



## Restore the Delta

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July 17, 2014

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

Via email to [BDCP.comments@noaa.gov](mailto:BDCP.comments@noaa.gov)

RE: Comments on the Bay Delta Conservation Plan and Associated Draft EIR/EIS

Dear Mr. Wulff:

Restore the Delta, which represents people and communities of the Sacramento-San Joaquin Delta, has been a steadfast opponent of both the twin tunnels project and the process by which the Bay Delta Conservation Plan has been developed. While recognizing that the Delta cannot be returned to any prior condition, we are convinced that with fair and realistic management of all the state's waters, the Delta can be a healthy, sustainable place for the fisheries, farming, and local and coastal communities that depend on Delta water that is adequate and of decent quality. In our view, BDCP does not represent fair and realistic management.

We are signatories to the analyses of the BDCP and its environmental documents that have been submitted by the Environmental Water Caucus. In addition, we submit the following comments about the documents. They focus on

- the fallacy of BDCP's underlying assumption that water supply reliability can be guaranteed, resulting in an unattainable purpose and a solution certain to fail;
- the reliance on misrepresentations of Delta conditions to justify and promote the tunnel plan and limit consideration of alternatives;
- the inadequacy of environmental protections under BDCP;
- disregard for the rights of affected communities to understand the impacts of the proposed project and to have meaningful participation in the planning process.

## **THE QUEST FOR WATER SUPPLY RELIABILITY**

Any visionary plan for California's future must begin with the recognition that the State, through the State Water Resources Control Board, has approved over five acre feet of consumptive water rights claims for every acre foot of unimpaired flow in the Sacramento and San Joaquin River basins.<sup>1</sup> California has built a \$2 trillion economy on heavily over-allocated, “paper” water, which cannot be relied upon even in an average water year, irrespective of limitations placed on water exports to protect endangered species in the Delta. The gap between expectations and supplies will become more stark as we experience serious drought in California and recognize that our water storage and delivery system was designed during a century – the 20<sup>th</sup> – that was unusually wet.<sup>2</sup>

The National Research Council found that “in some basins, the Water Board has over-allocated available supply by more than 800 percent (measuring supply as average annual runoff).”<sup>3</sup> The NRC also noted “[w]ater scarcity has long existed in much of California.... The magnitude or intensity of scarcity has grown over time and it continues to grow.”<sup>4</sup>

Water planners in 1960 understood that the system could provide a “usable surplus” for export only in the range of 3 MAF per year on average without the addition of flows from North Coast Rivers.<sup>5</sup> With the addition of flows from the Trinity River, the only north coast river that was actually developed, the average surplus available for export would be about 3.5 MAF per year. This level of exports leaves enough water in the Delta “common pool” to provide for the needs of the people and the ecosystem in the Delta and the Estuary and to maintain a freshwater barrier against salinity intrusion, which negatively affects exports as well as Delta agriculture and fisheries. No subsequent experience has shown this initial analysis to be unrealistic.

In fact, the reverse is true. Rather than redrafting water contracts, officials continued to honor them, relying on water that was supposed to be available for export only when it

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<sup>1</sup> “Paper Water in the Trinity and Sacramento River Basins,” and “Paper Water in the San Joaquin River Basin,” California Water Impact Network, accessed March 14, 2014.  
<http://www.c-win.org/paper-water-trinity-and-sacramento-river-basins.html>  
<http://www.c-win.org/paper-water-san-joaquin-river-basin.html>

<sup>2</sup> Robert Kunzig, “Drying of the West,” National Geographic Magazine, February 2008.  
<http://ngm.nationalgeographic.com/print/2008/02/drying-west/kunzig-text>

<sup>3</sup> National Research Council, “Sustainable Water and Environmental Management in the California Bay-Delta,” 2012, page 33.

<sup>4</sup> Id. at page 32.

<sup>5</sup> DWR Bulletins and Publications. “Bulletin 76, 1960, Delta Water Facilities.”  
<http://www.water.ca.gov/waterdatalibrary/docs/historic/bulletins.cfm>

was surplus to water needs in the Delta itself.<sup>6</sup> As exports increased over the past five decades, fish populations plummeted. Among others who have analyzed the long-term effects of various changes in the Delta ecosystem are U. S. Geological Survey researchers Cloern and Jassby, who looked at “Drivers of Change in Estuarine-Coastal Ecosystem: Discoveries from Four Decades of Study in San Francisco Bay.” They found that

[M]odifications of inflow and salinity are contributing factors to population declines of native species in low-salinity habitats of the San Francisco Bay system . . . and to the remarkably successful establishment of nonnative species. . . including species that have restructured food webs and their productivity. . . . Water export from the Sacramento-San Joaquin Delta is a direct source of mortality to fish, including imperiled species such as delta smelt and longfin smelt . . . and export plus within-Delta depletion alters system energetics of an already low-productivity ecosystem by removing phytoplankton biomass equivalent to 30% of Delta primary production. . . . Reduced autumn inflows and associated salinity increases . . . have lowered habitat quantity and quality for species endemic to the upper estuary, such as the endangered delta smelt. . . .<sup>7</sup>

The difference between the 3 to 3.5 MAF originally anticipated to be available for export and the 5 MAF actually exported on average, to the detriment of fisheries and other non-export uses, has fueled both urban and agricultural expansion in California, creating demands for surface water that cannot be met reliably over the long term in a state that experienced drought 40 percent of the time in the last century.

BDCP’s Proposed Action (EIR/EIS Alternative 9) reflects the rigidity of this demand. The primary conservation measure for BDCP – CM1 Water Facilities and Operation – calls for exports in a range of 4.71 to 5.59 MAF per year (Chapter 9, Table 9-3. Take Alternatives Overview, page 9-14). The Executive Summary of the EIR/EIS (page ES-10) includes the following proposed action under BDCP:

3. Restore and protect the ability of the SWP and CVP to deliver up to full contract amounts, when hydrologic conditions result in the availability of

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<sup>6</sup> A detailed explanation of the implications of “surplus” with respect to the Delta is covered in Sections 12200-12205 of the California Water Code. Not just the State Water Project but the Central Valley Project have been faced with supply uncertainties as demand has grown. The 2005 contract between the Bureau of Reclamation and Westlands Water District says specifically, in Section 3(b) that “Because the capacity of the Project to deliver [Central Valley] Project water has been constrained in recent years and may be constrained in the future due to many factors including hydrologic conditions and implementation of Federal and State laws, the likelihood of the Contract actually receiving the amount of Project Water set out in subdivision (a) of this Article in any given Year is uncertain.”

<sup>7</sup> James E. Cloern and Alan D. Jassby, “Drivers of Change in Estuarine-Coastal Ecosystem: Discoveries from Four Decades of Study in San Francisco Bay.” American Geophysical Union, October 24, 2012, 8.

sufficient water, consistent with the requirements of state and federal law and the terms and conditions of water delivery contracts held by SWP contractors and certain members of San Luis Delta Mendota Water Authority, and other existing applicable agreements.

The above Purpose Statement reflects the intent to advance the coequal goals set forth in the Sacramento–San Joaquin Delta Reform Act of 2009 (Delta Reform Act) of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem.

It is against the backdrop of over-allocation that we must evaluate the “purpose” of restoring and protecting the ability of the SWP and CVP to reliably deliver up to full contract amounts. The purpose and solution promote water allocations that cannot be sustained in the long term under any likely scenario.

Selection of the dual conveyance twin tunnels does not demonstrate compliance with state policies regarding reduced reliance on the Delta, as enunciated in the California Water Code. The Delta Reform Act of 2009 called for reduced reliance on the Delta through investments in improved regional supplies, conservation, and water use efficiency (Water Code Section 85021). Instead, the BDCP state-preferred action would harden demand through construction of twin tunnels that would facilitate and enhance the ability to transfer increased amounts of water from the Delta in the future. As discussed above, CM1 calls for exports in a range of 4.71 to 5.59 maf/year—over a half million acre-feet more than have actually been exported on average.<sup>8</sup>

The BDCP and EIR/EIS fail as informational documents to the extent that they fail adequately to discuss water supply reliability secured from differing sources in the breadth required under state law. In addition to the required reduced reliance on the Delta, mentioned above, the Delta Reform Act says that “[p]roviding a more reliable water supply for the state involves implementation of water use efficiency and conservation projects, wastewater projects, wastewater reclamation projects, desalination, and new and improved infrastructure, including water storage and Delta conveyance facilities”.<sup>9</sup>

Instead, the BDCP focuses on increased water deliveries from conveyance through or around the Delta to supply “reliable” water for California, discussing water supply reliability only in terms of the “current and projected future inability of the SWP and CVP to deliver water to meet the demands of certain south-of-Delta SWP and CVP water contractors—in all water year types and considering ecosystem and species

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<sup>8</sup> “Average Annual South-of-Delta Deliveries by State and Federal Water Projects, 2000-2009.” Restore the Delta, accessed 4/11/14.  
<http://restoredelta.org/wp-content/uploads/2014/03/Restore-the-Delta-Average-Annual-South-of-Delta-Water-Deliveries.pdf>

<sup>9</sup> California Water Code Section 85004(b).

requirements....”<sup>10</sup> These demand amounts are recognizably unattainable, as discussed above, yet BDCP seeks to promote deliveries beyond the system’s capacity, claiming “[i]t is the responsibility of the SWP and CVP to meet these beneficial uses regardless of hydrologic conditions.”<sup>11</sup>

We will not have water supply reliability in California until the problem of availability is realistically addressed. The effort to achieve reliability by means of the twin tunnels conveyance plan will irreversibly damage the Delta without solving the water supply problems that the plan is intended to solve.

### **EXAGGERATING THE FRAGILITY OF THE DELTA**

The conservation strategy for this HCP/NCCP consists of 22 conservation measures, the largest and most costly of which is twin tunnels under the Delta (CM1 Water Facilities and Operation). This proposal is extremely infrastructure-intensive and therefore extremely costly.

The plan says (9.3.4.1.6) that “Funding for the BDCP from the state and federal water contractors is ultimately based on the direct economic benefits of the BDCP Proposed Action to their customers. There is no inducement for water purveyors to participate in a conservation plan where the cost exceeds the benefits in relation to conditions as they would likely exist without the BDCP” (page 9-45).

For the reasons listed above, BDCP cannot argue economic benefits based on guaranteeing users *more* water than they have historically received. It has focused instead on the reliability of deliveries: fresh water delivered without periodic reductions to protect fish and without threat of disruptions due to floods or earthquakes. BDCP’s case for delivery disruptions depends upon making a case for earthquake threat and for the fragility of levees in the area of the Delta from which water has historically been exported.

Chapter 5 of the *Economic Sustainability Plan* produced by the Delta Protection Commission, as required by the 2009 Delta Reform legislation, thoroughly analyzed the condition of levees in the Delta and their actual vulnerability to the kinds of flood and earthquake events that are to be expected in California. This *Plan* found that investments in levee improvements “have created significantly improved Delta levees through modern engineering and construction, making obsolete the historic data that is still sometimes used for planning or predicting rates of levee failure” (56).<sup>12</sup>

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<sup>10</sup> EIR/EIS ES.2.2.2.2; see also 2.5.2.

<sup>11</sup> *Ibid.*

<sup>12</sup> Business Forecasting Center, Eberhardt School of Business, University of the Pacific et al., “Chapter 5: Flood, Earthquake and Sea-Level Rise Risk Management” in *Economic*

A map used in PowerPoint presentations by DWR itself<sup>13</sup> shows that although there have been 45 incidents of Delta islands flooding in the last 75 years, there have been only four since the State's Delta Levee Subventions Program resulted in major levees upgrades following heavy flooding in 1986. Three of those four were associated with flooding in 1997 but were outside the area on which the export pumps rely.<sup>14</sup>

The actual number of levee failures due to unknown causes in the Delta in the last 30 years, following investments in reinforcing and upgrading Delta levees, is one. This was the spectacular Jones Tract levee breach in June 2004, which was likely caused by burrowing animals and triggered by high tides. Flooding was confined to a single island. The breach was repaired in three weeks and the island dewatered five months thereafter.<sup>15</sup>

In other words, the event most disruptive to water exports in the last 30 years occurred not in conjunction with earthquakes or winter rains but on a sunny day, in a part of the Delta that BDCP proposes to use for average annual water deliveries 51% of the time even after the tunnels are built. And BDCP does not include any investments in Delta levees.

The westernmost part of the Delta is 30 miles from the nearest active fault, the Hayward Fault. This likely explains why no Delta levee, much less a domino series of levees, has ever collapsed in an earthquake, including the 1906 San Francisco earthquake and the 1989 Loma Prieta earthquake. Earthquake shaking is generally less in areas farther from a fault because earthquake waves diminish in intensity as they travel through the ground. A May 2008 report done for the Metropolitan Transportation Commission, *San Francisco Bay Area Regional Transportation Emergency Management Plan*, shows a 62% probability for a magnitude 6.7 or greater earthquake on a Bay Area fault between 2003 and 2032, based on USGS analyses. However, the report predicts only very light to light

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*Sustainability Plan for the Sacramento-San Joaquin Delta* (Delta Protection Commission, 2012), 56.

Also see "Appendix E: Clarification of Some Basic Issues with Regard to Delta Levees."

<sup>13</sup> BDCP Presentation Jan 27 2014 CC Meeting, Slide 7 of 29, cached under Bay Area Integrated Regional Water Management Plan, accessed March 17, 2014.  
<http://bairwmp.org/search?SearchableText=BDCP>

<sup>14</sup> "Chapter IV. January 1997 Floods," *Final Report of the Flood Emergency Action Team* (Department of Water Resources, 1997). Also see "Table IV-6, San Joaquin River Flood Control System Damage." <http://www.water.ca.gov/historicaldocs/irwm/feat-1997/janc1.html>

<sup>15</sup> Michael Mierzwa and Bob Suits, "Chapter 3: Jones Tract 2004 Levee Break DSM2 Simulation," *Methodology for Flow and Salinity Estimates in the Sacramento-San Joaquin Delta and Suisun Marsh 26<sup>th</sup> Annual Progress Report* (California Department of Water Resources, October 2005), 3-2. <http://modeling.water.ca.gov/delta/reports/annrpt/2005/2005Ch3.pdf>

damage in the Delta in connection with a 6.9 earthquake on the Hayward Fault.<sup>16</sup> Other active Bay Area faults are even farther west of the Delta.

Using poorly-documented levee fragility as a major criterion for evaluating alternatives led to the dismissal of Alternative F (EIR/EIS Alternative 9 – Through Delta/Separate Corridors), a much less infrastructure-intensive alternative that would convey water through modified Delta channels.

The total average annual project deliveries for Alternative F would be just 11 percent less than the bottom of the Proposed Action delivery range for the Preferred Alternative. The total project footprint of Alternative F is 6.2% smaller than that of the tunnels plan. Average annual outflows of fresh water would be up to 28% higher under Alternative F than under the Proposed Action because Alternative F provides all exports from the South Delta, which is better for fish and for water quality for all users. UOP Economist Dr. Jeffrey Michael cited the BDCP's own economic study that found the no-tunnel alternative had a significantly higher benefit-cost ratio than the tunnel plans and some benefits for fish.<sup>17</sup> The final Public Draft concedes that Alternative F would result in net benefits of \$6.8 billion compared to the Proposed Action.

The Proposed Action includes 75,000 acres of tidal habitat and seasonal floodplain restoration, whereas Alternative F includes none. Habitat restoration is a major component of the Proposed Action not because there are no existing habitat efforts going forward in the Delta but because BDCP planners hope that new habitat will compensate for reduced flows of fresh water, which will be diverted to the new tunnels for 49% of average annual project deliveries.

In terms of BDCP Goals (Table 9-8, page 9-38), habitat protection and restoration in Alternative F is found to be not measurably different from the Proposed Action. Alternative F is found to be consistent with the goal for in-Delta water quality improvement, ecosystem restoration for aquatic species, water supply, and water quality. **The one area in which Alternative F is found to be inconsistent with BDCP goals is the area of water supply reliability, which is defined as helping to protect water supplies from floods and seismic events.**

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<sup>16</sup> "Appendix C-2-11," *San Francisco Bay Area Regional Transportation Emergency Management Plan*, Metropolitan Transportation Commission, May 2008.  
[http://t2030.mtc.ca.gov/planning/emergency/RTEMP\\_App\\_C2\\_Hayward\\_Fault.pdf](http://t2030.mtc.ca.gov/planning/emergency/RTEMP_App_C2_Hayward_Fault.pdf)

<sup>17</sup> Dr. Jeffrey Michael, "A No Tunnel BDCP, Optimizing Through Delta Water Conveyance," on Valley Economy Blog, October 6, 2013.  
<http://valleyecon.blogspot.com/search/label/Delta%20water%20exports>

Also see Dr. Jeffrey Michael, "Viewpoints: The Economic Case for a Bay Delta Conservation Plan without the Twin Tunnels," *Sacramento Bee*, October 6, 2013.  
<http://www.sacbee.com/2013/10/06/5795956/viewpoints-the-economic-case-for.html>

BDCP has used bogus levee fragility and exaggerated seismic threat to justify the twin tunnels that exporters are determined to build and to sell the plan to uninformed people around the state. If the condition of Delta levees is such a serious threat, then BDCP should include investments in the levees that protect not just Delta people and property but infrastructure that the exporters themselves plan to use over half the time.

Many parts of California's water storage and transfer system, including transfer infrastructure that carries State Water Project water over the San Andreas and other major faults into Southern California, are vulnerable to floods and earthquakes. This situation suggests the prudence of investments in local projects to support local water supply reliability and to provide back-up in situations where the interbasin system cannot deliver because of earthquakes, flooding or drought. The *Economic Sustainability Plan* estimated that for \$2-\$4 billion, lowland and selected additional levees could be improved to a standard that would address hazards posed by floods, earthquakes, and sea-level rise.<sup>18</sup> Less expensive solutions for the Delta would leave more resources statewide to be invested in local projects.

## SHORTCHANGING ENVIRONMENTAL PROTECTIONS

Water supply reliability hinges on supply, and determining available supply must follow a full public trust balancing in which all beneficial uses – agriculture, municipal and industrial, fish and wildlife, ecosystem services – are considered. The flows of fresh water necessary to protect the public trust resources of the Bay-Delta estuary ecosystem have not yet been determined in a binding manner.

In recognition of the importance of water flows for the protection of public trust resources, the 2009 Delta Reform Act required the State Water Resources Control Board to develop flow criteria for the Delta ecosystem (Section 85086 (c)). The State Water Board's findings included the following criteria "to preserve the attributes of a natural variable system to which native fish species are adapted": 75% of unimpaired Delta outflow from January through June; 75% of unimpaired Sacramento River inflow from November through June; and 60% of unimpaired San Joaquin River inflow from February through June.<sup>19</sup>

Section 85086(c)(1) of the Water Code says, "For the purpose of informing planning decisions for the Delta Plan and the Bay Delta Conservation Plan, **the board shall, pursuant to its public trust obligations, develop new flow criteria for the Delta**

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<sup>18</sup> Business Forecasting Center, op. cit., 556-57.

<sup>19</sup> State Water Resources Control Board. *Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem Prepared Pursuant to the Sacramento-San Joaquin Delta Reform Act of 2009*. August 3, 2010, 5.  
[http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/deltaflow/docs/final\\_rpt080310.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/deltaflow/docs/final_rpt080310.pdf)



**ecosystem necessary to protect public trust resources.** In carrying out this section, the board shall review existing water quality objectives and use the best available scientific information. The flow criteria for the Delta ecosystem shall include the volume, quality, and timing of water necessary for the Delta ecosystem under different conditions” (emphasis added). CM1 involves a new point of diversion of Sacramento River flows, with three intakes in the north Delta. The flow criteria referenced above are to be determined *before* the point of diversion is changed.

Recognizing that its findings regarding flows did not consider competing beneficial uses of water, the Water Board’s report includes a disclaimer that it is also required by law to consider municipal and agricultural water supply and recreational uses. “This report represents only one of many factors that will need to be balanced by the State Water Board as it updates the Bay-Delta Water Quality Control Plan.”<sup>20</sup> The update of the Bay-Delta Water Quality Control Plan is a multi-year, four-phase process. Phase 2, which deals with issues vital to BDCP, is in the very early stages.<sup>21</sup> It does provide a framework for the necessary public trust balancing, but the information was not available to inform BDCP planning with regard to flows, and the permitting agencies will not have this information when they evaluate BDCP.

BDCP purports to include a habitat and ecosystem restoration component using adaptive management, but nothing in the governance structure described in the BDCP documents supports that claim. To begin with, there is nothing “adaptive” about a take permit that lasts for half a century.

Of eight management decision areas listed under Program Management, six vest final authority in the Authorized Entity Group (AEG) or their selected Program Manager. The remaining two management decision areas list the Permit Oversight Group (POG) as the final authority, but only after review and approval of the AEG. Therefore, the makeup of the AEG is very important in determining whether ecosystem restoration will be accomplished. “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 contractors.” (BDCP 7.1.3). This structure represents the theory that the only interested and affected entities are the agencies that move water and the contractors that buy it. Not considered is the fact that their management decisions will affect Delta families, farms and businesses, the rate of outflows into the San Francisco Bay, the salinity in the Delta, the health of endangered fish species and the fishing industry up the entire coast of California and Oregon as well as demands that will be made on the upstream supplies.

Adaptive Management and Monitoring on Table 7-1 references an entity called the

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<sup>20</sup> Ibid. Note to Readers.

<sup>21</sup> “San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay-Delta) Program,” State Water Resources Control Board, accessed March 15, 2014.  
[http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/comp\\_review.shtml](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/comp_review.shtml)

Adaptive Management Team (AMT) which will be chaired by the Science Manager (selected by the Program Manager). There are seven voting members of this team: Four votes controlled by the representatives of DWR, Reclamation, and two participating state and federal water contractors (one each representing the SWP and CVP). The other three voting members will represent the California Department of Fish and Wildlife (CDFW), the U.S. Fish and Wildlife Service (USFWS), and the National Marine Fisheries Service (NMFS). However the Plan also states that the AMT will operate by consensus. In the event that consensus is not achieved, the matter will be elevated to the Authorized Entity Group and the Permit Oversight Group for resolution.

The Adaptive Management Team . . . will decide when and on what terms to seek independent science review to evaluate technical issues for the purpose of supporting adaptive management decision making. These decisions to seek independent science review will be made considering budget and schedule limitations and other factors. . . Any proposed changes to conservation measures and biological objectives will be elevated to the Authorized Entity Group and the Permit Oversight Group for their concurrence or for their own determination regarding the matter. (BDCP 3.6.2.2)

Again, governance devolves back to the same Authorized Entities.

Parameters for successful adaptive management are found in the U.S. Department of the Interior's "Technical Guide for Adaptive Management," which says, "Without active stakeholder involvement an adaptive management process is unlikely to be effective."

In an effort to satisfy the requirement for stakeholder involvement, BDCP creates a Stakeholder Council to provide a forum for interested parties to consider, discuss, and provide input on matters related to the implementation of the BDCP. The Stakeholder Council will be convened at a minimum of four times per year, by the Program Manager, who will also serve as a member of the council. (BDCP 7.1.10) This Council cannot be taken seriously as an advisory body.

The Stakeholder Council will consist of a minimum of 40 members not including an undesignated number of "other Authorized Entities, other delta civic organizations and members of the public." It is a Who's Who of everybody who might possibly have an interest in the Delta. This very large group meeting quarterly will have little meaningful opportunity for information dissemination, discussion and decision-making. But it hardly matters, because their input can easily be ignored.

For those matters in which the Stakeholder Council has provided input, the position of the council, including any dissenting views, will be conveyed to the Implementation Office in a timely manner. Those position(s) will help inform decisions regarding the specific matter at hand. The objection procedures and dispute resolution process described above provide a means by which issues properly before the Stakeholder Council may be considered by the decision maker with the locus of responsibility for making the final decision with respect to the

issue in controversy. This dispute resolution process, however, does not create a legal right nor does it give rise to a right of action with regards to the members of the Stakeholder Council nor may it be used by any member of the council to delay, or otherwise impede, the proper implementation of the BDCP. **The Implementation Office, or other parties responsible for developing proposals or rendering decisions regarding implementation actions, will execute their responsibilities notwithstanding a pending unresolved dispute within the Stakeholder Council.** (Emphasis added) (BDCP 7.1.10.3)

Given the statewide implications of this project, the governance is far too narrow and exclusionary of people and the environment that will be affected by the Plan.

In the absence of checks and balances, and given the disincentives for adaptive management, it is hard to see how BDCP can meet the requirements of a Habitat Conservation Plan:

Habitat Conservation Plans (HCPs) under [the Endangered Species Act of 1973] provide for partnerships with non-Federal parties to conserve the ecosystems upon which listed [endangered and threatened] species depend, **ultimately contributing to their recovery** (emphasis added).<sup>22</sup>

Similarly, the California Fish and Game Code<sup>23</sup> requires that a Natural Communities Conservation Plan (NCCP) “assist in providing for the conservation of covered species and ecosystems within the plan area.”

Far from contributing to the recovery or conservation of covered species, BDCP will actually hasten their decline. In a letter to the Director of the California Department of Fish and Wildlife, one of the BDCP permitting agencies, the California Advisory Committee on Salmon and Steelhead Trout (CACSSST, an advisory committee authorized in Section 6920 of the California Fish and Game Code) advised that “The BDCP does not meet the requirements of Fish and Game Code 2920 for an NCCP and cannot legally be approved . . . .”

BDCP does not contribute to recovery and would jeopardize the continued existence of Sacramento River winter-run and spring-run Chinook salmon because smolt survival through the Delta is reduced by the project . . . .<sup>24</sup>

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<sup>22</sup> “Habitat Conservation Plans Under the Endangered Species Act,” U.S. Fish and Wildlife Service, accessed March 12, 2014.  
<http://www.fws.gov/endangered/esa-library/pdf/hcp.pdf>

<sup>23</sup> California Fish and Game Code, Section 2820.

<sup>24</sup> California Advisory Committee on Salmon and Steelhead Trout, Letter to Charlton H. Bonham, Director, California Department of Fish and Wildlife, February 26, 2014.

The CACSST also found that

The concept of habitat restoration measures to offset impacts from increased water withdrawals from the Delta (increased “reliability”) is not supported by science . . . .<sup>25</sup>

Restoration activities underway in the Delta could be used to test adaptive management strategies. For example, a water quality and habitat enhancement project has been underway since 2011 in the Cache Slough Complex, through a DWR grant to the Solano Resource Conservation District, Dixon Resource Conservation District, Reclamation District 2068, and local landowners.<sup>26</sup> Other restoration activities in Cache Slough will support the Fish Restoration Program Agreement (FRPA) that is already in place as a joint effort between DWR and CDFW to implement habitat restoration in partial mitigation for DWR impacts on sensitive fish species in the Delta. FRPA efforts are being undertaken to satisfy requirements of Biological Opinions for SWP and CVP operations and will go forward independent of BDCP.<sup>27</sup>

The projects in the Cache Slough Complex, totaling over 12,000 acres, are just a few of the many habitat projects underway in the Delta on public land and private land, in reserves and refuges and on land managed by conservancies. Tens of thousands of acres in the Delta are already managed for habitat. The Draft Delta Plan Program Environmental Impact Report identified 276,000 acres – 33% of the Delta and Suisun Marsh – as open water and natural community areas.<sup>28</sup> It is misleading to suggest that habitat restoration in the Delta depends on BDCP.

Reclamation in the 19<sup>th</sup> century indisputably altered habitat in the Delta. However, despite use of the Delta’s prime farmland for agriculture, Delta habitat has not changed significantly in the last 100 years. Delta fisheries collapsed after export facilities were constructed. Most restoration efforts in the Delta have inadvertently created habitat for undesirable species, predators, and noxious weeds, and have exacerbated toxic water quality conditions. The one strategy that hasn’t been tried for recovery of fish species is

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[http://mavensnotebook.com/wp-content/uploads/2014/02/CACSST-to-Bonham-CDFW-on-BDCP-NCCP\\_022614.pdf](http://mavensnotebook.com/wp-content/uploads/2014/02/CACSST-to-Bonham-CDFW-on-BDCP-NCCP_022614.pdf)

<sup>25</sup> Ibid.

<sup>26</sup> [http://baydeltaconservationplan.com/Libraries/Dynamic\\_Document\\_Library/Cache\\_Slough\\_Complex\\_Habitat\\_Restoration\\_Presentation\\_8-11-11.sflb.ashx](http://baydeltaconservationplan.com/Libraries/Dynamic_Document_Library/Cache_Slough_Complex_Habitat_Restoration_Presentation_8-11-11.sflb.ashx)

<sup>27</sup> Fish Restoration Program Agreement (FRPA). <http://www.dfg.ca.gov/water/frpa.html>

<sup>28</sup> “Section 4, Biological Resources, Table 4-4,” *Draft Delta Plan Program Environmental Impact Report*, page 4-159.  
[http://deltacouncil.ca.gov/sites/default/files/documents/files/Draft\\_EIR\\_chapter\\_04.pdf](http://deltacouncil.ca.gov/sites/default/files/documents/files/Draft_EIR_chapter_04.pdf)

reductions of exports and increases of outflows to something like the conditions to which native fish species were adapted. Ample experience suggests that habitat in the Delta will not substitute for flows to recover endangered species.

## **DISREGARDING THE PUBLIC INTEREST**

Habitat conservation plans are typically undertaken by people within a region who seek permitting to allow “incidental take” of a listed wildlife species as a result of activities that benefit them. HCPs “describe the anticipated effects of the proposed taking; how those impacts will be minimized or mitigated; and how the HCP is to be funded.”<sup>29</sup>

In contrast, the BDCP is being undertaken by beneficiaries in regions outside the Delta, while people within the Delta will bear 48 adverse impacts that have been determined to be “significant and unavoidable” even after mitigation.<sup>30</sup> These include adverse impacts to drinking water quality for people in the Delta region and adverse air quality impacts, including exposure of sensitive receptors to increased cancer risk from exposure to diesel particulate matter and ongoing greenhouse gas emissions from operations of the various conservation measures. Identifying these adverse impacts as “significant and unavoidable” relieves beneficiaries of any responsibility for their mitigation.

With regard to funding, beneficiaries propose to pay for CM1, the twin tunnels, but they have not yet secured funding from all water contractors. Especially worrisome is the fact that estimates of costs are based on a design that is only ten percent complete.<sup>31</sup> Beneficiaries propose to have conservation measures funded through a combination of federal monies and state bond funding, and these sources of funding, too, have not been secured and cannot be guaranteed. Taxpayers will end up responsible for much of this project, either through general obligation bonds or when exporters default on or delay repayment of project costs.

Throughout the BDCP development process, the Department of Water Resources and the export interests have only grudgingly engaged the people most immediately affected by their plan – the people of the Delta. (Even the Stakeholder Council, referenced above, is

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<sup>29</sup> “Habitat Conservation Plans Under the Endangered Species Act,” op. cit.

<sup>30</sup> Bay Delta Conservation Plan Draft EIR/EIS. “Table 31-1. Summary of Significant and Unavoidable Adverse Impacts.” Page 31-9 ff.

<sup>31</sup> The estimate of 10% completion for engineering design of the tunnels has been presented in a number of forums. One recent use of this figure was in a presentation by the San Diego County Water Authority in January 2014. The figure used in this presentation was 5-10%. The meeting is summarized here:

<http://mavensnotebook.com/2014/02/13/the-infrastructure-of-the-bay-delta-conservation-plan-the-san-diego-county-water-authority-begins-a-preliminary-analysis/>

designed to be impotent.) The most glaring instance of that grudging inclusion of the public in the process is the BDCP draft and environmental documents themselves. Not only are they staggeringly long and complicated, but they are entirely inaccessible to people who don't use computers and to anyone who doesn't speak English.

On May 28, 2014 Restore the Delta, the Environmental Justice Coalition for Water, Asian Pacific Self-Development and Residential Association, Café Coop, American Friends Service Committee Proyecto Voz, Environmental Water Caucus, California Sportfishing Protection Alliance, California Water Impact Network, and Friends of the River, sent a letter to BDCP, the California Resources Agency, and the Department of Interior requesting a restart and extension of the public comment period due to the agencies' failure to provide for meaningful access and participation of California limited English speakers, including Delta limited English speakers attempting to engage with the draft Bay Delta Conservation Plan and draft EIS/EIR.<sup>32</sup> In particular, we requested that the agencies hold public hearings and provide interpreters; translate vital documents such as, at the very least, the Executive Summary of the draft EIS/EIR; and provide affordable access to documents to allow the thousands of low-income and limited English speakers to have meaningful participation in the process.

To date, Restore the Delta has received a response only from a representative at the Bureau of Reclamation on behalf of the Department of the Interior, who conceded that NEPA participation requirements had not been met by BDCP. During this call, on July 9, 2014, we were informed that Interior is trying to assess how to deal with NEPA violations under Equal Justice Executive Order 12898: Federal Executive Order (EO) 12898 (1994), Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations. We explained to this representative that while the Executive Summary should be translated (as requested in our May 28, 2014 letter), two other sections should be translated for the limited English speaking community: 1) Chapter 8, Financing; and 2) the Tables of Significant, Adverse, and Unavoidable Impacts in Chapter 31 with their supporting documentation.

Environmental justice communities throughout California face important impacts of which they are not aware because public outreach during BDCP Open House meetings in early 2014 was inadequate and translated copies of documents have been unavailable. The Delta environmental justice community will be the most impacted by the significant, unavoidable, and adverse impacts referenced above. Furthermore, recent meetings with members of the Los Angeles City Council revealed that Los Angeles area environmental justice communities would be disproportionately impacted by higher water rates without benefitting from additional water. More broadly, efforts by the state and federal water contractors to finance BDCP planning through property tax increases on urban users will

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<sup>32</sup> "Request for Restarting and Extending Bay Delta Conservation Plan Comment Period Due to Lack of Meaningful Access for Limited English Speakers." Restore the Delta, accessed 7/16/14. <http://restorethedelta.org/wp-content/uploads/2014/05/RTD-Letter-Requesting-Comment-Extension-5-28-141.pdf>

result in costs of the tunnel project being borne by unsuspecting property owners, including lower income Californians least equipped to bear them.

As noted, Interior has been in touch with us regarding participation of environmental justice communities. By contrast, we have received no response from the California Resources Agency, the California State Agency responsible for administering the BDCP. We learned only through media stories that the Resources Agency has no intention of providing translated copies of BDCP documents.<sup>33</sup> They claimed it could not be accomplished due to time and budget constraints. Interests that have spent a quarter of a billion dollars on planning have not done any public outreach in languages other than English regarding the BDCP project and comment period other than establishing phone lines where those seeking more details can leave messages. Given the woeful inadequacy of serious outreach to environmental justice communities throughout California over the past seven years, it is not surprising that the Resources Agency hasn't gotten much response to its recent half-hearted efforts.

The California Environmental Quality Act (CEQA) Guidelines clearly state that public participation is an essential part of the CEQA process.<sup>34</sup> CEQA Guideline section 15141 recommends that the "text of draft EIRs ... for proposals of unusual scope or complexity should normally be less than 300 pages." The CEQA Guidelines also recommend that the opportunity for public review should not normally be longer than 60 days.<sup>35</sup> Since the bloated BDCP and EIR/EIS documents (over 40,000 pages) are over 100 times the length of the "normal"-size EIR/EIS, one hundred times that normal review time would be 6,000 days. The 182 day review period is inadequate under CEQA standards.

Full disclosure and complete public involvement are signature elements of CEQA. The agencies that have created this collection of documents should reissue the BDCP and EIR/EIR as a searchable documents on DVD disc, with hyperlinks, in languages accessible to non-English speakers who will be affected by the project. Paper copies in multiple languages should be made available at libraries throughout the state. And adequate additional time should be granted for public review, so that the public review function, which is essential under CEQA, can be adequately and timely performed.

We remain convinced, however, that no efforts to make the BDCP and its environmental documents more accessible will address the project's underlying, glaring inadequacies. It appears that a thorough public review would be powerless to give Californians an efficient, sustainable, economically and environmentally prudent water management

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<sup>33</sup> Breitler, Alex, "Advocates argue twin tunnels plan lost in translation," *The Stockton Record*, May 30, 2014.  
[http://www.recordnet.com/apps/pbcs.dll/article?AID=/20140530/A\\_NEWS/405300329](http://www.recordnet.com/apps/pbcs.dll/article?AID=/20140530/A_NEWS/405300329)

<sup>34</sup> California CEQA Guidelines section 15201

<sup>35</sup> CEQA Guideline 15103

system for the Delta when the state and federal governments are poised to advance a project designed to benefit some regions and interests of the state at the expense of others. Our hope is that fish and wildlife agencies charged with evaluating this habitat conservation plan will recognize BDCP for the travesty it is and refuse to permit it.

Sincerely yours,



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