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Division 4

Jim Abercrombie
General Manager

Thomas D. Cumpston
General Counsel

In reply refer to: L2014-024

July 29, 2014

Mr. Ryan Wulff
National Marine Fisheries Service
650 Capitol Mall, Suite 5-100
Sacramento, CA 95814

Also via email to BDCP.comments@noaa.gov

Re: Comments on Bay Delta Conservation Plan and Draft EIR/EIS

Dear Mr. Wulff:

These comments on the Bay Delta Conservation Plan (“BDCP”) and its draft Environmental Impact Report/Environmental Impact Statement (“Draft EIR/EIS”) are submitted on behalf of El Dorado Irrigation District (“EID”). EID serves more than 100,000 residents of El Dorado County, entirely from surface water supplies in the South Fork American River and Cosumnes River basins.

EID has vital interests at stake in this proceeding. In addition to very senior water rights associated with its upstream reservoirs and diversions in both river basins, EID relies heavily on Folsom Reservoir for multiple supplies. Specifically, at Folsom Reservoir EID has a water service contract for up to 7,550 acre-feet annually of Central Valley Project (“CVP”) water supplies, a Warren Act contract to take up to 4,560 acre-feet annually of its own supplies, and water rights permit issued under state area-of-origin laws for 17,000 acre-feet annually. Also, EID expects to be the beneficiary in the near future of a subcontract for all or a portion of the El Dorado County Water Agency’s pending 15,000 acre-foot water service contract for CVP water supplies. Like the North State Water Alliance (“NSWA”), EID is closely monitoring and assessing the BDCP’s development and environmental analysis for their conformance to the core principles of regional self-reliance, the protection of senior and area-of-origin water rights, avoidance of redirected impacts upstream of the Delta, and promotion of the co-equal goals.

Regrettably, we conclude that as currently formulated, the BDCP and Draft EIR/EIS either do not conform to these core principles, or fail to provide sufficient information by which to judge their conformance. EID calls on the BDCP’s proponents and coordinating agencies to address the fundamental flaws and omissions in the documents, and to recirculate them for public comment, before proceeding further toward implementing this massive and enduring undertaking.



EID adopts and incorporates by reference the concurrent and detailed comments of NSWA and the American River Water Agencies (“ARWA”). To avoid repetition, EID’s comments in this letter focus on summarizing the NSWA and ARWA comments about issues that bear most directly upon EID’s interests.

First and foremost, the operational and hydrologic modeling in the BDCP and Draft EIR/EIS are fundamentally flawed. Because this modeling serves as the cornerstone of the documents’ analyses of surface water, socioeconomic, and in-Delta aquatic impacts these impact analyses are deficient under the California Environmental Quality Act (“CEQA”) and the National Environmental Policy Act (“NEPA”).

Specifically, as explained by both NSWA and AWRA, the modeling does not employ the most current and correct methodologies. Nor does it realistically forecast future Folsom Reservoir operations, because (contrary to common sense and actual events in 2014) it assumes that CVP operations would not adapt to changing hydrological conditions. Projections of future water demands in the American River basin are inconsistent with both state-generated population projections and local water supply plans. Further, the in-Delta operations actually modeled differ from the narrative descriptions of those operations. These differences fail to meet CEQA’s standard of an accurate, stable, and finite project description, which has long been understood to be the *sine qua non* of a legally adequate EIR. (See, e.g., *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 192.)

The virtually unbounded agency discretion and lack of defined performance standards in the BDCP’s plan for adaptive management is an equally fundamental failure to provide an adequate project description or adequate impacts analysis. While adaptive management is a beneficial concept, the BDCP’s and Draft EIR/EIS’s over-reliance on future adaptations improperly “assumes away” reasonably foreseeable project impacts (see *Laurel Heights Improvement Ass’n v. Regents of the University of California* (1988) 47 Cal.3d 376, 396), and the failure to define adequately the “triggers,” performance standards, and “bookends” of future adaptations improperly defers the formulation of feasible and effective mitigation measures for those impacts. (See CEQA Guidelines § 15126.4(a)(1)(B); *Endangered Habitats League v. County of Orange* (2005) 131 Cal.App.4th 777, 793.)

The failure to model BDCP operations both without climate change assumptions compounds the inadequacy of the project’s impacts analysis (and therefore, its mitigation measures), because it makes it impossible to differentiate between impacts caused by the project, and impacts caused by climate change. (See *Neighbors for Smart Rail v. Metro Line Construction Authority* (2013) 57 Cal.4th 439, 456; *Environmental Planning and Information Council v. County of El Dorado* (1982) 131 Cal.App.3d 350.)



Conversely, the ill-defined “decision tree” mechanism for determining Delta flows creates a mathematical multiplicity of potential project alternatives, yet the BDCP and Draft EIR/EIS confine their analysis to a fraction of those scenarios (focused on preferred Alternative 4), despite the acknowledgement that “hybrid” scenarios are also possible. This too-narrow focus stultifies and analysis of potential project impacts and again betrays that the project description is uncertain.

EID is greatly troubled by the prospect of redirected impacts, and particularly impacts on its senior, upstream, area-of-origin water rights. Tellingly, the Draft EIR/EIS does not even attempt to assess the BDCP’s socioeconomic impacts outside of the statutory Delta. This voluntary donning of analytical blinders bodes ill for a plan that is supposed to avoid redirected impacts. Likewise, the BDCP and Draft EIR/EIS take a speculative and dismissive approach to project funding, notwithstanding the Endangered Species Act’s requirement that there be assured funding sufficient to implement a habitat conservation plan.

Both of these approaches suggest that, inevitably, upstream interests will be called upon to bear a share of the BDCP’s burdens, in the form of CVP contract charges, water foregone, or both. Indeed, the BDCP states, at page 8-82, that “[t]he financial support of the state and federal contractors is essential in order to implement the plan,” even though neither the United States Bureau of Reclamation, EID, nor many other federal contractors are parties to the draft Implementation Agreement. Further, the BDCP assumes that state funds earmarked for regional watershed projects will be redirected toward the BDCP. (See BDCP at p. 8-89.) EID participates in two Integrated Regional Water Management (IRWM) Plans; in neither does EID or any other member entity propose to dedicate any IRWM funds to implement the BDCP.

Finally, by providing overreaching regulatory assurances to its water-purveyor participants, the BDCP inevitably ensures that non-participants like EID will have to make up any shortfalls in, for example, environmental water flows, through subsequent water-right, endangered-species, and other regulatory processes after the BDCP is adopted and in place. In other words, the BDCP’s proposed regulatory assurances under the Endangered Species Act clearly set the stage for the future usurping senior and area-of-origin water rights, because the junior, export water-right interests will have acquired immunity to further regulatory impacts.

EID fully recognizes the need for a comprehensive, fair, and lasting solution to the myriad problems associated with the Delta. EID is committed to the co-equal goals. EID can and will support a program that advances those goals, and that supports regional self-reliance, protects senior and area-of-origin water rights, and avoids redirecting impacts to third parties. As currently formulated, the BDCP and the Draft EIR/EIS are emphatically not that program. Even if the documents were not marred by numerous and fatal analytical flaws, they would not detail a program that EID could support. The remedy, therefore, is not simply to attempt to correct the technical flaws and maintain the current course. EID calls on the BDCP participants to step



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back, reconsider, redraft, and recirculate for public review a plan and environmental documentation that can earn the support of upstream, area-of-origin interests.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Thomas D. Cumpston', is written over a light blue horizontal line.

Thomas D. Cumpston
General Counsel

TDC:pj

cc: EID Board of Directors
Jim Abercrombie, EID General Manager
Brian Poulsen, EID Deputy General Counsel
Dan Corcoran, EID Environmental Manager