



July 28, 2014

BDCP Comments
Ryan Wulff, NMFS
650 Capitol Mall, Suite 5-100
Sacramento, CA 95814

Delivered via email to: BDCP.Comments@noaa.gov

Dear Mr. Wulff:

On behalf of my constituents of the 7th Assembly District, as well as the nearly two million people who make the Delta their homes, their places of work, and where they recreate, I appreciate the opportunity to provide these comments on the “Bay Delta Conservation Plan, Public Draft, November 2013” (hereafter “BDCP”). While there are many issues and concerns regarding the BDCP Environmental Impact Report/Environmental Impact Statement (hereafter, “EIR/EIS”), these comments are focused on: (1) the quality of “science” underpinning the conclusions of the EIR/EIS and thus the related Conservation Measures, as highlighted by the Delta Independent Science Board; (2) Chapters 6 and 7 of the BDCP, related to “Plan Implementation” and “Implementation Structure”; and (3) the lack of adequate financial assurances provided for long-term BDCP implementation as required under *both* the Federal Endangered Species Act *and* the Delta Reform Act of 2009.

Quality of the Science Underpinning the BDCP

The long-term health of the Delta is absolutely critical to the environment and economy of the Delta region as well as to San Francisco Bay, and it remains the primary focus of my (and my constituents) interest in the BDCP. It was also very clearly important to the Legislature in 2009 when it adopted the Delta Reform Act as a means of establishing and maintaining the “co-equal goals” of protecting, restoring, and enhancing the Delta ecosystem and providing a more reliable water supply for California. (Water Code §§85000, *et seq.*)

In creating the Delta Stewardship Council as part of the 2009 Delta Reform Act, the Legislature also called for the creation of a “Delta Independent Science Board (ISB)” who are, by law, required to be “nationally or internationally prominent scientists with appropriate expertise to evaluate the broad range of scientific programs that support adaptive management of the Delta.” (Water Code §85280(a)(2).) And one of the key, statutory responsibilities of the Delta ISB as it relates to the BDCP is to review the draft EIR/EIS and submit its findings to the Delta Stewardship Council and the Department of Fish & Wildlife.

Recently, the Delta ISB issued its report following its analysis of the BDCP and the EIR/EIS. (“*Review of the Draft EIR/EIS and Draft BDCP*,” Delta Independent Science Board, May 15, 2014;

hereafter, “Delta ISB Report”). By its own acknowledgement, the Delta ISB focused its review “on the adequacy of the science and the validity of the conclusions drawn from that science.” (Delta ISB Report, Transmittal Memorandum to Randy Fiorini and Charlton Bonham.) What the Delta ISB found after conducting many interviews, participating in various briefings, and devoting hundreds of hours to reviewing the chapters and appendices of the BDCP and the EIR/EIS is *very* disconcerting to me, and should give pause to anyone concerned about the long-term health and viability of the Delta. Said the Delta ISB: “*We find... that the science in this BDCP effort falls short of what the project requires.*” (Delta ISB Report, Transmittal Memorandum to Randy Fiorini and Charlton Bonham; emphasis added.)

The Delta ISB summarizes some of its major concerns about the BDCP’s EIR/EIS as follows:

“1. Many of the impact assessments hinge on overly optimistic expectations about the feasibility, effectiveness, or timing of the proposed conservation actions, especially habitat restoration.

2. 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.

3. The potential effects of climate change and sea-level rise on the implementation and outcomes of BDCP actions are not adequately evaluated.

4. Insufficient attention is given to linkages and interactions among species, landscapes, and the proposed actions themselves.

5. 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.

6. 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 action.

7. Available tools of risk assessment and decision support have not been used to assess the individual and combined risks associated with BDCP actions.

8. The presentation, despite clear writing and an abundance of information and analyses, makes it difficult to compare alternatives and evaluate the critical underlying assumptions.” (Delta ISB Report, p. 3)

Two very important conclusions from the Delta ISB Report that are critical of the BDCP and the EIR/EIS must not be lost on the BDCP proponents, just as they *will not be ignored* by the millions of people who live and work in the Delta region: (1) expectations in the BDCP of the effectiveness of conservation measures to achieve various Delta ecosystem restoration are overly optimistic (Delta ISB Report, p. 5) ; and (2) the long-term, “adaptive management” process on which so much of the BDCP is reliant has not been fully or thoughtfully developed (Delta ISB Report, p. 9).

These two topics are key to understanding Delta stakeholders’ apprehension and concern about the BDCP itself, for several reasons. First, the BDCP identifies a series of “Conservation

Measures” which are to be taken by the project proponents, all with a view toward achieving Delta ecosystem restoration and enhancement. Yet if those Conservation Measures fail (and the Delta ISB determined many of them to be “overly optimistic”), then the only backstop to protect the Delta against catastrophic failure is the “adaptive management” process outlined in the BDCP. The Delta ISB identified serious shortcomings of the proposed adaptive management process, including: relegation of how the process will be designed and implemented to a future “Adaptive Management Team”, adequacy of scientific expertise to perform monitoring and analysis, ability of those with responsibility to timely develop and implement necessary adaptive management measures in the future, and failure to develop – let alone identify – contingency plans to address Conservation Measure failures. (See, Delta ISB Report, p. 8)

The second reason why Delta stakeholders share the concerns identified by the Delta ISB is tied to the very nature of the 50-year “no surprises” permit term under which the BDCP water conveyance facilities would be allowed to operate. In essence, the final BDCP must serve as a “blueprint” for helping manage the Delta for the next 50 years. If the scientific experts don’t have confidence that the currently identified Conservation Measures will work, and also have little confidence that the “adaptive management” process can succeed, then what assurances do Delta stakeholders have that restoring and enhancing the Delta will be achieved?

Yet a third reason why Delta stakeholders are concerned about the ability of the BDCP to uphold its obligations to protect, restore and enhance the Delta is rooted in the underlying governance and implementation structure of the proposed BDCP. The Delta ISB touches on some of the deficiencies of the proposed BDCP governance and implementation structure, noting that, by creating an operational structure “almost entirely within the BDCP governance organization...contrasts with a growing recognition of the need to engage a wide array of people and entities in a truly ‘collaborative adaptive management’” approach. (Delta ISB Report, pp. A-20-A-21.)

BDCP Implementation & Structure

Chapters 6 and 7 of the BDCP describe the anticipated plan for implementing the BDCP throughout the 50-year “no surprises” term of the permit to operate the new water conveyance facilities. The BDCP’s current implementation scheme is complicated, but in the end, fundamental authority for implementing the conservation measures intended to restore the Delta is left in the hands of the Federal and State Water Contractors. In essence, the plan would provide nearly free-reign to Water Contractors to both operate the new water export system and decide whether that system is actually working to restore the Delta. The current BDCP proposal provides limited oversight to federal and state agencies responsible for natural resources protection – and virtually no input from those of us who depend on the Delta for our livelihood. If BDCP proponents expect those of us who live and work in the Delta to “trust” the BDCP will restore and enhance the Delta ecosystem, then they should include Delta stakeholder interests within the management and implementation authorities during the 50-year life of the BDCP permit.

The BDCP governance and implementation structure could be significantly enhanced by providing substantive oversight and management roles to the State Water Resources Control Board (SWRCB) and the Delta Watermaster - each of whom have important statutory authorities over actions taken within or impacting the Delta. Because the SWRCB retains independent statutory authority to establish both standards as well as permit terms that will govern future exports of water via the BDCP-enabled tunnel system, it should be included among the Adaptive Management

Team. Similarly, because the Delta Watermaster is charged under the 2009 Delta Reform Act with enforcing permit terms adopted by the SWRCB, it is also appropriate to include the Delta Watermaster on the Adaptive Management Team.

Financial Assurances Under the BDCP

A review of the BDCP chapter that addresses project costs and funding sources reveals a distressing lack of transparency, and likely does not meet the minimum requirements of federal and state law. Moreover, the failure of the BDCP to identify adequate funding sources necessary to implement the HCP/NCCP seriously undermines the credibility of the entire Project.

Under the federal and state Endangered Species Acts, a habitat conservation plan must contain specific information that reasonably ensures the availability of adequate funding to carry out all aspects of the HCP. (See, 16 U.S.C. §§1539(a)(2)(A)(ii) and 1539(a)(2)(B)(iii); California Fish & Game Code §2820(a)(10). See also, *Nat'l Wildlife Federation v. Babbitt*, 128 F.Supp.2d 1274 (E.D. Cal., 2000); *Southwest Center for Biological Diversity v. Bartel*, 470 F.Supp.2d 1118 (S.D. Cal., 2006).) Case law interpreting the Federal Endangered Species Act on the need for ensuring adequate HCP funding has further held that the permit “applicant cannot rely on speculative future actions of others.” (*Southwest Center for Biological Diversity v. Bartel*, supra, 470 F.Supp.2d 1118, 1155, citing, *Nat'l Wildlife Federation v. Babbitt*, supra, 128 F.Supp. 2d 1274, 1294-95.)

Turning to the BDCP, Chapter 8 refers to and relies on purely speculative funding that is to come from a Water Bond that has not even been placed before the voters of this State, let alone passed. It is well-known that the current Water Bond scheduled to be placed before the voters in November, 2014 is likely to be withdrawn, and replaced by a bond that is significantly *smaller*. It is at least fair to suggest that whatever Water Bond proceeds will be available for BDCP-related ecosystem restoration will also be significantly smaller. In such an instance, what, if any, are the contingency plans to ensure that the beneficiaries of the BDCP will provide additional funding to make up for this short-fall?

According to Section 8.3, funding to ensure the BDCP will be carried out is to come from three primary sources: (1) federal government funding; (2) state government funding (including purely speculative funding provided by future water bonds to be placed before the California voters); and (3) the State and Federal Water Contractors (including, for purposes of municipal water supply districts, individual ratepayers). However, the BDCP contains no financing plan and no legal assurances that any of the funds “expected” will actually materialize.

According to Table 8-37, the BDCP expects to receive \$3.5 billion from the federal government, derived from various appropriations. However, the BDCP acknowledges that “additional federal legislation will be required to authorize the continued use of certain federal funds and to extend or broaden fund availability.” (BDCP, Sec. 8.3.1, page 8-64, lines 16-18.) Relying on future acts of Congress to make-up what is expected to be approximately 14% of the entire BDCP budget is not only precarious; it fails to satisfy the “speculative future actions” test of ensuring HCP funding.

Turning to the expected sources of state government funds for BDCP implementation, Table 8-37 indicates that Plan proponents expect approximately \$4.1 billion to come from the State of California, which accounts for approximately 17% of the entire BDCP budget. Section 8.3.5 of the BDCP provides, “Funds derived from the issuance of [the 2009 Water Bond] would be used, in part,

to satisfy the State's financial commitments to the BDCP." (BDCP, Sec. 8.3.5.1, page 8-84, lines 9-11.) According to the capital cost estimates for the entire BDCP project, the Authorized Entities are relying on the not-yet passed Water Bond for approximately 10% of the entire BDCP budget. (See, Table 8-35 (Ch. 8, page 8-63) and Table 8-46 (Ch. 8, page 8-85).) According to Table 8-37, BDCP proponents assume the passage of a "Second Water Bond" sometime in the future that will provide an **additional** \$2.2 billion dollars to fund BDCP actions.

All totaled, the BDCP proponents expect the voters of California to pass future water bonds in the amount of \$3.75 billion to fund BDCP actions – an amount approximately equal to 25% of the entire BDCP budget. This is a staggering assumption given the highly controversial nature of the BDCP project, and the current temperature of California voters who are very wary about approving **any** bonds that provide state money to support this project.

According to Table 8-37 in Chapter 8, the remaining BDCP budget (\$17 billion) is expected to be funded by the State and Federal Water Contractors. However, Section 8.3.4.4 fails to demonstrate that these funding sources are anything **but** speculative. According to that section, "[t]he most credible assurances of funding from the participating state and federal water contractors result from an economic benefits analysis..." and two primary conclusions derived from the economic analysis that: (1) the costs are affordable by the ratepayers, and (2) the benefits to be gained from the BDCP exceed the total cost. (BDCP, Sec. 8.3.4.4, page 8-81, lines 5-22.)

There is no discussion in the BDCP of whether the State and Federal Water Contractors and their ratepayers would be willing to pay additional billions of dollars in the event that state water bond funding and/or federal appropriations do not materialize. Additionally, the BDCP analysis fails to assess the potential impacts of one (or more) State or Federal Water Contractors, or their member agencies, withdrawing or refusing to continue to participate in the Plan.

Lastly, the BDCP analysis mistakenly assumes that State and Federal Water Contractors (and their ratepayers) will be willing to pay the high, long-term costs of the BDCP because of the commensurate benefits to be gained by securing water deliveries from the Delta through the newly-constructed conveyance facilities. These assumptions fail to consider – or even acknowledge – the very real possibility of reduced Delta water exports as a result of the State Water Resources Control Board's future Delta flow standards. This long-anticipated, major regulatory action of the State Water Board will likely not be taken until after the BDCP is approved under the currently-understood time schedule, yet will have a very significant impact on the economic viability of pursuing the BDCP project.

Thank you for considering these comments, and I look forward to receiving responses to the issues noted above.

Sincerely,

A handwritten signature in black ink, appearing to read "Roger Dickinson". The signature is fluid and cursive, with the first name "Roger" and last name "Dickinson" clearly distinguishable.

Roger Dickinson
Assemblymember, 7th District