

Comments on the BDCP Draft Implementing Agreement (IA)

General Comment on IA

This Implementation Agreement is premature because the BDCP proponents have failed to develop project alternatives that restore and sustain rather than harm key fish species, improve rather than degrade Delta water quality, and increase flows consistent with the recommendations of the SWRCB's 2010 Delta Flow Criteria report and the related Department of Fish and Wildlife flow recommendations.

What is needed is a project that includes new storage to capture surplus flow during wet periods, water use efficiency actions, and reduces exports in drier periods, i.e., reduces reliance on the Delta for export water supplies. Such a project will provide more certainty of success, will not rely on "blank checks" in the form of Decision Trees, adaptive management and as yet unknown and uncertain funding sources. Such a project will require a different Implementing Agreement than the one that has been developed to date.

An IA is intended to define the signatory parties' responsibilities and provide a common understanding of actions to minimize and mitigate the effects on species and their habitats from a proposed project. The agreement also protects the permittees from future unknowns or a worsening of conditions (unforeseen circumstances, no-surprises rule) over the life of the permit, which in the BDCP case is 50 years.

In the BDCP IA, information on key components of BDCP implementation, including assurances to fish agencies that habitat mitigation will happen and assurances to contractors relative to water supply and funding assurances become important, among other things. A governance structure for implementation operations and cost coverage are also key elements warranting close scrutiny, and will be reflected in the County's comments.

On the governance issue, the Counties and other impacted local agencies continue to be relegated to a role well outside any decision-making bodies, whereas the SWP and CVP export water contractors (Contractors), as permittee/ applicants are on all but one of the decision bodies. The IA more clearly vests power to bodies upon which the Contractors sit. The IA allows its supporting agencies, which include the Contractors, to use their respective authorities, providing them with the ability to implement aspects of the Plan, further blurring the line between agency oversight and applicant/permittee interests. There are four primary decision bodies; the Authorized Entity Group (AEG), the Permit Oversight Group (POG), the Adaptive Management Team (AMT) and to a lesser degree, the Real-time Operations Team. The formation of an Implementation Office with Program and Science Managers are also invested with some authority, (hired by and reporting to the AEG). The Contractors sit on all of the decision making bodies except the POG, which is made up of the state and federal wildlife agencies, whose charge is primarily that of implementation monitoring. While the fish and wildlife agencies retain ultimate authority to make decisions if there is a dispute, the IA sets up various levels of preliminary decision making and if the applicants/permittees and the agencies agree, it is not elevated to the POG.

In the IA there appears to be a shift in, or perhaps a more clear delineation of responsibility among these groups, with much of the responsibility taken on by the AMT, with decision authority for decision tree matters (i.e. outflows during critical periods) and changes to the Conservation Measures, (or CM's). There is a clear delineation between the Tunnels (CM1), operations and the other Conservation Measures (2-22) relative to authorities, level of implementation certainty and funding. There is little or no ability for a public presence at meetings of the decision bodies. This is an obvious concern. The Stakeholder Council, where the County would be relegated to one of more than 36 seats, would be public. The Stakeholder Council can advise and comment on Plan Implementation to the Program Manager (rather than directly to any of the decision bodies). A technical facilitation subgroup would be allowed some limited interaction with the Implementation office and the AMT on specific scientific and technical matters.

The IA appears to be weighted toward assurances for the Contractors at the expense of the wildlife agencies, Delta water users and the environment (for which the County and other Delta Counties will be required to give up lands). While it is acknowledged that a number of the clauses in the IA are standard for an HCP IA, the BDCP is unique due to size, scope and separation of impact and benefit areas, among other things. The Contractors seem to have limited liability and a 50-year permit and the wildlife agencies an uncertain programmatic conservation program with insufficient funding to get the job done. Only a portion of funding is assured by the Contractors for the programmatic Conservation Measures. The conservation strategy is very broad in the Plan, providing much flexibility in implementation (and resulting in little certainty and perhaps weak protections as a result), and the IA allows that changes to CM's do not require changes to the Plan or permits. Changes to CM's would be handled by the AMT (which has authority to change, eliminate CM's). In addition, the Contractors would not be on the hook for additional costs, the state (taxpayers) would be required to pay for changes other than those in the IA. There is language indicating that failure to achieve a biological goal would not constitute noncompliance with the Plan (if no more than a minimal effect on a species).

From an operations standpoint, the draft IA would allow permitting for the full range of outflow scenarios (allowing for the full range of north Delta diversions) outlined in the Plan and the AMT would have jurisdiction over decision tree matters, dealing with outflow during critical periods. The adaptive management program would be in effect as soon as the BDCP is permitted, outflow ultimately determined when tunnels operational.

The IA says the permit(s) can be revoked, yet this seems unlikely, given programmatic nature and uncertainty of the Plan's conservation measures, the inherent decision tree and adaptive management processes, legal conservation plan out-clauses (such as changes/unforeseen circumstances and no surprises rules), lengthy meet and confer processes embedded in the governance structure and opportunities for remedial action.

Where many of these clauses are in smaller, regional conservation plans, it seems inappropriate given the size and scope of this plan, the importance of the Delta to the state and significant changes in circumstances that are a given over a 50-year timeframe.

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It appears that Reclamation needs to take more of a leadership role in making decisions on implementing the BDCP. It is their CVP water, rather than the contractors' water, and CVP operations and conveyance of CVP water are major components of the BDCP. The IA needs to be renegotiated to meet the needs and legal requirements of Reclamation and to give Reclamation a leadership role in implementing the BDCP.

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Term 2.1.8 states: *The overall goal of the BDCP is to restore and protect ecosystem health, water supply, and water quality within a stable regulatory framework. To accomplish this goal, the Plan: ...*

However, the subsequent bullets say nothing about improving water quality in the Delta. The 2009 Delta Reform Act also calls for improvement of water quality in the Delta. The BDCP must include actions that improve, rather than degrade Delta water quality, and the IA must include terms to ensure that these actions are implemented. The Draft IA is inadequate because it fails to address implementation of measures to improve water quality in the Delta.

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3.7 Authorized Entity Group

The AEG will be established to provide program oversight and general guidance to the Program Manager regarding the implementation of the Plan. The Authorized Entity Group will consist of the Director of DWR, the Regional Director for Reclamation, a representative of the participating SWP Contractors, and a representative of the participating CVP Contractors, or their designees. The AEG must also consist of representatives of the five affected Delta counties, who must play a role in oversight and guidance of the proposed actions.

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4.2.2 The Sacramento-San Joaquin Delta Reform Act of 2009

This section contains a predecisional statement that CDFW has found that the BDCP satisfies the requirements of the Sacramento-San Joaquin Delta Reform Act of 2009, Water Code sections 85300 *et seq.* This section further states that, specifically, as required by Water Code, Section 85320, CDFW has found:

- *The BDCP complies with Chapter 10 (commencing with Section 2800) of Division 3 of the Fish & Game Code such that the BDCP can be approved as an NCCP.*
- *The Environmental Impact Report (EIR) prepared for the BDCP complies with Division 13 (commencing with Section 21000) of the California Public Resources Code, including by providing a comprehensive review and analysis of all of the following: ...The potential effects of each Delta conveyance alternative on Delta water quality.*

The BDCP DEIR/EIS includes a review and analysis of a number of very similar alternatives so it is not comprehensive or useful for addressing the water and ecosystem needs of California. The DEIR/EIS actually finds that the impacts on Delta water quality are significant and adverse.

Apparently, the Cal Department of Fish and Wildlife has already made Draft findings that the BDCP complies with the 2009 Delta Reform Act. However, the Draft BDCP proposed project fails to satisfy the requirements of the 2009 DRA. The BDCP analyses in the Plan and the DEIR/EIS show the north Delta intakes will harm covered species by reducing flows downstream of the intakes, increasing predation and reduction survival. The new intakes will also change the olfactory cues for returning salmonids, and reduce the dilution of contaminants in the Delta. These adverse impacts are all disclosed in the Draft Executive Summary for the BDCP for each species. An intake and conveyance alternative that harms key fish species is not consistent with the 2009 Delta Reform Act.

The BDCP proponents are planning on increasing south Delta exports in many cases. DWR is assuming that the current limits on inflow to Clifton Court Forebay will be eliminated for BDCP, and DWR is not planning on screening the largest unscreened intake in the Delta, Clifton Court Forebay. However, the Conceptual Engineering Reports show a screened intake to Clifton Court Forebay off Victoria Canal is feasible. The modeling data show south Delta exports will increase, in the driest months (from 11,300 cfs up to 14,400 cfs). The modeling of juvenile Delta smelt show entrainment will increase not decrease (Chapter 11, Figure 11-4-1).

The BDCP DEIR/EIS also acknowledges the project will cause significant adverse impacts on Delta water quality, which will also adversely impact aquatic species. It is not sufficient just to study the potential effects of each Delta conveyance alternative on Delta water quality. The BDCP project must not only avoid or mitigate all significant adverse impacts but contribute to improving Delta water quality. The current proposed project is definitely not consistent with the 2009 Delta Reform Act.

It is not sufficient to merely review water quality effects, under CEQA and NEPA, the DEIR/EIS should have also contained measures to avoid and mitigate those adverse water quality impacts, or develop new alternatives that avoid water quality impacts and result in a net improvement of not only water quality but also covered fish populations and water supply. The DEIR/EIS does none of this, despite the CDFW's conclusory "draft" findings.

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The section on Conservation Strategy (10.0) states that the "Conservation Strategy has been designed to achieve the BDCP's overall goals of **restoring and protecting** ecosystem health, water supply, and **water quality in the Delta** within a stable regulatory framework."

This is not correct. The BDCP DEIR/EIS in Chapter 8 and elsewhere acknowledges that it will cause significant adverse impacts to water quality in the Delta, in direct conflict to the 2009

Delta Reform Act from which the stated language is derived. The Implementing Agreement is premature because the BDCP and the Conservation Strategy also fail to restore export water supply (exports will reduce relative to existing conditions) and threatens the water supply for senior water right holders in the Delta and upstream.

The Draft IA must be withdrawn until such time as a viable BDCP project and conservation strategies are developed.

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10.2.2.2.1 Real Time Operations Team

This section states that the voting members of the Real Time Operations Team may, by consensus, expand the membership of the RTO Team. This means that the non-voting members from the SWP and CVP contractors could be made voting members at any time. This provides an opportunity to further shift the power and decision making to the SWP and CVP contractors. The AEG must also consist of representatives of the five affected Delta counties, who must play a role in oversight and guidance of the proposed actions.

It is also important that other affected parties have a voice and a vote on the RTO team, especially potentially impacted senior water right holders and in-Delta representatives. The RTO must, at a minimum, include voting members with technical and operational background representing senior water right holders and in-Delta representatives to be chosen by one representative each from NCWA and CCWD, and one representative representing Central Delta Water Agency and South Delta Water Agency combined.

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10.3.6 No Requirement for Plan or Permit Amendment

This section states that a change to a Conservation Measure or to a biological objective shall not require an amendment to the BDCP nor to the regulatory authorizations issued pursuant to the Plan, provided such change is adopted through the adaptive management process ... and in a manner consistent with the adaptive resources available for such changes ...

This could result in a decision to allow reduced Delta outflows or other actions that would further degrade Delta water quality beyond the significant adverse impacts already intended by the BDCP proponents. Any proposed changes to a Conservation Measure, especially CM1, that would further adversely impact Delta water quality or the water supply for in-Delta and senior upstream water uses must require a publicly noticed hearing before the AEG. Membership on the AEG for representatives of the Delta counties is essential for many reasons; including oversight over changes to Conservation measures that could further adversely impact the Delta.

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12.1 Process to Respond to Changed Circumstances

In the event of changed circumstances that require significant modifications to operation of CM1 and the other Conservation Measures, the Implementation Office shall not only notify the Authorized Entity Group, the Permit Oversight Group and the Stakeholder Council of the change in circumstances, but the matter must be brought before the AEG for their approval of the proposed changes to the operating rules and Plan. The AEG must also consist of representatives from the five affected Delta counties, who must play a role in oversight and guidance of the proposed actions.

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13.1.1 Obligations of the Authorized Entities

This section states that the Authorized Entities will contribute towards all other Conservation Measures and related program elements, as described in the column “Amount Paid by Contractors” in Table 8-41 in Chapter 8.3.4.1. It also states the Authorized Entities shall not be obligated to provide, either directly or through another agency, funding to implement any other elements of the Plan.

The goal of CMs 2-21 and habitat restoration is to reduce the amount of water the export water contractors need to leave in the Delta to restore and sustain key fish species. The main benefit is an increase in the amount of water that can be exported, relative to what SWP and CVP could otherwise export under their D-1641, biological opinion, 1959 Delta Protection Act, and 2009 Delta Reform Act obligations. The state, federal government and the public should not be required to pay for CMs 2-21 or water purchased for enhanced environmental flows, when the real beneficiaries are the Authorized Entities. The Authorized Entities must pay all, or at least most, of the costs of CMs 2-21, not the 10% envisaged in the Draft BDCP Chapter 8.

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13.2 Inadequate Funding

If circumstances regarding insufficient funding of the BDCP warrant action, that action should be a prohibition on use of the north Delta intakes and more protective limits on the use of the existing south Delta export facilities, until such time as adequate funding is made available. The IA allows for the possibility of revocation of one or both of the Federal Permits and the state permits if inadequate funding is provided. However, the IA should also make clear that operation of CM1 is contingent on adequate funding by the beneficiaries (the export water contractors) for all elements of the Plan, and of course, recovery of the fish populations. The additional possibility that use of the new facilities will be prohibited would serve as a necessary incentive for fully funding the project.

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14.4.2.1 Interim Obligations upon a Finding of Unforeseen Circumstances under the ESA or NCCPA

The draft BDCP is highly flawed and many of the assumptions and measures in the Draft Plan have been found to be insufficient or uncertain by scientific panels of experts that reviewed earlier versions of the BDCP. It is highly likely, with the current proposed project, that a Fish and Wildlife Agency will continue to find problems with regard to a Covered Species and that additional measures are required for the Covered Species as a result. Additional measures will be necessary. The IA should not absolve the Permittees of the responsibility for implementing additional measures unless a viable BDCP is developed that has a greater certainty of success.

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15.3 BDCP Authorized Entity Group

The AEG must also include representatives of the parties most likely to be impacted by the proposed BDCP project, namely, the Delta Counties.

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15.6 BDCP Stakeholder Council

It is appropriate, and necessary, to include representatives of the counties of San Joaquin, Sacramento, Solano, Yolo, and Contra Costa on the Stakeholder Council. However, the SC has no authority or decision making powers. The Authorized Entity Group has that power and must include as voting members, representatives of the Delta Counties.

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- Contra Costa County agrees with the following points made by the City of Antioch regarding the Draft Implementing Agreement.

Antioch Letter

1. The IA lacks any operational safeguards or criteria to protect senior water rights holders such as Antioch who will be impacted from BDCP operations as the result of increased salinity. For example, the Decision Tree process only applies to outflows to satisfy biological objectives. The lack of mitigation measures in the BDCP and the lack of any specific operating mitigation criteria in the IA appear to indicate that the BDCP process has no intent to mitigate adverse impacts to senior water rights now or in the future.
2. The IA and the BDCP appear to be attempting to change water rights priorities within the Delta. The vast majority of water to be diverted by the BDCP will go to agricultural uses - not to environmental uses. The BDCP agricultural diversions have lower priority rights to water than does Antioch, which provides drinking water to over 106,000 residents. The BDCP's lower priority agricultural diversions, however, will significantly impact Antioch's ability to use its higher priority rights to provide water for drinking purposes as well as for health and safety

purposes within the City. By failing to provide any mitigation or operating criteria to protect Antioch's superior water rights, the IA is effectively attempting to give the BDCP's junior water rights higher priority than Antioch's superior water rights.

3. The Five Year and Annual Operating Plans required in the IA do not require the protection or consideration of the impacts on non-BDCP-related in-Delta water quality. The IA fails to explain (or set forth operational criteria) how BDCP planned actions to meet export water supply and BDCP-related ecosystem goals will meet the State Water Resources Control Board ("SWRCB") water quality requirements under various SWRCB decisions.

4. The IA fails to incorporate any specific funding and operational provisions for mitigation to protect and sustain non-BDCP-related in-Delta water quality, beneficial uses, or non BDCP-related public trust resources. Again, this indicates that the BDCP does not intend to mitigate such impacts at all.

5. The IA provides certain guarantees and assurances to BDCP participants and beneficiaries regarding flows and water that could potentially conflict with the BDCP's requirements to comply with other applicable laws such as the Delta Protection Act and the co-equal goals of the Delta Reform Act. The IA commits only to operating to address covered species and provides no commitment or operational provisions to comply with other legal requirements with respect to water supply and water quality such as protecting in-Delta water supply and rights.

6. The IA does not provide adequate funding assurances for habitat conservation, restoration and management, which are the primary measures to protect and recover the specified covered species. Instead, the IA provides a broad and non-binding outline of potential funding sources including alleged funding sources that are "generally available" and potential future state and federal bonds and grants. The IA fails to specify how funding would be collected and secured from the contractors. Given the projected construction and operation costs of the BDCP conveyance and habitat restoration, the IA needs to provide firm funding commitments and sources of such funding. It would certainly be ironic and unjust if in-Delta water users adversely impacted by the BDCP end up having to pay portions of operational and restoration costs via bonds or administrative fees.

7. The IA governance structure includes project beneficiaries (e.g. contractors) in position to make critical determinations of implementation and operation. This creates a conflict of interest. At the same time, the governance structure fails to provide any consultation with potentially impacted, non-BDCP parties and no administrative remedies for those parties (unless such parties agree to become part of the BDCP process).

8. The Bureau of Reclamation operates the largest export project and is not a party to the IA. And yet, Reclamation has specified duties under the IA. Reclamation's compliance with its obligations under the IA is a yet to be disclosed "other" agreement. It is simply not possible to properly assess and comment on the IA, the BDCP and the EIRIEIS without having all applicable implementation documents provided for review.

Attachment D

Contra Costa County Comments on the Draft Implementing Agreement

July 29, 2014

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9. The SWRCB needs to be a significant part of BDCP's governance structure given that BDCP operations will impact Delta water quality, non-covered public trust resources and downstream beneficial uses such as senior water rights. There needs to be a streamlined administrative process to allow impacted Delta landowners, recreational users, water right holders and others to address such impacts directly to the SWRCB.