

July 15, 2015

**Attention: Imported Water Committee**

**Bay-Delta Activities Update (Information)**

**Purpose**

The purpose of this memo is to provide a brief background of Bay-Delta issues, recent actions related to the Bay-Delta activities, and an estimated timeline of anticipated activities.

**Discussion**

Over the past several years, the Board guided staff in an extensive review and assessment of the Bay-Delta Conservation Program (BDCP)<sup>1</sup> and other Bay-Delta matters that may impact the San Diego region. The Sacramento-San Joaquin Delta's (Delta)<sup>2</sup> ecosystem has deteriorated and species, such as the delta smelt and salmon, have become jeopardized, leading to biological opinions (BiOp) that restrict pumping at the Delta's export facilities.<sup>3</sup> Because the California State Water Project (SWP) is a major source of imported water for Southern California,<sup>4</sup> the predictability – how much water can be relied upon and under what conditions – of SWP is important for Southern California's water supply planning.

***The Rise of CalFed and the Bay-Delta Accord.*** The BDCP's dual objectives – water supply conveyance and habitat restoration – can be traced back to the 1994 establishment of the CalFed Bay-Delta Program (CalFed), a collaborative effort between State and Federal agencies formed with

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<sup>1</sup> The BDCP is a multi-species habitat conservation plan and a natural community conservation plan under the federal and state endangered species acts, with a goal to provide “a comprehensive strategy for the Sacramento-San Joaquin River Delta designed to restore and protect ecosystem health, water supply, and water quality.” By providing a plan that seeks to recover listed species, state and federal water management agencies will be able to obtain the permits necessary to build necessary infrastructure in the Delta over the 50-year permit timeframe.

<sup>2</sup> The Delta is an important ecosystem and water source located near San Francisco Bay and south of Sacramento. As an estuary, the Delta and its islands create a habitat for hundreds of aquatic and terrestrial species. The Delta region also supports critical infrastructure -- in addition to the water delivery systems (California's State Water Project and Federal Central Valley Project) that supplies drinking water to 25 million people and irrigation water to 4 million acres of farmland -- that includes energy transmission lines, transportation routes for ships, trains and trucks.

<sup>3</sup> Following U.S. District Judge Oliver Wanger invalidating the Delta smelt BiOp that had guided the SWP and the CVP operations in 2007, the United States Fish and Wildlife Services released a BiOp on the impacts of the SWP and Central Valley Project (CVP) on Delta smelt in 2008, which contained water supply restrictions that impacted SWP and CVP deliveries, which was challenged by Metropolitan Water District (MWD) and other entities. In 2011 the Eastern District Court ruled in the water agencies' favor, calling the federal BiOp on Delta smelt as “arbitrary and capricious.” In March 2014, the 9<sup>th</sup> U.S. Circuit Court of Appeals reversed the lower court ruling and said that it should have paid more heed to the BiOp and that federal wildlife officials had a duty to take “reasonable and prudent” measures to protect the fish. Further, in January 2015, the Supreme Court decided it would not hear the appeal related to the Delta smelt, which means that the circuit court ruling stands. Similarly, in 2009, the National Marine Fisheries Service released a BiOp for salmonid species, which further restricted the operations of SWP and CVP. The salmon BiOp was also challenged by MWD and other entities. In December 2014, the 9<sup>th</sup> Circuit held that the 2009 BiOp for salmonid species is valid and lawful.

<sup>4</sup> The SWP consists of reservoirs, aqueducts, and power and pumping plants owned and operated by the California Department of Water Resources. Because of the SWP's relatively small storage system (5.8 million acre-feet (MAF) as compared with the Colorado River system's 60 MAF, for example), the quantity of SWP water available for annual delivery is more influenced by hydrology and operational considerations.

the explicit goal of developing a science-based proposal for water quality standards. The agencies, recovering from the six-year (1987-1992) drought that obstructed water deliveries and impacted water quality and subsequently certain fish species, signed a document titled “*Principles for Agreement on Bay-Delta Standards between the State of California and the Federal Government.*” This agreement became known as the Bay-Delta Accord (Accord), and it initiated a long-term planning process to improve the Delta and increase the reliability of its water supply, which resulted in the completion of CalFed’s management plan.<sup>5</sup> Almost a decade after the release of CalFed’s management plan, discord continued to exist on resolving the issues in the Delta. The State Legislature created the California Bay-Delta Authority (Authority) to implement the CalFed management plan; however, several years after the Authority undertook its efforts, the Little Hoover Commission issued an independent report, which found CalFed’s management plan to be “*costly, underperforming, unfocused, and unaccountable.*” Shortly thereafter, in 2006, the Legislature dissolved the Authority and moved all Delta-related activity to the California Natural Resources Agency (formerly the California Resources Agency).

**A “New” Delta Vision and the Bay Delta Conservation Plan.** In 2006, then-Governor Arnold Schwarzenegger established by Executive Order a Delta Vision process as stakeholders continued to seek a solution to the Delta issues. In 2008, the Delta Vision Blue Ribbon Task Force, formed as a result of Governor Schwarzenegger’s Delta Vision process, issued a Delta Vision Strategic Plan that provided 12 integrated and linked recommendations for long-term sustainable management of the Bay-Delta. In an effort to meet the recommendation to restore habitat within the Delta in a way that reliably delivers water, the California Natural Resources Agency (Resources Agency) initiated the preparation of the BDCP. While the BDCP is managed by the Resources Agency, the development of the Environmental Impact Report and Environmental Impact Statement (EIR/EIS) is led by the California Department of Water Resources (DWR). The Bureau of Reclamation (Reclamation), the United States Fish and Wildlife Service and the National Marine Fishery Service are the federal co-leads on the EIS.

In 2009, the State passed Senate Bill X7-1, known as the Sacramento-San Joaquin Delta Reform Act (Delta Reform Act). The Water Authority, a strong advocate for a sustainable Bay-Delta solution, actively encouraged passage of the 2009 measure, among other bills that comprised a comprehensive water package of legislation. The Delta Reform Act directed that the Bay-Delta be managed with dual goals of water supply reliability and ecosystem protection. The legislation also created the Delta Stewardship Council, charged with adopting and overseeing implementation of a comprehensive Bay-Delta management plan (Delta Plan).<sup>6</sup> To be incorporated into the Delta Plan,

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<sup>5</sup> The CalFed management plan created under the Bay-Delta Accord included the CalFed Framework, Record of Decision, final Programmatic EIS/EIR and California Bay-Delta Act were adopted; the Bay-Delta Public Advisory Committee was formed and Congress authorized federal CalFed participation. The Framework document formalized cooperation among state and federal agencies with management and regulatory responsibility in the Bay-Delta. Signatories to the Framework agreed to work together to formulate water quality standards, coordinate operations of the SWP and the federal CVP and work toward long-term solutions to problems in the estuary. The Bay Delta Accord created programs that would address four urgent but interconnected problems related to water: water supply reliability, water quality, ecosystem restoration and Bay-Delta levee system integrity. MWD paid \$30 million of the \$32.2 million to “kick-start” water agency funding for the Accord’s ecosystem restoration program.

<sup>6</sup> The Delta Plan is a comprehensive, long-term management plan for the Delta that creates new rules and recommendations to further the state’s coequal goals for the Delta in a manner that preserves, protects and enhances the unique agricultural, cultural, and recreational characteristics of the Delta. The Delta Plan is enforceable through regulatory authority and requires state and local agencies’ actions or projects to be consistent with the Delta Plan. The Delta Plan was unanimously adopted by the Delta Stewardship Council on May 16, 2013 and its 14 regulatory policies

the BDCP must meet the statutory criteria in the Delta Reform Act. In 2012, Governor Jerry Brown and U.S. Secretary of the Interior Ken Salazar outlined a BDCP framework focused on achieving the dual goals. Meanwhile, the Water Authority's Board also reaffirmed its longstanding support for a sustainable "Delta fix," by adopting a set of policy principles relating to the Bay-Delta and outlining critical issues that must be resolved in the BDCP process (See Attachment 1).

In spring 2013, several chapters of the Administrative Draft BDCP were released to the public as a preview of the BDCP Draft EIR/EIS before it was made available for public comment. It was followed, in December 2013, by the Consultant Administrative BDCP Draft EIR/EIS and later the Draft Implementing Agreement (IA) in May 2014.<sup>7</sup> Over the course of 2013 and 2014, and using the Bay-Delta policy principles and the Water Authority's 2010 Urban Water Management Plan<sup>8</sup> as a framework and context for analysis, the Water Authority embarked on an extensive, multi-disciplinary review of the BDCP and its associated documents. The effort culminated in formal comment letters on the Draft EIR/EIS and Draft IA (See Attachments 2, 3 and 4).<sup>9</sup> Chief among the Water Authority's concerns are the need for state and federal agencies to be more transparent and detailed in water supply benefits and the financing of the proposed BDCP, including its funding sources and cost and supply allocation to allow participants to evaluate the cost-benefit of the project or reasonably limit their ratepayers risks assumed.

In August 2014, after receiving reportedly more than 10,000 comments on the BDCP and associated documents, DWR and the other state and federal lead agencies announced the expected publication of a Recirculated Draft BDCP, EIR/EIS, and IA in early 2015. The announcement implied the recirculated documents would address concerns expressed over habitat restoration measures, the nature of climate change, and the level of scientific uncertainty about future conditions. The announcement followed concerns expressed by federal fish and wildlife agencies concerning scientific uncertainty to support a 50-year permit as proposed in the BDCP (Alternative 4, the "preferred alternative"). In December 2014, a notice describing refinements to the BDCP was released. The refinements included a modified pipeline tunnel alternative – Alternative 4A, which is intended to reduce construction impacts on communities and the environment, improve long-term reliability and operation of the tunnels, and allow for gravity flows under certain river conditions. These modifications, along with others, are anticipated to be part of the recirculated draft.

***Emergence of a New Bay-Delta Approach.*** On April 30, 2015, Governor Brown unveiled a new approach that involved separating the BDCP's water conveyance and ecosystem restoration objectives into two discrete efforts – California WaterFix and California Eco Restore.<sup>10</sup> As reason

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were approved by the Office of Administrative Law. The Delta Plan became effective with legally-enforceable regulations on September 1, 2013. Following the adoption of the Delta Plan, seven lawsuits throughout California were filed challenging it. The complaints varied, such as violations to California Environmental Quality Act (CEQA), mandates of the Delta Reform Act, and Public Trust obligations. The seven cases were coordinated in the Sacramento Superior Court as the *Delta Stewardship Council Cases*. In March 2014, the court set a schedule for lodging of the administrative record. By May 2015, all briefs were filed. No trial date has been set at this writing.

<sup>7</sup> The Implementing Agreement clarifies the provisions of the BDCP and the processes the Parties intend to follow to ensure successful implementation.

<sup>8</sup> 2010 Urban Water Management Plan, <http://www.sdcwa.org/2010-urban-water-management-plan>

<sup>9</sup> Water Authority comment letters on the Draft EIR/EIS and Draft IA submitted to National Fisheries Service, dated February 5, 2014 and May 30, 2014 and July 28, 2014.

<sup>10</sup> The focus of California WaterFix is on the construction of a new water conveyance facility, while the California Eco Restore is centered on pursuing more than 30,000 acres of fish and wildlife habitat restoration in the next five years.

for the new approach, the Governor stated that bifurcating the objectives would “accelerate the restoration of the Delta’s ecosystem and fix the state's aging water infrastructure.”

Subsequent to the Governor’s re-branding of the BDCP, Reclamation and DWR described in a Federal Registry notice released in mid-June plans to pursue a BiOp pursuant to the Federal Endangered Species Act Section 7 and a corresponding State permit for the California WaterFix, rather than the endangered species compliance through the Habitat Conservation Plan (Federal) and Natural Community Conservation Plan (State). By doing so, the new water conveyance facility will function under the same permit standards and uncertain long-term regulatory conditions as the SWP is currently being operated, and the California WaterFix project will no longer pursue the 50-year permit as envisioned under the original BDCP.

**California WaterFix.** On July 9, 2015, DWR announced the release of a Partially Recirculated Draft EIR/EIS to the public beginning July 10, 2015 for a 45-day public comment period. This Recirculated Draft EIR/EIS include engineering refinements made to the water conveyance facilities and introduce new sub-alternatives – Alternatives 4A (dubbed the California WaterFix and the new California Environmental Quality Act (CEQA) and the National Environmental Policy Act (NEPA) Preferred Alternative), 2D and 5A. The documents also explore multiple regulatory approaches and include updated environmental analyses that reportedly respond to some issues raised in comments received on the earlier draft documents.

The California WaterFix includes three new intakes along the Sacramento River and dual-bore tunnels to convey water to the existing state and federal pumping facilities and operation elements similar to the BDCP’s Alternative 4. It also includes habitat restoration measures and other environmental commitments required to fulfill State and Federal environmental laws while incorporating the Governor’s regulatory approach for obtaining the necessary permits and authorizations to implement the project. According to the announcement, the Recirculated Draft EIR/EIS only includes sections requiring additional public review according to CEQA and NEPA.

**Next Steps.** The Water Authority has long advocated for a “right-size” fix for the Delta that stabilizes the ecosystem and provides predictability for water supplies and is supported by a broad range of stakeholders to ensure it is implementable. Additionally, it has advocated that the water contractors that expect to finance the solution demonstrate the ability to finance and maintain the improvements by obtaining firm financial commitment from their member units or member agencies. The Water Authority staff will review and assess the recirculated documents upon their release to determine whether and how the issues and concerns identified under the prior review have been addressed. The recirculated documents will also be reviewed against the backdrop of the Board approved Bay-Delta policy principles and the recently adopted 2015-2016 Bay-Delta Workplan (see Attachment 5). An invitation has been extended to a State representative to the August Imported Water Committee meeting to present on the Governor’s new approach. Staff will provide an in-depth analysis of the recirculated draft EIR/EIS at the September IWC meeting.

Prepared by: Debbie Discar-Espe, Senior Water Resources Specialist  
Reviewed by: Glenn A. Farrel, Government Relations Manager  
Amy Chen, Director of the MWD Program  
Approved by: Dennis A. Cushman, Assistant General Manager

Attachment 1: Water Authority Memo, "*Adopt Delta Policy Principles*," dated February 15, 2012

Attachment 2: Water Authority Comment Letter, dated February 5, 2014

Attachment 3: Water Authority Comment Letter, dated May 30, 2014

Attachment 4: Water Authority Comment Letter, dated July 28, 2014

Attachment 5: Water Authority Memo, "*Adopt Proposed 2015-2016 Bay-Delta Workplan*," dated February 18, 2015



February 15, 2012

**Attention: Imported Water Committee**

**Adopt Delta Policy Principles. (Action)**

**Staff recommendation**

Adopt Delta Policy Principles to guide staff in evaluating Bay-Delta initiatives and the Water Authority's advocacy to ensure a successful implementation of a Delta solution.

**Alternatives**

1. Modify one or more draft principles.
2. Do not adopt Delta Policy Principles.

**Fiscal impact**

None.

**Background**

The Sacramento-San Joaquin Bay Delta is an important water supply source for Southern California. Metropolitan Water District (MWD) purchases water from the Department of Water Resources through its State Water Project (SWP) contract. MWD is the SWP's largest customer, providing more than 50 percent of its revenues. As such, MWD is the principle source of revenue under the current SWP as it will be for any proposed Bay Delta solution. As the largest steady purchaser of MWD water, the Water Authority has a vital interest in assuring that any Bay Delta solution is financially sustainable. The Water Authority has advocated for a number of changes in the MWD rate structure, including securing take-or-pay contracts with its member agencies or other firm commitments to pay the fixed costs of a Delta conveyance project.

**Discussion**

The Water Authority has been a strong advocate for a sustainable Bay Delta solution. The Water Authority actively engages in Bay Delta issues at the MWD board and other forums including the State Capitol, where it lobbied for passage of the 2009 comprehensive Bay Delta bill package. The 2009 bill package approved as state policy the co-equal status of restoring the Delta ecosystem and creating a more reliable water supply for California. Recently, the Water Authority held two Bay-Delta workshops receiving input from stakeholders on their views of the issues and a Bay Delta solution. The Water Authority also participates directly on three Bay Delta Conservation Plan (BDCP) working groups on Conveyance, Governance and Finance.

The Water Authority has consistently advocated for a "right-size" solution in the Delta that is also supported by a broad range of stakeholders in order to reduce challenges to implementation. A central point of the Water Authority's advocacy position in determining the "right size" of a Bay

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**Delta solution is clear commitments to pay through take-or-pay contracts or legal equivalent to pay the fixed costs of a project.**

**The Delta Policy Principles will help guide staff as they evaluate the BDCP and other projects and actions relating to the Bay Delta solution. Draft principles were presented to this committee for review last month; the attached recommended principles reflect comments received on the prior draft.**

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**Reviewed by: Jeff Volberg, Government Relations Manager**  
**Amy I. Chen, MWD Program Chief**

**Approved by: Dennis A. Cushman, Assistant General Manager**

**Attachment: Delta Policy Principles**

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## **San Diego County Water Authority Delta Policy Principles**

The San Diego County Water Authority Board of Directors supports a Bay Delta solution that will meet the co-equal goals and provide San Diego County with a reliable, high-quality supply of affordable, imported water consistent with the Water Authority's Urban Water Management Plan and Regional Facilities Optimization and Master Plan. The adopted policy principles will guide staff in evaluating projects and actions concerning the Bay-Delta.

### Water Supply Reliability

- Continue to support the co-equal goals of water supply reliability and environmental restoration embodied in the 2009 Delta bill package.
- Support deliberative processes that are designed to ensure a meaningful dialogue with all stakeholders in order to reduce future conflicts and challenges to implementation of a Bay Delta solution.
- Provide regulatory certainty and predictable supplies to help meet California's water needs in the long-term.
- Encourage a Bay Delta solution that acknowledges, integrates and supports the development of water resources at the local level including water use efficiency, seawater and brackish water desalination, groundwater storage and conjunctive use, and recycled water including direct and indirect potable reuse.
- Improve the ability of water-users to divert water from the Delta during wet periods, when impacts on fish and ecosystem are lower and water quality is higher.
- Encourage the development of a statewide water transfer market that will improve water management.
- Support improved coordination of Central Valley Project and State Water Project (SWP) operations.

### Ecosystem Restoration

- Restore the Bay-Delta ecosystem consistent with the requirements established under the state Natural Community Conservation Plan and the federal Habitat Conservation Plan, taking into account all factors that have degraded Bay-Delta habitat and wildlife.
- Work with all stakeholders to ensure a meaningful dialogue and that ecosystem restoration issues are addressed in an open and transparent process.

### Finance and Funding

- Encourage and support a Bay Delta solution and facilities that are cost-effective when compared with other water supply development options for meeting Southern California's water needs.
- Require the total cost of any Bay Delta solution be identified before financing and funding decisions are made. The total cost must include the cost of facilities, mitigation and required or negotiated ecosystem restoration.
- Allocate costs of the Bay-Delta solution to stakeholders in proportion to benefits they receive.



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- Seek and support independent financial analyses of Bay-Delta solution including the ability of all parties to pay their proportional costs.
- Require a firm commitment and funding stream by all parties to pay for the fixed costs associated with the proportional benefits they will receive from a Bay Delta solution, through take-or-pay contracts or legal equivalent.
- Condition financial support on provisions allowing access to any water conveyance or storage facilities that are included in the Bay Delta solution.
- Support the use of public funds to support specific projects and actions with identified costs that protect and restore the environment and provide broad-based public benefits.
- Oppose water user fees to fund ecosystem restoration and other public purpose, non-water-supply improvements in the Delta that benefit the public at large.

Facilities

- Require independent technical analysis of proposed key elements of the Bay-Delta solution, including forecasting future urban and agricultural demands and size and cost of any proposed conveyance facility, to ensure the solution realistically matches statewide needs.
- Support “right-sized” facilities to match firm commitments to pay for the Bay Delta solution.
- Allow access to all SWP facilities to facilitate water transfers.

Governance

- Support continued state ownership and operation of the SWP as a public resource.
- Support improved efficiency and transparency of all SWP operations.
- Oppose any transfer of operational control of the SWP or any of its facilities to MWD, the State Water Project Contractors, Central Valley Project Contractors, the State and Federal Contractors Water Agency, any entity comprised of MWD or other water project contractors, or any other special interest group.



## San Diego County Water Authority

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February 5, 2014

### BDCP Comments

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#### 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

Oliverham  
Municipal Water District

Otay Water District

Padre Dam  
Municipal Water District

Camp Pendleton  
Marine Corps Base

Rainbow  
Municipal Water District

Ramona  
Municipal Water District

Rincon del Diabla  
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

Dear Mr. Wulff:

This letter raises a number of questions related to the funding and financing issues embodied within the Public Review Draft Bay-Delta Conservation Plan (BDCP). In addition to these questions, which are submitted as part of the BDCP open house in San Diego on February 6, 2014, the Water Authority intends to submit a more comprehensive comment letter on the Public Review Draft BDCP and associated Draft EIR/EIS documents prior to the April 14, 2014 comment deadline and close of public review.

As the largest member agency of the largest State Water Contractor, the Metropolitan Water District of Southern California (MWD), the Water Authority and its ratepayers are being counted upon to pay the second-largest share of BDCP costs in the state (among MWD member agencies, and second only to the Kern County Water Agency). Accordingly, we have requested – on multiple occasions – the opportunity to directly engage in the BDCP cost allocation discussions and negotiations process. Those requests have gone unanswered. We renew that request with this letter. The stakes are so high for the San Diego region that the Water Authority should clearly be afforded the opportunity to directly participate in the cost allocation negotiations and be provided the information we need to assess whether the preferred alternative advocated by the BDCP program will provide water supply benefits commensurate with the billions of dollars our ratepayers are being counted upon to pay. We also must ensure that our ratepayers are not at risk of paying costs for BDCP water supplies of other MWD member agencies or other state or federal water contractors, and that costs are allocated to the participants based on proportion of benefits received. To date, we have received no assurances to allay these concerns.

Over the past several years, I have sent several letters to officials with the California Natural Resources Agency raising a number of questions regarding the proposed project. To date, the Water Authority has received no responses to those questions. I incorporate those letters, attached, and the questions they raised, with this letter. We renew our request for answers raised in those letters with this letter.

We strongly believe that each participant in the BDCP must have clearly delineated capital and operations and maintenance cost responsibility identified, and be provided sufficiently detailed information to evaluate the cost-benefit (or feasibility) of participating in the project. The Water Authority has previously heard Dr. David Sunding report to the MWD Board of Directors that

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cost-benefit analyses have been produced by BDCP for all urban and agricultural water contractors, and that include cost-benefit analyses for each MWD member agency, including the Water Authority. The Water Authority has made multiple requests for this information. These requests have been ignored. We renew that request with this letter.

As we have consistently stated in a variety of public venues, the Water Authority believes that any BDCP financing plan must include enforceable agreements to pay for the project, not only from state water contractors directly, but also from the member agencies or units that provide revenues to their respective state water contractor. The stakes are far too high to simply rely on the hope that the contractors' variable water sales revenues will be adequate over the long-term to pay the project's costs.

Equally important, the Water Authority is also concerned that future progress of the BDCP and efforts to resolve seemingly intractable conflicts in the Delta will falter, especially if the cost allocation for those expected to be participants in the BDCP is not expected to be resolved before the BDCP environmental review process concludes. Without the cost allocation explicitly agreed upon, how does BDCP expect water agencies to evaluate the cost-benefit of the various alternatives or reasonably limit the risk that their ratepayers will be expected to assume?

The attachment to this letter outlines a series of issues and questions that the Water Authority believes should be thoroughly resolved in the context of the BDCP public review process. We are requesting formal, written responses to each of these items. We are concerned that the Public Review Draft BDCP does not comprehensively or adequately conduct due diligence on all of the facts and circumstances highlighted in the attachment. We remain concerned that a potential cascading collapse of funding could occur if information that should be included in a proper due diligence analysis is not provided, in a timely manner, to those who are expected to fund the program.

We appreciate the opportunity to provide these initial comments on the Public Review Draft BDCP. We remain committed to working with all parties to evaluate, address, and resolve these critical financing issues. We look forward to your written responses to our questions.

Sincerely,



Maureen A. Stapleton,  
General Manager

Attachment 1: BDCP Financing and Economic Issues and Questions

Attachment 2: October 7, 2013 letter to California Natural Resources Secretary John Laird

Attachment 3: July 30, 2013 letter to California Natural Resources Agency Deputy Secretary  
Gerald Meral

Attachment 4: August 28, 2012 letter to California Natural Resources Agency Deputy Secretary  
Gerald Meral

**Attachment 1****BDCP Financing and Economic Issues and Questions****Take-Or-Pay Contracts/Enforceable Commitments**

As the Water Authority has pointed out during discussions and written correspondence over the past two years, MWD – which, as the largest state water contracting agency, is the foundation for financing the BDCP project – relies on a financial rate structure that is not sustainable to pay its long-term financial obligations. While more than 80 percent of MWD’s costs are fixed, less than 20 percent of MWD’s revenues are paid from fixed charges. MWD’s heavy reliance – more than 80 percent -- on variable water sales to meet its financial obligations causes its water rates to be highly volatile. Since 2007, water rates at MWD have increased by more than 86 percent while sales have declined by 31 percent.

Although MWD sales have increased this year due to dry conditions, they are nowhere near the historically high water sales level. Region-wide, MWD’s per-capita water use in 2012 reduced by about 15.5 percent from its 2005 10-year average baseline. MWD’s member agencies are not required to purchase any water from MWD. The variability of water sales – and thus uncertain future water sales revenues – coupled with Southern California water agencies’ current and future planned actions to implement the State’s policy to improve water use efficiency and invest in local water resource development, raises significant question regarding MWD’s capability to provide the financial backing needed to fund long-term BDCP obligations. This should be a major concern for the State of California, whose full faith and credit will be expected to back up the financing of the project. And yet, Chapter 8 makes no mention of this material, foundational risk to BDCP financing.

The Water Authority believes that, at a minimum, state water contractors that are wholesale water agencies must demonstrate that their customers have take-or-pay contracts or other enforceable long-term financial commitments to pay the fixed costs of the BDCP program corresponding to the term of the contractor’s BDCP obligation. The Water Authority continues to be prepared to make such a commitment to MWD, as long as the Water Authority gets the water supplies in return for its payments. We also believe that the willingness to make such a firm financial commitment to a Delta solution will determine the true demand for Delta water supply, and therefore help inform the best sizing for the conveyance facility. It would not be in the state’s best interest to construct a facility only to have it stranded because no one is willing or able to pay for it, or hoped-for water sales necessary to pay for it do not materialize.

**“Step-Up” Provisions**

Existing State Water Project contracts contain provisions under which non-defaulting contractors can be assessed to cover payments not made by defaulting contractors, up to 25 percent of the defaulting contractors’ obligations. Additionally, the East Branch Extension of MWD’s State Water Project contract has a provision obligating MWD to cover default by any and all other participants. These State Water Project contract stipulations are known as “step-up” provisions. We are informed that bond underwriters for the BDCP project are expected to require a “step-up” provision by which each BDCP participant in BDCP-related bonds pledges to assume the obligations of defaulting participants. In fact, the Public Review Draft BDCP Chapter 8, at Section 8.3.3 (page 8-71) suggests amending the existing contracts as a potential funding source:

*“Existing water contracts would need to be amended to include the new costs of the BDCP assigned to the state water contractors and the repayment schedule.”*

Since “step-up” provisions are already embodied within, and apply to, MWD’s existing State Water Project contract, it would appear that such provisions would apply to the *“new costs of the BDCP assigned to the state water contractors.”* Given those “step-up” provision obligations, we remain concerned that the Public Review Draft BDCP does not fully analyze the possible financial effects of the “step up” provisions on MWD and the other participants in the BDCP.

#### Property Taxes

The Public Review Draft BDCP suggests that property taxes may be used as back-up security for BDCP payment obligations of individual state water contractors. However, there are very clear and significant limitations in MWD’s existing taxing authority under the provisions of the MWD Act:

- The Act limits MWD’s ability to levy taxes to pay its State Water Project obligations. MWD is limited to levying taxes for *“the composite amount required to pay (1) the principal and interest on general obligation bonded indebtedness of the district and (2) that portion of the district’s payment obligation under [the SWP contract] which is reasonably allocable, as determined by the district, to the repayment by the state of principal and interest on ISWP bonds] as of [January 1, 1985] and used to finance construction of facilities for the benefit of the district.”*
- Although the Act contains override ability in the event of a fiscal crisis, as determined by the MWD board, the override is limited to only one year at a time. In such an event, the State of California and bondholders would be relying upon an annual vote of MWD’s Board of Directors in which it *“. . . finds that a tax in excess of these restrictions is essential to the fiscal integrity of the district....”*
- It is unclear whether, or to what extent the MWD board would override this taxing limitation to back its BDCP obligation. The Public Review Draft BDCP should address and answer these questions.

Given these limitations and uncertainties, it is difficult to consider MWD’s or other contractors’ existing taxing authority as a meaningful back-up security for BDCP payment obligations. It is also highly questionable whether the financing of BDCP can be – or should be – backed by taxing authority that was authorized by voters decades ago, when the program was much different than is being discussed today. A careful legal analysis of MWD taxing authority should be included in the BDCP due diligence process if taxes are going to be relied upon as additional back-up security for BDCP project debt. The Public Review Draft BDCP is silent on this issue.

#### Funding Sources

Both state and federal regulations are clear in terms of their requirement for funding assurance before issuance of permit under the habitat conservation plan. The federal Endangered Species Act requires that a habitat conservation plan applicant ensure that adequate funding for the plan will be provided. The case law under ESA provides that:

- The plan must “ensure” funding over the lifetime of the permit
- The HCP cannot rely on federal funding to “ensure” funding of the plan in light of the “Anti-Deficiency Act and the availability of appropriated funds”
- The HCP must provide “remedies for failure to meet funding obligations by signatory measures”
- The HCP “cannot rely on speculative funding actions of others” for funding
- The HCP effectively must be backed by a guarantee by applicant to ensure funding for all plan element

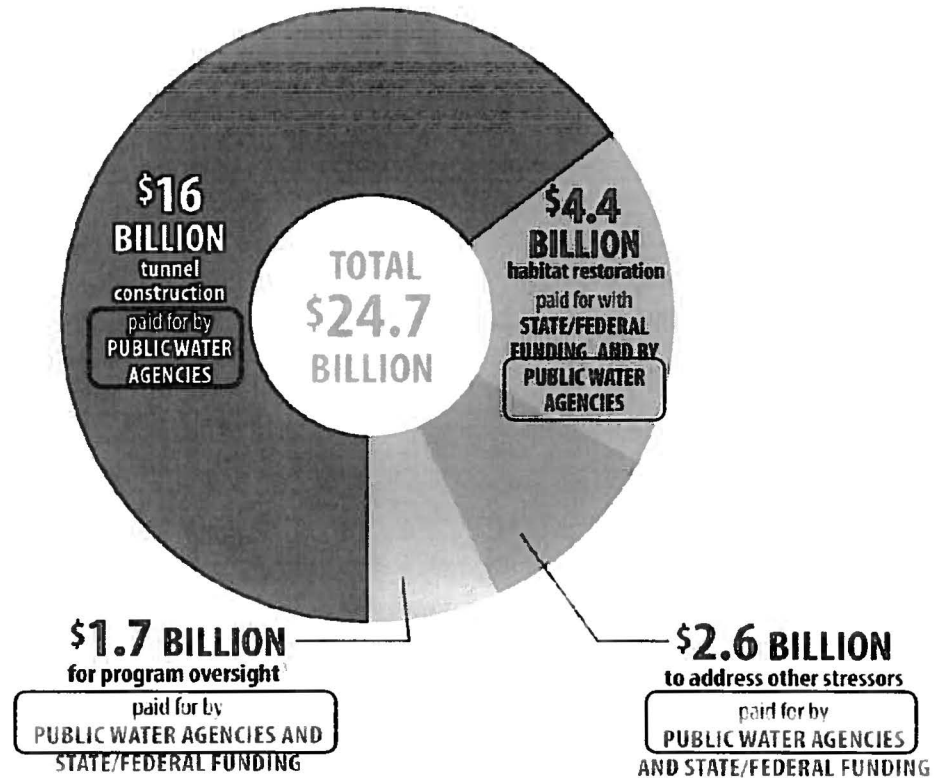
Yet, the BDCP appears to rely on federal funding that has yet to be appropriated and voter passage of future state water bonds to finance the habitat restoration costs. In fact, footnote “a” in Table 8-37 of the Public Review Draft states:

*“In most cases, funding amounts are estimates only based on funding history... Funding estimates from state and federal agencies do not represent commitments and are subject to grant awards, annual appropriations from Congress, and passage of water bonds by voters of California...”*

The BDCP must address whether the regulatory agencies will accept BDCP’s reliance on public funding sources yet to be approved as sufficient funding assurance before issuance of permits.

While the Public Review Draft BDCP goes to great lengths to explain the various funding sources and the responsibilities of the parties to fund components of BDCP implementation, Section 8.4.2 discusses the actions that will be taken or required in the event of a shortfall in state or federal funding. Specifically, the Public Review Draft BDCP states that: *“The Authorized Entities will not be required to provide land, water, or monetary resources beyond their commitments in this Plan in the event of a shortfall in state or federal funding.”* This statement appears to directly conflict with “step-up” provisions in existing State Water Project contracts, and which will likely be included in amended contracts.

This statement found in Section 8.4.2 also appears inconsistent with the BDCP public messaging regarding what will occur in the event of a shortfall in state or federal funding. The graphic below – taken directly from a BDCP presentation – demonstrates the reliance on water contractors to also provide some or, potentially *all* funding for BDCP program components beyond implementation of Conservation Measure 1.



### Cost Allocation

Even though the bulk of the BDCP will be paid by the federal and state water contractors, we are disappointed to learn that the actual funding share between the federal and state contractors will not be determined until it is “*near the time that permits are issued for BDCP.*” If this timeline, as described in the Public Review Draft, holds true, each contractor’s share of BDCP’s cost obligation will not be known until many months after the closing of the public comment period. How would water agency policy makers be in a position to assess whether BDCP is cost effective for their own unique jurisdictions? Relying on an overarching declarative statement that “*the costs of CM1 and associated mitigation and construction are affordable by ratepayers of the urban and agricultural agencies...*” is simply insufficient, and is certainly no guarantee that funding will materialize.

Even assuming that the BDCP, as a whole, would provide a statewide net positive benefit, how the costs are allocated and benefits apportioned could impact individual water agencies differently. Without a clear description of how costs are allocated, it is simply impossible to assess the cost-benefit of BDCP to individual water agencies and their ratepayers. Without this important piece being concluded or disclosed, what is the assurance that individual contractors will all find the BDCP cost effective when it is finally disclosed? And if not all contractors sign up to pay for the BDCP, how would that impact the costs that the remaining contractors must bear?

Postponing the cost allocation discussion to *after* the public commenting period is concluded is not acceptable. The BDCP must address this issue and keep the public commenting period open until this issue is resolved to afford the public an opportunity to comment on this critically important element.



## San Diego County Water Authority

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 (858) 522-6600 FAX (858) 522-6568 www.sdcwa.org

May 30, 2014

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

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

**Dear Mr. Wulff:**

The San Diego County Water Authority (Water Authority) is submitting the following 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). The BDCP has been developed to support issuance of long-term incidental take permits that meet the requirements of Section 10(a)(1)(B) of the federal Endangered Species Act, as well Section 2800 *et seq.* of the California Fish and Game Code, for certain actions proposed within the statutorily defined Sacramento-San Joaquin Delta (Delta) for a term of 50 years.

The BDCP proposes to make physical and operational improvements to the State Water Project (SWP) system in the Delta necessary to restore and protect ecosystem health, water supplies of the SWP and Central Valley Project (CVP) south-of-Delta, and water quality within a stable regulatory framework, consistent with statutory and contractual obligations. This comprehensive species conservation strategy generally consists of 22 separate conservation measures that will contribute to the preservation and recovery of 56 species of plants and animals.

The Water Authority is a local governmental entity responsible for providing a safe and reliable imported water supply to 24 member agencies serving the San Diego region's \$191 billion economy and its approximately 3.1 million residents. The Water Authority, by State legislative mandate, is the authoritative expert on the San Diego regions' water supply reliability and long-term water supply planning. The Water Authority imports up to 90 percent of the water used in the San Diego region through

#### 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

Otay 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



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five larger diameter pipelines. The source of imported water is the SWP and Colorado River. Highly dependent on imported supplies, the Water Authority has historically and consistently been a strong advocate for the Delta and for the co-equal goals of providing a more reliable water supply for California, while protecting, restoring and enhancing the Delta ecosystem.

The Water Authority's goal for providing written comments is to ensure that the Final EIR/EIS, Final BDCP, and any resulting incidental take permits, provide a comprehensive and lasting solution to the conflicts between water supplies and ecosystems in the Delta that have made water supplies less reliable. However, the Water Authority is also convinced that any solution to Delta conflicts must be cost-effective, that the costs be shared equitably among beneficiaries of the improvements, and that beneficiaries be required to make firm commitments to pay their share of constructing and maintaining improvements to the Delta.

#### GENERAL COMMENTS

1. As has been noted in previous BDCP correspondence to the California Natural Resources Agency dated August 28, 2012, July 30, 2013, and October 7, 2013 (attached and incorporated as additional comments), the Water Authority remains concerned that the financing components of the BDCP have not been explicitly described. As the largest customer of the largest state water contractor – the Metropolitan Water District of Southern California – the Water Authority's ratepayers have a great deal at stake in the BDCP process and its financing plan. Chapter 8 of the current BDCP does not provide the detailed information necessary for potential participating agencies to evaluate individual agency cost-benefit (or feasibility) of the proposed project. The Final BDCP should contain details on: how participating water contractors intend to guarantee the revenue necessary to pay for the BDCP; the provisions for "step-up" should individual water contractor's default on funding obligations; and a legal analysis of relying on property taxes as a back-up security for project debt.
2. A necessary component that is missing from BDCP public review documents is the proposed Draft Implementing Agreement, which will be signed by the U.S. Fish and Wildlife Service, National Marine Fisheries Service, California Department of Fish and Wildlife, California Department of Water Resources, and certain water contractors (Authorized Entities). Public review of this document is crucial to understanding exactly what assurances and commitments are being agreed to, and how the various financial and implementation obligations will be distributed among the signatories and, ultimately, ratepayers. The proposed Draft Implementing Agreement should be distributed for a minimum 60-day public review period. If necessary, the public comment period for the Draft EIR/EIS and BDCP documents should be extended, or re-opened, to include sufficient time for public review of the Implementing Agreement.

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## DETAILED COMMENTS

### **Draft EIR/EIS Document**

#### Executive Summary

1. Page ES-6, Table ES-1 lists Lead, Cooperating, Responsible, and Trustee Agencies.

*Comment:* The table listing is incomplete. All water contractors will be required to consider the Final EIR as part of their decision to participate in BDCP implementation as permittees (Authorized Entities). The Final EIR/EIS should list the water contractors that must approve the Final EIR/EIS as responsible agencies.

2. Page ES-8, line 22 lists Mirant LLC as an applicant for an incidental take permit, yet a footnote states they are no longer an active participant.

*Comment:* To avoid confusion, all references to Mirant LLC as a BDCP participant should be deleted from the Final EIR/EIS.

#### Chapter 4 – Approach to Environmental Analysis

3. Page 4-4, line 33 states that the CEQA baseline consists of those “facilities and ongoing programs that existed as of February 13, 2009 (publication date of the most recent NOP...)”.

*Comment:* While this approach is consistent with CEQA Guidelines, the exclusive use of this baseline is confusing when the Draft EIR/EIS analysis is compared to the baseline and analysis presented in BDCP Chapter 9 (Economic Analysis Report). We understand that the development and use of these two very different baselines is for different purposes: one to meet CEQA requirements, and the other to reflect assumed additional, potentially severe, regulatory agency restrictions on water exports that will greatly affect the financial viability of the BDCP. However, the much more restrictive conditions in Chapter 9 could actually represent the future “without BDCP” based on preliminary indications from the regulatory agencies. It would be helpful if the Final EIR/EIS also included an impact analysis, for reference only, using a baseline that matched the conditions assumed in the BDCP Economic Analysis Report. This would allow easy comparisons of the potential environmental impacts of the less restrictive CEQA baseline to the more restrictive BDCP Economic Analysis baseline. Such a comparison would highlight the true potential impacts and benefits of the BDCP.

### Chapter 30 – Growth Inducement and Other Indirect Effects

4. Page 30-126, line 19 states that “...unavoidable impacts would still be expected to occur”.

*Comment:* The basis for this statement is unclear. Neither DWR nor Reclamation have land use authority and cannot approve or deny development projects other than their own. Planning for, and approving, future public and private growth and development in areas served by SWP or CVP contractors is the responsibility of various land use agencies (e.g., cities or counties). The Draft EIR/EIS conclusion that unavoidable impacts would occur, especially when the location, magnitude, and timing of future development is unknown, is unsupported by the included information. The Final EIR/EIS should be revised to conclude that future development decisions are the responsibility of appropriate land use jurisdictions and that, in the absence of specific development proposals, it is speculative to make a determination as to the significance of environmental impacts resulting from any future growth in areas served by SWP and CVP contractors.

### **Draft BDCP Document**

#### Chapter 1 – Introduction

5. Page 1-8, lines 23-25 state that “The BDCP is intended to meet the regulatory requirements for the issuance of Section 10 permits... to allow for the incidental take of the species... resulting from implementation of covered activities by DWR and certain SWP and CVP contractors (e.g., the Authorized Entities).”

*Comment:* It is unclear if SWP and CVP water contractors that decline to participate in BDCP implementation will continue to receive water under terms of existing contracts pursuant to existing Biological Opinions. It is also not clear if existing contractors deciding to “opt out” of the BDCP can obtain “third party beneficiary” status (and receive the benefits of HCP coverage) through a separate agreement with an entity that does receive a HCP take authorization through BDCP participation. The Final BDCP should explain what happens to any existing in-Delta Biological Opinions (e.g., remain in force, terminate, etc.) should the BDCP be approved, as well as the ability of non-participating entities to obtain HCP coverage through execution of side agreements with a BDCP permittee, or through a separate Section 7 consultation process.

6. Page 1-11, lines 17-18 state that “... DWR and certain water contractors are seeking permits from CDFW that authorize the take of species covered under the Plan...”

*Comment:* It is unclear if SWP and CVP water contractors that decline to participate in BDCP implementation will continue to receive water under terms of existing contracts pursuant to existing CESA authorizations. It is also not clear if existing contractors deciding to “opt out” of the BDCP can obtain “third

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party beneficiary” status (and receive the benefits of NCCP coverage) through a separate agreement with an entity that does receive a NCCP take authorization through BDCP participation. The Final BDCP should explain what happens to any existing in-Delta CESA permits (e.g., remain in force, terminate, etc.) should the BDCP be approved, as well as the ability of non-participating entities to obtain NCCP coverage through execution of side agreements with a BDCP permittee, or through a separate Section 2081 permit process.

### Chapter 3 – Conservation Strategy

7. Page 3.4-2, line 26 states that a “structured scientific approach” will be taken to reduce uncertainty about the fall and spring outflow decision trees.

*Comment:* The specific timing and description of the research necessary to test the fall and spring outflow uncertainties is lacking. The process by which the decision tree outflow and export yield will be determined is important in understanding the value of the BDCP to water contractors. The Final BDCP should include a detailed description of the specific scientific research hypotheses, proposed methods, and schedule that will be undertaken to address the flow uncertainties incorporated into the decision tree.

8. Page 3.D-2, Table 3.D.1, CM1 Water Facilities Operation, Compliance Monitoring Action will “Document compliance with the operational criteria using flow monitoring and models implemented by the Implementation Office. [Details of monitoring to be developed...]”.

*Comment:* The details of compliance monitoring to document flow criteria are lacking. The importance of outflow monitoring cannot be overstated as it forms the basis for the decision tree export yield. The water contractors must have a clear understanding of the research deemed necessary to resolve the fall and spring outflow uncertainties. Stating that “details of monitoring to be developed” is inappropriate given its importance in helping frame whether water contractor participation in the BDCP is warranted. Outflow requirements are the most important issue for water contractors; to defer development of this essential research to a later time does not provide the information needed by water contractors to evaluate the science proposed to resolve decision tree uncertainty. The Final BDCP should provide greater detail on the likely magnitude and scope of research contemplated for the decision tree process.

9. Page 3.D-28, Table 3.D.3, CM1 Water Facilities Operation, Potential Research Actions states that “[Studies necessary to evaluate this uncertainty.... have not yet been determined.]”

*Comment:* Similar to Comment #7 above. The research necessary to determine the outcome of the decision tree is of the utmost importance to water

contractors. At a minimum, the general scope of these studies should be developed and included in the Final BDCP so water contractors can more fully evaluate the benefits and risks of participation.

#### Chapter 6 – Plan Implementation

10. Page 6-5, Table 6-2 provides a very aggressive implementation schedule for CM3 (24,396 acres), CM4 (19,150 acres), CM9 (98 acres), and CM10 (900 acres) during the near-term, especially the first 5 years.

*Comment:* The level of information included in the BDCP does not provide adequate support that restoration of these very large acreages can be achieved within the established time frames. For example, it is very difficult to envision how over 9,500 acres of tidal natural community restoration can be completed within 5 years given the time needed to properly plan, design, permit, and construct this habitat type. At a minimum, additional specific information on the location of identified parcels and conceptual design/planting plans for these near-term lands should be included in the BDCP and FEIR/EIS document to validate the assertion that these acreage targets can be achieved within the identified schedule. If the BDCP intends to rely on one or more interim action projects listed in Table 6-4 (page 6-14) to meet the implementation schedule, then the BDCP should identify those projects where a firm funding commitment has been, or will likely be made. Should restoration take longer than anticipated, legally binding assurances must be provided to permittees that water yields will not be reduced below the minimum described in the decision tree process.

11. Page 6-8, CM4 Tidal Natural Communities Restoration, states that the initial 4,000 acres will take “less time to plan and permit... because... is likely to be implemented first on public lands.”

*Comment:* We believe this timing assumption to be overly optimistic. The Water Authority’s experience for a 40 acre wetland restoration project on public land took three years just to obtain all necessary federal, state, and local approvals to commence construction. Because tidal natural community habitat type is critical to fish species being considered in the decision tree process, the BDCP and FEIR/EIS should examine the effects on ultimate BDCP success if a longer implementation schedule is required for this initial restoration increment. Should restoration take longer than anticipated, legally binding assurances must be provided to permittees that water yields will not be reduced below the minimum described in the decision tree process.

12. Page 6-29, lines 6-7 state that “...these measures do not involve additional financial commitments or resource restrictions without the consent of the Permittee...”

*Comment:* This text should be changed to read “...these measures do not involve additional land, water, or financial compensation commitments, or additional restrictions on the use of land, water, or other natural resources ~~restrictions~~ without the consent of the Permittee...”. This change is consistent with the regulatory assurances provided by the “no surprises” rule.

#### Chapter 7 – Implementation Structure

13. Pages 7-3 and 7-4, Table 7-1: A significant level of decision-making authority would be granted to the Authorized Entity Group under the proposed BDCP governance framework. For many of the decisions outlined in Table 7-1, the Authorized Entity Group is identified as having a primary decision-making authority role. Additionally, for many BDCP implementation issues, it appears that the Authorized Entity Group is being granted substantial decision-making authority. Even for those decisions where the Authorized Entity Group is not identified as the party making decisions on implementation issues in Table 7-1, the dispute resolution process proposes to grant substantial deference to the Authorized Entity Group.

*Comment:* Given that the Authorized Entity Group is granted such broad decision-making deference, it would seem that a significantly larger group than is currently contemplated within the BDCP governance framework is warranted. A more inclusive governance model – providing for all permittees to be members of the Authorized Entity Group – would ensure more balanced decision-making by the body. The Final BDCP should revise membership of the Authorized Entity Group to include all BDCP permittees.

14. Page 7-10, line 39 states that “The Authorized Entity Group will consist of the Director of DWR, the Regional Director for Reclamation, and a representative of the participating state contractors and a representative of the participating federal water contractors...”

*Comment:* Similar to Comment #13 above. The four-member Authorized Entity Group is inadequate to fully represent the interests of all Authorized Entities. As stated on page 7-9, line 14, Authorized Entities includes “...those state and federal water contractors that receive take authorizations...”. The relationship between the very limited membership of the Authorized Entity Group and the much larger group of SWP and CVP Authorized Entities is unclear. Because SWP and CVP Authorized Entities will have been issued permits and maintain a substantial direct financial interest in BDCP implementation, the Authorized Entity Group should include every SWP or CVP contractor that receives a take authorization. An example of this more-inclusive governance model can be found by examining the functions of the Steering Committee for the Lower Colorado River Multi-Species Conservation

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Program administered by Reclamation. The Final BDCP should expand membership of the Authorized Entity Group to include all SWP and CVP Authorized Entities.

15. Page 7-12, lines 17-21 state that “The Authorized Entity Group will institute procedures with respect to public notice of and access to its meetings and its meetings with the Permit Oversight Group....All meetings will be open to the public.”

*Comment:* The Water Authority appreciates that all meetings of the Authorized Entity Group will be conducted in public. However, the BDCP is silent with respect to the requirements under California’s open meeting and records laws, the Federal Advisory Committee Act, the California Public Records Act and the Federal Freedom of Information Act (FOIA), and the applicability of those statutes to the activities and undertakings of the Authorized Entity Group. The Final BDCP should clearly delineate the state and federal statutes relevant to the activities of the Authorized Entity Group.

16. Pages 7-13, lines 9-27 state that “The Permit Oversight Group will be composed of the state and federal fish and wildlife agencies... will be involved in certain decisions relating to the implementation of water operations, and other conservation measures, actions proposed through the adaptive management program or in response to changed circumstances, approaches to monitoring and scientific research.”

*Comment:* The BDCP document is completely silent with respect to whether or not the Permit Oversight Group must comply with state or federal public meeting and records laws. The Final BDCP should clearly delineate the state and federal statutes relevant to the activities of the Permit Oversight Group.

17. Page 7-13, line 37 states that the Permit Oversight Group will have “decision making regarding real-time operations”. This section goes on to state that the “roles ... are still under consideration and will be addressed in Chapter 3, Conservation Strategy”.

*Comment:* We could not find a detailed explanation of the Permit Oversight Group role in Chapter 3. Understanding the role of the regulatory (i.e., HCP/NCCP permits) agencies during implementation of the BDCP is critical. Most HCP/NCCP’s that the Water Authority is familiar with have the regulators as strictly advisory, without the ability to impose unilateral actions unless the species are in danger of extinction. This places sole responsibility for BDCP success on the permittees. If the regulators have unilateral decision making authority for one or more aspects of BDCP implementation, they then accept some level of responsibility for the ultimate outcome by virtue of any decisions they impose. Keeping the regulators outside the decision process, but in a close

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advisory role, allows the permittees to freely implement the BDCP that they voluntarily developed. If the regulators believe the permittees are not acting in compliance with BDCP permits, the Implementing Agreement would normally contain provisions to suspend or revoke the HCP and/or NCCP permits (however, as noted above, there was no Implementing Agreement included in review documents). The Final BDCP should remove all BDCP implementation decision making authority from the Permit Oversight Group.

18. Page 7-16, line 40 through Page 7-17, line 2 states that “The Adaptive Management Team will hold public meetings... noticed and open to the public.”

*Comment:* The Water Authority appreciates that all meetings of the Adaptive Management Team will be conducted in public. However, the BDCP is silent with respect to the requirements under California’s open meeting and records laws, the Federal Advisory Committee Act, the California Public Records Act and the Federal Freedom of Information Act (FOIA), and the applicability of those statutes to the activities and undertakings of the Adaptive Management Team. The Final BDCP should clearly delineate the state and federal statutes relevant to the activities of the Adaptive Management Team.

19. Page 7-17, line 17 states that “In the event that the Authorized Entity Group and the Permit Oversight Group are unable to resolve the issue at hand, the entity with decision-making authority... will make the final decision”.

*Comment:* Similar to Comment #17 above regarding the appropriate role of the permitting agencies. Regulatory agencies should not be in a decision making role unless they are prepared to accept responsibility for the eventual outcome of the BDCP. Once the regulatory agencies issue the HCP and NCCP authorizations (i.e., permits), their role is to verify compliance with the BDCP and Implementing Agreement. If permittees are not in compliance, the regulatory agencies can initiate permit suspension or revocation procedures (which should be detailed in the Implementing Agreement). Therefore, all decisions related to BDCP implementation should be made by the Authorized Entity Group (composed of all permittees), in consultation with the Permit Oversight Group. The Final BDCP should be revised to clarify that regulatory agencies provide guidance and advice to the Authorized Entity Group, but do not have BDCP implementation decision making authority.

20. Page 7-20, lines 21-22 state that “Stakeholder Council meetings will be open to the public.”

*Comment:* The Water Authority appreciates that all meetings of the Stakeholder Council will be conducted in public. However, the BDCP is silent with respect to the requirements under California’s open meeting and records laws, the



Federal Advisory Committee Act, the California Public Records Act and the Federal Freedom of Information Act (FOIA), and the applicability of those statutes to the activities and undertakings of the Stakeholder Council. The Final BDCP should clearly delineate the state and federal statutes relevant to the activities of the Stakeholder Council.

21. Page 7-21, lines 6-26 state that “Any member of the council, however, will have the right to object to any proposal of the Program Manager... If the dispute is not resolved within the 60 day period, the issue will be elevated to the Authorized Entity Group... If the issue remains unresolved... for over 90 days, it will be referred for decision by the entity with the locus of responsibility... recognizing that multiple entities may have some relevant responsibility.”

*Comment:* This provision needs additional clarification and structure to ensure that the dispute resolution process does not become a de facto delay process for those opposed to BDCP implementation. Gridlock could easily occur if not only prospective, but also prior implementation actions may be challenged at any time. The Final BDCP should include provisions to ensure that multiple or repeated objections do not result in significant disruption of the program.

22. Page 7-27, lines 29-31 state that “The Program Manager, through the Implementation Office... will generally be responsible for the planning, oversight, implementation of actions set out in the conservation strategy.”

*Comment:* While charged with implementing the BDCP, there is no discussion of the appropriate legal framework within which the Implementation Office, proposed BDCP governance structure, and associated coordinating and dispute resolution mechanisms would be effectuated. Would the legal framework require legislation, a memorandum of understanding/agreement, bylaws, a joint powers authority, or some other structure? The Final BDCP should explain the legal documentation and processes necessary to allow participating entities to fund and implement the BDCP. Again, Reclamation’s Lower Colorado River MSCP provides an example of a legal framework that is working to successfully implement a complex multiple species conservation plan.

#### Chapter 8 – Implementation Costs and Funding Sources

23. Page 8-1, lines 36-39 state that “Consistent with the ‘beneficiary pays’ principle and in recognition of public benefits associated with environmental restoration of this important region, it is assumed that a state and federal investment will be available and necessary to implement the BDCP, as described in Section 8.3, *Funding Sources.*”

*Comment:* BDCP was conceived as a “beneficiary pays” project. However, the BDCP does not include a detailed financial plan. Instead, the public draft relies on the projected benefits afforded to the exporters to gauge funding support for the conveyance facilities (i.e., CM1). Until a detailed financial plan is finalized and cost allocation formula agreed upon by participants, there will continue to be questions and concerns regarding what “beneficiary pays” means in terms of precise cost obligations. Is “beneficiary pays” based on the value the water provides to a specific contractor? Does “beneficiary pays” mean every contractor pays the same unit cost for water received? As envisioned by the BDCP, the water quantity available for export will vary depending on hydrology; how would the benefits be calculated and unit costs be derived for each “beneficiary” under constantly changing hydrological conditions? Many water suppliers in Southern California are seeking to reduce their demand for imported water from the Delta. What happens if contractors’ needs for the water decrease in the future? How would the costs be allocated then? More importantly, how would costs be allocated pursuant to state and federal laws – including, without limitation, the cost-of-service requirements of California Constitution Article XIII A and C (Proposition 26)? Both the HCP and NCCP regulations require the BDCP to demonstrate that it has funding assurances from those expected to pay - including the state and federal governments – rather than relying on assumptions. The Final BDCP should address these issues to ensure the BDCP’s ability to be funded.

24. Page 8-2, lines 22-24 state that the chapter is not a financing plan...“nor does it establish the final allocation of cost or repayment responsibility; rather financing plans will be prepared separately by various funding agencies and through future discussions between state and federal agencies.”

*Comment:* The final BDCP must make fiscal sense and also be both affordable and financeable. Potential participants in the BDCP must have sufficient detailed information to evaluate the cost-benefit (or feasibility) of participating in the project on the individual participant level. Lack of disclosure on how costs will be shared by beneficiaries does not allow existing water contractors to make an informed decision to invest in the BDCP. This analysis should be included in the Final BDCP.

25. Page 8-66, Footnote “a” states that “...funding estimates from state and federal agencies do not represent commitments and are subject to grant awards, annual appropriations from Congress, and passage of water bonds by the voters of California.”

*Comment:* The reliance on the funding history of yet to be appropriated federal sources and future water bonds makes it unclear if the project will receive an adequate public share of the funding. To match the comprehensiveness of

BDCP as a planning process, it is important to identify how the public share of the funding source may be composed and from whom the funds may be derived. The Final BDCP should provide greater detail and explain how funding assurances required by HCP/NCCP permits will be achieved given the uncertain nature of future state and federal funds.

26. Page 8-73, lines 5-7 state that “State and federal water contractors that are participating in the development of the BDCP have committed to fund construction, operation, and construction-related costs for implementation of *CM1 Water Facilities and Operation*, the new water conveyance facilities.”

*Comment:* Contrary to this statement, there is nothing in the EIR/EIS or BDCP documents that confirms that any state or federal water contractor has made a commitment to fund the project. The Water Authority is not aware of any such commitments. In fact, the Board of Directors of the Metropolitan Water District of Southern California – the largest State Water Project contractor, with an approximate 46-percent share of the existing State Water Project – has never voted to fund construction of any portion of the proposed project (CM1). Necessary contractual agreements for individual SWP and CVP contractors to fund CM1 are unclear and the process for revising SWP and CVP cost allocations if individual contractors decline to participate, or drop out later, is not defined. To ensure the BDCP is fully funded, any BDCP financing plan must include enforceable agreements to pay for the project, not only from state and federal water contractors directly, but also from the member agencies or units that provide their revenues. It is unclear whether the SWP contractors can rely on the taxing authority afforded to them under the existing SWP project to pay for the BDCP. The projected costs are too high to have confidence that the contractors’ water sales are adequate to cover the BDCP’s costs now or in the future. Specific areas requiring more detail in the Final BDCP include:

- Contractors that are wholesale water agencies should demonstrate that their customers will pay for the project, either through take-or-pay contracts or other enforceable, long-term financial commitments to pay the fixed costs of the project commensurate with the term of the contractors’ BDCP obligation;
- Analysis is needed on the impacts of “step-up” provisions – pledges that require other BDCP participants to assume the debt obligations of defaulting participants;
- Legal analysis should be undertaken to examine the feasibility and appropriateness of relying upon property taxes as additional back-up security for contractors’ BDCP debt; and
- Legal and financial analyses should be undertaken to examine the financial risks to the state of California if bonds issued to fund construction of the project (CM1) are backed by the full faith and credit of the state.

27. Page 8-84, lines 18-21 state that "...the BDCP is expected to secure a large portion of the funds allocated to Delta sustainability, as well as smaller portions of funds allocated to conservation and watershed protection. The water bond will support the public benefits of Plan implementation, particularly natural community restoration and other stressors conservation measures."

*Comment:* Firm commitments to ensure state and federal funding for CM 2-22 are lacking. The BDCP expects almost 90 percent of the costs for ecosystem restoration and program administration to be shared by state and federal funding. Most state funding is anticipated to be provided by future water bonds, including one or more bonds scheduled for the November 2014 ballot. A majority of federal funding is expected to be provided by congressional appropriation, which has uncertain support. The uncertainty that voters and Congress would approve the water bonds and federal appropriation, respectively, leads to the question as to whether, and how much, the contractors will be expected to help pay for the costs to obtain the envisioned water supply benefits. If the public funding envisioned does not materialize, will the contractors be expected to fund these costs? If funding is unavailable for restoration, would CM1 operations be changed from those presented in the BDCP? The Final BDCP needs to include a discussion of alternate funding sources, as well as potential impact on available exports, should bonds for CM 2-22 not be approved by the voters.

28. Page 8-80, lines 16-17 state that "Contractors more distant from the Delta provide more funding than contractors close to the Delta because of the capital cost of the California Aqueduct and increased pumping and O&M costs."

*Comment:* While this statement may be true for existing SWP contractors, it is unclear whether this same logic is being applied to BDCP funding. Since all Delta improvements will occur upstream of the Banks Pumping Plant at Clifton Court Forebay and will not affect existing south-of-Delta facilities or operations, distance from the Delta has no bearing on BDCP implementation cost. The Final BDCP should clarify that funding obligations for water contractors south of Banks Pumping Plant will not contain any differential based on distance from the Delta.

29. Page 8-99, lines 17-21 state that "...potential federal funding sources are divided into four categories. First, existing federal appropriations relevant to BDCP are expected to continue in amounts and for durations described below. Second, new federal appropriations would be needed to support BDCP. Third, several federal grant programs are expected to provide funding to support BDCP actions. Finally, other federal funding sources are described."

*Comment:* See above comment #27.

30. Page 8-122, lines 13-15 state that "...the Authorized Entities will not be required to provide land, water, or monetary resources beyond their commitments in this Plan in the event of a shortfall in state or federal funding."

*Comment:* Provisions to ensure adequate funding by participants required for HCP/NCCP approval are lacking. It is unclear how CM 1 would be operated as a result of a shortfall in public funding. What operational scenarios and how much export water would be made available absent public funding (and associated reduction in restoration) should be disclosed in the Final BDCP and before HCP/NCCP permits are issued.

Appendix 9A – Economic Benefits of the BDCP and Take Alternatives

31. Page 9.A-7, line 36 states that "Seawater desalination is another supply that is relied on during drought periods."

*Comment:* The Water Authority concurs with the acknowledgement that seawater desalination can be an important and reliable water supply during both normal and drought periods, as well as with the incorporation of the Carlsbad Desalination Project in the analysis.

32. Page 9.A-12, lines 9-13 and Footnote 5 state that "...models incorporate projections... provided by... San Diego Association of Governments (SANDAG)"

*Comment:* The SANDAG Series 12 growth forecasts used in the analysis are outdated and do not account for updated Census data and the 2007 recession. Utilizing old growth forecast information likely results in a higher water demand forecast in the initial years. Analysis in the Final BDCP should incorporate the updated SANDAG forecast released last year (Series 13). This forecast incorporates data from the 2010 Census and captures the effects of the 2007 recession.

33. Page 9.A-14, Footnote 6 states that "...SANDAG employment projections were developed before the 2007 recession..."

*Comment:* The employment projections use an outdated SANDAG growth forecast (Series 12), which doesn't take into account the updated Census data and 2007 recession. Utilizing old growth forecast information likely results in a higher employment (and water demand) forecast in the initial years. Analysis in the Final BDCP should incorporate the updated SANDAG forecast released last year (Series 13). This forecast incorporates data from the 2010 Census and captures the effects of the 2007 recession.

34. Page 9.A-28, lines 36-40 state that “...historical consumption and rate data...were collected directly from retailers with the exception of... San Diego County Water Authority, for which data was acquired from annual surveys conducted by the wholesale member agencies.”

*Comment:* The Water Authority has not prepared an annual survey of water rates since 2004. The Final BDCP should clarify how the Water Authority’s service area retail rate information was derived, and include the date and title of any reference document in the literature cited section.

35. Page 9.A-33, lines 8-14 state that “The cost of the water supply increase resulting from the BDCP Proposed Action is also well below the cost of other alternative supply alternatives. ...the implicit water supply cost... ranges from \$238 to \$321 per acre foot<sup>9</sup>.”

*Comment:* Although we understand that the range of unit costs represents the cost of the incremental yield for the BDCP Proposed Action High-Outflow and Low-Outflow Scenarios relative to the Existing Conveyance High-Outflow and Low-Outflow Scenarios, it is unclear how the \$238/AF to \$321/AF unit costs were derived or what the exact meaning of “implicit water supply cost” is. We recognize Appendix 9A is an economic analysis to quantify BDCP benefits on an average yield basis. However, the reliance on incremental yield in calculating those economic benefits should be placed into the context of what contractor allocations under Table A will look like post-BDCP implementation. Actual unit costs will vary widely given the expected swings in yield and the fixed cost nature of the contracts. It is also unclear why unit costs are being included in the water supply alternatives discussion because, (as noted in Footnote 9) the costs cannot be used to directly compare other supply alternatives. If the intent of the included alternatives analyses is to compare the implicit water supply cost of the BDCP Proposed Alternative to local supplies, the Water Authority suggests that a unit cost can be developed that is comparable to the local supply cost being cited. Such a unit cost can be calculated based on the following:

$$\text{Unit Cost} = \frac{\text{Annual amortized capital cost for CM1} + \text{Annual operating cost}}{\text{Expected yield expressed in the same year dollars as the local supply cost}}$$

This approach would allow the BDCP to more adequately benchmark its cost to local supply costs, and is more consistent with the method water suppliers (like the Water Authority) use to compare alternative supplies. The Final BDCP should provide more detailed information on the derivation of the unit costs, a definition of implicit water supply costs, and describe why they are being included in this section, especially if the cited unit costs cannot be used to

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compare the supply alternatives. To support the analytical conclusions, the Final BDCP should provide a unit cost that can be used to compare supply alternatives.

36. Page 9.A-36, lines 7-11 state that "...costs of... short-term conservation are at the low end of... water supply alternative costs. Because short-term conservation is a feasible option, and because the costs of alternatives cannot be known with precision for any individual agency, for planning purposes it is appropriate to measure BDCP benefits using mandatory short-term conservation costs."

*Comment:* It is unclear why other alternative water supply costs are discussed in this section when short-term conservation is assumed as the appropriate measure of BDCP benefits. The Final BDCP should clarify the purpose of Section 9.A.2.4.4 and how the alternative water supply volumes and costs are utilized in the economic benefits analysis.

37. Page 9.A-36, lines 14-15 state that "... the analysis of urban water supply benefits... is based on an assumed build-out of alternative water supplies."

*Comment:* It is unclear how build-out of alternative water supplies is utilized in the BDCP economic benefits analysis. The Final BDCP should clarify how the costs for alternative water supply build-out and mandatory conservation were used in the economic benefits analysis, and the distinction between the two uses.

38. Page 9.A-49, lines 14-17 state that "The BDCP Proposed Action...assumed 3.8 MAF of water supplies under post-earthquake conditions."

*Comment:* There is no backup information to support the assumptions on water supply availability under post-earthquake conditions. The Final BDCP should provide information to support the supply yields assumed to be available from existing conveyance, BDCP Proposed Action, and other take alternatives under post-earthquake conditions.

### **Draft Conceptual Engineering Report**

The Conceptual Engineering Report (CER) does not lend itself to the "page and line" comment format as in the above documents. Therefore, the following comments have been grouped in general topical areas. Because these topics are not confined to a single location and are scattered throughout the report, any comment should be considered applicable to every appearance of that topic in the report.

### **Schedule**

39. The project's schedules included as part of the CER's Executive Summary and Appendix C are not the same.

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*Comment:* These schedules need to be reconciled and the text clarified to discuss any assumptions used in the schedule.

40. The Appendix C schedule contains a number of fixed, or constrained, task completion dates.

*Comment:* The CER does not include the schedule logic to determine if these constrained dates are achievable or reasonable. At the preliminary engineering stage of a project, completion dates should not be constrained so it can be determined if the schedule is reasonable. All constraints should be removed from the task completion dates and the schedule logic should be provided to determine whether that logic, and therefore the schedule, is appropriate and reasonable.

41. Appendix C of the CER includes an item for property acquisition necessary to complete the project.

*Comment:* Appendix C provides no detail on how the BDCP team intends to acquire land rights from the hundreds of impacted property owners along the route of the tunnels, at the forebays, the intake facilities, and impacted by the installation or relocation of utilities and roads necessary for the project. A comprehensive property acquisition plan should be included to identify the nature of property rights to be acquired, the schedule for doing so, and the staff or consultant resources necessary to complete this task.

### Project Risks

42. The BDCP infrastructure is subject to a considerable number of risks that could negatively impact the project's cost and schedule.

*Comment:* While mostly identified in the CER, these risks must be adequately addressed during the design and construction of the project. The most significant of these risks include:

- Lack of geotechnical information. The CER repeatedly states that additional geotechnical information is needed to adequately design the project's tunnels, intake pumping facilities, levees, tunnel muck disposal sites and forebays.
- Tunnel construction methodology. The tunnel methodology is highly dependent on the geologic conditions along the tunnel routes but must address the likelihood of variable soil conditions.
- Available Resources. The project as proposed and ancillary efforts such as utility relocation will require numerous specialized engineers, geologists, right of way agents, tunnel boring machines, tunnel boring machine operators, specialized underground contractors, lawyers, court resources (in support of right of way acquisition efforts) and various technical experts. It



is unclear of these resources can be obtained in a timely manner to meet the project's schedule.

- **Power requirements.** The CER is undecided on how the power will be provided to the project both during construction and during operations and by how many electrical companies. The CER indicates power may be provided to each site by multiple electrical companies. The cost and time associated with a second power source to each project location has not been addressed.
- **Access and utility conflicts.** The project will require the relocation of roads and utilities. It is uncertain whether those conflicts will be addressed by the BDCP or the utility or public agency that owns the utility. The extent of relocations, their cost and how long it will take to resolve utility and road conflicts are not thoroughly defined in the CER.
- **Property rights acquisition.** See item under Schedule above. Property acquisition via the eminent domain process allows the property owner to challenge the project proponent's right to take their property via eminent domain. Linear projects, such as the BDCP infrastructure, are particularly vulnerable to costly reroutes and delays if a right to take challenge is upheld by the courts. The value of the rights to be acquired can also vary greatly. This uncertainty should be thoroughly detailed in the CER.
- **Recent Court rulings.** On March 13, 2014 the Third Appellate District Court of Appeal ruled the BDCP's efforts to obtain additional geotechnical and environmental information resulted in a permanent property acquisition (take) from impacted property owners. This contradicts long-standing law that allows public agencies access to private property for study purposes and pay the owner if there are any damages. This ruling, if not overturned, will result in unknown and potentially significant delays to the project.

A comprehensive Risk Registry that identifies risks that could adversely impact the project's schedule, and cost and how those risks will be mitigated during future design or construction, should be included in the final CER and updated on a regular basis as the design and construction progresses.

#### Estimate Accuracy and Project Contingency

43. The CER (Chapter 8) notes the accuracy of the construction estimate ranges from is +50% to -25%; however, the project cost estimate includes only a 36% contingency.

*Comment:* The CER is unclear on the rationale used to determine the cited accuracy range or the selection of the specific cost estimate contingency. Subsequent communication (February 26, 2014 letter from Mr. Charles R. Gardner Jr., CEO Hallmark Group) noted the construction estimate accuracy had been improved to +30% to -20% and therefore the contingency of 36% was more than adequate. However, no information on how the "more accurate" cost

Ryan Wulff  
May 30, 2014  
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estimate was prepared has been provided since the October 2013 release of the CER. The final CER should disclose the methodology, including an analysis of project risks, used to derive a project contingency of 36%. It should also disclose and explain the information that allowed a more accurate cost estimate to be prepared. Absent this information the Water Authority believes the project contingency should be set at 50% based upon the upper range of the cost estimate's accuracy.

The Water Authority appreciates the opportunity to review the proposed project and provide comments on the Draft EIR/EIS and associated documents. As noted above, the Water Authority requires additional information to determine if the BDCP Proposed Action as described 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

---

Attachments: (1) Meral ltr of 08/28/12  
(2) Meral ltr of 07/30/13  
(3) Laird ltr of 10/07/13



**Dr. Gerald Meral  
August 28, 2012  
Page 2**

that provide their revenues. The costs are simply too great to rely on the hope that there will be enough water purchasers over the long-term to pay the project's costs.

As the largest customer of the largest state water contractor – the Metropolitan Water District of Southern California (MWD) – the Water Authority's ratepayers have a great deal at stake in the BDCP process and its financing plan. The Water Authority must be able to assess not only that the project will provide sufficient benefits to be affordable by our ratepayers, but also that they are not at risk of paying BDCP costs associated with the water supplies of other MWD member agencies or state contractors. The Water Authority is already in litigation with MWD over how it allocates its current State Water Project costs.

The Water Authority is concerned that all of the progress that has been made in bringing the BDCP to this point will be stymied, and that the BDCP will fail if participants are not able to evaluate the cost-benefit of the project or reasonably limit the risk their ratepayers are being asked to assume. It is in this light that we offer the following brief comments on the administrative draft of Chapter 8 – *Implementation Costs and Funding Sources*.

#### **Comments**

As the largest state water contractor, MWD is the foundation for financing the project. And yet, MWD itself has been struggling over the past several years to pay its current fixed costs – let alone a substantially larger cost associated with the BDCP. The reason is simple: more than 80 percent of MWD's costs are fixed while less than 20 percent of its revenues are paid from fixed charges. More than 80 percent of MWD's revenues come from water sales. Yet, MWD's member agencies are not required to purchase *any* water from MWD. With its member agencies unwilling to sign take-or-pay contracts or make any other firm financial commitments to MWD to cover its fixed obligations, the agency remains heavily dependent on revenues from variable water sales. MWD's water sales have declined approximately 30 percent since 2008, with its firm sales declining to less than 1.3 million acre-feet in fiscal year 2012. MWD's member agencies – including the Water Authority – have also experienced significant reductions in sales. A direct consequence of these declining sales is sharply higher imported water rates that have made additional local water supply investments economically competitive. As a consequence, MWD's member agencies – and their sub-agencies – are doing what they have been asked to do over the past 20 years: reducing reliance on water supplies imported from the Delta.

Dr. Gerald Meral  
August 28, 2012  
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We are concerned that the BDCP will become the kind of "big ticket project" that MWD board members vocally and enthusiastically support – at the same time their agencies are unwilling to make enforceable commitments to pay for the project.

A final note on the subject of risk: because the project is anticipated to be financed through project revenues, we are informed that bond underwriters are expected to require a "step up" provision by which each BDCP participant in BDCP-related bonds pledges to assume the obligations of defaulting participants.<sup>1</sup> The current draft of Chapter 8 is silent on this issue, yet it is conceivable that some of the BDCP participants may default, which would cause remaining participants, including MWD, to assume a greater portion of the debt. It is important that Chapter 8 analyze the possible effects of the "step up" provisions on MWD and the other participants in the BDCP.

Some have suggested that property taxes may provide the ultimate security for BDCP payment obligations of individual contractors. Putting aside the question whether property taxes levied under the authorization of the Burns-Porter Act may be used to pay for new projects contemplated by the BDCP, it is important to remember that MWD's taxing authority is further limited by the provisions of the MWD Act.<sup>2</sup> Although the Act contains override ability in the event of a fiscal crisis as determined by the MWD board (one year at a time<sup>3</sup>), it effectively limits MWD's ability to levy taxes to pay its SWP obligations. It is also unclear whether changes to this limit would require voter approval. Thus, a careful legal analysis of MWD taxing authority should be included in the BDCP due diligence process if taxes are contemplated as additional back-up security for project debt.

To effectively evaluate the finances available for the BDCP, the drafters of Chapter 8 need to conduct comprehensive due diligence on all of the facts and

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<sup>1</sup> Under Section 50(h) of MWD's current State Water Project contract, non-defaulting contractors can be assessed to cover payments not made by defaulting contractors, up to 25 percent of the payment not made. Under Section 49(i) of its East Branch Extension of the State Water Project contract, MWD is obligated to cover a default by any and all other participants.

<sup>2</sup> Section 124.5 of the Metropolitan Water District Act limits MWD's property tax levy to "the composite amount required to pay (1) the principal and interest on general obligation bonded indebtedness of the district and (2) that portion of the district's payment obligation under [the SWP contract] which is reasonably allocable, as determined by the district, to the repayment by the state of principal and interest on [SWP bonds] as of [January 1, 1985] and used to finance construction of facilities for the benefit of the district."

<sup>3</sup> In such an event, the State of California would be relying upon an annual vote of MWD's Board of Directors in which it "...finds that a tax in excess of these restrictions is essential to the fiscal integrity of the district...."

Dr. Gerald Meral  
August 28, 2012  
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circumstances described in this letter. Without such due diligence, the BDCP faces a potential cascading collapse of funding. At a minimum, state water contractors that are wholesale water agencies must demonstrate that their customers – the member agencies or units that buy their water and provide their revenues – have take-or-pay contracts or other enforceable commitments to pay the fixed costs of the project commensurate with the term of the BDCP obligation. The Water Authority continues to stand ready to make such a commitment to MWD that provides benefits commensurate with its payments.

Ultimately, the full faith and credit of the State of California will back up the bonds issued to build the conveyance project. Failure to secure enforceable financial commitments from the member agencies or units of water wholesale contractors could place all of California at significant risk of having tens of billions of dollars of new outstanding debt without sufficient water contractor payments to cover the debt service. This is why all California taxpayers have a stake in ensuring that there is a solid foundation and financing plan for the BDCP going forward.

Thank you again for providing the opportunity to comment on the administrative draft of Chapter 8 of the BDCP. We are committed to working with you and all parties to address and resolve these issues.

Sincerely,



Maureen A. Stapleton  
General Manager

Enclosure: Water Authority Bay-Delta Policy Principles



**San Diego County Water Authority**

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July 30, 2013

**Dr. Gerald Meral**  
**Deputy Secretary**  
**California Natural Resources Agency**  
1416 Ninth Street, Suite 1311  
Sacramento, CA 95814

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
- Fullbrook Public Utility District
- Metz Water District
- Lakeside Water District
- Orsinger Municipal Water District
- Olney Water District
- Padre Dam Municipal Water District
- Lamp, Paudleron Marine Corps Base
- Rainbow Municipal Water District
- Rancho Municipal Water District
- Rincon del Diablo Municipal Water District
- San Diego Water District
- Santa Fe Irrigation District
- Southern Bay Irrigation District
- Vallecitos Water District
- Village Center Municipal Water District
- Vista Irrigation District
- Yuma Municipal Water District

OTHER REPRESENTATIVE

- County of San Diego

Dear Jerry:

Thank you for the efforts that you, your state and federal agency colleagues, and the Administration have made to bring the BDCP to the point where it stands today. We appreciate the opportunity that the release of an administrative draft of the BDCP affords us to provide comments and questions that should be addressed in the next draft. This letter is a follow-up to the Water Authority's previous correspondence on BDCP Chapter 8, and conversations we have had with you over the past year.

Like many other stakeholders, the San Diego County Water Authority anticipated the May 29 release of the final chapters of the administrative draft of the BDCP document and believed, based upon earlier representations, it would address the questions and concerns the Water Authority has raised over the past several years over project financing. In particular, we were anxious to review the new draft of Chapter 8 in light of the correspondence we sent you 11 months ago (attached), in which we raised a series of BDCP financing issues and concerns. Our subsequent conversations led us to believe these concerns would be addressed in the most current iteration of Chapter 8. Instead, and disappointingly, Chapter 8 begins with this jarring admission:

*"Details of the financing... are still being determined through on-going discussion between the state and federal governments and between the government, the state and federal water contractors and other interests."*

After reviewing the newly-revised Chapter 8 of the BDCP administrative draft, seven years into the BDCP planning process, and nearly a year after commenting on the prior draft, the most critical financing issues confronting the BDCP have yet to be addressed.

As we shared with you previously, potential participants in the BDCP must have sufficiently detailed information to evaluate the cost-benefit (or feasibility) of participating in the project. We recently heard David Sunding report to the Metropolitan Water District of Southern California's (MWD) Board of Directors that a cost-benefit analysis has been produced for all urban and agricultural water contractors, and that it includes an urban cost-benefit analysis for all MWD member agencies. Would you please send a copy of the complete report to me in advance of Dr. Sunding's Sept. 12 appearance before our Board's Imported Water Committee?

*A public agency providing a safe and reliable water supply to the San Diego region*

Dr. Gerald Meral  
 July 30, 2013  
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As we have consistently stated, the Water Authority believes that any BDCP financing plan must include enforceable agreements to pay for the project, not only from state water contractors directly, but also from the member agencies or units that provide their revenues. The costs are far too high to simply rely on the hope that the contractors' water sales will be adequate over the long-term to pay the project's costs.

As the largest customer of the largest state water contractor – MWD – the Water Authority's member agency ratepayers have a great deal at stake in the BDCP process and its financing plan, its risks and contingencies. The Water Authority must be able to assess that the preferred alternative advocated by the BDCP program will provide sufficient benefits to be affordable for our member agency ratepayers. We also must ensure that our ratepayers are not at risk of paying BDCP costs associated with the water supplies of other MWD member agencies or other state or federal water contractors. The Water Authority is already in litigation with MWD over how it allocates its *current* State Water Project costs.

The Water Authority is concerned that future progress of the BDCP and efforts to resolve seemingly intractable conflicts in the Delta will falter if those expected to be participants in the BDCP are not able to evaluate the cost-benefit of the various alternatives or reasonably limit the risk that their ratepayers will be expected to assume. In this context, we renew our request that our comments and concerns raised in our August 28, 2012 correspondence regarding Chapter 8 of the BDCP administrative draft – *Implementation Costs and Funding Sources* – be addressed in the next draft.

#### **Comments**

In our August 28, 2012 correspondence, we identified three specific issue areas as lacking necessary discussion within Chapter 8:

- State water contractors that are wholesale water agencies should demonstrate that their customers – the member agencies or units that purchase their water and provide their revenue – have take-or-pay contracts or other enforceable, long-term commitments to pay the fixed costs of the project commensurate with the term of the BDCP obligation.
- It is important to analyze the possible effects of “step up” provisions – those bond pledges that may require other BDCP participants to assume the obligations of defaulting participants – on MWD and other participants in the BDCP.
- A careful legal analysis should be undertaken of MWD taxing authority within the BDCP due diligence process, to examine the feasibility and appropriateness of relying upon property taxes as additional back-up security for project debt.

#### **Take-Or-Pay Contracts/Enforceable Commitments**

As we have previously pointed out in discussions with you, MWD – which, as the largest state water contracting agency, is the foundation for financing the BDCP project – has been struggling over the past several years to pay its current fixed costs, let alone a substantially larger new cost associated with the BDCP. More than 80 percent of MWD's costs are fixed – however, less than 20 percent of MWD's revenues are paid from fixed charges. Conversely, more than 80 percent of MWD's revenues are from water sales – a variable revenue source – and those sales have



Dr. Gerald Meral  
 July 30, 2013  
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declined by 30 percent since 2007. Furthermore, MWD's member agencies are not required to purchase *any* water from MWD. The variability of water sales – and thus uncertain future water sales revenues – coupled with Southern California water agencies' current and future planned actions to implement the State's policy to reduce reliance on water supplies imported from the Delta, creates significant uncertainty regarding long-term financing of BDCP obligations. This should be a major concern for the State of California, whose full faith and credit will be expected to back up the financing of the project. And yet, Chapter 8 makes no mention of this material, foundational risk to BDCP financing.

The Water Authority believes that, at a minimum, state water contractors that are wholesale water agencies must demonstrate that their customers have take-or-pay contracts or other enforceable long-term commitments to pay the fixed costs of the BDCP project corresponding to the term of the BDCP obligation. The Water Authority continues to be prepared to make such a commitment to MWD as long as the Water Authority gets the water supplies in return for its payments. We also believe that the willingness to make a financial commitment to a Delta solution will largely determine the demand for Delta water supply, and therefore help inform the best sizing for the conveyance facility. It would not be in the state's best interest to construct a facility only to have it stranded because no one is willing to pay for it, or hoped-for water sales necessary to pay for it do not materialize.

#### “Step-Up” Provisions

Existing State Water Project contracts contain provisions under which non-defaulting contractors can be assessed to cover payments not made by defaulting contractors, up to 25 percent of the defaulting contractors' obligations. Additionally, the East Branch Extension of MWD's State Water Project contract has a provision obligating MWD to cover default by any and all other participants. These State Water Project contract stipulations are known as “step-up” provisions.

We are informed that bond underwriters for the BDCP project are expected to require a “step-up” provision by which each BDCP participant in BDCP-related bonds pledges to assume the obligations of defaulting participants. In fact, the newly-released Chapter 8, at Section 8.10.1.1.1 (page 8-81) provides that:

*“Existing water contracts would need to be amended to include the new costs of the BDCP assigned to the state water contractors and the repayment schedule.”*

Since “step-up” provisions are already embodied within, and apply to, MWD's State Water Project contract, it would appear that such provisions would apply to the “new costs of the BDCP assigned to the state water contractors.” Given those “step-up” provision obligations, we renew our request that Chapter 8 fully analyze the possible financial and economic effects of the “step-up” provisions on MWD and the other participants in the BDCP.

#### Property Taxes

Some have suggested that property taxes may be contemplated as back-up security for BDCP payment obligations of individual state water contractors. There are very clear and significant limitations in MWD's existing taxing authority under the provisions of the MWD Act:

- The Act limits MWD's ability to levy taxes to pay its State Water Project obligations.

Dr. Gerald Meral  
July 30, 2013  
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MWD is limited to levying taxes for “*the composite amount required to pay (1) the principal and interest on general obligation bonded indebtedness of the district and (2) that portion of the district’s payment obligation under [the SWP contract] which is reasonably allocable, as determined by the district, to the repayment by the state of principal and interest on [SWP bonds] as of [January 1, 1985] and used to finance construction of facilities for the benefit of the district.*”

- Although the Act contains override ability in the event of a fiscal crisis, as determined by the MWD board, the override is limited to only one year at a time. In such an event, the State of California and bondholders would be relying upon an annual vote of MWD’s Board of Directors in which it “...*finds that a tax in excess of these restrictions is essential to the fiscal integrity of the district....*”
- It is unclear whether changes to the limitations provided under the MWD Act would require voter approval and/or new legislation. Chapter 8 should address and answer these questions.

Given these limitations and uncertainties, it is difficult to consider MWD’s existing taxing authority as a meaningful back-up security for BDCP payment obligations. It is also highly questionable whether the financing of BDCP can be – or should be – backed by taxing authority that was authorized by voters decades ago, when the program was much different than is being discussed today. A careful legal analysis of MWD taxing authority should be included in the BDCP due diligence process if taxes are going to be relied upon as additional back-up security for BDCP project debt. The newly-released version of Chapter 8 is silent on this issue.

Based on the assurances that you previously provided to the Water Authority, we expected that the full consideration and analysis of the issues we have raised would be integrated in to the Chapter 8 analysis and conclusions. And yet, the current version of Chapter 8 of the BDCP administrative draft does not comprehensively or adequately conduct due diligence on all of the facts and circumstances described in this letter and our previous correspondence. We remain concerned that a potential cascading collapse of funding could occur if the proper due diligence is not undertaken in a timely manner.

We appreciate the opportunity to provide comments on the newly-released Chapter 8 of the BDCP administrative draft. We remain committed to working with you and all parties to evaluate, address, and resolve these critical financing issues.

Sincerely,



Maureen A. Stapleton  
General Manager

Attachment: August 28, 2012 letter

## Attachment 3



## San Diego County Water Authority

4677 Overland Avenue • San Diego, California 92123-1233  
(858) 522-6600 FAX (858) 522-6568 www.sdcwa.org

October 7, 2013

Secretary John Laird  
California Natural Resources Agency  
1416 Ninth Street, Suite 1311  
Sacramento, CA 95814

#### 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

Otay 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

Vallejitos Water District

Valley Center  
Municipal Water District

Vista Irrigation District

Yuima  
Municipal Water District

#### OTHER REPRESENTATIVE

County of San Diego

Dear Secretary Laird:

On behalf of the San Diego County Water Authority (Water Authority), thank you for your September 11, 2013 letter to Chair Wornham and me responding to a January 2013 multi-agency letter requesting analysis of the Natural Resources Defense Council's portfolio approach to statewide water management and the Bay-Delta Conservation Plan (BDCP).

We look forward to working with you to help develop a BDCP project that achieves the co-equal goals and is affordable. As the largest member agency of the largest State Water Contractor, the Metropolitan Water District, the Water Authority and its ratepayers are being counted upon to pay the second-largest share of BDCP costs.<sup>1</sup> Yet, we have been relegated to the status of an outside observer who may have no financial stake in the BDCP. Accordingly, we request the opportunity to become more directly engaged in the BDCP cost allocation discussions and negotiations process – and be part of the solution. The stakes are sufficiently high for the San Diego region to be afforded the opportunity to be at the cost allocation negotiating table.

As you know, the Water Authority has not endorsed any alternative that has been considered by the BDCP program or advanced by others, including the Natural Resources Defense Council's Portfolio Alternative and the Delta Vision Foundation's BDCP-Plus. However, we firmly believe that a thorough and comprehensive analysis of Delta fix alternatives is critical to help inform the ultimate selection of an implementable plan for achieving the co-equal goals.

The Water Authority is committed to helping find a Delta solution, and to that end, is continuing its multi-year effort to inform our Board of Directors and civic and business leaders in our region on a variety of issues associated with the Delta. In addition, over the past several months, the Water Authority Board and staff have been engaged in an intensive, comprehensive review of BDCP-related alternatives to assess how various options may improve the San Diego region's water supply reliability along with risks associated with each. This review process is ongoing, and is scheduled to continue into 2014. We were disappointed to learn from Natural Resources Agency Deputy Secretary Jerry Meral at our September 12 Board workshop that determinations regarding the cost allocation among contractors will not be concluded when the BDCP and its environmental documents are released for public review next month. Although we plan to

<sup>1</sup> Among MWD's member agencies, and second only to the Kern County Water Agency.

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submit a formal comment letter during the BDCP environmental review process, the allocation of BDCP costs and the resultant rate impacts on San Diegans will remain a central element in our Board's consideration of which option to support.

While we had hoped that your Agency's evaluation of the Portfolio Alternative would be helpful to the Water Authority's ongoing review and analysis, some of the information contained in your September 11 letter raises more questions than it answers.

- The letter states that a single-tunnel, 3,000 cfs conveyance facility (which is proposed in the Portfolio Alternative) would cost \$6 billion less than the BDCP preferred alternative (9,000 cfs twin tunnels) - \$8.5 billion compared to \$14.5 billion. However, on September 16, a corrected version of the evaluation was posted on the BDCP website, which indicates that the 3,000 cfs single-tunnel conveyance facility would only cost \$3 billion less than the BDCP preferred alternative. Further, none of these numbers match Dr. David Sunding's economic benefit analysis, which he shared with us at our September 12 Board of Directors workshop, which identified the cost at \$10 billion.

Many entities that are undertaking review and analysis of the Delta fix options, like the Water Authority, would benefit from reliable cost estimates for the conveyance features of the Portfolio Alternative. The lack of clarity in the cost estimate has made it challenging to have a meaningful cost comparison of the various conveyance feature sizes. Could you please provide an apples-to-apples cost comparison of the 3,000 (single tunnel), 6,000 and 9,000 cfs conveyance project sizes?

- In terms of the benefit cost ratio of alternatives, your evaluation indicates that "*the 3,000-cfs tunnel has a negative benefit cost ratio, largely because the cost of the 3,000-cfs tunnel is approximately two thirds of building the proposed 9,000-cfs twin tunnels but the water yield is much smaller.*" The evaluation may be accurate; we are not attempting to dispute or refute the calculations and findings. However, with the numerous cost estimates for the conveyance features included in your own evaluations it is difficult to definitively understand the benefit cost ratio at which the evaluation arrives. A more comprehensive evaluation and identification of the appropriate assumptions would be valuable for those seeking to undertake independent analysis of cost-related information.
- The evaluation regarding the potential water supply yield in water recycling and water use efficiency projects that could be achieved from a \$3B investment in local and regional water supply projects requires additional analysis. Your evaluation indicates, that with respect to investments in local and regional water recycling projects and water conservation projects, "*it is doubtful that a \$3 billion investment would produce even 100,000 acre-feet of reliable new water supply in urban areas, and would do nothing for agricultural users.*" This evaluation appears at odds with the Department of Water Resources' California Water Plan Update, which provides an analysis from which it may be concluded that a \$3 billion investment in water recycling projects could actually

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produce approximately 400,000 acre-feet of new water supplies (2009 Water Plan Update, Page 11-10). In addition, data developed by the Water Authority on local project costs and implementation also indicates that BDCP's estimate is very low. We believe this warrants additional analysis to better understand how your evaluation arrived at a potential yield of 100,000 acre-feet or less. We would be happy to share the Water Authority's data and our observations on local supply development with your staff.

- The evaluation with respect to the ability to export water from the south Delta following a significant seismic event stated that, *"It may take from one to 10 years to rebuild enough Delta levees to once again allow substantial exports from the south Delta."* While certainly more work remains to be completed in terms of the efforts that have been undertaken through the Delta Emergency Rock and Transfer Facilities Project and the Delta Emergency Response Program to secure water supply reliability following a significant seismic event, it is our understanding that significant progress has been made to reduce the worst-case export outage. A more comprehensive analysis on this issue would be beneficial.

We look forward to working with you to consider a BDCP project that is implementable, achieves the co-equal goals, and improves water supply reliability and is affordable within the San Diego region and the rest of the state. In addition, we look forward to arranging a meeting with you in the near-term to explore avenues for additional information sharing and the Water Authority's participation in the cost allocation negotiation process.

Sincerely,



Maureen A. Stapleton  
General Manager

Attachments:

1. January 2013 multi-agency letter regarding NRDC Portfolio Alternative
2. September 11, 2013 correspondence and Portfolio Alternative evaluation from Secretary John Laird



## San Diego County Water Authority

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July 28, 2014

**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  
Otay 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 (USFWS); the U.S Department of Commerce, National Oceanographic and Atmospheric Administration, National Marine Fisheries Service (NMFS); 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 whether some other type of

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funding agreement (that includes back-stop and assurances for long-term financial commitments) will 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 Reclamation has “no obligations” established in the IA. It is

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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 that Reclamation can act independent of implementation actions taken by BDCP participants. The Final IA needs additional clarification describing Reclamation'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., an expanded Authorized Entity Group consisting of all permit holders). 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



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Final IA and Final BDCP should clarify that the AMT acts strictly in an advisory capacity to the permit holders.

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 listed 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.

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

"• Participating in the Authorized Entity Group...."

*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."

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*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-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 Reclamation 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 Reclamation 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

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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-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.

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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

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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 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.”

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*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..."

*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 comments 26, 28, and 29. 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

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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.

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.



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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 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

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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.

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 (all permit holders) 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 nor Fish and Wildlife Agencies make decisions related to BDCP implementation.

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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 for the adaptive management effort. 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 through the Authorized Entity Group, 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.

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.”

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*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.”

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*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 in its entirety.

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 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 comments 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, especially if the BDCP is being implemented by other permit holders in accordance with the 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

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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, meeting 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.

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 because one or more other Parties are not performing 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.”

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*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.

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

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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,

A handwritten signature in blue ink, appearing to read 'Maureen A. Stapleton', with a stylized, cursive script.

Maureen A. Stapleton  
General Manager





February 18, 2015

**Attention: Imported Water Committee**

**Adopt Proposed 2015-2016 Bay-Delta Workplan. (Action)**

**Staff Recommendation**

Adopt the proposed 2015-2016 Bay-Delta workplan.

**Alternatives**

1. Modify the proposed Bay-Delta workplan.
2. Do not adopt the proposed 2015-2016 Bay-Delta workplan.

**Fiscal Impact**

There is no fiscal impact associated with this action.

**Discussion**

The Water Authority has been very active in matters pertaining to the Bay-Delta for the past several years, and has engaged in a years-long Board and staff education process on the Bay-Delta Conservation Plan (BDCP) proposal and its potential effects on the San Diego region. Since 2011, the Board has conducted more than 31 public meetings on Bay-Delta and BDCP-related issues. In addition, an intensive, multi-disciplinary staff analysis of the BDCP environmental and planning documents was undertaken and shared with the Board over the course of 2013 and 2014, culminating in formal Water Authority comment letters submitted on the BDCP effort in Spring and Summer 2014.

Over the course of 2015 and into 2016, significant activity is expected related to the BDCP. In April 2015, it is anticipated that the BDCP will recirculate the environmental documents, including the EIR and EIS, and Implementing Agreement, for further public comment. The BDCP program has identified September 2015 as the projected timeframe for release of the final EIR/EIS, and October 2015 is identified as the projected timeframe for issuance of the federal Record of Decision and the state Notice of Decision on the environmental documents, thereby allowing construction to proceed in the 2016 timeframe.

This report presents a proposed Bay-Delta workplan for calendar years 2015 through 2016. The Bay-Delta workplan is intended to guide staff and the Water Authority Board of Directors in its actions on Bay-Delta issues over the next two years.

Staff recommends that the Board adopt the proposed 2015-2016 Bay-Delta workplan.

Prepared by: Glenn Farrel, Government Relations Manager  
Debbie Espe, Senior Water Resources Specialist  
Amy Chen, MWD Program Director

Reviewed by: Dennis A. Cushman, Assistant General Manager

Attachment: Proposed 2015-2016 Bay-Delta Workplan

## **PROPOSED 2015-2016 BAY-DELTA WORKPLAN**

**Objective: The Water Authority will actively engage at various decision-making levels to ensure the development and implementation of a cost-effective Delta solution that will stabilize its environment and provide improved water quality and water supply reliability, and ensure that the Water Authority's share of the financial obligations match with the benefits provided by the selected Delta solution. The Water Authority staff will provide timely information and recommendations about Bay-Delta and Bay-Delta Conservation Plan (BDCP) activities to the Board of Directors.**

### **Oversight of Bay-Delta Activities**

- Advise the Board on Bay-Delta activities through regular reports to the Imported Water Committee – hold Board workshops on specific issues, as appropriate.
- Monitor activities related to the Bay-Delta, such as the BDCP and the Delta Stewardship Council.
- Actively participate, to the extent possible, in the governance, oversight, finance and funding, ecosystem restoration, facilities operations, and public advisory structures that emerge as a result of the BDCP and related forums.
- Provide input to the Water Authority's delegation to the MWD Board of Directors regarding decisions to be made about MWD's participation in Bay-Delta actions and solutions.

### **Development of Water Authority Positions Related to the Bay-Delta**

- Upon publication of BDCP cost allocation data, staff will review and analyze the fiscal and cost allocation data presented to evaluate the potential BDCP fiscal impact on San Diego ratepayers, and to evaluate the BDCP project's cost-benefit to Water Authority ratepayers as compared to other supply alternatives.
- Review and provide comments on the BDCP re-circulated EIR/EIS and Implementing Agreement, as appropriate.
- Monitor the State Water Resources Control Board's process to develop new flow objectives for the Delta and assess potential impact from that process to Delta export as it relates to supply benefit described in BDCP.
- Actively engage in the development of new BDCP governance structures and parameters to ensure balanced and fair representation of interests.

- Educate San Diego business, community, legislative, civic, and opinion leaders, and the media, regarding the Water Authority positions related to the BDCP.

### **Bay-Delta Program Financing**

- Advocate that the costs and sources of funds of any Bay-Delta solution be identified and funding committed before project commences.
- Monitor BDCP pre-construction cost to ensure it is shared equally by all project proponents.
- Monitor and analyze development of any short- or long-term finance plan that:
  - Provides adequate and stable funding to accomplish the co-equal goals of providing a reliable water supply and restoring the Bay-Delta ecosystem.
  - Ensures Bay-Delta solutions proportionately allocate the costs to all those that benefit from the program's actions, so that financial support for the program reflects benefits received.
  - Links water user funding to the accomplishment of specific water supply reliability and water quality goals.
- Work with other stakeholders to secure and maximize appropriations of state and federal funding for necessary Bay-Delta improvements.
- Educate San Diego business, community, legislative, civic, and opinion leaders, and the media, regarding financial implications and potential water supply and water quality benefits of BDCP to San Diego ratepayers.
- Continue to actively advocate for a BDCP financing model that requires firm financial commitments – through take-or-pay contracts or legal equivalent – from member agencies or units of the State Water Project and Central Valley Project contractors, to pay the fixed costs of BDCP, and that utilizes appropriate back-stop financing mechanisms to ensure payment, before bonds are issued and commencement of project construction.

### **Advocacy for Near- and Longer-Term Bay-Delta Improvements Necessary to Restore and Improve Water Supply Reliability**

- Engage Water Authority directors in direct advocacy efforts in Sacramento and Washington, D.C. to communicate the San Diego region's interests in a Delta solution and Bay-Delta improvements.

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- Engage directly to secure the support of San Diego business, community, civic, and opinion leaders, and the media, for any Delta solution supported by the Water Authority.
- Monitor MWD's positions and recommendations on Bay-Delta issues and provide recommendations to the Water Authority's delegation to the MWD Board of Directors.
- Recommend to the Water Authority board positions of support or opposition to legislation concerning the Bay-Delta and the BDCP.
- Monitor and report the progress of Bay-Delta water rights hearings and settlement discussions as they affect the quality, reliability, and cost of State Water Project supplies.
- To the extent possible, participate in any forums related to BDCP to advance and protect the San Diego region's interests.

**Participation and Outreach to Member Agencies and the Public**

- Advise the member agencies on Bay-Delta activities through periodic reports at member agency general manager meetings; make informational presentations at member agency Board meetings and interested community organizations, as requested.
- Represent Water Authority positions at meetings in public forums related to the Bay-Delta, as appropriate; inform Board members and member agency managers of opportunities for their participation in the process and assist in the development of letters and public testimony.
- Provide briefings and written updates, as appropriate, on Bay-Delta issues and San Diego region concerns to local legislators and elected officials, business and community groups, and other interested parties.