



**SENT VIA EMAIL**

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BDCP Comments  
Ryan Wulff, National Marine Fisheries Service  
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Re: **Comments on the Bay-Delta Conservation Plan (EIR/EIS)**

Dear Mr. Wulff:

The San Joaquin Tributaries Authority (“SJTA”) provides the following comments on the Bay Delta Conservation Plan (“BDCP”) Environmental Impact Report/Statement (“EIR/S”). The SJTA generally supports projects that increase water reliability and benefit the ecosystem. The SJTA’s primary concerns regarding the BDCP is the potential impacts it may have upon SJTA member operations and their respective water supply reliability. Despite the volume of the EIR/S, it remains unclear how the BDCP will affect the members of the SJTA. The BDCP EIR/S does not provide a sufficient description of the BDCP project or the impacts the BDCP project will have on upstream water right holders. The SJTA requests the EIR/S be revised to include the analysis more fully described below and recirculate the EIR/S for public review.

**Chapter 1 – Introduction**

The role and the responsibility of the Bureau of Reclamation (“Reclamation”) in participating, benefiting and funding the BDCP is unclear. The introduction states Reclamation is a necessary party to the implementation of the BDCP. (EIR/S, at 1-26.) However, Reclamation is not a project proponent, despite the fact that many Central Valley Project (“CVP”) contractors are project proponents. (*Id.*, at 1-1, fn. 1.) Furthermore, the BDCP Implementation Agreement states that “Reclamation will enter into a Memorandum, or similar agreement, with the Parties that sets out Reclamation’s roles and responsibilities pursuant to the BDCP and establishes processes to ensure that Reclamation’s actions are implemented in a manner consistent with the Plan,” but does not disclose what actions Reclamation will take, what role Reclamation will play in the BDCP or how Reclamation will be bound to the Agreement. Without this information, the public cannot meaningfully understand and consider the issues raised by the proposed project. The failure to disclose and analyze

Reclamation's role violates the California Environmental Quality Act ("CEQA") disclosure requirements. (See *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47, Cal.3d 376, 405.)

The Plan Area is too narrow. It is clear that Reclamation will be required to modify its operation of the CVP as part of the BDCP project. Despite this, CVP facilities upstream of the Plan Area are not included within the Plan Area and, thus, are not analyzed by the EIR/S. The failure to include areas upstream of the Delta in the Plan Area prevents the public from meaningfully understanding and considering the issues raised by the BDCP, as many potential environmental impacts will be overlooked.

The Project Area is unclear, rendering the project description inadequate. The EIR/S notes that "the project area consists of the following three geographic regions, as shown in Figure 1-4." (EIR/S, at 1-11.) First, no "Figure 1-4" is included with the Draft BDCP EIR/S. This statement likely refers to "Figure 1A-4;" and if so, the text should be corrected. Second, Figure 1A-4 includes a map of most of the State of California, with no boundary lines for the Project Area. It is unclear if the whole map is included, just the highlighted waterworks, or the highlighted water works and certain areas surrounding them. Furthermore, the project description does not include a written description of boundaries for the Project Area, such that a member of the public cannot understand whether they are inside or outside the Project Area with any degree of certainty. The map should be changed so that it accurately shows the Project Area, or an adequate written description should be included. "An accurate, stable, and finite project description is the Sine quo none of an informative and legally sufficient EIR." (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 193.) As it stands, the current description of the Project Area is not legally adequate.

## Chapter 2 – Project Objectives and Purpose and Need

The EIR/S does not disclose which water right permits will need to be modified in order to facilitate the operation of the BDCP. In addition, the EIR/S does not analyze whether such permit changes will cause injury to other legal users of water. The EIR/S notes that one of the objectives of the BDCP is to increase water supply reliability. (EIR/S, at 2-6.) The Department of Water Resources ("DWR") and Reclamation will be required to modify their water right permits in order to alter their project operations to provide additional water supply reliability and water to diverters. To the extent the EIR/S will be relied upon as the environmental analysis sufficient to support the State Water Resources Control Board's ("State Water Board") review and potential change to DWR and CVP water right permits, this analysis must be included. The EIR/S should disclose which permits will be required to be modified to operate the BDCP. The EIR/S should be revised to include the impact of the changes to water right permits, including the analysis of injury to other legal water users.

The EIR/S does not disclose what changes to water quality control objectives or other regulations would be necessary for the implementation and operation of the BDCP. The EIR/S recognizes the State Water Board will be reviewing the existing water quality objectives. The EIR/S must explicitly disclose the changes it anticipates for the water quality objectives and how these changes will affect the BDCP. To the extent the implementation or operation of the BDCP relies upon increased flows from the changes to water quality objectives, the EIR/S must analyze the impacts of these changes to the upstream water users. Without this information, the public cannot meaningfully understand and

consider the issues raised by the proposed project, as the future regulatory regime under which the State Water Project (“SWP”) and CVP will be operated is unclear.

### Chapter 3 – Description of Alternatives

It is unclear from the information presented in the EIR/S how the BDCP will function after it is built and implemented. For instance, it is not disclosed as to how much additional water will be available for export, how much additional water will actually be exported, which parties will benefit from the additional water, and to what extent, if at all, the south Delta intakes will continue to be used. Without this information the public cannot meaningfully understand and consider the issues raised by the proposed project.

The EIR/S discusses two categories of actions that are occurring under the BDCP – covered activities and associated federal actions. (EIR/S, at 3-17.) It is unclear whether the environmental impacts from both of these categories of actions are covered by the EIR/S. Without this information, the EIR/S is confusing and unclear.

The EIR/S is unclear as to whether it analyzes the environmental impacts of the proposed alternatives under the regulations affecting the export of water alone or in addition to expected changes to these regulations. The EIR/S discusses the various regulations impacting the export of water from the Delta. (*Id.*, at 3-31 through 3-33.) However, the EIR/S indicates these regulations are likely to change in the future. (See *Id.*, at 3-34; 5-34.) Furthermore, the 2009 National Marine Fisheries Service Biological Opinion (“NMFS BiOp”) discussed in the EIR/S is currently on appeal; it is likely the requirements in the BiOp will change substantially. The EIR/S should state whether it is analyzing environmental impacts under the regulations as they currently stand, or under the regulations as they are likely to be once the BDCP is approved and implemented. If it is not analyzing environmental impacts under the probable future regulatory regime, the EIR/S must be revised to include this analysis. Without this information, the public cannot meaningfully understand and consider the issues raised by the proposed project, because they will not understand how the BDCP will be operated, and the environmental impacts that operation will cause in the regulatory environment that will exist when the BDCP is actually implemented.

The adaptive management and monitoring program is neither formal, nor transparent, and thus fails to meet the requirements of the Water Code. The Delta Plan will incorporate the provisions of the BDCP, including the adaptive management plan. (See Water Code, § 85320; See also <http://deltacouncil.ca.gov/delta-plan-and-bdcp>.) The Water Code requires that the adaptive management strategy in the Delta Plan be “science-based, transparent, and formal”. (Water Code, § 85308(f).) The adaptive management program is not described in any detail in the EIR/S. Furthermore, the BDCP document, itself, does not describe a formal process by which adaptive management will take place, nor does it describe with any level of certainty what actions will be taken in response to certain events or conditions precedent, and thus the program is not transparent. The EIR/S must be modified to include a full description and analysis of the adaptive management program, and the adaptive management program must be more fully fleshed out to meet the Water Code’s requirements of transparency and formality.

### Chapter 5 – Water Supply

It is unclear how DWR and Reclamation will coordinate operations of the SWP and CVP under the BDCP. The EIR/S discusses the Coordinated Operations Agreement (“COA”), under which the SWP and CVP are currently operated. (EIR/S, at 5-20 and 5-33.) It is unclear whether the changes to these systems based on the construction and implementation of the BDCP will require the COA to be modified or replaced. Without this information, the public cannot meaningfully understand and consider the issues raised by the proposed project.

It is unclear whether water transfers are part of the BDCP or planned future actions, and the degree to which these transfers are considered in the environmental analysis. The EIR/S indicates that water transfers are planned after the implementation of the BDCP. (See *Id.*, at 5-40 and 5-41.) The EIR/S also indicates that more water will be exported by the SWP and CVP after construction and implementation of the BDCP. (See *Id.*, at 8-408.) However, the EIR/S states that any potential transfer will have its own separate EIR/S. (*Id.* at 5-40 and 5-41.) If the potential transfer of water is necessary for the implementation or operation of the BDCP, the impact of the transfers should be analyzed in the EIR/S. In the alternative, the EIR/S should make clear how the environmental analysis will be tiered from the EIR/S. Without this information the public cannot meaningfully understand and consider the issues raised by the proposed project.

The EIR/S discusses the 2006 Bay-Delta plan, but does not discuss the ongoing review of the Bay-Delta plan; these impending regulations should be discussed and analyzed. The State Water Board has released a draft modification and draft environmental documentation for the first phase of the ongoing review of the Bay-Delta Plan. This draft modification will have significant impacts on the Sacramento and San Joaquin Rivers, and the Delta systems, and would potentially provide more water for export. The consideration of these modified regulations in the EIR/S’s analysis could substantially change the conclusions of that analysis. Without this information, the public cannot meaningfully understand and consider the issues raised by the proposed project because it will not understand how the BDCP will likely operate, and the environmental effects of that operation, in the regulatory environment that will exist when the BDCP is actually implemented.

The EIR/S must be revised to analyze impacts to water users upstream of the Delta. The EIR/S states, “the water supply analysis addresses impacts to DWR, Reclamation, and SWP and CVP contractors, as opposed to other water right holders, as the BDCP does not include any regulatory actions that would affect any such water right holders.” (*Id.*, at 5-43.) This conclusion is not supported by information and analysis included in the EIR/S. Construction and implementation of the BDCP will, according to the EIR/S, allow for increased exports of water. It is unclear where this increased supply will come from. Assuming it could decrease the amount of water available to upstream water right holders, the EIR/S must be modified to discuss and analyze these potential impacts to upstream water users. Without this information, the public cannot meaningful understand and consider the issues raised by the proposed project.

The EIR/S should include a separate analysis, considering and explaining the effects of climate change, alone, on the project area. The EIR/S notes that climate change is expected to significantly change the hydrology and ecosystem of the Plan Area. (See *Id.*, at 5-48.) Many of the environmental impacts found under the proposed alternatives are attributed solely to climate change. (See *Id.*, at 7-85.) It is unclear why these impacts are identified as solely caused by climate change. If the EIR/S included the

environmental analysis on the effects of climate change alone, readers would be able to compare this analysis to the analysis of the alternatives, and understand why the EIR/S found a significant impact to be the result of climate change alone. The methodology for this analysis should also be included in the EIR/S. Without this information the public cannot meaningfully understand and consider the issues raised by the proposed project.

The alternatives considered all improperly include the Vernalis Adaptive Management Plan (“VAMP”) flows, which renders the EIR/S’s environmental analysis incorrect and inadequate. Table B-18 in the EIR/S shows VAMP flows being a part of each alternative’s modeling assumptions. The VAMP ended and the regulatory requirements of that program are no longer in effect. Including VAMP flows in the modeling assumption for environmental impacts renders this analysis incorrect and inadequate, as these flows are no longer being met and, thus, the projected environmental impacts may be more or less severe.

The BDCP increases reliance on the Delta, and thus is inconsistent with the terms of Water Code section 85021. Water Code section 85021 states, in part, that “[t]he policy of the State of California is to reduce reliance on the Delta in meeting California’s future water supply needs...” The EIR/S, however, indicates that after construction and implementation of the BDCP the SWP and CVP will likely export more water from the Delta. (See *Id.*, at 8-408.) Increasing exports from the Delta appears to place greater reliance on the Delta region for California’s water supply. The EIR/S should be modified to explain how increasing exports from the Delta region is reducing reliance on the Delta region, and thus, how the BDCP is consistent with Water Code section 85021.

#### Chapter 6 – Surface Water

Neither Chapter 5 nor Chapter 6 analyzes the impact to entities upstream of the Delta resulting from the depletion or reduction of surface water that could occur due to the implementation of the BDCP or changes in DWR or Reclamation’s water right permits. If no impact to these entities of this kind will occur, the EIR/S should state so, and explain the reason no such impact will occur. Without this information members of the public cannot meaningfully understand and consider the issues raised by the proposed project.

#### Chapter 7 – Groundwater

Over the past six months, the California Legislature has been working to develop legislation to regulate the management and extraction of California’s groundwater resources. Legislation will be finalized in a matter of months. This legislation will have a great impact on all water users, all water systems operations and, most significantly, the operation of the SWP and CVP under the BDCP. This great impact could lead to environmental impacts. The EIR/S does not identify or analyze potential environmental impacts of the BDCP cumulatively with groundwater regulation. In addition, the BDCP does not analyze the impacts that future groundwater legislation will have on the viability of the BDCP project. Without this analysis the public cannot meaningfully understand and consider the issues raised by the proposed project.

#### Chapter 8 – Water Quality

The EIR/S assumes that San Joaquin River outflow will increase as a result of the BDCP or concurrent with the implementation of the BDCP. (*See* EIR/S, at 8-408.) The statement that San Joaquin River flows will increase into the Delta is not explained or supported, and the impacts of this assumption are not analyzed. Providing the environmental analysis for the effects of climate change, for example, as discussed above, may demonstrate to readers whether or not climate change will actually play a role in increasing San Joaquin River outflow. Because the EIR/S does not contain an explanation for this projected increase in San Joaquin River outflow, the environmental analysis based on increased San Joaquin River outflow is not supported. Without this analysis the public cannot meaningfully understand and consider the issues raised by the proposed project.

The EIR/S indicates that Reclamation will unavoidably violate chloride and electrical conductivity (“EC”) water quality objectives under Alternative 4. (*Id.*, at 8-428 and 8-439.) These water quality objectives are legally binding on Reclamation, and their ability to divert water pursuant to their water right is conditioned upon their meeting these objectives. The EIR/S cannot simply assume Reclamation will violate these standards as a long-term method of operating. Instead, the EIR/S must discuss what steps it will take to modify these water quality objectives or consider the impacts to service providers resulting from Reclamation being prohibited from diverting water because they are failing to meet the chloride and EC water quality objectives. Without this analysis the public cannot meaningfully understand and consider the issues raised by the proposed project.

#### Chapter 11 – Fish and Aquatic Resources

The EIR/S contains no analysis concerning the estimated effectiveness of habitat restoration. In addition, the EIR/S fails to disclose or outline the actions that will be taken if the habitat restoration activities are not fully effective. The EIR/S assumes that habitat restoration activities will be fully effective. (*See* EIR/S, at 11-5.) The EIR/S also analyzes the environmental impacts if the habitat restoration was completely ineffective. (*See Id.*, at 11-265.) Despite the fact that the EIR/S acknowledges some reasonable possibility that habitat restoration will fail, the EIR/S does not analyze the possibility of this occurring, nor what actions will be taken if it does. Without this analysis the public cannot meaningfully understand and consider the issues raised by the proposed project, because the public will not know how likely the environmental analysis is to be correct, nor what actions will be taken, if any, if it is not.

#### Chapter 21 – Energy

The EIR/S is deficient because it does not analyze the impacts to energy based upon season or timing. The EIR/S’s analyses impacts to energy resources based on the net energy used on a monthly or annual basis. (EIR/S, at 21-26.) This analysis fails to take into account the realities of California’s energy grid, and patterns in the public’s usage of energy. Energy usage peaks during particular times of year and during particular times of the day. The EIR/S should be modified to contain the impacts to energy resources during these peak periods. Without this analysis, the public cannot meaningfully understand and consider the issues raised by the proposed project.

The EIR/S’s analysis of impacts to energy resources is inadequate because it only considers impacts caused by additional energy consumption, and fails to consider impacts caused by changes in river flows and hydrogenation. The EIR/S only considers impacts to energy resources caused by additional

pumping by the SWP and CVP. (*Id.*, at 21-26.) There are many other factors affecting the production of energy resources. As recognized by the EIS/S, a great deal of energy in the State is generated via hydroelectric power. Hydroelectric plants depend on river flow and hydrogenation to operate. The BDCP will likely impact the stream flow and hydrogenation of the rivers, but it's not considered as a factor impacting energy resources in the EIS/S. Without this analysis the public cannot meaningfully understand and consider the issues raised by the proposed project, because the environmental analysis does not consider factors which could potentially have a substantial impact on energy resources.

Level of Environmental Analysis is Inconsistent

The EIR/S provides a program level analysis of some impacts, and a project level analysis to others; this inconsistency obscures the true impacts of the project. The EIR/S must be amended to analyze all impacts at a project level.

Funding Disclosure and Analysis is Deficient

The EIR/S fails to provide any disclosure regarding how the BDCP project will be funded. It has been reported recently that the BDCP could be funded through property tax revenues without a public vote. (See [http://www.mercurynews.com/science/ci\\_26198239/property-taxes-could-pay-25-billion-delta-tunnels](http://www.mercurynews.com/science/ci_26198239/property-taxes-could-pay-25-billion-delta-tunnels).) The EIR/S must be amended to disclose and explain how each component of the BDCP will be funded. Included in this analysis, the EIR/S must disclose which parts of the project will be funded by the specific project proponent, the general schedule, the method of funding and which project components will be funded by bond or other public funding mechanisms.

Very truly yours,

**O'LAUGHLIN & PARIS LLP**

  
VALERIE C. KINCAID

VCK/jac

cc: San Joaquin Tributaries Authority