



July 16, 2014

**Attention: Imported Water Committee**

**Draft supplemental comment letter on the Bay Delta Conservation Plan Implementing Agreement. (Information)**

**Purpose**

This report presents the supplemental comment letter on the Bay Delta Conservation Plan (BDCP) environmental documents, specifically the Draft Implementing Agreement, which provides further clarity to information contained in the Draft EIR/EIS and BDCP.

**Background**

The BDCP is a joint Habitat Conservation Plan/Natural Communities Conservation Plan (HCP/NCCP) intended to restore and protect ecosystem health, water supply, and water quality within a stable regulatory framework. The BDCP objective is to obtain long-term state and federal Endangered Species Act (ESA) permits for the operation of the State Water Project (SWP) and Central Valley Project (CVP).

The issuance of ESA permits requires preparation of a joint Environmental Impact Report (EIR)/ Environmental Impact Statement (EIS) pursuant to the California Environmental Quality Act (CEQA) and National Environmental Policy Act (NEPA). The draft BDCP EIR/EIS contains an analysis of the potential environmental impacts of approving and implementing the BDCP. The draft EIR/EIS and draft BDCP were released for a 180-day public review period commencing on December 13, 2013 and ending on June 13, 2014. The Water Authority submitted a formal comment letter on May 30, 2014.

Also on May 30, 2014, the BDCP released a draft Implementing Agreement and extended the public review period until July 29, 2014. An Implementing Agreement is typically executed among the ESA permittees and the wildlife agencies, and is intended to describe their respective roles and responsibilities in implementing the BDCP. Of particular interest are obligations related to funding, governance, and regulatory assurances.

**Discussion**

The Board has received numerous BDCP briefings over the past year. After reviewing the draft Implementing Agreement, and considering prior Board questions and comments, staff has prepared the attached supplemental comment letter, which the General Manager will submit prior to the public review deadline.

Prepared by: Laurence J. Purcell, Water Resources Manager  
Reviewed by: Ken Weinberg, Director of Water Resources  
Reviewed by: Dennis A. Cushman, Assistant General Manager

Attachment: Supplemental BDCP Comment Letter



## San Diego County Water Authority

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July 29, 2104

**Mr. Ryan Wulff**  
**National Marine Fisheries Service**  
**650 Capitol Mall, Suite 5-100**  
**Sacramento, California 95814**  
**ATTN: BDCP Comments**

### MEMBER AGENCIES

Carlsbad  
Municipal Water District

City of Del Mar

City of Escondido

City of National City

City of Oceanside

City of Poway

City of San Diego

Fallbrook  
Public Utility District

Helix Water District

Lakeside Water District

Olivenhain  
Municipal Water District

Olay Water District

Padre Dam  
Municipal Water District

Camp Pendleton  
Marine Corps Base

Rainbow  
Municipal Water District

Ramona  
Municipal Water District

Rincon del Diablo  
Municipal Water District

San Dieguito Water District

Santa Fe Irrigation District

South Bay Irrigation District

Vallecitos Water District

Valley Center  
Municipal Water District

Vista Irrigation District

Yuima  
Municipal Water District

### OTHER REPRESENTATIVE

County of San Diego

**Re: Draft Environmental Impact Report/Environmental Impact Statement for the Proposed Bay Delta Conservation Plan, Alameda, Contra Costa, Sacramento, Solano and Yolo Counties, California – Additional Comments on Draft Implementing Agreement**

**Dear Mr. Wulff:**

The San Diego County Water Authority (Water Authority) is submitting the following additional comments on the joint Draft Environmental Impact Report (EIR) Draft Environmental Impact Statement (EIS) prepared by the U.S Department of Interior, Bureau of Reclamation (Reclamation), and U.S. Department of Interior, Fish and Wildlife Service; the U.S Department of Commerce, National Oceanographic and Atmospheric Administration, National Marine Fisheries Service; and the California Department of Water Resources (DWR) for the proposed Bay Delta Conservation Plan (BDCP).

While these comments are directed to the Draft Implementing Agreement (IA) dated May 30, 2014, the inter-related nature of the Implementing Agreement, the BDCP and the Draft EIR/EIS make these comments equally applicable to all three documents. Therefore, this letter should be considered a supplement to the previous Water Authority letter dated May 30, 2014.

### GENERAL COMMENTS

1. While the extension of the review period to accommodate release of the Draft Implementing Agreement is appropriate and appreciated, the Water Authority believes there is a substantial lack of specificity regarding the financial commitments required to approve the BDCP and issue any necessary incidental take permits. The IA provides no additional clarity on how these legally binding funding commitments are expected to be made and the timeline by which they are expected to be executed. We believe the IA should address whether existing water contracts will contain such language, or will some other type of funding agreement (that includes back-stop and assurances for long-term financial

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- commitments) be developed and executed by the BDCP participants? The Final IA should specify how firm funding commitments with all participants will be assured.
2. The commitment of individual State Water Project (SWP) or Central Valley Water (CVP) contractors to participate in the BDCP has not been determined, and it is possible that some contractors will decline. The Final IA should specify the criteria to be used by DWR and Reclamation in determining how to coordinate and allocate water between the SWP and CVP, and among the BDCP participants and non-participants.
  3. The Draft IA specifically notes that neither the state nor federal government can commit to providing funds in the amounts expected or within the established BDCP implementation schedule. Yet, state and federal funding contributions remain crucial to overall BDCP success. Without such commitments, it remains unclear how the funds required to fully implement the BDCP will be obtained. The Final IA should explain the process that will be followed to make up for any sporadic or prolonged shortfall in BDCP funding by the state or federal governments.

#### DETAILED COMMENTS

1. Page vi: The Table of Contents lists the exhibits attached to the BDCP Draft IA.  
*Comment:* None of the listed exhibits were attached to the public review draft. The exhibits form an integral part of the commitments and assurances made by the participants. Please attach the completed exhibits to the Final IA.
2. Page 1, Section 1: Lists the parties to the IA, but does not list the individual State Water Contractor or Central Valley Project contractor agencies that would be signatories.  
*Comment:* It is not possible to determine BDCP financial impacts or overall viability without the full list of participating agencies. The Final IA and Final BDCP should list the individual contractor agencies that have financially committed to, and their level of financial participation in the BDCP.
3. Page 2, Section 2.1.6: States that “Reclamation is not a permit applicant... under the ESA or NCCPA”.  
*Comment:* This position is further reinforced by the statement on page 1, section 1 that USBR has “no obligations” established in the IA. It is unclear how an agency can participate in the BDCP, yet not be bound by implementation commitments established in the IA. This would seem to suggest

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that USBR can act independent of implementation actions taken by BDCP participants. The Final IA needs additional clarification describing USBR's commitments to conform to the terms of the BDCP while not being a signatory to the IA.

4. Page 3, Section 2.1.8: States that "...the BDCP...Provides an allocation of responsibility among the Parties for BDCP requirements.....".

*Comment:* The term "Parties," especially as it relates to individual SWP or CVP contractors, is not specifically defined. Does it mean the signatories to the IA, or is there some broader list of agencies that will participate in BDCP implementation without signing the IA? This term should be defined in the Final IA, and include the list of agencies that have committed to sign the IA. Additionally, the allocation of responsibility presumably includes funding obligations. To date, no state or federal water contractor has formally committed, in writing, to fund any aspect of the BDCP. As such, the structure of financing the underlying credit for long term debts, and the sources of funds for day-to-day operations are not defined. Without such legally binding commitments, it is unclear how the BDCP can be approved and long-term endangered species act permits can be issued.

5. Page 3, Section 2.1.10: States that "DWR and the participating SWP/CVP Contractors have submitted the BDCP....".

*Comment:* This indicates that individual SWP/CVP contractors have executed and submitted the appropriate permit applications to the federal and state wildlife agencies on behalf of their respective agencies. If so, the individual SWP/CVP agencies that are requesting HCP/NCCP permits should be listed in the Final IA.

6. Page 5, Section 3.1: Describes the membership and roles of the Adaptive Management Team (AMT), including voting members.

*Comment:* It is unclear exactly what the AMT will "vote" on or if the "vote" is expected to be binding on the IA signatories. Implementation of the BDCP is the sole responsibility of those entities receiving incidental take authorizations through the ESA and NCCPA permit process (i.e., the expanded Authorized Entity Group). It is one thing to have the AMT vote to submit a proposed management change to the Authorized Entity Group (the permittees) for consideration. It is quite another if the AMT can unilaterally impose management changes without the consent of the permit holders. The Final IA and Final BDCP should clarify that the AMT acts strictly in an advisory capacity to the permit holders.

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7. Page 7, Section 3.18: States that: “Coordinated Operation Agreement means the agreement... for the coordinated operation of the Central Valley Project and the State Water Project dated November 24, 1986.”

*Comment:* Given that both the SWP and CVP operations will be modified under the BDCP, the Final IA should describe how operations under the BDCP will be coordinated between the two projects and how the Coordinated Operation Agreement will be modified as a result.

8. Page 9, Section 3.46: States that “Permittees means DWR and SWP/CVP Contractors”.

*Comment:* Since the permit applications have been submitted to the wildlife agencies (see Section 2.1.10 above), the individual contractor agencies that have requested incidental take authorization should be listed in the Final IA.

9. Page 10, Section 3.55: States that “Supporting entity... performs task at the request of the Program Manager...”.

*Comment:* Since a supporting entity will not be a BDCP permit holder, implementation of BDCP actions will need to be authorized by a permit holder. Yet, the Program Manager is not a signatory to the IA and is not a permit holder. The Final IA will need to explain how the non-permitted Program Manager can authorize permit coverage for another non-permitted entity.

10. Page 10, Section 3.56: States that “SWP/CVP Contractors means the individual water agencies that hold water delivery contracts... and that have executed this Agreement.”

*Comment:* The definition of “SWP/CVP Contractors” also includes joint exercise of power agencies that execute the IA. However, it is unclear how a joint exercise of power agency can be granted a permit unless it has also submitted a permit application and committed to fund, on behalf of all its member agencies, BDCP implementation. In this case, the member agencies of the joint exercise of powers agency will need to have developed and executed a legally binding cost-sharing agreement to ensure adequate funding as required by the ESA and NCCPA permit processes. The Final IA should clarify if any joint exercise of power agency has formally committed to fund and participate in BDCP implementation and include a copy of the actual funding agreement.

11. Page 15, Section 7.1: States that “... Authorized Entities will fulfill all of their respective obligations...”

“• Participating in the Authorized Entity Group....”.

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*Comment:* As noted in our May 30 comment letter, because permit holders are funding BDCP implementation and are responsible for ultimate success, the Authorized Entity Group should consist of all permit holders, not just the limited subset currently defined in the Draft BDCP and Draft IA. The Final BDCP and Final IA should be revised to state that the AEG includes all individual permit holders.

“• Conferring with the... Permit Oversight Group... and obtaining approval ...where required.”

*Comment:* As noted in our May 30 comment letter, the POG should not have any unilateral BDCP implementation decision authority. Implementation is rightfully the sole obligation of the BDCP permit holders. The POG role is limited to ensuring compliance with the BDCP and permits, and providing implementation advice to the Authorized Entity Group. The Final IA and Final BDCP should be revised to reflect this more appropriate compliance oversight role for the POG.

12. Page 17, Section 8.1.1: States that “... take authorizations will cover the Permittees, including all of their respective officers, directors, employees, agents, subsidiaries, member agencies, contractors, and the Supporting Entities ...who engage in any Covered Activity. All contracts... will require compliance with the Permits... ”.

*Comment:* While this addresses Permit compliance for contractual relationships, it is silent on other relationships. For example, what sort of written documentation, if any, is required for an agent, subsidiary, member agency, or Supporting Entity to claim permit coverage? The Final IA should clarify that to obtain take authorization coverage through an existing permit holder, an entity must have a legally binding agreement stating that the entity is acting directly for, and on behalf of the permittee.

13. Page 18, Section 8.2: States that “An Other Authorized Entity will receive take authorization... after executing a Certificate of Inclusion that meets minimum requirements... set forth in Exhibit C... to ensure compliance with... Plan and Permits.”

*Comment:* Exhibit C was not attached to the Draft IA, so it is not possible to comment on the specifics contained in the “Certificate of Inclusion” or its applicability to covered activities contemplated by non-SWP/CVP contractors. In particular, it is not clear if the Certificate of Inclusion is the only mechanism available to non-SWP/CVP contractors to allow the use of SWP or CVP facilities for water transfers. The Final IA needs to address the process for non-

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SWP/CVP contractors to implement water transfers; specifically from willing sellers north of the Delta to willing buyers south of the Delta.

14. Page 20, Section 8.9: The third paragraph duplicates text in the first two paragraphs.

*Comment:* The Final IA should be revised to delete redundant text.

15. Page 21, Section 9.1: States that “Covered Activities and Associated Federal Actions encompass all actions that are proposed for coverage under Take Authorizations to be issued by the Fish and Wildlife agencies on the basis of the BDCP.”

*Comment:* It is unclear, since USBR is not a signatory to the IA, how a federal agency can, or even needs to obtain state take authorizations under the NCCPA. It is typical for federal agencies to obtain take coverage for their actions through a federal ESA Section 7 process; for the BDCP, this has been described as the Integrated Biological Opinion. The BDCP permits to be issued pursuant to the IA will provide take authorizations to non-federal agencies pursuant to ESA Section 10 and NCCPA Section 2835. The Final IA should explain how the USBR will obtain state and federal ESA coverage through issuance of the BDCP permits when that agency is not signatory to the IA.

16. Page 22, Section 9.5: States that “... If CDFW determines...”

*Comment:* The entire section should be revised to replace all occurrences of “CDFW” with “the fish and wildlife agencies”, and the remaining text modified accordingly. The current text is specific to the CDFW process, with no mention of a parallel process for the federal wildlife agencies. This text change is suggested to make it clear that both the state and federal wildlife agencies are included in the conference process. Alternately, a new IA section that mimics this wording, but focuses specifically on the federal agencies (USFWS and NMFS) should be added.

17. Page 25, Section 10.2.1.1: States that “... the applicants propose a project with operational and flow criteria intended to achieve the biological goals and objectives...”. It further states that “It is expected that the USFWS, CDFW, and NMFS will issue Permits for...the high outflow scenario...”.

*Comment:* While the range of outflow criteria proposed by the BDCP are intended to achieve the biological goals and objectives for the smelt, there is no certainty that those goals will be achieved, even with the proposed “decision tree” process. Page 23, Section 10.1 states that “failure to achieve biological goals and/or objectives shall not be a basis for a determination ... of non-

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compliance with the Plan or for the suspension or revocation of Permits....”  
 The Final IA should specifically state that the high spring and fall outflow scenarios as described in the BDCP are the maximum and will not be increased even if biological goals and objectives are not met.

18. Page 26, Section 10.2.1.2 (3): States that “Completion and peer review....will be administered by the Implementation Office under the direction of the Adaptive Management Team.”

*Comment:* The Implementation Office is the focal point for BDCP implementation. All implementation decisions need to be distributed from this single office. None of the support groups, whether it be the Permit Oversight Group or Adaptive Management Team, can have independent decision making authority for implementation or the BDCP is no longer that same one submitted by the permit applicants. For this reason, the following text should be revised as shown:

“This step will be administered by the Implementation Office in coordination with ~~under the direction of~~ the Adaptive Management Team”.

19. Page 26, Section 10.2.1.2(4): States that “... the Implementation Office will provide the report... to the Authorized Entity Group and the Permit Oversight Group for decision pursuant to....”).

*Comment:* Once Permits are issued, the Permit holders are legally responsible for BDCP implementation. Consequently, this group retains sole decision making authority for all aspects of implementation. The POG should have no independent decision making authority when it comes to BDCP implementation. The role of the permitting agencies is to ensure compliance with the terms of the BDCP and Permits, and to provide advice and guidance to the Permit holders on implementation issues. The decision making role of the POG is a repeating theme throughout the Draft IA and Draft BDCP. The Final IA and Final BDCP should be changed to reflect a more limited Permit oversight and compliance role for the POG.

20. Page 26, Section 10.2.1.4: States that “The outflow criteria applicable to CM1 may be within the range of outflow criteria analyzed in the decision tree...”.

*Comment:* The BDCP was developed by the Permit applicants with a very specific range of proposed outflow criteria. No outflow should exceed the maximum contemplated in the BDCP. For this reason, the following text should be revised as shown:



“The outflow criteria applicable to CM1 will ~~may~~ be within the range of outflow criteria....”

21. Page 26, Section 10.2.1.5: States that “...changes to the outflow requirements of CM1 associated with these other fish species...”

*Comment:* This provision infers that the maximum outflows contemplated in the BDCP can be increased beyond those in the “decision tree” to encompass other fish species. As already noted in Section 10.1, “failure to achieve biological goals and/or objectives shall not be a basis for a determination ... of non-compliance with the Plan or for the suspension or revocation of Permits...” It is important that the outflows not exceed the amounts proposed in the BDCP, even if all biological goals are not achieved. The Final IA and Final BDCP should state that alternate management methods will need to be considered if flows beyond those in the BDCP are suggested.

22. Page 27, Section 10.2.2.1: States that “The primary BDCP agencies (CDFW, USFWS, NMFS, DWR, and Reclamation will collaborate in making real time operational adjustments.”

*Comment:* This approach excludes the permit holders from any decision making regarding implementation of this aspect of the BDCP. If Permit holders are excluded, then additional language needs to be added to the Final BDCP and Final IA that relieves the Permit holders of responsibility for any adverse effects on BDCP implementation that result from decisions in which they have been excluded from making.

23. Page 27, Section 10.2.2.2.1: States that “The RTO Team will also include one representative of the SWP contractors and one representative of the CVP contractors, who will serve as non-voting members.”

*Comment:* This organizational structure precludes the SWP and CVP contractors from meaningful involvement in deciding how the BDCP will be implemented. Yet, Permit holders are solely responsible for BDCP implementation success. As noted above, if Permit holders are excluded from the decision making process, then additional language needs to be added to the Final BDCP and Final IA that relieves the Permit holders of any responsibility for any adverse effects on BDCP implementation that result from decisions in which they have been excluded from making.

24. Page 27, Section 10.2.2.2.2: Describes the functions of the RTO Team.

*Comment:* The RTO Team was not fully described in the Draft BDCP (as noted in the preamble to Section 3.4.1.4.5). Consequently, the applicability of state

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and federal open meeting laws that pertain to this Team have not been described. The Final BDCP should describe this Team in greater detail and reflect that it is bound by the same open meeting laws as all other groups that are assisting in BDCP implementation. It should also clarify how the 1986 Coordinated Operation Agreement will be modified as a result of RTO decisions.

25. Page 28, Section 10.2.2.2.3: States that “The RTO Team shall operate by consensus...”.

*Comment:* This is in conflict with Section 10.2.2.2.1 which lists SWP and CVP contractors as non-voting members. It is not clear if SWP/CVP contractor representatives on the RTO Team will be part of the consensus process or not. The Final IA needs to be revised to reflect that SWP and CVP contractors that are part of the RTO Team have the same roles and rights as other team members. It should also describe the process to follow if consensus could not be reached by the RTO members.

26. Page 29, Section 10.3.2.1: States that “The Adaptive Management Team...shall have authority to make decisions...”.

*Comment:* As noted repeatedly, the Permit holders (represented by an expanded Authorized Entity Group that includes all permit holders), are solely and legally responsible for the successful implementation of the BDCP and compliance with issued permits. Having the Adaptive Management Team function autonomously from the entities legally responsible for BDCP implementation is inappropriate and could undermine overall program success. The Adaptive Management Team should only provide implementation recommendations to the Authorized Entity Group (i.e. permit holders) for decision, and should not be authorized to make any decisions unilaterally. The Final BDCP and Final IA should be revised to reflect this supporting role.

27. Page 30, Section 10.3.2.3: States that “On a periodic basis, the Adaptive Management Team shall open its meetings to the Public.”

*Comment:* To maximize transparency and provide the greatest public involvement, all meetings of the Adaptive Management Team should be open to the public and follow all state and federal open meeting laws. The Final IA should be revised to reflect that all meetings will be open to the public.

28. Page 32, Section 10.3.5.1.1: States that “...decisions of the Adaptive Management Team shall not be subject to review and consideration of the Authorized Entity Group and Permit Oversight Group...”.

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*Comment:* See above comment 26. All decisions that can affect BDCP implementation must to be made by those entities legally responsible for BDCP implementation and compliance with permits. No other group should be making unilateral decisions that affect the BDCP or the permits. Every group or team formed to assist in BDCP implementation, whether the Permit Oversight Group, Adaptive Management Team, RTO Team or any other body, are all supporting the permit holders in implementing the BDCP. The Final BDCP and Final IA should be revised to reflect that all BDCP implementation and permit compliance decisions must be made by the permit holders.

29. Page 33, Section 10.3.5.1.1: States that “. . . if the Authorized Entity Group and the Permit Oversight Group are unable to reach agreement, the Permit Oversight Group will decide the matter.”

*Comment:* See above comments 26 and 28. The Permit Oversight Group should only be responsible for ensuring compliance with the permits. If the Authorized Entity Group (permit holders) takes an action that the permit issuing agencies believe violates permit terms and conditions, the IA contains specific permit suspension and revocation procedures to force compliance. Only the permit holders can, and should, make decisions regarding BDCP implementation; they are the ones legally and financially responsible. The Final BDCP and Final IA should be revised throughout to note this more limited role for the Permit Oversight Group.

30. Page 36, Section 10.3.5.1.1: States that “In the event that the Authorized Entity Group and the Permit Oversight Group are unable to reach agreement . . . the appropriate Fish and Wildlife Agency official with authority over the matter . . . shall decide . . .”.

*Comment:* See above comment 26, 28, and 29 above. The Draft BDCP and Draft IA contain multiple and repeated references to groups, teams or individuals other than the permit holders being authorized to make decisions that affect BDCP implementation. This approach is entirely inappropriate. The BDCP is a voluntary plan prepared and submitted by the permit applicants. Therefore, the only entities responsible for funding and implementing the BDCP are the permit holders. If another entity/agency demands decision authority, then that entity or agency must be willing to accept responsibility for the outcome of those decisions. However, by doing so, the permit holders will be relieved of any responsibility for future consequences of those decisions. The Final BDCP and Final IA should be revised to remove all references to decisions made by any entity other than the permit holders. If not, additional text needs to be added to the Final BDCP and Final IA that relieves the Permit holders of responsibility for any adverse effects on BDCP implementation that result from decisions not made by them.

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31. Page 37, Section 10.3.7.3.2: States that "... the Supplemental Adaptive Management Fund may be used at any time, provided the following actions have occurred or determinations have been made....".

*Comment:* The text then goes on to list six bulleted items necessary to trigger use of the supplemental fund. However, it is unclear if all six of the bullets have to be satisfied to access funds, or just one. Recommend changing the text as shown below:

"... may be used at any time, provided one or more of the following actions...."

32. Page 39, Section 10.4.2: States that "The Adaptive Management Team, shall have primary responsibility....".

*Comment :* To reinforce that all entities working on BDCP implementation recognize the overall responsibility of the permit holders, the text change shown below is recommended:

"Under the direction of the Authorized Entity Group, the Adaptive Management Team shall have primary..."

33. Page 39, Section 10.4.3: States that "In the event the Authorized Entity Group and the Permit Oversight Group are unable to reach agreement,... the Permit Oversight Group will determine whether the proposed plan... will be adopted."

*Comment:* See above comments 11, 19, 29, and 30. It is inappropriate for any entity other than the permit holders to make decisions regarding BDCP implementation.

34. Page 40, Section 11.1: States that "The Implementation Office will ensure that the Conservation Measures are implemented substantially in accordance with the Implementation Schedule, Exhibit D."

*Comment:* None of the exhibits referenced, including Exhibit D, were included in the Draft IA. All exhibits should be included in the Final IA.

35. Page 40, Section 11.1.1: States that "If Conservation Measures are implemented in accordance with the Implementation Schedule..., Rough Proportionality will be considered by CDFW to be maintained....".

*Comment:* Rough proportionality is only discussed in the context of CDFW NCCPA permits. The Final IA should also indicate if the USFWS and NMFS

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will also follow this Rough Proportionality standard in evaluating BDCP implementation under their ESA Section 10 permits. Further, it is unclear if Rough Proportionality can be maintained if federal or state funding commitments are not met. The Final IA should include text that suspends the Rough Proportionality requirement if state or federal funding obligations are not met.

36. Page 42, Section 11.4.1: States that “The Fish and Wildlife Agency(ies)... shall respond to the Implementation Office within sixty (60) days.”

*Comment:* To minimize potential implementation delays, text should be revised as shown below:

“The Fish and Wildlife Agency(ies)... shall respond to the Implementation Office within sixty (60) days or such revision shall be deemed approved.”

37. Page 45, Section 13.0: States that “... the State and federal governments have committed to provide additional funding to implement the Plan.”

*Comment:* It is unclear how the state or federal governments can legally commit to fund their portions of the BDCP in advance of actions by the Legislature or Congress to appropriate and allocate funds. Without such legally binding commitments, it is unclear how the BDCP can be approved and long-term endangered species act permits can be issued. The Final BDCP and Final IA should cite provisions in the NCCPA and ESA regulations that allow Permits to be issued in the absence of assured funding.

38. Page 46, Section 13.1.2: States in a note to reviewer that “... while the United States has been engaged in development of this draft Agreement, there is no federal position... regarding potential funding obligations... The Parties anticipate reaching agreement on a federal and state cost share.”

*Comment:* This sentence conflicts with the statement on page 45 where the state and federal governments have definitively committed to provide additional funds for the BDCP. The cost share eventually agreed to by the state and federal governments should be included in the Final IA, as well as a description of how long-term state and federal funding will legally be assured. Without such assurances, we are unsure how the BDCP can be approved and long-term endangered species act permits can be issued. The Final BDCP and Final IA should cite provisions in the NCCPA and ESA regulations that allow Permits to be issued when funding is uncertain.

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39. Page 48, Section 14.0: States that “The State and federal agencies may use a variety of tools at their disposal... to ensure the needs of species affected by unforeseen events are adequately addressed.”

*Comment:* To provide assurances to the Authorized Entity Group that no additional funds or resources will be required, the Final IA should include text that protects the Authorized Entity Group (permittees) from being subject to new or revised regulations or fees, the intent of which is to obtain the funding or resources necessary to address unforeseen events.

40. Page 53, Section 15.1: States that “The implementation of the BDCP will generally be effectuated through an Implementation Office, which will be... governed by the Authorized Entities through the “Authorized Entity Group”.

*Comment:* Consistent with our prior comment letter, we strongly believe that all permit holders must be included in the Authorized Entity Group; a small subset cannot truly represent the interests of all permit holders or provide for the broadest public interest.

41. Page 53, Section 15.1: States that “Through the Permit Oversight Group, the Fish and Wildlife Agencies will be involved in certain specified implementation decisions...”

*Comment:* It is important that the POG and Fish and Wildlife Agencies provide input into relevant decisions, but they should not be making the actual decision. All decisions related to BDCP implementation are the purview of the permit holders. Once the permits are issued, the POG and wildlife agencies role is to ensure that the permit terms are met. The Final BDCP and Final IA should be clear that neither the POG or Fish and Wildlife Agencies make decisions related to BDCP implementation.

42. Page 55, Section 15.2.1: States that “The Implementation Office shall not administer the Adaptive Management and Monitoring Program.”

*Comment:* While it is appropriate to have the Adaptive Management Team administer the monitoring program, the Implementation Office should provide overall direction to the Adaptive Management Team. The Adaptive Management and Monitoring Program is a key component of BDCP implementation. Having an entity other than the Implementation Office, which is charged with BDCP implementation, direct this work is inappropriate and counterproductive to BDCP success. The Final BDCP and Final IA should be revised to reflect that the Implementation Office will provide overall direction in the administration of the Adaptive Management and Monitoring Program.

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43. Page 58, Section 15.2.4.4: States that “The Implementation Office shall be responsible for... implementation of Conservation Measures... and will not require the approval... of the Authorized Entities, the Fish and Wildlife Agencies, or the Adaptive Management Group.”

*Comment:* The Implementation Office should not act unilaterally. The permit holders (i.e., Authorized Entities) are responsible for all aspects of BDCP implementation, including all the Conservation Measures. Consequently, no actions should be undertaken by the Implementation Office or any other group without the approval or concurrence of the Authorized Entities (permit holders). This presumably can be accomplished through approval of the annual work plan. The Final BDCP and Final IA should be revised to reflect Authorized Entities approval is required for any implementation action.

44. Page 60, Section 15.3.3: States that “The Authorized Entity Group will meet...at a minimum on a quarterly basis. ...On a periodic basis, the Authorized Entity Group will hold meetings that are open to the public.”

*Comment:* All, not just some, meetings of the Authorized Entity Group should be open to the public and comply with state and federal open meeting laws. The Final IA and Final BDCP should be revised to state that all meetings of the AEG will be open to the public and comply with open meeting laws.

45. Page 60, Section 15.4.1: States that “... the Fish and Wildlife Agencies will retain responsibility for monitoring compliance with the BDCP, approving certain actions, and enforcing the terms and conditions of their respective regulatory authorizations.”

*Comment:* Having the Fish and Wildlife Agencies responsible for monitoring BDCP compliance, and the terms and conditions of the permits is entirely appropriate once permits are issued. However, having them make unilateral decisions on BDCP implementation actions is not appropriate. As noted previously, once permits are issued, the sole responsibility for BDCP implementation belongs to the permit holders. Consequently, the permit holders should be making all decisions that affect BDCP implementation. If the Fish and Wildlife Agencies (issuers of the permits) disapprove of action taken by the permit holders, there are permit suspension and revocation procedures in the IA to ensure permits are not violated. The Final BDCP and Final IA should be revised to remove any reference to the Fish and Wildlife Agencies “approving certain actions”.

46. Page 61, Section 15.4.1: States that “The Permit Oversight Group will have the following roles...”

- Participate in decision-making regarding real-time operations....”.

*Comment:* It is appropriate for the Permit Oversight Group to provide guidance to the permit holders in the decision making process, but that involvement should strictly be advisory. The permit holders are ultimately responsible for all aspects of BDCP implementation. No other group should be making unilateral decisions regarding BDCP implementation. The Final BDCP and Final IA should be revised to make it clear that the permit holders make all decisions, with other groups providing guidance and advice.

47. Page 66, Section 15.8.1: States that “With respect to implementation matters for which the Authorized Entity Group and Permit Oversight Group have joint-decision making authority...”

*Comment:* There should be no joint-decision making authority when it comes to BDCP implementation. Once the permits are issued, the permit holders have sole and complete responsibility to meet the terms and condition of the permits. There are no further decisions for the Permit Oversight Group to make once the permits are issued. The POG’s role is to ensure compliance with terms of the permits. There is already a procedure in the IA for the Fish and Wildlife Agencies to follow if the permit holders are not in compliance with the permits. The Final BDCP and Final IA should be revised to note that the POG provides guidance and advice to ensure compliance with the permits.

48. Page 66, Section 15.8.2: States that “If... the matter remains unresolved, the entity with decision-making authority... will make the final decision.”

*Comment:* The only entity with decision making authority should be the Authorized Entity Group (i.e., permit holders). There should be no need for a review process to challenge a decision by the permit holders. The Permit Oversight Group can certainly provide advice and guidance to the permit holders, but the ultimate decision belongs to those who have been issued permits and are responsible for BDCP compliance. The Final BDCP and Final IA should be revised to delete any reference to any BDCP implementation decisions being made by the Permit Oversight Group. As a result, there is no need for Section 15.8 and it should be deleted.

49. Page 72, Section 17.2.2: States that “... the Permit Oversight Group... will provide written concurrence...that the draft plan... makes adequate provisions for... joint decision of the Authorized Entity Group and the Permit Oversight Group or decisions of an agency with authority over the matter.”

*Comment:* As has been stated repeatedly throughout these comments, the only entity authorized to make BDCP implementation decisions should be the permit



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holders. They are the ones ultimately responsible for BDCP implementation and permit compliance. The Final BDCP and Final IA should be revised to state conclusively that the permit holders are the final decision making authority for all BDCP implementation actions.

50. Page 72, Section 17.2.3: States that "...implementation of the applicable joint decisions of the Authorized entity Group and the Permit Oversight Group or decisions of an agency with authority over the matter."

*Comment:* See above comment 47 and 49. The only entity authorized to make BDCP implementation decisions should be the permit holders. They are the ones ultimately responsible for BDCP implementation and permit compliance. The Final BDCP and Final IA should be revised to state conclusively that the permit holders are the final decision making authority for all BDCP implementation actions.

51. Page 79, Section 21.4: States that "In the event of withdrawal by DWR, the Permits will be terminated."

*Comment:* This proposal is unwarranted. It is unclear why withdrawal by DWR would trigger termination of all other permits. The DWR is only one of many permit holders; each has legal responsibility for BDCP implementation. Terminating all permits without cause may be in direct conflict with provisions of the "Permit Revocation Rule" and "assurances" authorized under ESA Section 10 and NCCPA permits. The withdrawal of DWR should be handled no differently than the withdrawal of any other permit holder. The Final IA should be revised to allow all other permits to remain in force even if DWR withdraws.

52. Page 79, Section 21.4.1: States that "As a condition of withdrawal, the withdrawing Party(ies) shall remain obligated to ensure implementation of... Conservation Measures required under this Agreement, the BDCP and the Permits..."

*Comment:* It is appropriate for withdrawing parties to remain obligated for impacts of take caused by their actions prior to withdrawal. However, if DWR withdraws, and all permits are terminated as currently proposed in Section 21.4, then DWR should bear the sole burden of, and responsibility for all obligations of the permit holders that did not request to withdraw and had permits unilaterally terminated. The Final IA should be revised to reflect this additional obligation of DWR should it choose to withdraw without the concurrence of the other permit holders.

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53. Page 80, Section 22.0: States that “... none of the parties will be liable in damages to any other Party or to any other person or entity for any breach of this Agreement...”

*Comment:* If there is no penalty for non-compliance, why would a participant place a priority on performing? If Parties fulfilling their obligations are hindered, or incur greater costs than if the other party had performed as expected, damages should be recoverable from the non-performing Parties. The Final IA should be revised to allow for damages claims against non-performing parties.

54. Page 80, Section 22: States that “The Authorized Entities use their best efforts to remedy their inability to; and”

*Comment:* This sentence is incomplete. Text should be revised as shown below:

“The Authorized Entities use their best efforts to remedy their inability to perform; and”

55. Page 86, Section 23.2.1: States that “The Fish and Wildlife Agencies... may submit comments on the proposed minor modification.... The Authorized Entities must agree to any proposed minor modification.”

*Comment:* This paragraph can be interpreted several ways. To make it clear that the Authorized Entities have approval authority for minor modifications, the text should be changed as follows:

“The Authorized Entities must agree to any proposed minor modification before it is incorporated into the Plan.”

56. Page 87, Section 23.3: States that “Formal amendments include, but are not limited to... • Changes to Biological Goals.”

*Comment:* Requiring a formal amendment for changes to biological goals directly conflicts with the conservation strategy (page 24, Section 10.1.2), which specifically allows biological goals to be modified through the adaptive management process. This is a significantly streamlined process when compared to the formal amendment process. In keeping with the relatively informal adaptive management process, the Final IA should move “Changes to Biological Goals” from the Formal Amendment process to the Minor Modification process.

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57. Page 91, Section 24.15: States that “Nothing in this Agreement is intended or shall be construed to require the ... expenditure of funds by the United States....Nothing in this Agreement will be construed by the Parties to require... expenditure of any money from the Treasury of the State of California...”

*Comment:* This section allows the State and Federal governments to avoid funding commitments if monies are not appropriated by their respective authorizing bodies. To make it clear that permits will not be revoked or suspended by the lack of state or federal funds, the Final IA should add language as follows:

“Failure of the federal or state to provide funds as required to implement the BDCP will not be justification to initiate permit suspension or revocation.”

The Water Authority appreciates the opportunity to review and provide comments on the Draft Implementing Agreement. As noted above and in a prior comment letter, the intention of our comments is to obtain additional information and clarification in the Final environmental documents to determine if the Proposed Action as described in the Draft BDCP and Implementing Agreement, and analyzed in the Draft EIR/EIS, is a cost-effective, long-term solution to Delta water supply and ecosystem conflicts.

Please retain the Water Authority on your mailing list to receive future notifications or documents regarding this project. If you have questions or wish to discuss any of the above concerns in greater detail, please contact Larry Purcell, Water Resources Manager at (858) 522-6752, or by email at [lpurcell@sdewa.org](mailto:lpurcell@sdewa.org).

Sincerely,

Maureen A. Stapleton  
General Manager