	A property acquisition plan is missing.	✗
Tunnel Methodology	Additional design is necessary to define the type of tunnel boring machines (TBM); how many TBMs will be needed; tunnel muck disposal; tunnel ventilation; and adequate skilled labor to operate the TBMs.	✗
Power Requirements	Cost and impact of providing two separate power supplies to key BDCP facilities are not identified or analyzed compared to benefits of redundancy.	✗
Access and Utility Conflicts	Time and resources necessary to relocate roads and associated utilities at two Sacramento River intake locations has not been identified.	✗
Access and Utility Conflicts	Plan to address relocation or avoidance of known and unknown natural gas wells is missing.	✗
Lack of Geotechnical Information	Additional discussion of required geotechnical information is needed and how it will be obtained in order to proceed to the next phase of design.	✗

## Attachment 3, Page 4 of 4

Project Delivery Method	No evaluation of possible alternate project delivery methods.	✗
Available Resources	No evaluation of the availability of tunnel boring machines, borrow material, specialized contractors and technical experts necessary to complete the project.	✗

2014 Implementing Agreement		California WaterFix Preferred Alternative PRDEIR/SDEIS
Financial Commitments	Lack specificity regarding financial commitments required to approve the BDCP and issue any necessary incidental permit.	Not relevant with Preferred Alternative
Commitment of Individual Contractors	No details on how to coordinate and allocate water between the SWP and CVP Contractors and among the BDCP participants and non-participants.	
Source of Funds	Lack of details on source of funding required to implement BDCP.	



October 30, 2015

BDCP/WaterFix Comments  
P.O. Box 1919  
Sacramento, California 95812

Re: Partially Recirculated Draft Environmental Impact Report/Supplemental  
Environmental Impact Statement for the Proposed Bay Delta Conservation  
Plan/California Water Fix

Dear Sir/Madam:

The San Diego County Water Authority (Water Authority) is submitting the following comments on the Partially Recirculated Draft Environmental Impact Report (EIR)/Supplemental Draft Environmental Impact Statement (EIS) prepared by the U.S. Department of Interior, Bureau of Reclamation (Reclamation), and U.S. Department of Interior, Fish and Wildlife Service (USFWS); the U.S. Department of Commerce, National Oceanographic and Atmospheric Administration, National Marine Fisheries Service (NMFS); and the California Department of Water Resources (DWR) for the proposed Bay Delta Conservation Plan (BDCP)/California Water Fix.

While these comments are directed to the Partially Recirculated Draft EIR/Supplemental Draft EIS dated July 10, 2015, this letter should be considered a supplement to the previous Water Authority comment letters dated May 30, 2014 and July 28, 2014.

#### COMMENTS

1. The BDCP was portrayed as a Habitat Conservation Plan/Natural Community Conservation Plan (HCP/NCCP) that implements certain conservation actions to benefit sensitive species and habitats while increasing water supply reliability for millions of Californians. The wildlife agencies and participating water contractors would memorialize their commitments to undertake these conservation actions in an Implementing Agreement that provided assurances that as long as the conservation measures were being implemented per the BDCP, the water contractors would receive increased water reliability.

While the shift to an alternative approach to federal and state endangered species permitting is understandable, this change will result in less supply certainty for federal and state water contractors. Without the assurances provided by the federal

Section 10 and state Section 2835 incidental take permits and associated Implementing Agreement, the continued availability of sufficient water for export is questionable.

*Comment:* With abandonment of the BDCP approach, the Final EIR/EIS should more clearly identify how the new permitting approach maintains and enhances water supply reliability to the same levels anticipated under the BDCP, and quantify the annual amounts expected to be available for each water contractor compared to the BDCP approach.

2. The commitment of individual State Water Project (SWP) or Central Valley Water (CVP) contractors to participate financially in implementing the proposed project remains undetermined and it is likely that some contractors will decline given the reduced level of certainty resulting from the alternative permitting approach.

*Comment:* With abandonment of the BDCP approach, the Final EIR/EIS should specify the criteria to be used by DWR and Reclamation in determining how to coordinate and allocate water between the SWP and CVP, and among the funding and non-funding contractors. The Final EIR/EIS should also include details on how DWR and Reclamation intend to guarantee that each participating water contractor provides the revenue necessary to pay for the proposed project, including any necessary provisions for “step-up” should one or more water contractors default on funding obligations, and a legal analysis of relying on property taxes as a back-up security for debt.

3. Page 4.1-1, lines 32 through 34 state that: “Alternatives 4A... would not serve as... (HCPs/NCCPs)... but rather would achieve incidental take authorization under ESA Section 7 and CESA Section 2081(b).”

*Comment:* While ESA Section 10/Section 2835 (HCP/NCCP) permits are no longer preferred, the Water Authority is concerned that continuing the current management approach using Section 7/Section 2018 permits lack sufficient assurances to ensure a reliable water supply for millions of Californians. The Water Authority is also concerned over the lack of collaborative decision-making inherent in implementing adaptive management and real time water operational changes under a traditional Section 7/Section 2081 permit. The Water Authority encourages the lead agencies to pursue innovative permitting approaches with the federal and state wildlife agencies (e.g., hybrid Section 7/10 permits, incorporating all or parts of Candidate Conservation Agreements (with assurances) and Safe Harbors Agreements into a legally binding agreement, along with a similar approach on the state permit) that provide as much certainty as possible for participating water contractors. The complexity of the Bay-Delta ecosystem and the large human dependence on exported water supplies warrant consideration of cooperative and flexible permitting approaches.

4. Page 4.1-15, Table 4.1-3 lists the environmental commitments for preferred Alternative 4A. The total mitigation acreage shown for all habitat types appears to be around 15,548 acres.

*Comment:* BDCP Conservation Measure 1 (CM1) was defined as the conveyance facility (intakes and tunnels). The proportional direct and indirect mitigation acreage and costs for CM1 to be borne by the participating state and federal contractors is shown in Table 8-41 of the Draft EIR/EIS (pages 8-74 through 8-76). However, it is unclear how the required mitigation acreage and costs for CM1 in Alternative 4 compare to the required mitigation acreage and costs for the new Alternative 4A. It is also unclear how the new biological opinion proposed for Alternative 4A will relate to the current biological opinions for existing projects. The Final EIR/EIS should provide a table showing a side-by-side comparison of the expected direct and indirect impacts, required mitigation acreage (whether conservation measure or environmental commitment), and mitigation costs for CM1 and Alternative 4A. This will aid in clarifying how the new preferred alternative has lessened potential impacts and required mitigation, and reduced costs for participating state and federal water contractors.

In addition, the relationship between the environmental commitments (i.e., project mitigation) for preferred alternative 4A and the separate ecosystem restoration efforts anticipated under California EcoRestore needs additional clarification. The participating water contractors need to clearly understand where the “bright line” is between project mitigation obligations and general ecosystem restoration. The Final EIR/EIS should provide more detail on how the “environmental commitments” of Alternative 4A relate and contribute to the related, but separate, California EcoRestore effort.

5. Page 4.1-21, lines 2 through 6 state that: “Commitments to adaptive management... will be secured through a MOA... Details... including adaptive management decision-making, an organizational structure for... decisions, and funding... will be developed through the MOA...”

*Comment:* Adaptive management is highlighted as the mechanism through which construction and operation of the new conveyance facilities will be managed. Freshwater outflows (and corresponding export flows) will be determined through current and future scientific studies, monitoring, and a yet to be developed Memorandum of Agreement (MOA) between the lead agencies, public water agencies, and wildlife agencies. In other words, the MOA will govern future operation of the conveyance facility. Given the crucial nature of this document, it is especially disappointing that the additional details to be provided in the MOA are not yet available. These details will certainly be required for potential participating water agencies to decide whether to commit the funds and other resources necessary

to implement the preferred alternative. The Final EIR/EIS should provide greater clarity on the adaptive management “details” expected to be included in the MOA and provide a schedule and process for MOA development and implementation. Further, the Final EIR/EIS should include additional details on the extent of authority for participating entities, i.e., the water contractors need assurances that their interests will be incorporated in all operational actions.

6. Page 9-269, Table 9-32 of the Draft EIR/EIS identifies the total average water deliveries to the contractors under various take alternatives. As shown, water supplies available under the BDCP range from 4.7 to 5.6 million acre feet per year (MAFY) depending on high or low outflow scenarios, respectively. Average annual flows for the existing conveyance scenarios (defined as the “without BDCP” scenario on page 9-39) ranged from 3.4 to 3.9 MAFY for the high and low outflows, respectively. The “without BDCP” scenario contemplated continuing fish population declines and imposition of additional operational constraints that would reduce water supply availability.

*Comment:* With abandonment of the BDCP approach, the Final EIR/EIS should clarify and explain how the new permitting approach will prevent available water supplies from being reduced to the existing conveyance scenario volumes (e.g., 3.4 to 3.9 MAFY) shown in Table 9-32. In other words, what assurances can be given to the state and federal water contractors that after making a considerable financial investment in Alternative 4A, available water supplies will not be reduced to 3.4 to 3.9 MAFY if fish populations continue to decline even after Alternative 4A is constructed?

The Water Authority appreciates the opportunity to review and provide comments on the Partially Recirculated Draft EIR/Supplemental Draft EIS. As noted above and in two prior comment letters, the intention of our comments is to obtain additional information and clarification in the Final environmental documents to determine if the Proposed Action/Preferred Project is a cost-effective, long-term solution to Delta water supply and ecosystem conflicts.

Please retain the Water Authority on your mailing list to receive future notifications or documents regarding this project. If you have questions or wish to discuss any of the above concerns in greater detail, please contact Larry Purcell, Water Resources Manager at (858) 522-6752, or by email at [lpurcell@sdewa.org](mailto:lpurcell@sdewa.org).

Sincerely,

Maureen A. Stapleton  
General Manager