

**Congress of the United States**  
**Washington, DC 20515**

July 29, 2014

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

Dear Mr. Wulff:

We write today to offer comments on the Bay Delta Conservation Plan (BDCP) and its Draft Environmental Impact Statement and Report under the National Environmental Policy Act (NEPA) and the California Environmental Quality Act (CEQA). Our congressional districts include much of the San Francisco Bay-Delta region and other areas that would be impacted by the proposed project. We represent millions of residents – both upstream and downstream of the Bay-Delta – who rely on the estuary for their livelihoods, as a source of drinking water, for recreation, and for numerous other values. In addition, our congressional districts include numerous tribes, counties, cities, water utilities and other public agencies, commercial businesses, and conservation organizations, many of which will be submitting their own comments on the plan.

Over the last decade we have submitted numerous comment letters and participated in countless hearings and meetings with the relevant state and federal agency officials. Unfortunately, the fatal flaws that we and others have identified – repeatedly – remain uncorrected in the documents available for comment, which confirms that the plan is legally deficient under NEPA, CEQA, and several other statutes, and represents the wrong direction for the people of California. This is a significant missed opportunity, and given the persistent failure to address these fundamental problems, it is becoming increasingly doubtful that the BDCP can be salvaged. The comments below are representative, not exhaustive, of problems that we and others have been calling out.

BDCP fails to reduce reliance on the Delta as required by California law. The passage of California's historic package of water reforms in 2009 established several important new tenets of state water policy. The Delta Reform Act directed state agencies to reduce reliance on the Bay-Delta estuary as a source of water exports: “The policy of the State of California is to reduce reliance on the Delta in meeting California’s future water supply needs through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency.”

Despite this clear, overarching policy directive, BDCP proponents have gone out of their way to reject alternatives that would reduce reliance on the Delta and invest in improved regional supplies, conservation, and water use efficiency. Instead, BDCP proposes to flout the Delta Reform Act and take California in the direction of increased water diversions and exports from the Delta.

The BDCP would lock-in — for decades to come — levels of water exports from the Delta that are unsustainable, environmentally destructive, and legally indefensible. Moreover, proponents of this plan have sought guarantees from state and federal agencies that water exports would not be reduced. These guarantees are impermissible under numerous laws including the Central Valley Project Improvement Act and the state and federal Endangered Species Acts. The BDCP fails to resolve this dilemma and instead would lead to using public funds to purchase water as mitigation – a taxpayer-financed bailout plan that is not only bad fiscal policy, but ignores the failure of the similarly conceived Environmental

Water Account (EWA). Simply put, water exports at the levels proposed in this plan, especially when coupled with the assurances sought by Delta exporters, are completely at odds with state and federal law and cannot be remedied by repeating the failed “buying water for the environment” approach of the EWA.

BDCP fails to respond to California law's Public Trust requirements. The 2009 California water reforms also directed the State Water Resources Control board to develop new flow criteria to protect public trust resources for the Sacramento-San Joaquin Delta ecosystem, for the “purpose of informing planning decisions” for the Bay Delta Conservation Plan. The law was very clear: a conservation plan for the estuary, established under the State's Natural Community Conservation Planning Act and the federal Endangered Species Act (ESA), should be informed by an understanding of the public trust values of the estuary. The BDCP has violated this provision of state law. The plan shows no evidence of being informed by the state board's 2010 flow criteria report, reflecting a fatal flaw that has been evident from the beginning of the process: the BDCP is structured to maintain or increase current water export levels, and has never reconciled this purpose with the amount of water needed to sustain a healthy estuary.

BDCP confuses and conflates the proper role of agencies. Numerous analyses of the BDCP over the past decade have identified the plan's significant internal confusion regarding the roles of project proponents and the various state and federal agencies. It is clear from the present documents that those problems have not been resolved. It is improper for the state and federal governments to delegate such a significant role in adaptive management and project governance to non-agency entities, such as water districts that rely on water exports, and to make those water districts “permittees” for activities and decisions that should be carried out by federal and state agencies. We incorporate by reference a series of letters and statements from 2011 regarding the amended Memorandum of Agreement that allowed water exporters a major role in the governance and development of the BDCP in exchange for continued funding.<sup>1</sup> The confused structure is the result of an arbitrary and capricious decision to imbue some water districts with independent legal authority to challenge agency decisions regarding the State Water Project and Central Valley Project facilities. This arrangement is impermissible under CEQA and the federal ESA, at the very least, and inappropriate as a matter of public policy.

BDCP illegally narrows the range of alternatives. One of the most important roles of NEPA and CEQA is to provide a wide range of alternatives so the public may determine whether the preferred alternative is the best of all possible options. The BDCP fails to do this by improperly screening out numerous viable alternatives – indeed, at least one of the missing alternatives appears more viable, affordable, and comprehensive than the alternatives presented in these documents. We incorporate by reference a letter sent in 2013 asking that BDCP include the analysis of a “Portfolio Alternative” or similar approaches.<sup>2</sup> Since the outset, project proponents have only considered minor variations on the idea of a large export facility, and have sidelined viable proposals that would genuinely reduce reliance on the Delta and increase the reliability of the state's water supply through alternative water supply tools.

BDCP is inconsistent with the Central Valley Project Improvement Act. Federal law requires the Bureau of Reclamation to operate the Central Valley Project to “protect, restore, and enhance fish,

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1 Congressional letter of October 24, 2011, and State Legislature letter of November 22, 2011, as well as subsequent statements, available at;

- <http://blogs.esanjaquin.com/san-joaquin-river-delta/files/2011/11/bdcpsign.pdf>
- <https://georgemiller.house.gov/press-release/interior-department%E2%80%99s-bay-delta-negotiations-draw-rebuke-california-members-congress>
- <http://georgemiller.house.gov/press-release/bay-delta-members-congress-respond-bdcp-statement-transparency>

2 Available at <https://georgemiller.house.gov/press-release/rebs-miller-and-matsui-call-consideration-alternative-bdcp>

wildlife, and associated habitats in the Central Valley and Trinity River basins of California,” and to implement a plan to double the region's naturally returning anadromous fish populations. The proposed BDCP fails to establish appropriate objectives for species recovery, let alone for achieving the fish-doubling goal, and fails to protect water from the Trinity River basin and its already-threatened fish and wildlife from continued unsustainable diversions into the Central Valley Project.

BDCP would not restore the Delta ecosystem or listed species. The BDCP is designed as a Habitat Conservation Plan (HCP) under the ESA and a Natural Community Conservation Plan (NCCP) under state law. Among many other things, an HCP must establish clear and enforceable biological goals and objectives that lead to recovery. Unfortunately, the plan's biological goals and objectives would undermine rather than enhance the recovery of several covered fish species such as Longfin smelt, Delta smelt, steelhead trout, and numerous Chinook salmon runs, by negatively impacting their habitat among other things. In addition, the draft Implementing Agreement is legally flawed as it proposes to make even these inadequate goals and objectives unenforceable by stating they "shall not be a basis for a determination by the Fish and Wildlife Agencies of non-compliance with the Plan or suspension or revocation of the Permits..." In this way and others, the plan fails to meet the high “conservation” standard that a NCCP must meet to be successful. Finally, there is significant uncertainty as to whether the plan will improve the health of the estuary, yet it would provide 50 year incidental take permits to the project proponents, leaving listed species to bear the risk. Failure to demonstrate that the environmental benefits are reasonably certain to occur is a fatal flaw for any NCCP/HCP, let alone one of this scale. For these reasons, the BDCP cannot credibly or lawfully be permitted as either a HCP or NCCP.

The BDCP does not use the best available science. Independent scientific reviews of the plan's earlier iterations have been scathing in their analysis of the plan's structure and scientific inadequacy. The latest version of the BDCP has not corrected the majority of the flaws identified over the last decade by the National Research Council, the Delta Independent Science Board, and other federal and state agencies, and it clearly does not reflect the best available science.<sup>3</sup> Among other flaws, these independent scientific reviewers have noted that the BDCP relies on overly optimistic assessments of the effects of restoration activities, and that the plan is a “post hoc rationalization” that offers no scientific reasons to ignore viable and less-damaging alternatives.

The BDCP is too expensive and is overbuilt for the stated purpose. As previously discussed, the BDCP documents inappropriately eliminate alternatives that would provide similar benefits with a greater certainty of success. One consequence of this narrowing of alternatives is that the only proposals contained in the BDCP are unnecessarily expensive and are overbuilt for the stated purpose of the project. The BDCP has focused on a massive plumbing solution only, proposing two tunnels that will cost tens of billions of dollars and will be enormously disruptive to construct and maintain, and which are large enough to be operated at levels that would cause great environmental damage. The BDCP

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3 Including but not limited to those of the U.S. Environmental Protection Agency, Bureau of Reclamation, Fish & Wildlife Service, National Marine Fisheries Service, and the California Department of Fish & Wildlife:

- [http://baydeltaconservationplan.com/Libraries/Dynamic\\_Document\\_Library/NMFS\\_Progress\\_Assessment\\_Regarding\\_the\\_BDCP\\_Administrative\\_Draft\\_4-11-13.sflb.ashx](http://baydeltaconservationplan.com/Libraries/Dynamic_Document_Library/NMFS_Progress_Assessment_Regarding_the_BDCP_Administrative_Draft_4-11-13.sflb.ashx)
- [http://baydeltaconservationplan.com/Libraries/Dynamic\\_Document\\_Library\\_-\\_Archived/Effects\\_Analysis\\_-\\_Bureau\\_of\\_Reclamation\\_Red\\_Flag\\_Comments\\_and\\_Responses\\_5-31-12.sflb.ashx](http://baydeltaconservationplan.com/Libraries/Dynamic_Document_Library_-_Archived/Effects_Analysis_-_Bureau_of_Reclamation_Red_Flag_Comments_and_Responses_5-31-12.sflb.ashx)
- [http://baydeltaconservationplan.com/Libraries/Dynamic\\_Document\\_Library\\_-\\_Archived/Effects\\_Analysis\\_-\\_Fish\\_Agency\\_Red\\_Flag\\_Comments\\_and\\_Responses\\_4-25-12.sflb.ashx](http://baydeltaconservationplan.com/Libraries/Dynamic_Document_Library_-_Archived/Effects_Analysis_-_Fish_Agency_Red_Flag_Comments_and_Responses_4-25-12.sflb.ashx)
- <http://www2.epa.gov/sfbay-delta/bay-delta-conservation-plan-epa-documents>
- <http://deltacouncil.ca.gov/science-board/delta-isb-products>
- <http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=13148>

should have included far smaller options paired with meaningful conservation and alternative supply investments, rather than putting taxpayers on the hook to build oversized tunnels that could operate beyond permissible levels. In addition, the public should have been allowed to evaluate at least one alternative in which the proposed project is phased in, which would reduce costs and allow for more meaningful adaptive management.

The BDCP lacks a suitable financing plan. Numerous state and federal statutes require clarity as to the source of a project's funding, and the certainty of the funds' availability, for approval, and state law is very clear that the mitigation required for the construction of this particular project cannot be borne by the public. The BDCP provides neither clarity nor certainty as to project financing, and does not follow the long-established principle of "beneficiary pays." BDCP does not even come close to answering the basic question: who is going to pay for it? Whether the unallocated costs of the BDCP's construction and mitigation will ultimately be borne by taxpayers throughout the state, the nation, other federal water contractors (even those who oppose the plan and would not benefit from it), or some other party is entirely unclear, but any public subsidy of this type would be unacceptable and unlawful.

The BDCP does not explain how new facilities will be operated nor how it will impact existing facilities. The plan does not include a clear operations plan so that the public can meaningfully analyze or comment on the proposed project including the new tunnels' impacts on upstream reservoirs, the Trinity River, or flood control facilities, nor does it explain how the new facilities and other activities will affect the operations of the Central Valley Project and the State Water Project. It is impossible to determine the direct effects, indirect effects, and cumulative impact, without this information.

As these comments make clear, the BDCP would neither restore the Bay-Delta ecosystem to health, nor increase statewide water supply reliability. The plan falls far short of federal and state standards for the type of long-term permit it seeks. Implementing the BDCP as presently described would be far too expensive, would undermine the health of the Bay-Delta estuary and Northern California fisheries, harm tribes as well as communities in the Bay-Delta region, and violate numerous state and federal laws – including several laws that the authors of this letter have written and championed. Given the fundamental flaws that have been repeatedly identified over the years, we expected that there would be a "reality check" that would re-direct the BDCP to something that complies with state and federal laws, meets the HCP/NCCP standards, and is financeable. Clearly, that "reality check" has not occurred. If BDCP is to be salvaged, it would need to be completely overhauled, its proposals redesigned, and its documents subjected to additional peer- and public review.

Thank you for your consideration of these comments.

Sincerely,

  
JARED HUFFMAN  
Member of Congress

  
GEORGE MILLER  
Member of Congress

  
MIKE THOMPSON  
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