

July 29, 2014

Ryan Wulff
National Marine Fisheries Service
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Sacramento, CA 95814
BDCP.Comments@noaa.gov

Re: Bay Delta Conservation Plan

Dear Mr. Wulff:

Thank you for the opportunity to comment on the public drafts of the Bay Delta Conservation Plan, Environmental Impact Statement/Report, and Implementing Agreement.

American Rivers is committed to the successful completion of the Bay Delta Conservation Plan (BDCP). We understand success to mean: the State Water Project (SWP) and Central Valley Project (CVP) contribute significantly to attaining the co-equal goals of a sustainable Delta ecosystem and water supply reliability in the Delta.

The status quo of perpetual litigation, political conflicts, species in decline and water shortages is simply unacceptable for the Delta and the State as a whole. It is truly time to answer the call by the State Water Resources Control Board (SWRCB) in Decision 991 (1961), which granted certain water rights to the Bureau of Reclamation for CVP operations. Fifty-three years ago, it recognized emerging conflicts between water supply users and water quality in the Delta watershed, concluding:

“...[T]he Board will reserve jurisdiction for a reasonable period...for the purpose of allowing the United States, the State of California, and the water users in the Delta, an opportunity to work out their problems by mutual agreement.... The Board...recognizes that reservation of jurisdiction does not solve the problem and without participation in good faith by all parties such action by the Board is of little consequence. The Board does not believe that reservation of jurisdiction and postponement of the day of final decision will cause the problem to disappear or diminish. Neither does it believe that the problem can be legislated out of existence nor solved by the mere weight of further investigations and studies, of which there have been many in the past, some of which have been recited in this decision. The time has arrived for the parties to meet at the conference table, recognizing that all have a responsibility and an urgent interest in an early solution.” Decision 991, 1961 WL 6816 (1961), p. 23.

An effective solution is even more urgent now. This plan has certain elements which are essential for attaining the co-equal goals in the Delta. It proposes a new point of diversion for

the projects in the North Delta, as recommended by fish agencies since roughly 1961. It is intended to conserve all fish and wildlife species affected by project operations. It integrates management of flows and other stressors for these species. It is long-term, based on adaptive management of conservation measures across time. It includes governance procedures that are designed to assure that permittees, regulators, and other stakeholders collaborate in plan implementation through 2065. All of these elements are significant improvements in the status quo – indeed, reversals.

We are also mindful that this draft plan is the result of unprecedented efforts. The California Department of Water Resources, Bureau of Reclamation, and their contractors have reportedly spent more than \$200 million in this process. Diverse stakeholders with very different interests and perspectives have invested literally hundreds of thousands of hours of their time in public meetings, comments, and other efforts to bring this process to closure. To that end, American Rivers was a charter member and active participant in the BDCP Steering Committee from 2006 to 2010. We participated in multiple work groups convened by the Brown Administration from 2011 to 2013. We have directly contributed to the development of the plan elements related to habitat restoration, operations, and governance.

In 2013, American Rivers and the Nature Conservancy commissioned an independent review of the sufficiency of the plan, then as an administrative draft. Specifically, we convened a panel of respected scientific and legal experts, under the leadership of Dr. Jeffrey Mount. We attach and incorporate the *Panel Review of the Draft Bay Delta Conservation Plan* (Sept. 2013), colloquially known as the Mount Report. While finding that Conservation Measure 1, including the new north Delta diversion, may improve conditions for Delta smelt, the overall conclusion is that the plan will not significantly improve the ecosystem as a whole or assure reliable water supply.

We regretfully conclude that the plan, in its current draft form, will not make a sufficient contribution to the attainment of the co-equal goals in the Delta as required by applicable laws. We urge California and the United States to supplement and revise the plan with respect to the twelve elements discussed below.

Our comments are deliberately brief, focused on the overall structure of the plan. We are mindful that all possible defects have been or will be identified in detailed comments submitted by others, including many from the conservation community. Likewise, the factual record regarding the elements discussed below is voluminous and may be found variously in this draft EIR/S or the dockets for the Central Valley Flood Protection Plan, California Water Plan, or the Bay-Delta Water Quality Control Plan Update.

Recommended Changes

- 1. Increase and reshape inflows from the Sacramento and San Joaquin Rivers to mimic the natural hydrograph and maximize the extent of frequently inundated floodplain habitat.** An overwhelming body of evidence demonstrates that instream flows and associated floodplain inundation, particularly in the late winter and spring,

improves conditions for numerous fish and wildlife species. Water export rules from the Delta drive upstream reservoir operations and associated inflows today and would continue to do so in the future under the plan. As a result, the BDCP, as it is presently constituted, will perpetuate an excessively altered hydrologic regime and the inexorable ecological decline of the rivers flowing into the Delta, particularly the Feather and Sacramento.

- 2. Invest in demand reduction and water use efficiency throughout the Bay-Delta watershed and export demand areas including the Bay Area.** Excessive diversions from the Bay-Delta watershed combined with the difficulty of providing assurances that BDCP will not exacerbate this underlying problem are the primary challenges confronting a successful BDCP. Investment in conservation throughout the watershed and export demand areas is the best possible mechanism for managing both these challenges.
- 3. Increase Delta outflow to improve conditions for pelagic species.** A large body of scientific evidence indicates that more outflow (and inflow) is necessary to achieve recovery of endangered species. Due to the substantial scientific uncertainties, the Mount Report recommended that “default starting operating conditions be negotiated that approximates the [high outflow scenario], with a goal of identifying and operationalizing attributes of this scenario that are most beneficial to listed fishes.” Requirements to both increase outflow and inflow would theoretically allow the water exporters to divert more water than the status quo even while meeting requirements to increase outflow.
- 4. Downsize or phase the new north Delta diversion intakes.** The primary reason to consider phasing or downsizing is not the amount of water that could be taken from the proposed north Delta intakes,¹ but rather the uncertainty about whether the new intakes will function as advertised (i.e., no significant impact on covered species) combined with the massive construction impacts along the Sacramento River between Walnut Grove and Clarksburg - the most scenic part of the entire Delta. The BDCP should consider smaller, tested diversion technology that could be spatially distributed over a larger area and incrementally phased in over time. The EIR/S does not consider an adequate range of intake locations and strategies and instead confines the analysis to the unjustified assumption that all north Delta diversion alternatives are limited to one or more 3,000 cfs intakes located between Walnut Grove and Freeport. Why didn't the EIR/S consider smaller intake facilities or alternative intake locations upstream of Freeport or downstream of Walnut Grove?
- 5. Consider a western conveyance alignment and employ a hybrid conveyance approach that improves the ecological performance of the existing south Delta diversion along with creation of a new North Delta diversion.** Improvements of

¹ Existing infrastructure in the South Delta can already divert as much water as the proposed 9,000 new north Delta facility. The primary constraint is the size of the aqueduct.

S. Delta diversion should be consistent with the Delta Corridors approach to create an entrainment free corridor in Old River during periods when covered species are present. A hybrid approach should also evaluate the potential for diversions from the west Delta, potential use of brackish desalination from the Delta Diablo sanitary district, and adoption of the western conveyance alignment to maintain flexibility to phase in the least harmful diversion infrastructure over time, consistent with point four above. The EIR/S does not adequately evaluate intake and conveyance alternatives and completely failed to consider the potential benefits of a hybrid approach that combines the Delta corridors alternative along with a smaller north Delta diversion.

- 6. Expedite and maximize the ecological benefits that could accrue from restoring and or expanding floodplain habitat in the Yolo Bypass and the Lower Sacramento River.** As discussed in the Mount Report, floodplain restoration in the Yolo bypass and north of the proposed intakes is the only high certainty strategy for mitigating the impacts of the proposed north Delta diversions. Expansion of the Yolo Bypass, which is planned as part of the Central Valley Flood Protection Plan, is one of the most promising opportunities for increasing the area of floodplain habitat. Other promising ideas for floodplain restoration contemplated by the CVFPP or associated planning efforts include the West Sacramento Southport Project and the Woodlake project along the lower American River. Unfortunately, the EIR/S failed to consider how these proposed flood system improvements could be incorporated into BDCP. Although Conservation Measure Two (CM2) does contemplate increasing the frequency of floodplain habitat in the Yolo bypass, completion and operation of CM2 is not scheduled until after the North Delta intakes are operational.
- 7. Create a new South Delta Bypass in the vicinity of Paradise cut and Fabian Tract to reduce flood risk and increased frequently inundated floodplain habitat in the South Delta.** The BDCP does little to improve habitat conditions in the South Delta, particularly for San Joaquin basin salmon species. Creation of a new floodplain corridor in the South Delta, similar to the Yolo Bypass, in combination with the Delta corridors approach identified in point five above, would substantially improve such conditions in the South Delta.
- 8. Significantly increase the area of frequently inundated floodplain habitat upstream of the Delta.** Floodplain habitat restoration upstream of the Delta is very likely one of the best ways to mitigate the projects' impacts on salmon species and the Delta foodweb. Increased floodplain habitat will result in stronger, fitter juvenile salmon better able to survival their journey to the Ocean and will increase food-web subsidies to the impoverished Delta ecosystem. Prime opportunities include Deer Creek, multiple sites along the Feather River, the lower San Joaquin from the Tuolumne confluence to Mossdale, and the constellation of sites associated with the lower Sacramento and Yolo Bypass discussed in point 6 above.

- 9. Provide assurances of sufficient water supplies to meet the needs of wildlife refuges and attain the goals of the Central Valley Habitat Joint Venture for migratory birds.** By easing Delta conveyance constraints, BDCP will significantly increase the potential for water transfers from the Sacramento Valley that will diminish agricultural wetlands and tail water habitat for migratory birds. The EIR/S does not evaluate this foreseeable future impact or propose suitable mitigation. The BDCP should include dedicated funding necessary to provide habitat and water for migratory birds throughout the Central Valley.
- 10. Protect Delta levees, particularly western Delta levees necessary to maintain the current relationship between inflow and X2 location.** In its current form, the BDCP may conflict with the common pool doctrine that has been the cornerstone of Delta water policy since 1961. To some extent, the proposed new diversion in the North Delta would isolate the projects from the common pool. We believe that the BDCP should commit to: (a) make an appropriate contribution to attain water quality standards for the common pool (including X2), regardless of Delta island failure, or (b) reasonable measures that would substantially reduce the probability of islands failure that would result in the eastward migration of X2. The western Delta conveyance alignment proposed by Peer Swan and referenced in point 6 above would facilitate the stabilization of Sherman Island and thereby substantially reduce the probability of seaward intrusion resulting from Delta levee failure.
- 11. Realign responsibilities of the permittees and the regulators as necessary to assure effective plan implementation, including adaptive management.** The draft plan includes many elements which we support. An Implementation Office will be responsible for day-to-day plan implementation, subject to the exception that DWR and Reclamation will manage project operations as required by the organic statutes for the projects. The permittees will coordinate through an Authorized Entity Group (AEG), and regulators will likewise coordinate through a Permit Oversight Group (POG). A Stakeholder Council will represent other interests. The Implementation Office will propose annual plans for implementation of the conservation strategy. An Adaptive Management Team will propose adaptive management, given the reality that the strategy will necessarily evolve as monitoring results improve our understanding of effectiveness. The AEG and POG will review these several proposals and resolve any disputes through administrative elevation to the highest appropriate authority over a given dispute.

Notwithstanding our support for much of the overall structure, we believe that certain elements should be revised to assure effective plan implementation in compliance with applicable laws.

- a. Permittees should propose adaptive management, subject to review and any modification by regulators.** The draft plan (including the Implementing Agreement) proposes that the Adaptive Management Team include representatives from regulators and permittees alike. Any proposal which

achieves team consensus will be implemented, while any other proposal will be elevated to the AEG and POG for review, and if necessary, to the highest decisional authority.

We believe that this structure unduly conflates the fundamental responsibilities under a regulatory permit. Stated simply, permittees should be responsible for plan implementation, and regulators should be responsible for assuring that plan implementation timely occurs and complies with the permits and underlying laws. We recommend that this element should be revised to provide: (a) Implementation Office in concert with AEG would propose adaptive management; (b) the POG would have a specified period to object, and absent objection, a proposal would be implemented; and (c) any other proposal would be subject to dispute resolution followed by decision by the applicable authority, which in nearly all instances would be the regulators.

- b. Governance should include all primary regulators of the plan.** The draft plan limits governance to the three regulators under the Endangered Species Act (ESA) and Natural Communities Conservation Planning Act (NCCPA). These are: National Marine Fisheries Service, U.S. Fish and Wildlife Service, and California Department of Fish and Wildlife. This structure, while right under the ESA and NCCPA, is otherwise legally inadequate.

The plan will be implemented only if approved by other regulators under other laws. For example, the SWRCB will review the plan under at least three different authorities: Water Code, with respect to changes in point and method of diversion; Porter-Cologne Act, with respect to water quality standards applicable to this plan and other diversions which affect attainment of water quality standards; and Clean Water Act section 401, with respect to any federal permit (such as a dredge-and-fill permit under CWA section 404) that involves a discharge. Other regulators have other authorities which are pre-conditions for implementation, as well.

These other regulators cannot lawfully delegate their oversight of plan implementation (including adaptive management) to the three fish agencies. In turn, it would be unworkable to have different governance structures for ESA and NCCPA, and then for all other purposes. These several laws will overlap substantially in governing Conservation Measure 1 and other essential measures. As a result, we recommend that the governance structure should be expanded to include all primary regulators.

- 12. Structure a package of regulatory assurances under all applicable laws.** The plan proposes regulatory assurances under ESA and NCCPA, essentially providing that the permittees will not be responsible for additional funding or other resources in response to unforeseen circumstances over the term of these permits. However, the plan does not address whether comparable assurances are available under the other

laws which are also pre-conditions for plan implementation. As one example, assurances are more limited under the Water Code, which provides for the SWRCB's continuing jurisdiction to protect reasonable and beneficial uses and the public trust.

We believe that the applicants may reasonably request and expect assurances which are both (a) proportionate to the unprecedented scale and cost of this capital project and (b) allowed under all applicable laws. We recommend that the applicants propose a package of assurances under such laws.

Next Steps

American Rivers respectfully recommends the following next steps to bring the BDCP to successful completion.

- A. Supplement and revise the public drafts of the BDCP, EIR/S, and Implementing Agreement.** We recommend that the applicants supplement these public documents in response to comments, including our request for modification of certain elements. Such supplement should also include any missing elements, such as the (i) Memorandum which is Reclamation's substitute for the Implementing Agreement and (ii) the exhibits to the Implementing Agreement.

The supplement would be subject to a further round of public comments. Recognizing the length of the initial round, this would be relatively quick.

We recommend against proceeding directly to final plan and associated documents. We believe that that alternate procedure would increase litigation risk associated with procedural claims.

- B. Convene a technical conference of primary regulators to establish a regulatory pathway.** This plan is subject to review and approval under many laws other than ESA and NCCPA. We recommend that the applicants convene a technical conference of all primary regulators, including the SWRCB, to establish a sequence and schedule for such proceedings. We encourage the applicants to maximize coordination between the proceedings.
- C. Cooperate with the SWRCB and other regulators to develop a coordinated approach to the projects and other diversions.** Whatever the ultimate fate of the BDCP, the CVP and SWP do not have the physical or legal capacity to attain the co-equal goals for the Delta. Other diversions which are roughly two-thirds of the total in the Delta watershed, and other stressors (such as exotic clams) which are not under the direct control of the projects, must also be managed as necessary to attain

those goals. In sum, it's essential that all hands are on deck, as the late Professor Joe Sax said in April 2013.

We are mindful of the immense complexity of a coordinated solution, given seniority of other water rights and other legal and physical variables. That said, the wicked problem of the Delta will only become worse if the balkanized regulation which has occurred since 1961 continues – if the only changes in the status quo arise under the projects.

Respectfully submitted,



Steve Rothert
California Director,
American Rivers

Attached: Mount Report (2013)

Cc: Director Chuck Bonham, California Department of Fish and Game
Director Mark Cowin, California Department of Water Resources
Secretary Sally Jewell, U.S. Department of Interior
Secretary John Laird, California Resources Agency
Director Ren Lohofener, U.S. Fish and Wildlife Service
Chair Felicia Marcus, State Water Resources Control Board
Regional Director David Murillo, Bureau of Reclamation
Secretary Penny Pritzker, U.S. Department of Commerce
Secretary Matt Rodriquez, Cal-EPA
Regional Administrator Will Stelle, NMFS