

July 29, 2014

To: Bay Delta Conservation Plan
responsible state and federal resource agencies

From: Save the California Delta Alliance

Comments on the Draft Bay Delta Conservation Plan
Comments on the Draft Environmental Impact Statement / Environmental Impact Report
Comments on the Draft Implementation Agreement

These comments are submitted on behalf of the Save the California Delta Alliance (“STCDA”). STCDA is headquartered in Discovery Bay, California. STCDA represents the interests of individuals who live and work in the Delta, including those with waterfront homes located in Discovery Bay, Delta related businesses, and many who engage in all kinds of water-related recreation in the Delta. STCDA regularly turns out several hundred enthusiastic members at its town hall style meetings held in Discovery Bay.

These comments address the Draft Bay Delta Conservation Plan, the Draft Environmental Impact Statement / Environmental Impact Report, and the Draft Implementation Agreement.

References cited herein and attached hereto (and hereby made a part of the administrative record for the BDCP and EIR/EIS) are listed in Appendix 1 hereto.

Thank you for the opportunity to submit these comments and for considering our views.

I. The Project Area In The BDCP and The Project Objectives / Purpose In The EIR/EIS Are Defined In Unreasonably Narrow Terms Frustrating Consideration Of A Reasonable Range Of Alternatives.

The EIR/EIS (“EIR”) does not consider broad alternatives or compliments to the twin tunnels. For example, although virtually all sides in the California water debate agree that some form of additional storage is a necessary component of any long-term solution, the EIR does not consider any alternatives that include storage options. Likewise, the Public Draft Bay Delta Conservation Plan (“BDCP”) does not include any storage components. Nor does the BDCP include actions outside the narrow geographic scope defined in the Plan Area, which is the statutory Delta and several immediately adjacent areas. *See* BDCP § 1.4.1.

A significant justification for the twin tunnels has been the “little sip, big gulp” rationale. Although this seems to have fallen by the wayside in BDCP promotional efforts

of late, it still accurately describes the best policy rationale for the tunnels. By relocating the point of diversion and providing large capacity conveyance it would be possible to draw larger quantities of water at times of abundance (big gulp) thereby allowing diversions to be minimized at times of low flow and critical environmental need (little sip). Sounds good. But it doesn't work without storage. Although the tunnels would provide the ability to divert large quantities of water during peak winter flows, there is currently nowhere to store such diversions. The legislature has ordained that it is state policy to "[i]mprove the water conveyance system and expand statewide water storage." Cal. Water Code § 85020(f). It is no accident that storage and conveyance are tightly yoked in legislative policy. Only with the provision of additional storage capacity can the tunnels actually function as a big gulp little sip device. Yet the BDCP does not contain any storage, and the EIR does not analyze a "tunnels plus storage" alternative.

The feasibility and benefits of expanding storage through increased groundwater recharge is beyond dispute. The necessity to provide additional storage and feasibility of doing so is discussed in more detail in section II below.

The project proponents have attempted to insulate the failure to consider storage and other defects in the BDCP and EIR from challenge by narrowly defining the Project Objectives/Purpose in the EIR and geographic scope in the BDCP. *See* EIR ES.2; BDCP § 1.4.1. However, "a lead agency may not give a project's purpose an artificially narrow definition" in order to arrive at its own foreordained result. *In Re Bay-Delta Programmatic Env'tl. Impact Report Coordinated Proceedings*, 43 Cal. 4th 1143, 1166 (2008). An "agency cannot define its objectives in unreasonably narrow terms." *City of Carmel-By-The-Sea v. U.S. Dept. of Transp.*, 123 F.3d 1142, 1155 (9th Cir.1997). "Instead, agencies must look hard at the factors relevant to the definition of purpose Once an agency has considered the relevant factors, it must define goals for its action that fall somewhere within the range of reasonable choices." *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (9th Cir. 1991).

The Project Objectives provide that a project objective is the "construction and operation of facilities ... for the movement of water entering the Delta from the Sacramento Valley watershed to the existing SWP and CVP pumping plants located in the southern Delta." EIR ES-9. This, however, is simply a definition of the twin tunnels. That is an *end result* of the decisional process, not a valid project objective. The project proponents have simply crafted a definition of Project Objectives so narrow that the only result can be to fulfill their own twin tunnel prophecy. However:

We realize, as we stated before, that the word "reasonable" is not self-defining. Deference, however, does not mean dormancy, and the rule of reason does not give agencies license to fulfill their own prophecies, whatever the parochial impulses that drive them. Environmental impact statements take time and cost money. Yet an agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action, and the EIS would become a foreordained formality.

Citizens Against Burlington, Inc. v. Busey, 938 F.2d at 196.

The actual purpose of the project is to provide regulatory stability to the operation of the entirety of the state and federal water projects while at the same time lessening and/or mitigating the impact of the operation of the water projects on Delta ecology, and increasing water deliveries with the goal of attaining full contract amounts. These are extraordinarily broad-based policy goals. However, the “Project Objectives” and “Project Purpose” sections in the EIR have been drafted with exceeding precision and care, likely involving many attorney hours in the crafting of these few paragraphs, to limit the range of actions that would fulfill the Project Purpose and Objectives to improving conveyance from the north Delta to the existing export pumps, and providing habitat within the statutory Delta and adjacent areas. *See* EIR ES.2.

The Project Purpose and Project Objectives sections, however, are radically under-inclusive of the actual purposes, as betrayed repeatedly throughout the text of the BDCP: “The overarching goals of the BDCP are to advance the restoration of the ecological functions and productivity in the Delta and restore and protect water supplies provided by the SWP and CVP” BDCP 1-5. Successful completion of the BDCP is intended to “afford regulatory stability with respect to the operation of the primary water delivery systems for the State of California.” BDCP 1-26. The BDCP “is intended to result in long-term regulatory stability for the state and federal water projects, while furthering the goals of the BDCP to restore and protect ecosystem health, water supply, and water quality.” BDCP 1-6. *See also* Draft Implementing Agreement for the Bay Delta Conservation Plan § 2.1.8 (“The overall goal of the BDCP is to restore and protect ecosystem health, water supply, and water quality within a stable regulatory framework.”) (“IA”).

Surely if the actual goals are to provide regulatory stability for the entire state and federal water projects, protect the drinking water supply and quality for 19,000,000 Californians and millions of acres of irrigated agriculture, and restore the ecosystem health of the largest estuary on the west coast of north America then it is irrational to provide a legal description of those goals in terms so narrow that possible alternatives are limited to exclude almost all components of the state and federal water projects, exclude storage, exclude conservation, and exclude solutions that actually address the problem.

The artificial and impermissible segmenting of Biological Opinions is another attempt to insulate broad effects of the project from challenge by narrowing its legal scope in a way that is inconsistent with its actual scope. BDCP section 1.3.2.2 provides:

With respect to Reclamation’s operation of the CVP, the joint BiOp for the BDCP will cover only those operations that occur after the new water conveyance facilities are operational which is expected to be in 2026. At that time, the joint BDCP BiOp is expected to supersede the existing BiOps (as revised) for the coordinated long-term operation of the SWP and CVP, but only for those operations that occur within the Plan Area. The BiOps on the coordinated long-term operation of the SWP and CVP are expected to continue to provide Section 7 Authorization for operations of the SWP and CVP that occur outside of the BDCP Plan Area.

BDCP 1-9. This segmenting is inconsistent with the fact that “[t]he infrastructure of the state and federal water projects form an integrated system that extends beyond the boundaries of the Delta [and BDCP project area]; as such, the BDCP will affect water operations, species, and habitat both inside and outside the Delta.” BDCP 1-3.

For all its discussion of the importance of scale within the fledgling science of restoration ecology, the BDCP does not blush at turning a blind eye to scale when embracing the true dimensions of an issue becomes an impediment to breaking ground on tunnel construction.

II. The BDCP Should Be Revised To Include Storage Through Groundwater Recharge And The EIR Should Analyze A Reasonable Range Of Alternatives That Include Storage Through Groundwater Recharge.

The recently completed Delta Plan, promulgated after years of study and at the charge of the Legislature to set state policy for the Delta, concluded that the key to restoring the health of the Delta and providing a reliable water supply for the state is “Storing Floods to Ride Out Droughts (and Give the Delta a Break).” Delta Plan ES-6. As the Delta Plan is critical to informed decision making for the BDCP and for consideration of a reasonable range of alternatives for the EIR, it is attached in its entirety and made a part of these comments and the administrative record. The Delta Plan further found that groundwater recharge is the best way to achieve additional storage capacity: “using aquifers like bank accounts: to be filled up in wet times, in order that they may be drawn from in dry.” Delta Plan ES-7.

A critique of the BDCP by an eminent panel of scientists, commissioned by American Rivers and the Nature Conservancy, Saracino & Mount, LLC, Panel Review of the Draft Bay Delta Plan Prepared for the Nature Conservancy and American Rivers (“Mount Report”) also concluded that although one of the objectives of the BDCP is “to increase exports during wet periods and decrease them during dry periods ... it does not significantly reduce pressure on the Delta during drier periods.” Mount Report 30. The Mount Report suggested that “Expanding potential storage, particularly groundwater storage, would have created considerably more flexibility in exports” allowing more water to be harvested in wet years (big gulp) and conserving environmental flows during periods of scarcity (little sip). Mount Report 22. The Mount Report is attached in its entirety and made a part of these comments and the administrative record.

In Research Brief Issue #102, *Does California Have the Water to Support Population Growth ?* The Public Policy Institute of California Concluded that groundwater storage can provide an additional two million acre feet of “new” water per year. (Attachment ____). Moreover, increasing groundwater storage is the official policy of the state of California. The California Water Plan Update 2005 estimated that through groundwater banking there is “the potential to increase average annual water deliveries by 2 million acre-feet” in conjunction with reoperation of existing surface water reservoirs. California Water Plan Update Chapter 4, page 4-2.

In the report, Groundwater Availability of the Central Valley Aquifer, published by the USGS (“Groundwater Availability”), the authors discuss water banking through groundwater recharge generally and the new groundwater recharge water bank, the Madera Ranch Project, that “would divert floodwaters from the Delta” for storage and

future use. Groundwater Availability 108. The Madera Ranch Project involves the banking of CVP water in collaboration between the Madera Irrigation District, A CVP water contractor, and the USBR, a close collaborator on the BDCP. The parties to the BDCP have it well within their means to use additional groundwater banking as a component of the BDCP and it is proven feasible to bank CVP water in groundwater recharge throughout the state.

Groundwater Availability is designed to “be used to identify favorable locations [for groundwater recharge] on a regional scale” and should be of use to BDCP planners in evaluating alternatives that build on the Madera Ranch model. *Id.* Attached are the Madera Ranch federal Record of Decision and Environmental Impact Statement for use in considering additional groundwater banking as an integral component of the BDCP and as part of a reasonable range of alternatives. Also attached are the following scientific reports on groundwater recharge for use in developing alternatives, as listed in Appendix 1.

There is scientific consensus that additional storage through groundwater banking is an essential and feasible element in addressing California’s water supply issues and in restoring the health of the Delta. Since these are the two actual goals of the BDCP, there is no reason why groundwater banking should not be a part of the BDCP and failure to consider an alternative that includes groundwater storage is failure to consider a reasonable range of alternatives.

The artificial narrowing of possibilities for infrastructure to exclude groundwater recharge by limiting conveyance to the tunnels and the project area to the Delta by way of an inapt Project Objectives section is no bar to real solutions. Instead, the BDCP proponents “must look hard at the factors relevant to the definition of purpose Once an agency has considered the relevant factors, it must define goals for its action that fall somewhere within the range of reasonable choices.” *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (9th Cir. 1991). Here, the range of reasonable choices must include storage, and any reasonable consideration of storage must include groundwater banking.

Investment in infrastructure throughout California to accomplish groundwater recharge is well within the range of reasonable choices available to the BDCP. The water contractor proponents of the BDCP have much of the state’s groundwater resources under their collective purview. The water contractors have participated successfully in construction of regional groundwater banking facilities and with USBR in groundwater banking CVP water. As noted in the Delta Plan:

Statewide water storage capacity, both above and below ground, is currently inadequate, especially south of the Delta, to facilitate export of water at times of surplus when the impacts on the Delta’s ecosystem are reduced and the only impediment is lack of available storage capacity (DWR 2009). For example, in 2010, the SWP and CVP pump operations were slowed even though water was available to be pumped at a time when it would not have conflicted with endangered species or other water quality requirements. The SWP and CVP could not convey the surplus water through the Delta at that time because storage capacity south of the Delta was full.

Delta Plan 86.

How much “new” water could be harvested from the existing pumps if lack of storage was addressed through provision of groundwater banking facilities? Construction of the tunnels will cause massive disruption of life in the Delta. The stretch of the Sacramento River and adjacent farmland between Clarksburg and Walnut Grove will be transformed from a peaceful boating and farming landscape into a vast industrial complex supporting tunnel infrastructure. The tens of billions of dollars involved in tunnel construction might be better spent on a series of smaller groundwater recharge projects that would be much less locally disruptive, spare Delta communities from annihilation, and would actually achieve the goals of providing a more reliable water supply to the state, restoring the Bay-Delta ecosystem, and expanding statewide storage capacity as mandated by the legislature.

Or, perhaps, a smaller tunnel project in conjunction with additional storage would be the optimal solution. We will not know until the proponents of the BDCP roll up their sleeves and analyze a reasonable range of storage alternatives—not limited by an artificially narrow project description.

III. The BDCP Should Be Revised To Include Storage / Management With The Sites Reservoir As An Integral Component And The EIR Should Analyze Alternatives Including Sites Reservoir As An Integral Component Of The BDCP.

The proposed Sites Reservoir project, also known as North of Delta Offstream Storage (“NODOS”) is well along in planning and analysis. A preliminary draft environmental impact report and preliminary engineering design were completed in May 2014. Technical difficulties prevented download and inclusion of these documents herewith. They are incorporated by reference and will be provided under separate cover. They are available at <http://www.water.ca.gov/storage/northdelta/index.cfm>. A technical Memorandum, Sensitivity Analysis of Operation with the BDCP, has not yet been released to the public. The technical memorandum, however, should be currently available to the resource agencies and it is incorporated into the administrative record by reference now even though it is not available to be attached hereto.

NODOS would operate by diverting flows from the Sacramento River at times of high flow through a series of existing irrigation canals to a new surface storage facility. The stored water would then be released back to the river during periods of scarcity. NODOS is well upstream of the Delta, and water released from NODOS could be allocated between in-stream environmental needs and export needs. NODOS could operate in conjunction with any new or existing point of diversion in the Delta, including the tunnels.

NODOS is projected to store up to 1.4 million acre feet. This would add considerable flexibility (which the Mount Report found lacking) to the BDCP for both water supply and environmental needs. The logic of incorporating Sites into the BDCP is obvious. Its technical development has been coterminous with the BDCP. Its function, is to bring to fruition the little sip big gulp approach sorely lacking in the BDCP.

Failure to analyze an alternative that includes Sites makes the range of alternatives analyzed by the BDCP unreasonable. Incorporating Sites would allow the BDCP to become what it must be in order to be successful, a system that can “Store[] Floods to Ride Out Droughts.” Delta Plan ES-6.

IV. The BDCP Should Store Floods To Ride Out Droughts.

As currently formulated, the BDCP fails the basic test for providing water supply and environmental solutions because it is a run-of-the-river project. It fails to comply with the coequal goals of the Delta Reform Act, “providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem.” Cal. Water Code § 85054. Instead, it must continue to rob environmental needs of water at times of scarcity in order to provide water supply. As such, it simply continues the basic problem rather than offering any solution. The problem, in a nutshell, is that there is an overabundance of water that comes all at once, at the wrong time, in the wrong place, and erratically.

Winter storms drop tremendous amounts of water in very short periods and there is currently no way to harvest or store this water. Instead, it is diverted through flood control structures around the Delta and out to sea.

Attached is a DWR fact sheet entitled Sacramento River Flood Control Project Weirs and Flood Relief Structures. It shows historical diversions at the Moulton, Colusa, Tisdale, Fremont, and Sacramento Weirs. These weirs have combined capacity to divert 588,000 cfs. The Sacramento Weir alone, operating at a river stage of 31 feet, diverts over 31,000 cfs. To put this into perspective, that would be 1 MAF approximately every 16 hours, or the equivalent of the high end of total SWP and CVP yearly diversions (6 MAF) in a period of 4 days. From just one of the five weirs.

The BDCP proposes to spend tens of billions of dollars on new water supply infrastructure. Yet no alternative that would harvest and store even a fraction of this abundance is considered.

V. Issuance Of ESA Permits Is Not A Valid Project Objective And Mis-describes The Project.

The stated objective of “[r]espond[ing] to the application for ITPs for the covered species that authorize take,” EIR, ES-8, is not a lawfully permissible project objective or purpose. STCDA first pointed out the confusion around what the project actually is in its comments dated November 16, 2011. Our November 16, 2011, comments are attached and incorporated in full here as to project objectives and purpose and all the other issues raised therein. As we pointed out in those comments, the February 13, 2009, Notice of Intent to prepare an Environmental Impact Statement, 74 Fed. Reg. 7257 (“NOI”) states that the proposed federal actions are issuance of ESA permits and implementation of one or more components of the BDCP. However that is not correct. The major federal action is the continued operation of the CVP at increased rates of export through implementation of conveyance improvements/alterations.

See Delta Smelt Consol. Cases, 686 F. Supp. 2d 1026, 1042 (E.D. Cal. 2009) (major federal action was not the issuance of biological opinions but rather “planned coordinated operation of the Projects [CVP] that creates the jeopardy found by the BiOp.”). *See also* U.S. Fish & Wildlife Service, *Habitat Conservation Plans*, available at http://library.fws.gov/Pubs9/hcp_section10.pdf (last visited Nov. 14, 2011) (noting that “[t]he purpose of the incidental take permit is to authorize the incidental take of a listed species, not to authorize the activities that result in the take”).

The mis-description of the project in the NOI and Project Objectives section of the EIR are part and parcel of the attempt to portray the tunnels as a “conservation measure” and/or integral part of a habitat conservation plan. The tunnels are a piece of water supply infrastructure. They are an operationally indivisible part of the system that *causes* the take. The vast habitat restoration projects are *mitigation* for operation of the tunnels/CVP/SWP.

The BDCP’s pervasive attempts to disguise as a habitat conservation plan a project aimed at increasing water exports through construction of large capacity conveyance facilities violates the Endangered Species Act and numerous other state and federal laws, including the federal Information Quality Act. The attempt to disguise and dissemble also means that the BDCP EIR/EIS fails to provide a stable and accurate project description, in violation of CEQA and NEPA. Rather than foster informed public participation, which is at the heart of CEQA and NEPA, the overly-clever scheme to disseminate misinformation about the true nature of the project is a wanton and willful violation of CEQA and NEPA.

A major Project Objective is to “[r]estore and protect the ability of the SWP and CVP to deliver up to full contract amounts” of water as stated in water delivery contracts. EIR ES-8. The SWP and CVP have never been capable of delivering full contract amounts. Environmental consequences of such delivery and the fact that Delta water is vastly oversubscribed have made such exports impossible. Yet, the tunnels, which would make such vastly increased exports possible, are described as a conservation measure. And the project, including the objective of doubling or tripling water exports, is denominated as a habitat conservation plan. Vastly increasing water exports has nothing to do with conserving habitat or arresting the decline of species.

The two key quantitative guardians of maintaining in-stream flow necessary for environmental protection, X-2 and spring outflow, are made subject to manipulation in order to “minimize water supply effects.” BDCP 3.4-11. In other words, the BDCP is a plan to shift water from environmental application to export.

To meet the requirements of state and federal law, the project must be accurately portrayed as a water supply project with attendant habitat restoration as mitigation. As currently formulated, the BDCP is not a Habitat Conservation Plan, within the meaning of the federal Endangered Species Act.

VI. The BDCP Fails To Comply With Water Code Section 85321

California Water Code section 85321 provides that:

The BDCP shall include a transparent, real-time operational decision-making process in which fishery agencies ensure that applicable biological performance measures are achieved in a timely manner with respect to water system operations.

The intent of the legislature was that real-time decision-making would “ensure that applicable biological performance measures are achieved in a timely manner.” However, BDCP section 3.4.1.4.5 employs real-time decision-making as a way of maximizing water exports:

The CM1 real-time operational decision-making process (real-time operations [RTOs]) allows for short-term adjustments in operations within the range of CM1 criteria described above in Section 3.4.1.4.3, *Flow Criteria*, in order to maximize water supply for SWP and CVP relative to the Annual Operating Plan and its quarterly updates subject to providing the necessary protections for covered species.

BDCP 3.4-26. Species are an afterthought in the BDCP’s version of real time operations. They were the *only* concern of the legislature in its specification of real time operations. The legislature said *nothing* about using real-time operations to maximize water supply or adjust the Annual Operating plan.

The BDCP further lists the factors to be considered in adjusting real-time operations as “Covered fish species risks; Necessary actions to avoid adverse effects on covered fish species; Allocations in the year of action or in future years; End of water year storage; San Luis Reservoir low point; Delivery schedules for any SWP or CVP contractor; Actions that could be implemented throughout the year to recover any water supplies reduced by actions taken by the RTO team.” BDCP 3.4-26–27. This further emphasis on operation of the tunnels as a water supply device simply confirms the obvious that the tunnels are a water supply device; they are not a conservation measure; nor are they properly described as part of a Habitat Conservation Plan.

All real-time operations adjustments are further strictly limited in that they cannot override the bypass flow criteria established in the BDCP. In other words, no matter what, the water contractors are entitled to receive water in the range permitted by the bypass flow criteria. Real time operations cannot reduce exports beyond these levels. *See* BDCP Chapter 3.4.1.4 and IA § 10.2.2.3. That is not what the legislature ordained. Pasting this additional guarantee of water deliveries into real-time operations that were intended to “ensure that applicable biological performance measures are achieved in a timely manner with respect to water system operations” is contrary to the legislative intent and directive.

To be sure, consistent with its penchant for providing result-oriented legal descriptions that endorse its predetermined course of conduct, the BDCP declares that “[t]he RTO’s will satisfy Water Code, section 85321.” BDCP 34-26. But saying doesn’t make it so. Particularly when no analysis or reasoning is provided as to how, given the glaring disparities described above, the BDCP RTOs satisfy section 85321. Moreover, this one-sentence feat of statutory interpretation, along with the other criteria provided in the BDCP to “implement” section 85321, is an illegal underground regulation with respect to DWR and CDFW. *See* section IV of these comments below.

The Draft IA proffers CDFW’s finding that the BDCP complies with section 85321. IA § 4.2.2. However, the drafters have misread the Water Code. Section 85320 is within CDFW’s purview (although with limited effect and subject to appeal). Section 85321 is not within CDFW’s purview at all. The legislature charged a different state agency (the Delta Stewardship Council) with adjudging in the first instance whether the BDCP complies with section 85321.

VII. The BDCP Lacks Effective Adaptive Management Capability.

Despite the lavish attention paid to general concepts of adaptive management and the celebration of adaptive management as essential to any hope of success of the project, adaptive management is effectively hobbled with respect to the variable most crucial to the success of the plan: water exports.

The IA provides that any “change to a Conservation Measure in a manner that would potentially result in the modification of water supplies [must be] consistent with Section 9.3.7” of the IA. “9.3.7” appears to be a typo and should read 10.3.7. Section 10.3.7, in turn, provides that the “limits and constraints” on adjusting water operations through adaptive management “are set out in Chapter 3.4 and Chapter 8.” Chapter 3.4, in turn, contains all the flow criteria, including bypass flows, that have been ardently negotiated into the agreement by the water contractors. Thus, adaptive management is no more available to reduce exports below the flow criteria set out in BDCP section 3.4.1.4.3 than is real time management.

Under withering public criticism, state and federal officials finally backed down from previous agreements (in prior drafts of the BDCP) extracted by the water contractors that reductions in guaranteed levels of exports could only be accomplished through a years-long appeal process that ultimately had to be decided by the Secretaries of the Interior and Commerce and Governor of California (virtually assuring that exports would never be reduced). However, in yet another glaring example of regulatory capture, the water contractors appear to have *improved* their position in the latest BDCP draft.

Under regulatory assurances, the IA specifies that “quantity and timing of [water] delivery” may not be altered under the no surprises rule, and additional measures required of the water contractors to address emergent circumstances may not involve “resource restrictions.” IA § 14.1.

By providing an exhaustive list of what constitutes changed circumstances in BDCP section 6.4.2, the BDCP insulates the water contractors from reductions in water exports under the no surprises rule for anything that is not listed. Glaringly absent from the list is the simple proposition that the BDCP will simply not work as projected. Much of the BDCP can, most charitably, be described as at the frontier of scientific knowledge.

The BDCP assumes that wetland creation on farmland that has been reclaimed for over a hundred years and has subsided dozens of feet will be wildly successful. This, despite the fact that no wetland creation in similar circumstances has ever been attempted. It assumes that changes in the point of diversion will achieve all hoped for benefits. None of this is proven from experience. All BDCP projections rely on modeling. And as every good scientist knows, all models are wrong but some models are useful. To make the BDCP models useful to species recovery (rather than lethal to it), the list of changed circumstances should be amended to include “any component of the BDCP not performing as projected,” and “jeopardy to any species.”

Calling the tunnels a conservation measure has led to a perversion of the Endangered Species Act whereby the largest single stressor to endangered species, water exports, are guaranteed against reduction (even if reduction is needed to assure species recovery) by the no surprises rule. The ESA and HCP here function as guarantors of economic benefit to the water contractors and not as tools of species recovery. This is not what Congress intended in enacting the ESA and allowing for HCPs.

If it was not the intent of the state and federal resource agencies to guarantee export levels no matter what, the IA and BDCP should be amended to include the following: “Nothing herein, including but not limited to section 3.4.1.4.3 of the BDCP and section 14.1 of the IA, shall limit or constrain any reduction in water exports determined to be appropriate to achieve the biological goals and objectives through the adaptive management process.”

VIII. Along With Much Of The BDCP, DWR’s Interpretation Of Section 85321 And Promulgation Of Implementing Criteria Are Illegal Underground Regulations.

California Government Code section 11342.600 provides:

“Regulation” means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

California Government Code section 11340.5 in turn provides in pertinent part:

No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

These provisions of the California Administrative Procedure Act (“APA”) apply to the BDCP. The BDCP implements, interprets, and makes specific numerous state laws, including the Delta Reform Act. “The provisions of the BDCP were developed to satisfy the requirements of the Sacramento-San Joaquin Delta Reform Act of 2009, California Water Code (Water Code) § 85300 *et seq.*” IA 2.1-9.

The criteria promulgated to implement Water Code section 85321, as discussed in section III of these comments above, are regulations within the meaning of the APA. The criteria selected and the statutory interpretation involved therein (for example, that real time operations cannot override pre-established flow criteria) are subject to the APA. “Absent an express exception, the APA applies to *all* generally applicable administrative interpretations of a statute.” *Morning Star Co., v. State Bd, of Equalization*, 38 Cal. 4th 324, 335 (2006) (emphasis added). The sole exception, that the agency’s interpretation is “the only legally tenable interpretation of a provision of law,” Cal. Gov. Code § 11340.9(f) cannot apply here. The “lone ‘legally tenable’ reading of the law applies only in situations where the law can reasonably be read only one way.” *Morning Star Co.*, 38 Cal. 4th at 337. Only where “the agency’s actions or decisions in applying the law are essentially rote, ministerial, or otherwise patently compelled by, or repetitive of, the statute’s plain language,” does the exception apply. *Morningstar*, 38 Cal. 4th at 336. The interpretation and implementation of section 85321 here involves an exercise of discretion as to how the statute will be applied. The choices made are by no means the only ones possible under the statute.

The BDCP is not limited to a single project but rather is of general application to an entire class of cases and projects: the BDCP’s designated “Covered Activities.” This is acknowledged by the parties to the BDCP: The BDCP “[s]ets out a comprehensive approach to coordinating and standardizing applicable requirements for Covered Activities and Associated Federal Actions within the Plan Area.” IA 3. The BDCP “[e]stablishes a more efficient and effective approach to regulatory compliance with State and federal endangered species laws than through project-by-project, species-by-species planning.” Draft Implementing Agreement for the Bay Delta Conservation Plan § 2.1.8.

Where implementation or interpretations “apply generally, rather than in a specific case” the rulemaking provisions of the APA apply. *Morning Star Co., v. State Bd, of Equalization*, 38 Cal. 4th 324, 334 (2006).

The Biological Goals and Objectives and performance standards are further examples of regulations. “‘Performance standard’ means a regulation that describes an objective with the criteria stated for achieving the objective.” Cal Gov. Code § 11342.570.

The BDCP is of monumental public interest and importance, essentially governing the operation of the state’s water supply infrastructure and managing the Delta’s biological resources over the next fifty years. DWR and CDFW may believe that operating the SWP and managing Delta resources are a matters of internally managing their own infrastructure and not therefore subject to the APA. However, matters “of serious consequence involving an important public interest” cannot escape the requirements of the APA on grounds that the agency is simply determining how it will handle its own internal affairs. *City of San Marcos v. Cal. Highway Com.*, 60 Cal. App. 3d 383, 408 (1976).

By way of further example, CDFW has engaged in underground rulemaking by promulgating section 9.5 of the Draft IA, which specifies procedures and standards of future general application for evaluating “Approval, Adoption or Amendment of Future Plans or Projects,” which could result in suspension or revocation of state permits; section 11.1.2, which specifies procedures for “Addressing Failure to Maintain Rough Proportionality.”

The instances of underground rulemaking in the BDCP are too numerous and extensive to be exhaustively listed here. Wherever the BDCP implements, interprets, or makes specific state law for general future application, that exercise must comply with the APA.

IX. USFWS And NMFS Have Engaged In Disguised Negotiated Rulemaking With The Water Contractors In Violation Of The Administrative Procedure Act And The Negotiated Rulemaking Act.

All rules issued by federal agencies are subject to the requirements of the federal Administrative Procedure Act. A rule is defined as “an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency” in carrying out its functions. 5 U.S.C. § 551(4). All rules promulgated by federal agencies are subject to notice and comment requirements and publication in the Federal Register, not met here. Further requirements are imposed by federal law on “negotiated rulemaking” whereby federal agencies negotiate, as here, the outcome of the rulemaking process with affected entities. *See generally* the Negotiated Rulemaking Act of 1990, the Federal Advisory Committee Act.

The BDCP and Draft IA contain numerous binding pronouncements of the federal agencies of both general and particular applicability and future effect designed to implement and interpret numerous federal statutes, including the Endangered Species Act, the Fish and Wildlife Coordination Act, the Fish and Wildlife Act of 1956, and the Central Valley Improvement Act. These commitments have been arrived at through negotiation with the Water Contractors. As such, both the BDCP and IA are subject to the Administrative Procedure Act, the Negotiated Rulemaking Act, and the Federal Advisory Committee Act.

Indeed, the entire “adaptive management” component of the BDCP was arrived at through disguised negotiated rulemaking and specifies little more than a procedure for future disguised negotiated rulemaking, intended to subvert the requirements of federal law.

Section 10.2.1.3 of the IA acknowledges that specific outflow criteria are integral to the issuance of take permits. However, it further provides that the outflow criteria may be altered by following a process outlined in section 10.2.1.2, without amending the permits. Likewise, section 10.3.6 specifies that a Conservation Measure or a biological objective may be changed through the adaptive management process set out in section 10.3 of the IA without amending the BDCP or any incidental take permit or other regulatory authorization. First, this is unlawful in any event as permit conditions cannot be altered except by amending the permit. Second, specifying a procedure and

substantive criteria that are to be used, and the agency is legally committed to using, in order to alter the terms of permits it issues or to alter the terms of the BDCP is an “agency statement of general or particular applicability and future effect” within the meaning of 5 U.S.C. § 551(4).

Moreover, the parties seem blind to the fact, even if the adaptive management process could be used in the way intended by the IA, that each such change would be subject to environmental review pursuant to NEPA and CEQA.

The management of outflow criteria, the amount of freshwater that flows from the Delta into San Francisco Bay and the Pacific Ocean, is of monumental scope and public importance. The federal agencies have bound themselves to future conduct with respect to their responsibilities in this regard. Section 10.2.1.4 further limits the discretion of the federal agencies to act with regard to outflow through the adaptive management process of the BDCP.

X. The BDCP and Draft IA Violate The Delta Reform Act Because They Contain No Provisions Providing For A Statewide Reduction In Reliance On Delta Water Supplies.

The Draft IA acknowledges that the BDCP must comply with the Delta Reform Act of 2009. Draft IA § 4.2.2. However, the BDCP and IA entirely overlook the Delta Reform Act mandate that “[t]he policy of the State of California is to reduce reliance on the Delta in meeting California’s future water needs” through regional self-sufficiency. The pervasive preoccupation with finding a path to reduce outflow criteria conflicts with state policy to reduce reliance on the Delta. Rather it is a formula to reduce water committed to environmental needs so more water can be exported from the Delta and reliance on Delta water can be increased.

XI. The BDCP Lacks Required Assurances of Adequate Funding.

The BDCP relies on funding from new state water bonds, yet to be approved by the legislature for placement on the ballot and of uncertain fate with the voters if placed on the ballot. The water bond described in section 8.3.5.1 is, at best, a political football in the state legislature and likely to contain provisions that bar use of any funds for anything related to the BDCP. Several legislators have announced intentions to place such restrictions on the water bond. The statement that “[t]he BDCP is expected to secure a large portion of the funds allocated [by the new water bond] to Delta sustainability as well as smaller portions of funds allocated to conservation and watershed protection” is at best wishful thinking.

The BDCP’s reliance on the use of funds from existing water bonds, already approved, is subject to legal challenge as the monies designated by these bonds were not approved by the voters for construction of the BDCP.

As to federal funding, the BDCP acknowledges that “new federal appropriations would be needed to support the BDCP.” BDCP § 8.3.6. A wish that Congress will appropriate funds, or the intent to request funds for your pet project, is not an assurance of adequate funding within the meaning of state and federal law.

The IA statement that “there is no federal position as of this time regarding potential funding obligations of the United States,” IA § 13.1.2, is accurate. However, the IA’s statement that “[t]he parties anticipate reaching agreement on a federal” share of funding seems blissfully ignorant of the fact that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” U.S. Const. Art. 1, Sec. 9, cl. 7. Until appropriated by Congress, federal funding is not assured.

XII. Impacts on Discovery Bay Are Not Analyzed In The EIR And The BDCP Lacks Adequate Monitoring For Discovery Bay.

Representatives from Discovery Bay have requested at BDCP public meetings and through other channels that specific analysis of the project’s water quality impacts on Discovery Bay be included in the Draft EIR/EIS. They have not been included. Discovery Bay is different than the rest of the Delta. It consists of 16 shallow water bays, ranging in size from less than an acre to several acres. There is little circulation in the bays. The impacts on water quality in nearby open water sloughs and channels do not translate to water quality impacts in the bays, where reduction in high quality fresh water will translate to much greater degradation of water quality. In order to adequately assess the impacts of the project on water quality in Discovery Bay it will be necessary to perform a fine grain RMA or other analysis of the specific impacts on Discovery Bay. The EIR/EIS fails to adequately address water quality impacts in Discovery Bay.

The EIR/EIS also fails to adequately take account of existing and expected baseline conditions for Discovery Bay and other areas of the Delta where invasive aquatic weeds have significantly hampered circulation and degraded water quality. The weeds result in algal blooms and dangerous reductions in dissolved oxygen. Planned operational changes to the cross-Delta gates, which supply high quality water to the central Delta, including Discovery Bay, must be analyzed at a fine grain level with respect to Discovery Bay and taking account of weed infested baseline conditions.

The mitigation and monitoring/adaptive management program lacks monitoring specific to Discovery Bay. Nearby monitoring stations in open water are inadequate to capture conditions in the sheltered bays.

Submitted,

s/Michael A. Brodsky
Michael A. Brodsky

APPENDIX 1 TO STCDA BDCP COMMENTS

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