RURAL COUNTY REPRESENTATIVES OF CALIFORNIA

July 29, 2014

Mr. Ryan Wulff
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Sacramento, CA 95814
Transmit via Email: BDCP.comments@noaa.gov

Secretary Sally Jewell
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Secretary John Laird
California Natural Resources Agency
1416 Ninth Street, Suite 1311
Sacramento, CA 95814

RE: Draft Bay Delta Conservation Plan (BDCP), Draft Environmental Impact Report/Environmental Impact Statement (DEIR/EIS) and Implementing Agreement (IA)

Dear Mr. Wulff and Secretaries Jewell and Laird:

On behalf of the thirty-four member counties of the Rural County Representatives of California (RCRC), I appreciate the opportunity to provide comments on selected sections of the public review draft of the proposed Bay Delta Conservation Plan (BDCP), the draft Environmental Impact Report/Environmental Impact Statement (DEIR/EIS), and the recently released draft Implementing Agreement (IA) for the BDCP.

The draft BDCP has been developed to support issuance of long-term incidental take permits that meet the requirements of Section 10(a)(1)(B) of the federal Endangered Species Act, as well as Section 2800 *et seq*. of the California Fish and Game Code, for certain actions proposed within the statutorily defined Sacramento-San Joaquin Delta (Delta) for the term of fifty years. The BDCP proposes to make physical and operational

changes to the State Water Project (SWP) including the placement of underground twin tunnels to convey water south of the Delta.

Comment Deadline Extension

In mid-May, RCRC requested a minimum extension of 60 days for responding to the draft BDCP and the DEIR/EIS. The primary reason for this request was the unavailability of the IA. RCRC was therefore appreciative that the comment deadline was extended to July 29 and that the draft IA, also with a July 29 comment deadline, was made available for review. RCRC's comments on the IA can be found in the latter portion of this comment letter.

DEIR/DEIS

RCRC has reviewed the Delta Independent Science Board (DIS Board) comments on the DEIR/EIS for the BDCP dated May 15, 2014. The DIS Board comments can be accessed at: http://deltacouncil.ca.gov/sites/default/files/documents/files/Attachment-1-Final-BDCP-comments.pdf

RCRC commends the DIS Board for their work and agrees with many of the Board's observations.

Of particular note are the following DIS Board findings:

- Many of the impact assessments hinge on overly optimistic expectations about the feasibility, effectiveness, or timing of the proposed conservation actions, especially habitat restoration.
- The project is encumbered by uncertainties that are considered inconsistently and incompletely; modeling has not been used effectively to bracket a range of uncertainties or to explore how uncertainties may propagate.
- The potential effects of climate change and sea-level rise on the implementation and outcomes of BDCP actions are not adequately evaluated.
- Insufficient attention is given to linkages and interactions among species, landscapes, and the proposed actions themselves.
- The analyses largely neglect the influences of downstream effects on San Francisco Bay, levee failures, and environmental effects of increased water availability for agriculture and its environmental impacts in the San Joaquin Valley and downstream.
- Details of how adaptive management will be implemented are left to a future management team without explicit prior consideration of (a) situations where adaptive management may be inappropriate or impossible to use, (b) contingency plans in case things do not work as planned, or (c) specific thresholds for actions.
- Available tools of risk assessment and decision support have not been used to assess the individual and combined risks associated with BDCP actions.

These identified flaws get to the heart of RCRC's primary concern – the 50-year permit term, the guarantees proposed to be afforded to the beneficiaries of Conservation Measure 1 (CM1) (Water Facilities and Operation), and the lack of assurances for areas upstream of the Delta and in-Delta as it relates to regional water sustainability, water rights protections, and no negative redirected impacts to the water supply, economy and environment of those areas of the state not party to the BDCP. Please see RCRC's more specific comments elsewhere in this document on this topic.

The DIS Board states:

- Assuming that CMs 2 - 22 will produce the anticipated benefits needed to offset any impacts of BDCP actions is an implausible standard of perfection for such a complex problem and plan (Chapters 11 and 12, Appendix B). RCRC agrees with the DIS Board recommendation to begin with more realistic expectations that include contingency or back-up plans.

- That uncertainties accompany every action and consequence discussed in the DEIR/EIS, and that when combined these uncertainties will be compounded and propagate. The DIS Board has also noted the DEIR/EIS in some instances argues that uncertainty is sufficient reason not to address the issue of uncertainty at all (Chapter 11, Appendix B). RCRC agrees with the DIS Board that if uncertainties are acknowledged the expected outcomes and benefits of BDCP actions will be more realistic. This in turn would provide a more reasoned assessment. Additionally, RCRC agrees with the DIS Board that CMs 2 - 22 should be treated as hypotheses to be tested, or perhaps broadly defined adaptive-management experiments.

- The potential effects of climate change and sea-level rise are underestimated or not adequately considered, and that similar comments could be made about the treatment of other disrupting factors such as floods, levee failure, earthquakes, or invasive species (Chapter 29/Chapter 12, Appendix B). Any one or more of these factors could profoundly alter the desired outcomes of BDCP actions. RCRC believes that all factors that may substantially alter the outcomes of the project must be considered.

- That much of the DEIR/EIS is focused on individual species, particular places, or specific actions that are considered in isolation from other species, places or actions. As a result, potential predator-prey interactions and competition between covered and non-covered fish species are not fully recognized (Chapters 11 and 12, Appendix B). RCRC agrees with the DIS Board that failing to treat the Delta as a fully functioning and integrated ecosystem may well result in overlooking interactions that may enhance or undermine the effectiveness of BDCP actions.

- Although the consequences of BDCP actions undertaken within the Plan Area will extend downstream to affect San Pablo Bay and San Francisco Bay, the draft BCDP and DEIR/EIS do not analyze these potential environmental impacts. Similarly, the draft BDCP and DEIR/EIS do not consider the consequences of levee failures on the effectiveness of BDCP actions or the financial implications of demands for levee maintenance on BDCP implementation (Appendix A). RCRC agrees with the DIS Board that these potential effects merit careful consideration.

- That adaptive management is the key to addressing uncertainties and successfully implementing the BDCP, but details about how it will be designed and implemented are left to a future Adaptive Management Team. The DIS Board also notes that because BDCP CMs will not likely play out as planned, it would be prudent to have contingency plans generally outlined before discovering that actions are not working as expected (Appendix A). RCRC, like the DIS Board, has substantial misgivings about how the proposed adaptive management process, as proposed, will actually function as a key component of the BDCP. As others have commented, the BDCP's monitoring and adaptive management program is at best a plan to have a plan.

- It found no indication that the available scientific approaches to risk assessment were used to any great extent in the development of the BDCP (Appendix A). RCRC agrees with the DIS Board that given the concerns over uncertainty and the proposed adaptive management plan, consideration should be given to incorporating structured decision-making into the process.

Chapter 2. Project Description

The draft BDCP and DEIR/EIS leaves to future EIR's nearly every project element other than CM 1. The decision to perform a project-level analysis of CM 1, but only a program-level analysis of CMs 2 – 22, means that meaningful environmental review and evaluation of CMs 2 - 22 are not available for public review. As a result, the state and federal agencies responsible for approving or disapproving the BDCP and members of the public are unable to evaluate the potential effectiveness and potential impacts.

RCRC agrees with the Yolo County comment letter that projects necessary to implement the BDCP and related environmental effects should receive full environmental review at the outset rather than in separate documents that may follow years or even decades later. In particular, Yolo County notes that CM 2 should be analyzed given the defined nature of certain biological objectives in the BDCP, and the fact that more than enough information exists for the DEIR/EIS to include specific information about potential impacts using the acreage data, modeling, and other presently available information regarding the seasonal floodplain restoration element of CM 2.

The DEIR/EIS states that it generally uses a baseline tied to the 2009 date of publication of the Notice of Preparation (NOP). RCRC agrees with Yolo County that the use of an outdated "existing conditions" baseline is not reasonable for a project like BDCP given its lengthy and complex planning and environmental review process, as well as the overall timeframe for implementation.

The conclusion of the DEIR/EIS that the impacts of CMs 2 - 22 could be "significant and unavoidable" paves the way for BDCP proponents in the future to find that impacts of these CM's, once they are fleshed out, are "within the scope" of the BDCP program EIR/EIS and thus conclude that meaningful environmental review is not needed. RCRC believes that the state and federal agencies must make a public commitment in the final BDCP and EIR/EIS that this scenario will not occur. The agencies also should pledge that all future EIRs and EISs on individual projects will include a cumulative and synergistic effects analysis to ensure that the potential environmental impacts of the individual projects will be evaluated as integral components of the entire BDCP.

RCRC agrees with the report recently prepared by ARCADIS (ARCADIS Report) for the Delta Stewardship Council (DSC) that states "The presentation of conservation measures 2-22 at the programmatic level contributes to uncertainty in benefits and impacts", "More detailed planning and design of habitat restoration measures is needed to reduce uncertainties in the plan" and that the "…specific location and design details of restored areas with the ROAs are critical to determination of the ability of these actions to support the ecosystem goals of Water Code 85302(e)." The ARCADIS Report, which is referenced throughout this document, can be accessed at: http://deltacouncil.ca.gov/sites/default/files/documents/files/Item_9_Attach_1_10.pdf

Chapter 5. Water Supply

RCRC has significant concerns relating to the potential impacts of the BDCP on the water supply of the Delta counties and areas upstream of the Delta.

As noted in the ARCADIS Report, "Although the BDCP improves water supply reliability for contractors downstream of the Delta, it does not improve reliability for in-Delta users." RCRC agrees with the ARCADIS Report conclusion that impacts on in-Delta water supplies should be better mitigated.

CM 1 implementation modeling shows that there will be significant operational changes at upstream reservoirs, including Central Valley Project (CVP) owned and operated reservoirs. The BDCP must discuss in detail the nature of these changes and the impacts associated with those changes. Failure to do so prevents adequate consideration of the environmental impacts in the DEIR/EIS.

As this drought year has shown, the approach to the operations of the CVP and the SWP needs to be modified to ensure a stable supply of water is maintained in the reservoirs that feed into the CVP and SWP in order to meet the needs of Northern

California while also serving export interests and meeting requirements in the Delta. A commitment by state and federal agencies that operations will be modernized to accomplish this balance is vital.

The ARCADIS Report notes in the Key Findings "While the BDCP can contribute to a more reliable water supply for south-of-Delta contractors, the combined diversions of the BDCP's tunnels and the re-operated south Delta diversions are insufficient to fully meet demand. Because Delta diversions will not fully meet existing and future demands, it will be necessary for Delta water users to promote statewide water conservation, diversify their local water supplies, and to improve water use efficiency."

The DEIR/EIS does not consider future water demands of water users north of the Delta. This is a major flaw as population is expected to increase in a number of counties north of the Delta during the proposed 50-year permit term. (See California Department of Finance population projections July 1, 2010-2060 at: http://www.dof.ca.gov/research/demographic/reports/projections/P-1/) RCRC believes that it is therefore reasonably foreseeable (changed circumstance) that water demand will increase north of the Delta as a result of this population growth.

California water law specifically recognizes the prior right of communities in the areas of origin/counties of origin to water currently being exported when needed to adequately supply the beneficial needs of those areas (See Water Code Sections 10505, 10505.5, 11460, 11463, 11128, and 12200-12220). The ARCADIS Report comment noted above highlights the importance of the DEIR/EIS analyzing future water demands in the areas of origin and evaluating the BDCP's potential effects on the future water supply and water reliability of upstream water users. This key analysis must not be deferred as an indirect project impact. The BDCP must also clearly state that future BDCP implementation and CVP and SWP operations will not negatively impact upstream and in-Delta senior water rights and area-of-origin water rights.

Please also see RCRC's comments elsewhere dealing with this specific subject.

Chapter 6. Surface Water

The construction of the facilities proposed by the draft BDCP will change SWP and CVP operations, which in turn will affect flow in the Delta and areas upstream of the Delta. The DEIR/EIS appears to assume that the changed operations of the SWP and CVP will not impact the operation of facilities owned and operated by other water right holders, and that the surface waters of other water rights holders will also be unaffected. RCRC believes that this assumption is likely to be incorrect and that the DEIR/EIS should analyze this very real potential.

Comments on the BDCP and DEIR/EIS submitted by the Central Valley Flood Protection Board (CVFPB) point out that BDCP documents should properly reference

the CVFPB as the non-federal sponsor for any project proposed to modify a State Plan of Flood Control (SPFC) facility. RCRC supports the CVFPB recommendations that:

1. Any proposed project that can affect a SPFC facility should be approved by the CVFPB either under its permitting authority or in conjunction with its duties as the non-federal sponsor for levee modification projects submitted to the U.S Army Corps of Engineers (USACE).

2. Implementation of the BDCP should include CVFPB review and concurrence in BDCP project plans.

3. CVFPB staff should be part of any design review or peer review panel that may be assembled to discuss design criteria for conveyance facilities.

While Chapter 6 of the DEIR/EIS discusses how the BDCP and the Alternatives may affect levees, and levees are discussed in other parts of the DEIR/EIS, RCRC believes that levees are of such importance that a chapter devoted to levees would greatly improve the DEIR/EIS.

Chapter 7. Groundwater

The Delta counties are rightly concerned about the impact of construction activities on both municipal and agricultural water supplies. RCRC does not believe that a proposed impact of ten years or more should be characterized as "temporary".

The DEIR/EIS described groundwater impacts are primarily due to construction dewatering activities. The DEIR/EIS notes that some well yields may be affected substantially and shallow agricultural or domestic wells "may not be able to support existing land uses" while dewatering is occurring. The effects are likely to vary depending on aquifer and location. RCRC believes that the potential impacts should be more specifically described on that basis.

The development of mitigation measures for the loss of municipal and agricultural water supplies should be jointly developed with the impacted individuals and entities to ensure all issues are addressed.

Chapter 8. Water Quality

The DEIR/EIS states that water quality conditions will be degraded in the western and central Delta. This is inconsistent with the Delta Reform Act which calls for the improvement of water quality and the protection of beneficial uses (Water Code Section 85302 (d)(3)).

RCRC notes that the ARCADIS Report lists as a Key Concern that "Water quality impacts are compared to SWRCB water quality objectives with little regard to specific water quality needs of aquatic species of concern" and "Water quality impacts to in-

Delta users from a variety of causes (e.g., impacts from restoration measures, altered mixing, and new constituents of concern) are not adequately mitigated."

RCRC concurs with the ARCADIS Report recommendation that specific, feasible and enforceable mitigation measures are merited for significant impacts to water quality.

Chapter 11. Fish and Aquatic Resources

Habitat restoration is being heavily relied upon to compensate for a variety of negative impacts related to CM 1, but it must be acknowledged that any positive benefits of habitat restoration are highly uncertain. Construction and flow operations will have immediate impacts, while habitat restoration benefits, if any, may not become evident for a decade or more.

Please see RCRC's comments pertaining to Sacramento River Winter Run and Spring Run Chinook Salmon under Chapter 5, Effects Analysis.

Chapter 13. Land Use

Delta counties are concerned about the impact the BDCP will have on existing Delta communities. This impact goes beyond the creation of the physical structures (CM 1) as proposed, and includes the proposed habitat creation and restoration measures. The BDCP would permanently alter the rural/agricultural land use pattern for which the Delta is known, yet there is no analysis of the potential impact of the BDCP on existing city and county General Plans and potential constraints on future local government projects and activities.

CM 1 construction would have numerous negative impacts on Delta residents and visitors from construction activities including construction noise, traffic, road relocations, effects on utilities, and an increase in safety hazards and visual impacts, among other impacts noted elsewhere.

RCRC agrees with the comments of the Delta Protection Commission (DPC) that the draft BDCP overwhelmingly focuses on one of the co-equal goals (a more reliable water supply) with only a distant secondary focus on the other co-equal goal (protect, restore and enhance the Delta ecosystem) and that the draft BDCP manifests an almost complete disregard for "the protection and enhancement of the unique cultural, recreational, natural resource and agricultural values of the Delta as an evolving place" as required by the Delta Reform Act (Water Code Section 85020).

The ARCADIS Report states "The BDCP does not adequately address its contribution (conveyance and ecosystem restoration) to cumulative impacts to agriculture, recreation, community character, and historical and archaeological resources in the Delta." RCRC agrees with the ARCADIS Report recommendation that "the BDCP should more thoroughly identify impacts to agriculture, recreation, community character,

and historical and archaeological resources in the Delta, and offer specific, feasible, and enforceable mitigation measures."

The DPC has suggested that for community and regional impacts the BDCP proponents could utilize the existing Delta Investment Fund established by the Delta Reform Act (Public Resources Code Section 29778.5) to advance regional economic sustainability and enhance Delta communities. Additionally, the DPC suggests that for individuals directly impacted by BDCP construction, there be established a simple claims process to address economic damages related to tunnel construction activity modeled after the British Petroleum Deepwater Horizon Disaster Victim Compensation Fund. The proposed "Delta Compensation Fund", funded by the BDCP proponents, would be administered by an impartial and independent third party. RCRC urges serious consideration of the DPC suggestions on mitigation.

Chapter 14. Agricultural Resources

The DIS Board noted in its review of Chapter 14 that the analysis in the DEIR/EIS is "mostly an acreage analysis, and omits most relevant economic analysis." The DIS Board goes on to state that "Quite a bit of economic analysis capability is available for agricultural land and economic issues in the Delta, Yolo Bypass, and the Central Valley – very little of it has been used in the DEIR/EIS" and "Even though specific locations for habitat restoration have not been specified, it is still possible to come up with a reasonable range of likely agricultural and agricultural economic impacts." Given that farming drives the economic engine of the Delta, RCRC advocates that the analysis of CM 2 and other CMs that will impact agriculture not be deferred for consideration to some uncertain time in the future.

The draft BDCP proposed mitigation to reduce the effects of BDCP implementation on agricultural resources in the Delta is inadequate. A three part mitigation measure (Mitigation Measure AB-1) is proposed as follows:

- Develop an Agricultural Lands Stewardship Plan (ALSP) to Maintain Agricultural Productivity and Mitigate for Loss of Important Farmland and Land Subject to Williamson Act Contracts or in Farmland Security Zones;
- BDCP proponents to comply with applicable provisions of Government Code Sections 51290-51295 with regard to acquiring land subject to Williamson Act contracts; and,
- Consideration of an Optional Agricultural Land Stewardship Approach or Conventional Mitigation Approach.

The estimated land required for the BDCP with a breakdown of the estimated Important Farmland follows. The DEIR/EIS Important Farmland includes Agricultural Land, as defined in CEQA, plus Farmland of Local Importance. It does not include grazing land as Important Farmland.

Estimated Land Required for BDCP:
CM 1: 5,000 acres (permanent); 1,300 acres (temporary)
CM 2: 17,000 acres (periodic inundation) (Yolo Bypass)
CM 3: 70,000 acres (permanent restrictions)
CM 4-CM 10: 83,800 acres (permanent)

Estimated Important Farmland Required for BDCP:
CM 1: 5,000 acres (permanent); 1,300 acres (temporary)
CM 2: 17,000 acres (periodic inundation) (Yolo Bypass)
CM 3: 43,200 acres (permanent restrictions)
CM 4-CM 10: 40,000 acres (permanent conversion)

In addition to the conversion of agricultural land to habitat, other impacts on agricultural activities in the Delta include: disruption of necessary infrastructure such as irrigation and drainage facilities, as well as access roads and electrical facilities; changes in groundwater elevation; changes in water quality; reduction in agricultural employment; and, a decrease in total agricultural production in the Delta.

Identified shortcomings in the DEIR/EIS include the fact that the DEIR/EIS does not propose agricultural mitigation measures for temporary and short-term effects or for periodic effects. As noted elsewhere, impacts that may last 10 or more years are not "temporary". This deficiency must be remedied.

As part of the proposed mitigation strategy, BDCP proponents propose to work with counties to expand Williamson Act authorized uses to include open spaces and habitat lands. State Williamson Act subvention payments to local governments were suspended in the 2009-10 State Budget and Williamson Act counties are now bearing 100% of the financial burden of Williamson Act and Farmland Security Act contracts. Many of the impacted counties are struggling financially and no longer accept new contracts, while others are considering cancelling existing contacts. What, if anything, is being proposed to defray Delta county costs should they agree to the proposed expansion of Williamson Act authorized uses?

The DEIR/EIS concludes that the environmental impacts on agricultural resources will remain significant and unavoidable because:

- The BDCP would require the conversion of substantial amounts of Important Farmland and land subject to Williamson Act contracts or in Farmland Security Zones;
- Conversion or preservation by means of acquiring agricultural land conservation interests may not avoid a net loss of Important Farmland and land subject to Williamson Act contracts or in Farmland Security Zones; and,
- The proposed Optional Agricultural Land Stewardship Approach does not focus principally on physical effects.

For additional details specific to Delta agriculture please see *A Guide to BDCP and Delta Agriculture Impacts and Mitigation as described in the December 2013 Draft BDCP EIR/EIS.* The June 2014 Guide was prepared by the DWR Agricultural Land Stewardship Workgroup. The Guide can be accessed at: https://agriculturallandstewardship.water.ca.gov/documents/18/2b68621a-28eb-4109-a7fa-f94f81c42ad7;jsessionid=C53FA6BC66C4288CE45D3AC3420D46D5

Given the "significant and unavoidable" conclusion reached, RCRC believes that more must be done as it relates to mitigation for impacts to agriculture and the Delta economy. The DEIR/EIS should analyze and disclose all of the adverse impacts on agriculture in the Delta, including whether agricultural operations in all or portions of the Delta will remain viable upon the completion of CMs 1-22. This includes both the viability of agricultural production as well as the needed infrastructure i.e., the businesses that supply growers with all the supplies and services necessary to run an agricultural operation.

RCRC believes that the DEIR/EIS should be revised for the sake of clarity. RCRC agrees with Yolo County that a county-by-county summary of anticipated project features and environmental effects would be appropriate given the complexity of the BDCP.

BAY DELTA CONSERVATION PLAN

Chapter 1. Introduction

The BDCP makes various statements that are, on closer examination, misleading or inaccurate.

For example, in Chapter 1 on page 1-21, lines 21-25, the BDCP states "Areas potentially affected by the implementation of the BDCP located outside of the Plan Area, have been included in the analysis of effects to ensure that all of the potential effects within the *action area* (all areas to be affected directly or indirectly by the federal action and not merely the immediate area involved in the action), as defined by Section 7 of the ESA, have been adequately addressed."

The DEIR/EIS, contrary to federal and state law, fails to follow through and assess the direct and indirect impacts from the BDCP on areas outside of the Delta. Please see RCRC's comments elsewhere on this specific subject as it relates to areas upstream of the Delta.

Chapter 3. Conservation Strategy

Although the draft BDCP and the DEIR/EIS both place a strong reliance on adaptive management, discussion on how adaptive management and the Adaptive Management Team (AMT) will work is insufficient.

Additional details must include: the qualifications of the AMT; how the AMT is to be funded; how the AMT and Implementation Office will coordinate; how the AMT is to conduct their responsibilities; and the AMT responsibility, if any, for compliance monitoring of CM 1.

The specifics relating to the Supplemental Adaptive Management Fund also require additional detail. For example, what happens if the financial limit is exceeded and the funds are insufficient to achieve the conditions of the permit?

As part of the adaptive management process, the CMs are subject to being "modified, replaced, or supplemented" via agreement between the BDCP proponents and the state and federal agencies. It does not appear that there is an opportunity for public involvement in this decision-making process. RCRC advocates that public input be incorporated into the adaptive management process to remedy this oversight.

Considering the uncertainties noted elsewhere, and the importance of adaptive management to successful program implementation, the adaptive management process (e.g., organization, funding, monitoring and analysis) must be discussed in detail in the BDCP.

Also see RCRC comments under Chapter 7.

Many of the CMs, including CM 1, will occur in the vicinity of the facilities of the SPFC, including modifications to the Sacramento River Flood Control Project (SRFCP). These levees and related structures provide flood protection to over 2 million people in approximately 50 communities. The Central Valley Flood Protection Plan (CVFPP), adopted in mid-2012, is overseen by the CVFPB.

The BDCP fails to analyze its consistency with the CVFPP, one of the flaws resulting from the application of the outdated baseline as noted earlier. RCRC supports the following recommendations of the CVFPB:

1. All CMs with the potential to affect the SPFC should be analyzed for consistency with the state system-wide investment approach outlined in the 2010 CVFPP and in accord with any applicable guidelines, standards or criteria developed as part of the CVFPP in effect at the time to BDCP implementation.

2. All CMs in the BDCP with the potential to impact the operations and maintenance of the SPFC, including habitat restoration projects and multi-benefit projects that increase or enhance existing habitat in or around floodways and system levees, should be analyzed for impacts to the operations and maintenance of the SPFC.

3. State and local maintaining agencies should be consulted prior to implementing CMs in the floodways and system levees.

4. The BDCP should identify ways to integrate long-term management of the system that serves both public safety and environmental needs.

5. All projects proposed within the Yolo Bypass should comply with Title 23, Section 136 Supplemental Standards for Yolo Bypass and Sutter Bypass. The supplemental standards protect the flood control functions, safeguard existing agricultural land use, and control the development of wetlands.

6. The proposed modifications to the Yolo Bypass should avoid reducing conveyance capacity and the potential to divert flows upstream and through the Sacramento River. These potential flow increases into the Sacramento River may increase flood risks to areas protected by levees including the City of Sacramento downstream and areas adjacent to the American River.

7. Whenever haul routes or construction zones include travel over levee roads, the BDCP should implement mitigation measures. They should include pre-project inspections and levee geometry surveys including the elevations of levee crests and waterside and landside hinge points, and continuous monitoring during construction for evidence of levee deformation.

8. Traffic control measures should include reducing truck speed limits and limiting the number of trucks on the levee during flood seasons.

9. Levee deformation (either vertical or lateral) should be mitigated and be restored in accordance with project levee designs pursuant to CVFPB and USACE.

Chapter 5. Effects Analysis

The hydrologic model used to support the BDCP and the effects analysis is not the most current hydrologic model. The outdated hydrologic model used was known to have flaws in its assumptions and inputs, issues which have since been corrected. As the issue of Delta outflow, exports, etc. is fundamental to analyzing the BDCP, the updated hydrologic model must be utilized to ensure the best available and most accurate tools are used to evaluate the BDCPs impacts.

In March 2014 the Delta Science Program released the final report on Phase 3 of an Independent Panel's (Panel) review of Chapter 5, dealing with the analysis of potential ecosystem effects of BDCP actions. The report can be accessed at: http://deltacouncil.ca.gov/sites/default/files/documents/files/Delta-Science-Independent-Review-Panel-Report-PHASE-3-FINAL-SUBMISSION-03132014_0.pdf

The DIS Board concurred with the findings of the Panel, and specifically mentioned several important areas of agreement as follows:

The Effects Analysis:

- Does not adequately convey the sources and effects of uncertainties.
- Does not include clear statements of critical assumptions underlying many of the proposed actions and their consequences.
- Characterizes adaptive management as the default solution to unresolved issues and uncertainties, without a clear description of how adaptive management will actually be implemented or how it is tied to monitoring.
- Fails to recognize that habitat restoration is a lengthy process with uncertain results and timing.
- Presents modeling results without thorough sensitivity analyses or consideration of a range of possible scenarios.
- Partitions the Delta into separate pieces (i.e. covered species) without also considering linkages and the broader spatial and temporal dynamics of the Delta as a system.
- Uses a flawed analysis to determine net effects because it uses professional judgment to assess net effects and is therefore in reality an unacknowledged "working hypothesis".

As stated previously, these identified flaws get to the heart of RCRC's primary concern – the 50-year permit term, the guarantees proposed to be afforded to the beneficiaries of CM 1, and the lack of assurances noted previously for areas upstream of the Delta and in-Delta. Please see RCRC's more detailed comments in Chapter 6, Plan Implementation below.

RCRC also notes that the Effects Analysis finds that operation of CM 1 will reduce winter-run and spring-run Chinook salmon survival by 2.9% and 4% respectively. The California Advisory Committee on Salmon and Steelhead Trout, in a February 26, 2014 letter to the California Department Fish and Wildlife, recommended that Director Bonham deny issuance of an incidental take permit for the BDCP's Alternative 4 as a Natural Communities Conservation Plan (NCCP) stating that "The BDCP does not meet the requirements of Fish and Game Code 2820 for an NCCP and cannot legally be approved because it will contribute to the further decline of Sacramento River Winter Run and Spring Run Chinook salmon."

RCRC also notes that the ARCADIS Report expresses as a Key Concern that "The effects analysis likely overstates the benefits of tidal marsh restoration to Delta and longfin smelt."

Chapter 6. Plan Implementation

The draft BDCP implementation schedule lacks sufficient detail to determine if the schedule is realistic. Table 6-2 provides a very aggressive implementation schedule for CM 3 (24,396 acres), CM 4 (19,150 acres), CM 9 (98 acres) and CM 10 (900 acres) during the near-term. However, the discussion of activities necessary to implement the conservation and restoration measures is vague and implementation details are lacking

for planning and design of activities for each CM. It will likely take considerable time to properly plan, design, permit, and construct these various habitat types. At a minimum the draft BDCP and DEIR/EIS should include specific information on the location of identified parcels and conceptual design/planting plans for these near-term lands as well as an identified source of funding. Chapter 6 should also include a discussion of BDCP coordination with local governments on land and easement acquisition, as well as how the BDCP will be coordinated with the various Delta Counties HCPs/NCCPs.

Please also see RCRC's comments under Chapter 8.

The draft BDCP recognizes modifications to the BDCP will be needed, and it defines "minor modifications" and "formal amendments" to include all aspects of BDCP implementation. The draft BDCP states that "If any Authorized Entity disagrees with the proposed minor modification or revision for any reason, the minor modification or revision will not be incorporated into the BDCP". Formal amendments "will be subject to review and approval by the Implementation Office and the Authorized Entities."

It is an issue of concern that the draft BDCP expressly provides that the Authorized Entity Group may veto any revisions or modifications to the BDCP. It is the regulatory agencies fundamental responsibility to ensure that the BDCP (if approved) will achieve its goals during the term of the permit. Instead, the proposed BDCP modification process would constrain the ability of the fish and wildlife agencies' to respond to inadequacies in the biological objectives, conservation measures, and other adaptive management strategies. Minor modifications and formal amendments of the BDCP relating to changes to biological objectives, conservation measures, and adaptive management strategies should be subject to review and approval by the Permit Oversight Group with no veto authority given to individual Authorized Entities or the Authorized Entity Group.

The California Legislative Analyst's Office (LAO) noted in its August 2013 report entitled "Governance and Financing of the Bay Delta Conservation Plan" that the draft BDCP appears to give significant authority over certain aspects of BDCP to water supply agencies, while the authority of fish and wildlife agencies is less clear. This raised the question for the LAO as to the extent to which BDCP will balance the co-equal goals.

The veto authority provided to the Authorized Entities/Authorized Entity Group appears to violate the California Delta Reform Act which states in part that the fisheries agencies shall "ensure that applicable biological performance measures are achieved in a timely manner with respect to water system operations." (Water Code Sections 85320-85322)

The draft BDCP also makes it difficult for the state and federal agencies to terminate the incidental take permits and to rescind the BDCP if they determine that the biological objectives, conservation measures, and adaptive management changes do not achieve their primary goal. The fish and wildlife agencies are required by the draft BDCP to

follow a variety of procedures and to meet certain standards. In other words, once the incidental take permits are issued the burden of proof is placed on the fishery agencies to conduct scientific research to support changes in BDCP or suspension or revocation of its permits. An additional hurdle is the requirement that any decision to revoke one or both of the federal permits would require the written signature of the Secretary of the Interior or the Secretary of Commerce, depending on the permit in question, thus removing the revocation decision from the agencies themselves.

The draft BDCP proposes to create two types of regulatory assurances. First, it states that future biological opinions shall be consistent with the terms and conditions of the BDCP, and second it offers "no surprises" for deviations between the biological opinions and the BDCP and for future changes to the BDCP itself. The BDCP states:

> Under ESA regulations, if unforeseen circumstances arise during the life of the BDCP, USFWS and/or NMFS may not require the commitment of additional land or financial compensation, or additional restrictions on the use of land, water, or other natural resources other than those agreed to in the plan, unless the Authorized Entities consent.
>
> In the event of unforeseen circumstances, CDFW will not require additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources without the consent of the plan participants for a period of time specified in the Implementation Agreement.
>
> Furthermore, USFWS and NMFS will not require additional land, water, or other natural resources, or financial compensation or additional restrictions on the use of land, water, or other natural resources regarding the implementation of covered activities beyond the measures provided for under the BDCP, the Implementing Agreement, the incidental take permits, and the integrated BiOp.

The purpose of the assurances provided to the Authorized Entities is to exempt them from any of the costs of complying with the federal and state Endangered Species Acts except as agreed to in the BDCP. The assurances proposed are of great concern to those who are not party to the BDCP given the multitude of uncertainties as noted elsewhere. For example, if additional flows are required due to species decline the only other source of water is that of other water right holders not party to the BDCP. However, requiring these other water right holders to forgo water to benefit a species in decline would in turn violate California water law i.e. the "no injury" rule (Water Code Section 1701.2) and the water right priority system which is one of the fundamental principles of California water law. There have been a number of legal decisions upholding the water right priority system including *El Dorado Irrigation District v. State Water Resources Control Board (2006)* and *City of Barstow v. Mojave Water Agency (2000).*

The report of the independent panel of experts convened by Dr. Jeff Mount on behalf of American Rivers and The Nature Conservancy pointed out that if it was determined during the permit term it was necessary to construct additional upstream storage to protect salmon, for example, that this action would constitute an "unforeseen circumstance" because it falls outside the defined responses to climate change contained in the BDCP. As a consequence, state and federal taxpayers would have to bear all the costs of constructing and operating the new or expanded storage.

The same report also notes that if funding were not available to construct new storage capacity, and the fisheries agencies made jeopardy findings and issued new biological opinions that altered reservoir release requirements in a manner that reduced water supply or export capacity, the state and federal governments would have to compensate the Authorized Entities for the value of the lost water or the cost of replacement supplies.

The upstream of the Delta water right holders are rightly concerned that, in the absence of assurances for upstream water right holders, the state and federal agencies will look upstream for replacement water and/or funding to the detriment of upstream regional water sustainability as well as the region's economy and environment.

While it is understandable that the BDCP proponents desire the 50-year "no surprises" guarantee, the federal and state agencies must carefully consider the public policy implications of the no surprises guarantee as currently written.

RCRC supports incorporation of the recommendations of the independent panel into the BDCP as follows:

1. If the parties to the BDCP do not intend for the "no surprises" guarantee to cover new construction and project operational changes outside the plan area, then the BDCP should say so explicitly.

2. Delete the sentence which exempts the Authorized Entities from all costs associated with Section 7 consultations to project facilities and operations other than BDCP covered activities. This sentence states: "USFWS and NMFS will further ensure that the terms of any BiOp issued in connection with projects that are independent of the covered activities and associated federal actions do not create or result in any additional obligation, cost, or expense to the Authorized Entities."

The full report titled *Panel Review of the Draft Bay Delta Conservation Plan: Prepared for the Nature Conservancy and American Rivers* can be accessed at: https://watershed.ucdavis.edu/files/biblio/FINAL-BDCP-REVIEW-for-TNC-and-AR-Sept-2013.pdf.

Chapter 7. Implementation Structure

The BDCP implementation structure is complex and convoluted.

The primary authority for BDCP implementation is placed in the hands of a Program Manager with broad authority, among other things, for planning, oversight, and implementation of actions set out in the CMs. However, the Program Manager does not appear to have the full authority required to successfully implement the Implementation Office responsibilities. For example, the Implementation Office does not have contracting authority. The Implementing Agreement proposes instead that the Implementation Office (which will not be a legal entity) will administer the implementation of the BDCP under the existing authorities of the Authorized Entities.

The Program Manager is subject to oversight by the Authorized Entity Group which is composed of the Director of the Department of Water Resources (DWR), the Regional Director of the U.S. Bureau of Reclamation (Bureau), a representative of the CVP contractors, and a representative of the SWP contractors. The Authorized Entity Group's authority over the Program Manager is also broad. The BDCP states that the Program Manager "will report to the Authorized Entity Group, and act in accordance with the group's direction."

Regulatory authority is placed in the hands of a "Permit Oversight Group" which is composed of the Regional Director of the U.S. Fish and Wildlife Service (USFWS), the Regional Administrator of the National Marine Fisheries Service (NMFS), and the Director of the Department of Fish and Wildlife (DFW). The Permit Oversight Group has a significant role in implementing the conservation goals and adaptive management strategies of the BDCP.

It is an issue of concern that the Authorized Entity Group is granted a significant level of decision-making authority. For example, the Authorized Entity Group, as opposed to the Permit Oversight Group, is granted veto authority over changes to the conservation measures, biological objectives, adaptive management strategies, and amendments to the BDCP. The Permit Oversight Group, composed of the regulatory agencies, should have the authority to revise the biological objectives, conservation measures, and other adaptive management strategies as needed. Additionally, the Permit Oversight Group's role should be limited to regulatory oversight so as not to impair its independent judgment.

The veto authority proposed to be provided to the Authorized Entities/Authorized Entity Group appears to violate the California Delta Reform Act which states that the fisheries agencies shall "ensure that applicable biological performance measures are achieved in a timely manner with respect to water system operations." (California Water Code Section 85321)

As the state and federal agencies are aware, the Delta counties that will be directly impacted by BDCP implementation have advocated for a role in decision-making. Instead, the BDCP has relegated Delta county participation to membership on the Stakeholder Council whose function is limited to the exchange of information and providing recommendations to the Program Manager. Given the impact the BDCP will have on the citizens of these counties, RCRC urges the state and federal agencies to give further thought to the role of the locally elected Delta county supervisors.

Lastly, the BDCP is silent with respect to the federal and state open meeting (Brown Act) and records laws, and the applicability of these laws to the Authorized Entity Group, the Permit Oversight Group, and the Stakeholder Council. The final BDCP should clearly describe the state and federal statutes relevant to the activities of these BDCP governing/advisory bodies.

Chapter 8. Implementation Costs and Funding Sources

As noted previously, all of the conservation measures in the BDCP, with the exception of CM 1, are programmatic in nature and lack the detail and level of analysis needed to inform the public, develop realistic and reliable estimates of costs, and identify who will pay and whether adequate funding is available. It is also unclear whether the BDCP cost estimates reflect the added cost for planning and implementing adaptive management.

Funding for CMs 2 - 22 is far from assured. The BDCP would require the majority (almost 90 percent) of these costs to be borne by state and federal taxpayers. According to the ARCADIS Report, the water contractors' contribution to fish and wildlife ranges from as little as 2.7% of the cost for riparian habitat restoration (CM 7), up to 40.7 percent for CM 15 (Localized Reduction of Predatory Fishes). The ARCADIS Report also notes that the water contractors will not fund any portion of 11 of the CMs.

Questions have been raised regarding the imposition of costs of certain conservation measures, CM 4 for example, on the general public when the water contractors benefit. Currently the BDCP suggests that the water contractors' share of CM 4 is 12.6 percent of the cost as a small portion of the restoration occurring under CM 4 is now required by the USFWS Biological Opinion for the Long-Term Operational and Criteria Plan (OCAP BiOp). Not disclosed is that tidal land restoration will also help mitigate the adverse impacts of relocating the North Delta diversion facilities. RCRC strongly encourages the State and federal agencies to closely review each of the proposed CMs cost allocations to ensure that State and federal taxpayers are not burdened with costs that rightly should be the responsibility of the BDCP beneficiaries.

Doubts have been raised regarding the ability and commitment of the water contractors to fund CM 1 and the mitigation necessary to address the multiple impacts associated with construction and ongoing operation of new water facilities. The individual governing boards of the various water contractors who would benefit have reportedly

been reluctant to formally authorize a financial commitment. As a result the current "commitment" so often cited cannot be legally relied upon.

The BDCP states that state water contractors "commitment" will require the amendment of existing contracts. However, no mention is made of the renegotiating of the existing contracts that is currently underway and nearing completion. See: http://www.water.ca.gov/swpao/watercontractextension/index.cfm. Contract extension negotiations, which began in 2013, will extend SWP contracts to December 31, 2085 and make other changes relating to financing. Reportedly the water contractors were not prepared to engage in any meaningful discussions on BDCP financial obligations during the current negotiations.

The San Diego County Water Authority (SDCWA) in its May 30, 2014 BDCP comment letter, sheds some light on the perspective of the water contractors who are potential beneficiaries of the BDCP. The SDCWA is the largest customer of the largest state water contractor, the Metropolitan Water District of Southern California. The SDCWA BDCP comment letter states "Chapter 8 of the current BDCP does not provide the detailed information necessary for potential participating agencies to evaluate individual agency cost-benefit (or feasibility) of the proposed project. The Final BDCP should contain details on: how participating water contractors intend to guarantee the revenue necessary to pay for the BDCP; the provisions for "step-up" should individual water contractor's default on funding obligations; and a legal analysis of relying on property taxes as a back-up security for project debt."

Other comments by the SDCWA regarding the lack of clarity relating to the water supply implications of water contractors declining to participate in BDCP implementation, water contractors deciding to "opt out" of the BDCP, the ability of non-participants to obtain HCP coverage through the execution of side agreements, etc., demonstrate the importance of and the need to identify in the final BDCP (or final IA) those water contractors who are financially committed to the BDCP. Only then can it be established if there is sufficient funding for CM 1 and the related costs of mitigation.

Chapter 8 assumes that federal water will be moved through the new conveyance facilities, and it is clear that for CM 1 to be financially viable the Bureau must commit to utilize the new facilities. However, the Bureau is not a BDCP permittee, the Bureau is not party to the IA, and there is no Bureau-DWR agreement to wheel federal water. With no agreement in place, the State and federal permitting agencies cannot assume that the CVP contractors will participate in funding CM 1.

Chapter 8 states that "Consistent with the 'beneficiary pays' principle and in recognition of public benefits associated with environmental restoration of this important region, it is assumed that a state and federal investment will be available and necessary to implement the BDCP, as described in Section 8.3, Funding Sources." The draft BDCP does list possible funding sources, but these are very speculative in nature.

The passage of future bond measures and the willingness of the California Legislature or Congress to fund habitat and ecosystem creation and restoration are uncertain at best. For example, in California an alternative water bond to replace the existing $11.1 billion water bond on the November 2014 ballot is currently being negotiated. Governor Brown has stated that the alternative bond dollar amount must be smaller (in the range of $6 billion, $2 billion of which would be for the public benefits associated with water storage) and that the bond must be "tunnel neutral" meaning that it will not fund Delta habitat and ecosystem creation and improvements that could be associated with mitigation for the BDCP. This stance is intended to forestall active opposition to a water bond on the ballot as opposition could potentially result in failure to secure the votes required for passage. Despite this proposed strategy, opponents to the BDCP have publically stated that they would oppose any funding contained in a water bond for habitat and ecosystem creation and restoration in the Delta. As nearly all of the state funds for habitat and ecosystem creation and restoration proposed in the BDCP are to be paid by future water bonds, it is purely speculative as to when and if the habitat and ecosystem creation and restoration will occur.

The federal government, according to the ARCADIS Report, would be responsible for 48% of the program administration costs; 77% of the Monitoring, Research, Adaptive Management, and Remedial Measure costs; 37% of the Natural Community Protection and Management costs; 29% of the Natural Community Restoration costs; and 41% of the Other Stressors cost. Members of Congress have made known their concerns regarding the assumption that federal funding will be required for the BDCP. The August 30, 2013 letter to Governor Jerry Brown signed by seven California members of Congress (Doris Matsui, George Miller, Mike Thompson, Jerry McNerney, John Garamendi, Anna Eshoo, and Ami Bera) can be accessed at: http://matsui.house.gov/uploads/8.30.13%20Letter%20to%20Gov%20Brown%20on%20BDCP.pdf.

RCRC agrees with the ARCADIS Report which states "There are significant uncertainties about the availability, reliability, and sources of funding for implementation of BDCP's Conservation Measures (other than conveyance facilities)." As noted earlier, the funding for conveyance facilities (CM 1) is also an open question at this point in time in RCRC's view.

The final BDCP should explain how funding assurances required to secure HCP/NCCP permits will be achieved given the uncertain nature of future state (water bond) and federal (congressional appropriations/grants) funding. If the public funding (almost 90% of the costs for ecosystem creation and restoration and program administration) does not materialize for CMs 2-22, what is the state and federal planned response in light of the fact that the BDCP specifies that "…the Authorized Entities will not be required to provide land, water, or monetary resources beyond their commitments in this Plan in the event of a shortfall in state and federal funding."? The response to this question should

be explained in some detail in the BDCP and/or IA. Areas upstream of the Delta as well as others who are not party to the BDCP, such as RCRC member county and SWP water contractor Butte County, are concerned that the state and federal agencies will look to them for additional water, funding, etc. which is a key reason for the repeated requests for "assurances" for those areas of the State that will not benefit from the BDCP.

RCRC read with interest the statement that the Implementation Office (although not legally required to do so) will offset the loss of local property tax and assessment revenue resulting from fee title acquisition of land for the reserve system during the permit term. The source of funding for Payment-in-Lieu-of-Taxes (PILT) to the Delta counties for the conversion of agricultural land to habitat is not identified. The Delta counties, and in particular Yolo County, may well be somewhat skeptical as to whether the State of California will honor this statement of intent given the State's track record. The DFW has not made statutorily required PILT payments to 36 counties for private lands taken off the tax rolls and converted to wildlife management areas in over a decade. As of May 16, 2014, the State of California owes these 36 counties in excess of $18 million and an additional $1.5 million annually going forward. As of May 16, 2014 the State owes $1,533,148.00 in past due PILT payments to Yolo County.

The lack of firm funding commitments is clearly a serious deficiency that must be remedied as both the HCP and NCCP regulations require the BDCP to demonstrate that it has funding assurances from those expected to pay – including the state and federal governments.

RCRC believes that the BDCP must be significantly revised to address the substantive issues raised, and recirculated for public comment.

IMPLEMENTING AGREEMENT

Given the lack of detail on key points in the BDCP and DEIR/EIS, RCRC had anticipated that the IA for the BDCP would fill in the missing blanks and provide an understanding of exactly what assurances and commitments are being agreed to and how the BDCP is proposed to be implemented and funded. The draft IA is extremely disappointing in this regard.

The Implementing Agreement:

- States that "The overall goal of the BDCP is to restore and protect ecosystem health, water supply, and water quality…" (2.1.8). As has been noted elsewhere, the impact of the BDCP on salmon appears to be negative, water supply impacts on areas upstream of the Delta and in-Delta are of concern, as are the negative water quality impacts on portions of the Delta.

- States that the BDCP "Provides clear expectations and Assurances and Protections." (2.1.8) As RCRC has noted previously, there are no assurances and/or protections for areas upstream of the Delta and in-Delta.

- States that the provisions of the BDCP were developed to satisfy the requirements of the Delta Reform Act of 2009. (2.1.9) (4.2.2) Please see RCRC's previous comments as it relates to noncompliance with the Delta Reform Act.

- States that one of the purposes of the document is to "Set out the Assurances and Protections provided to the Authorized Entities." (2.2) Please see RCRC's previous comments on this specific point.

- Defines "Changed Circumstances" (3.13) and "Unforeseen Circumstances" (3.59). Please see RCRC's previous comments relating to "changed circumstances" and "unforeseen circumstances".

- Lists the findings that must be made by the USFWS and NMFS regarding the adequacy of the BDCP to meet the permitting requirements of the ESA (4.1). RCRC's comments throughout this document call into question the ability of the USFWS and NMFS to make these findings unless significant revisions to the BDCP and DEIR/EIS are made.

- Lists the findings that must be made by the DFW regarding the BDCP and the IA relating to the permitting requirements of the NCCPA (4.2). RCRC's comments elsewhere on adaptive management, CM implementation schedule, funding, etc. call into question the ability of the DFW to make these findings unless significant revisions to the BDCP and DEIR/EIS are made.

- States that the DFW has found the BDCP satisfies the requirements of the Delta Reform Act of 2009. (4.2.2) Please see RCRC's comments elsewhere that questions BDCP compliance with the Delta Reform Act.

- States that the Bureau will enter into a MOU or similar agreement that sets out the Bureau's roles and responsibilities as well as establishing processes to ensure its actions are consistent with the BDCP (5.0). RCRC believes that the MOU or similar agreement should be finalized and included as part of the BDCP (and/or the details of the Bureau's commitments included in the IA) as until such time as the agreement is finalized there is no assurance that the Bureau will commit to any action or provide any funding to support the BDCP. The MOU and/or IA should specifically discuss the implications of the fact that the Bureau cannot obtain regulatory assurances under Section 10 of the ESA.

- States that the fish and wildlife agencies have found that the BDCP meets the requirements of the ESA and NCCPA for the issuance of Take Authorizations for

the Covered Activities and Associated Federal Actions. (8.0 -8.9) Please see RCRC's previous comments relating to this specific issue.

- States that the BDCP includes a comprehensive analysis of the effects related to both the SWP and the CVP within the BDCP area. (9.4) RCRC does not believe this statement is accurate. Please see RCRC's previous comments relating to the lack of analysis of effects related to areas inside and outside of the BDCP area.

- States that the CMs are expected to be sufficient to achieve the biological goals and objectives of the BDCP during the 50-year timeframe for implementation. Also acknowledged is that a key area of scientific uncertainty concerns the volume of Delta outflow that is necessary to advance the biological goals and objectives for both delta smelt and longfin smelt. (10.2) Please see RCRC's comments elsewhere relating to the uncertainty associated with CMs 2 – 22, and the importance of utilizing updated/current modeling tools.

- States that the CMs will be implemented substantially in accordance with the Implementation Schedule and sets out a procedure for addressing failure to maintain rough proportionality. (11.0) Please see RCRC's previous comments relating to the vagueness of the Implementation Schedule.

- States that a Fish and Wildlife Agency that determines that Rough Proportionality between impacts to Covered Species and the implementation of the Conservation Measures is <u>not</u> being maintained must invoke a specific procedure (11.1.2) and may suspend but shall not revoke the permits until such time as the dispute resolution process detailed in 15.5 has been completed. Please see RCRC's previous comments on the overly optimistic expectation about the effectiveness of the CMs and the constraints being placed on the fish and wildlife agencies to respond to inadequacies.

- States that for certain Changed Circumstances responsible actions will fall outside the scope of the adaptive management program. Please see RCRC's previous comments relating to "changed circumstances" and projected population growth in the areas north of the Delta.

- States that the parties agree that the assessment of funding requirements for the BDCP, the viability of the sources identified for such funding, and the commitments made by the Parties provide an adequate basis for a finding by the State and federal Fish and Wildlife Agencies that sufficient assurances of funding have been provided pursuant to the ESA and the NCCPA. Please see RCRC's previous comments regarding the uncertainty of the identified funding sources and the lack of firm "commitments".

- States that the water contractors will provide funding equal to the costs associated with the construction, operation, and maintenance of the new conveyance infrastructure (CM 1) and for the mitigation associated with such infrastructure. States that the water contractors shall not be obligated to provide, either directly or through another agency, funding to implement any other element of the Plan. The "Note" in table 8-41 of the draft BDCP states that the "Amount Paid by Contractors" totals $903 million. (13.1.1) If one assumes that the "official" BDCP cost estimate of $24.9 billion is relatively accurate, state and federal taxpayers will be expected to pay slightly less than $24 billion of the cost of the BDCP. Given the multiple uncertainties associated with the BDCP, RCRC believes that the final price tag is very likely to become significantly more than the "official" cost estimate. Other organizations have put forward various estimated costs, the most recent of which is $67 billion per the Natural Resources Defense Council and Defenders of Wildlife in a July 29, 2014 Sacramento Bee Viewpoints article authored by Doug Obegi and Kim Delfino.

- States that the water contractors will not be required to provide land, water, or monetary resources beyond their commitments in the event of a shortfall in State or federal funding (13.2). Please see RCRC's previous comments regarding the uncertainty of State and federal funding. Also see RCRC's comments regarding area of origin concerns relating to water and funding.

- States that if unforeseen circumstances occur that adversely affect species the water contractors will not be required to provide any additional land, water, or financial compensation nor impose additional restrictions on the use of land, water, or other natural resources without their consent (14.0). Please see RCRC's previous comments relating to the concerns of areas upstream of the Delta.

- States that if the status of a species covered by the HCP unexpectedly declines because of unforeseen circumstances, the primary obligation for undertaking additional conservation measures rests with the federal government, other governmental agencies, or other nonfederal landowners who have not yet developed HCPs (federal No Surprises Rule) (14.1). The potential implications of the federal No Surprises Rule on upstream water users/ecosystems should be analyzed in the BDCP DEIR/EIS. Please also see RCRC's previous comments relating to California water law.

- States that the NCCPA provides entities receiving permits under the NCCPA assurances that if there are unforeseen circumstances, no additional financial obligations or restrictions on the use of resources will be required of the Permittees without their consent (14.2). Please see RCRC's previous comments relating to area of origin concerns.

- States that the NCCPA requires the Department of Fish and Wildlife to suspend or revoke a permit, in whole or in part, if the continued take of a Covered Species would jeopardize its continued existence (14.2). Please see RCRC's previous comments on the constraints placed on the state and federal regulatory agencies by the BDCP as it relates to permit suspension or revocation.

- States that the USFWS and NMFS agree that once the Integrated Biological Opinion has been issued: (1) to the maximum extent allowed by law, Reclamation's ongoing responsibilities for Associated Federal Actions under Section 7(a) (2) of the ESA will be fulfilled through Reclamation's participation in the BDCP; and, (2) USFWS and NMFS agree that Reclamation will not be required to provide additional commitments or measures for Associated Federal Actions beyond those in the BDCP without the attempt to resolve the issues as provided in the Implementing Agreement (14.3.2). RCRC believes that the formal agreement between the federal agencies, whether it is a MOU or takes some other form, should be included in or as an attachment to the IA.

- States that within the constraints imposed by the No Surprises Rule, the USFWS and/or NMFS may require additional measures, but only if certain conditions apply (14.3.3). These conditions include that the agencies prove that all the conditions apply including that an unforeseen circumstance exists and that the overall cost of implementing the BDCP is not increased by the modification. Please see RCRC's previous comments relating to the role of, and constraints placed upon, the regulatory agencies.

- States that the Authorized Entity Group will consist of the Director of DWR, the Regional Director for Reclamation, a representative of the SWP contractors and a representative of the CVP contractors (15.3.1). The makeup of the Authorized Entity Group appears to be an issue for some of the water contractors who are urging that the membership of the Authorized Entity Group be revised to include all BDCP permittees. Given the broad decision-making authority of the Authorized Entity Group, RCRC does not believe it wise to place the State and federal representatives in a minority membership position given that some already question the membership of the proposed SWP/CVP representatives.

- States the process to be followed for review of disputes regarding implementation matters. States that the entity with decision-making authority will make the final decision, but allows the initiation of a non-binding review process which includes a three member panel and written recommendations which the decision-making authority must consider (15.8-15.8.3). RCRC is of the opinion that this proposed process, which includes the submittal of letter briefs and documentary evidence and the potential for rebuttals and responses, is overly complex.

- States that the USFWS and NMFS, to the maximum extent possible, shall rely on and use relevant portions of the EIS and NEPA findings when conducting future environmental review of Covered Activities and Associated Federal Actions (20.1.9) States that unless otherwise required by law, the Permittees and DFW shall rely on and use relevant portions of the EIS/EIR and the California Environmental Quality Act (CEQA) findings when conducting future environmental review of Covered Activities. Please see RCRC's previous comments relating to EIRs and EISs on future individual projects.

- States the 50 year term of the permits (21.2), allows for renewal of the permits (21.3), discusses the suspension of federal permits (22.1), the reinstatement of suspended federal permits (22.2), the revocation of federal permits (22.3), the suspension or revocation of the State permit (22.4), the dispute resolution process for revocation or suspension of the federal permits or invalidation of the Incidental Take Statement related to a Jeopardy Determination (22.5), and the dispute resolution process for revocation or suspension of the State permit related to a Jeopardy Determination (22.6). Please see RCRC's previous comments on the constraints placed on USFWS and NMFS discretion regarding enforcement.

- Lays out the modification and amendments process for changes to the BDCP including administrative changes (23.1) and minor modifications or revisions (23.2); procedures for minor modifications (23.2.2) and formal amendment (23.3) and process for formal amendment (23.3.1) Please see RCRC's previous comments on the modification and amendment process.

- States as it relates to the availability of funds that all actions required of the U.S. or its agencies in implementing the IA are subject to appropriations by Congress and that nothing in the IA shall be interpreted as/or constitute a commitment or requirement for funding. States that implementation of the Implementing Agreement and the BDCP by DWR and DFW is subject to the availability of appropriated funds and that nothing in the IA will be construed to require funding from the State (24.15). Please see RCRCs previous comments relating to the uncertainty of state and federal funding and the inability of the state and federal fisheries agencies to approve the BDCP as currently written.

RCRC believes that the IA must be revised to address the issues raised, and recirculated for public comment.

Conclusion

RCRC appreciates the opportunity to provide comments on the draft BDCP, DEIR/EIS, and IA. RCRC recognizes the difficulty of preparing a legally adequate BDCP and EIR/EIS for a complex program like the BDCP. RCRC has endeavored to evaluate the draft BDCP and DEIR/EIS in a constructive manner, but as noted throughout our

comments significant deficiencies have been identified by the scientific community and others.

The BDCP and DEIR/EIS is voluminous, and often difficult to understand. In addition, as noted previously in our comments, both documents are incomplete. As a result, decision-makers and the public are not properly informed about the potentially significant effects of the BDCP, thus the BDCP is in violation of CEQA and NEPA requirements.

A number of flaws in the BDCP and DEIR/EIS are the result of the use of an outdated existing conditions baseline tied to the 2009 date of publication of the NOP. The baseline must be updated to include current available data as work to revise the DEIR/EIS proceeds. Please see RCRC's previous comments, for example, on the Yolo Bypass and the CVFPP.

Equally as important, the updated hydrologic model must be utilized as the issues surrounding Delta flows and exports, among other things, is key to analyzing the BDCP. The best available and the most accurate tools must be used to evaluate the BDCP's impacts.

As currently written, the draft BDCP and the DEIR/EIS are also not in compliance with the Natural Community Conservation Planning Act (NCCPA), and the U.S. Endangered Species Act (ESA). RCRC has provided several specific examples of this noncompliance.

RCRC understands that years of effort and millions of dollars have been spent on development of the BDCP, DEIR/EIS, and IA. However, the years and dollars spent to date cannot be used to justify the federal and state regulatory agencies ignoring the identified deficiencies. A detailed financing agreement with firm legal commitments, and missing BDCP related documents such as the DWR/Bureau MOU, should be included as part of the package so that the public may provide informed commentary and the decision-makers can make well-informed decisions.

Given the significant nature of the deficiencies noted, among others not addressed, RCRC believes that the federal and state agencies must significantly revise and recirculate for public review and comment the draft BDCP, DEIR/EIS (CEQA Guidelines, Section 15088.5 (a)), and IA.

Please feel free to contact me if you have any questions at (916) 447-4806 or kmannion@rcrcnet.org.

Sincerely,

KATHY MANNION
Legislative Advocate

cc: Governor Jerry Brown, State of California
Members, California Congressional Delegation
Secretary Matt Rodriquez, California Environmental Protection Agency
Director Mark Cowin, California Department of Water Resources
Director Charlton Bonham, California Department of Fish and Wildlife
Members, Delta Stewardship Council