

TCCA *Tehama-Colusa Canal Authority*

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July 29, 2014

Via U.S. Mail and E-mail (BDCP.Comments@noaa.gov)

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

Subject: Comments of the Tehama-Colusa Canal Authority on the Draft Bay-Delta Conservation Plan and EIR/EIS

Dear Mr. Wulff:

The Tehama-Colusa Canal Authority (“TCCA”) is a joint exercise of powers agency comprised of 18 water districts and companies that receive water from the Central Valley Project (“CVP”). The TCCA service area is made up of 150,000 acres of irrigated farmland located along the west side of the Sacramento Valley, and includes the counties of Colusa, Glenn, Tehama and Yolo. TCCA was formed in order to operate and maintain the facilities necessary to supply water to the federal contractors within the Sacramento Canals Unit of the CVP and to preserve our rights to water originating in the Sacramento Valley.

TCCA has reviewed the Draft Bay Delta Conservation Plan (“BDCP” or “Plan”) and the accompanying Draft Environmental Impact Report/Environmental Impact Statement (“EIR/EIS”) that were released for public review last December. Because the BDCP states that the Plan and supporting documents are incorporated into the EIR/EIS, our comments on the BDCP should also be considered comments on the EIR/EIS. Further, these comments also address the more recently released BDCP Implementing Agreement.

TCCA hereby incorporates by reference and joins the comments on the BDCP Plan, the Implementing Agreement, and the EIR/EIS submitted by the North State Water Alliance (including all attachments to those comments) dated July 28, 2014 as though fully stated herein.

TCCA would like to take this opportunity to underscore several comments made in the North State Water Alliance comments, which are of particular importance for TCCA.

First, TCCA is gravely concerned that the proposed operations of BDCP Conservation Measure 1, the tunnels, will have the impact of draining north of Delta reservoirs on a much more frequent basis than at present, thereby diminishing the water supply reliability for both Sacramento River Settlement Contractors and TCCA, as discussed and demonstrated at length in the MBK report. Water users in the Sacramento Valley are protected by California's water right priorities and the "area of origin" statutes. The BDCP and the accompanying EIR/EIS are filled with statements to the effect that the BDCP will not interfere with these upstream uses of water. However, the proposed operations in the BDCP documents and an examination of the underlying modeling clearly refute these assertions. Under the current document, TCCA and the SRSCs could potentially be severely impacted by the operation of the tunnels. As such, TCCA seeks a simple and clear statement that the final BDCP will not cause the state and federal projects to operate in a way that *impacts* TCCA's present water supply reliability, and that does not have an adverse effect on fish and wildlife resources in the Sacramento Valley. TCCA requests the BDCP proponents amend the modeling by using the best available science, and work to redefine operations of the BDCP to address these shortcomings and comport with legal requirements to avoid impacts to upstream water users. Absent these assurances, TCCA cannot support the BDCP as currently formulated because of the clear impacts it would have on waters supply reliability for upstream areas. Further, as currently formulated, the BDCP will be unable to obtain the State Water Resources Control Board approvals for the changes in point of diversion necessary to implement the BDCP due to these concerns.

Second, as noted in the North State Water Alliance comments, in order for the federal regulatory agencies to approve the proposed Habitat Conservation Plan, there must be an enforceable set of funding commitments. To date, there is no such approved funding plan. Instead, it vaguely describes a funding plan comprised of future bond proposals, state and federal water contractors contributions (without defining the exact nature and amounts of those commitments), and unidentified state and federal funding and grants. Indeed, last week there were news stories across California indicating the State Water Contractors were considering financing their share of the BDCP through increases in property tax rates, thereby evading the constitutional limitations of Proposition 13 and Proposition 218. Until such a plan is developed and approved through the normal legal means, the BDCP is fatally flawed and should not proceed.

Further, any financing plan must adhere to the principle of "beneficiary pays." At present, the BDCP alleges it has commitments from State and Federal Water Contractors to pay for the project. All of TCCA's member agencies are federal water contractors, none of whom need or will benefit from the tunnels, and in fact, are likely to be negatively impacted by the tunnels proposal as it is currently formulated. As such, TCCA will not voluntarily contribute any funding to the BDCP, and objects to any effort to attempt to charge TCCA members for these efforts to implement the BDCP (it should be noted, federal law makes it very clear that an HCP is strictly a voluntary activity). Reclamation has indicated that the costs associated with providing water to south of Delta refuges would be treated as an operations and maintenance cost, and so would be chargeable to all federal contractors on annual basis. TCCA objects strongly to this proposed charge, on the ground that the proposed tunnels (and their associated capital and operations and maintenance costs) are not needed in order to move water to south of

Delta refuges. If it is Reclamation's desire to move such water through the proposed tunnels, then that charge is properly paid for by the United States, not federal water contractors.

Third, the centerpiece of the BDCP is the effort to provide regulatory assurances to the Department of Water Resources (and, by extension, to the State Water Contractors) under section 10 of the federal Endangered Species Act ("ESA"). However, section 10 of the federal ESA does not extend these types of protections to Reclamation. Instead, section 7 of the federal ESA imposes a continuing obligation on Reclamation to consult with the federal regulatory agencies to take actions that may be needed to conserve threatened and endangered species.

With this legal framework in mind, the BDCP lacks a clear demonstration how the regulatory assurances contemplated in the BDCP can protect "potentially regulated entities" without adversely affecting upstream stakeholders. Specifically, if the conservation measures identified in the BDCP prove inadequate in the eyes of either the National Marine Fisheries Service or the U.S. Fish & Wildlife Service, Reclamation will be legally obliged to re-engage in consultation with either of these agencies in order to take appropriate actions to conserve listed species. If either agency determines that additional conservation measures are appropriate, then Reclamation (and its contractors like TCCA's member agencies) will be required to implement (or alternatively, be potentially impacted by) those conservation measures or risk the loss of water supplies, fines and penalties for unauthorized take of listed species. By contrast, the Department of Water Resources and its contractors will be able to rely on the assurances contained in the Implementing Agreement.

Such a result – in which the "potentially regulated entities" are protected from additional mitigation obligations, but upstream stakeholders like TCCA and its members, are forced to meet those obligations – is unfair and violates the repeated claim that there will be no "redirected impacts" from the BDCP. Moreover, this result would also violate the provisions of the Coordinated Operations Agreement that require regulatory obligations to be shared among the state and federal project contractors. TCCA has voiced this concern to USBR and the BDCP proponents on countless occasions over the past few years during the development of the BDCP, but we have never received a simple and clear explanation of how the BDCP can evade the obligations imposed on Reclamation by section 7 of the federal Endangered Species Act. We have repeatedly heard from USBR that these are valid questions and concerns that are being investigated and that a response would be forthcoming, yet still no answers have been provided. With the release of the subject BDCP documents that are the subject of these comments, still no information or adequate response has been provided that addresses these important issues. TCCA requests that the final BDCP contain such an explanation.

Fourth, TCCA is concerned about the governance structure proposed for the BDCP. If the twin tunnels are ever constructed, there will be strong incentives from south of Delta interests to recoup their investment by moving as much water across the Delta as possible. In order to ensure that the BDCP does not literally drain Northern California, the BDCP governance structure must be revised to provide significant and meaningful representation for the Northern California stakeholders in regard to the operations of the BDCP.

Despite the concerns expressed here, TCCA does wish to highlight that we continue to be committed to working collaboratively with all statewide water interests in effort to find balanced

and equitable solutions for the Delta. We have made this sentiment clear throughout the BDCP process, to no avail. Despite voluminous materials being released, an assortment of public meetings being scheduled, to date, still no real collaborative process has yet to take place. As such, the resulting BDCP process has resulted in a proposal that clearly neglects to address any of the important concerns expressed herein and in the comment letter and attachments provided by the North State Water Alliance (to which TCCA hereby joins). It is the sincere belief of TCCA that an effort that were to truly include, not only the proponents of the BDCP whose sole purpose is moving more water south of the Delta, but also invites the participation of the potentially affected upstream stakeholders, would have a much better likelihood for success. TCCA is committed to working with all stakeholders on such a collaborative process.

Until that occurs, TCCA is left with no other alternative but to provide these critical comments on the BDCP documents that clearly fails to provide a project description of proposed (viable) operations, fails to describe a legally viable regulatory framework, and fails to meet the requirement of an enforceable funding plan. As such, not only does this plan fall far short of the requirements set forth under NEPA and CEQA, but it also fails to comply with state water law and the requirements under the federal and state ESAs necessary to permit the BDCP.

Thank you for the opportunity to provide these comments, and your attention to the same.

Please do not hesitate to contact me directly if you have any questions or concerns,

Very truly yours,



Jeff Sutton
General Manager

cc: TCCA Board of Directors
David Murillo, US Bureau of Reclamation
Maria Rea, National Marine Fisheries Service
Ren Lohofener, US Fish and Wildlife Service
Mark Cowin, CA Department of Water Resources
Chuck Bonham, CA Department of Fish and Wildlife