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RE: Public Comment on the BDCP Financing MOA

Dear Mr. Barajas,

Thank you for the opportunity to submit comments on the First Amendment to the Memorandum of Agreement Regarding Collaboration on the Planning, Preliminary Design and Environmental Compliance for the Delta Habitat Conservation and Conveyance Program in Connection with the Development of the BDCP (MOA). This letter addresses as well issues raised in the Federal White Paper on the 2011 BDCP MOA attached to the October 31, 2011 letter from Deputy Secretary David Hayes to U.S. Representative George Miller. We also concur in and support the comments submitted by our colleagues with the Natural Resources Defense Council and the Environmental Water Caucus.

As one of the signatories to the Planning Agreement Regarding the BDCP (Oct. 6, 2006) (“Planning Agreement.”), EDF has a strong interest and substantial investment in the development of a successful and credible Conservation Plan pursuant to the relevant state and federal endangered species statutes. These comments are submitted in furtherance of that goal.

Export Water Contractor Permittee Status

The MOA commits the California Department of Water Resources (DWR) and the U.S. Bureau of Reclamation (Bureau)(together, Project Agencies) to listing the export water contractors as applicants and permittees for the incidental take permits based on the BDCP Habitat Conservation Plan/Natural Community Conservation Plan (HCP/NCCP). It also notes that, as required by law, the California Department of Fish and Game, the National Marine Fisheries

Service and the U.S. Fish and Wildlife Service (together, Fish Agencies) will decide whether to grant the permits. Section II(H).

EDF and other NGOs have previously detailed why it is inappropriate to list the export contractors as applicants and permittees for purposes of the incidental take permit at issue. *See* Memorandum to Jerry Meral and David Nawi regarding Permittee Status (March 23, 2011) attached and incorporated herein by reference. We note that we have not received a response from the agencies addressing the issues or analysis raised in this Memorandum.

In brief, the BDCP is intended to be a Conservation Plan to provide the basis for the issuance of new federal and state incidental take authorizations for the coordinated operation of the Central Valley Project (“CVP”) and the State Water Project (“SWP”)(together, “Projects”). These Projects are owned and operated by the U.S. government and the State of California respectively which is why the existing Biological Opinions, authorizing take for the Projects, operate against actions taken exclusively by the U.S. Bureau of Reclamation and the California Department of Water Resources. At issue in both of the Biological Opinions is the impact of coordinated Project operations on the biological resources of the Bay Delta Estuary. The issuance of any of the new incidental take authorizations at issue will inherently revolve around the coordinated Project operations that gave rise to the jeopardy opinions. While the export water contractors are the ultimate beneficiaries of certain water deliveries from the Projects, it is the actions and decisions of the Bureau of Reclamation and the Department of Water Resources that are at issue in the Fish Agencies’ determinations about whether or not incidental take may be authorized for the Projects’ Delta operations.

The export water contractors neither own nor operate these Projects. They are not parties to the 2004 Long-Term CVP and SWP Operations Criteria Plan (OCAP), or the 1986 Coordinated Operating Agreement (COA). We appreciate that the MOU states that the export water contractors do not have any “authority over water project operational decisions,” but due to the importance of this fundamental issue, more clarification is warranted. The MOU should ensure that the export water contractors have no authority or role beyond that of the general public in developing project operational parameters, developing or employing adaptive management limits of project operations, developing annual operations plans or any other activity that may present conflicts between water exports and ecosystem protection of Delta water quality. Furthermore, it is not appropriate for the contractors to be co-permittees with the Project Agencies, which would essentially put the contractors in the shoes of these agencies and elevate their interests above those of others with a stake in these massive public works projects.

Moreover, allowing the export water contractors to hold incidental take permits for the operation of federal and state water Projects that they neither own nor operate and for which they do not have primary responsibility is not only illogical and inappropriate, but legally improper. Federal guidelines provide that permittees must “be capable of overseeing HCP implementation and have the authority to regulate the activities covered by the permit.” As non-owners or operators of the

Projects, the water contractors – properly – do not have authority with regard to (1) Project operations, (2) the Projects’ water rights, or (3) obtaining a permit to change the point of diversion. These are central, if not the central, implementation activities at issue in the BDCP.

We respectfully disagree with the assertion in the Federal White Paper that there are precedents for granting contractors permittee status. The single such instance of which we are aware, and the only one noted in the White Paper, is the Lower Colorado River Multi-Species Conservation Plan (MSCP). This MSCP is not comparable or relevant to the Bay Delta Conservation Plan because it does not involve water project operations and contractors were granted permittee status only with regard to taking species associated with habitat restoration and management and fish stocking. Neither the Section 10 permit for the water agencies nor the Section 7 biological opinion for the Bureau of Reclamation covered water operations on the Lower Colorado River MSCP. Further issues and problems with extending this status to the contractors are outlined in the March 2011 memorandum attached.

Agency correspondence in response to congressional and stakeholder objections around this issue has been inconsistent. The agencies maintain, first, that such concerns are “misplaced” because permittee status confers limited benefits and not control of underlying activities. At the same time, the agencies justify various provisions in the MOA giving the contractors access to information and influence over the process (see below) on the basis of their decision to treat the export contractors as applicants (“HCPS/NCCPs are typically applicant driven.”)

In our view, the law, regulations and precedents are clear; the appropriate applicant and permittee for an incidental take permit related to operations of the State Water Project is DWR, the sole owner and operator of the SWP and the only entity ultimately responsible for its operations. EDF also concurs with the Federal White Paper that the BDCP should reasonably serve as the basis for Section 7 reconsultation with regard to the Bureau of Reclamation’s CVP operations within the Delta. However, Section 7 involves the legal duties and obligations of federal agencies whose actions affect listed species, and should not be driven by the prerogatives of federal contractors.

We appreciate that the MOA contains savings language reflecting the legal reality that the Fish Agencies will ultimately make the decision about whether to “grant any permit.” Sec. II(H). Nevertheless, in signing the MOA, the U.S. Department of the Interior and the California Department of Water Resources would appear to have committed themselves to the untenable position that the export water contractors should be accorded legal status to hold incidental take permits alongside the Project agencies for the coordinated operations of the Projects. The Fish Agencies are obviously sub-agencies of, or sister agencies to, the agencies that by virtue of signing the MOA have pre-committed themselves to this position. While the Fish Agencies have the technical authority to reach a different conclusion, their ability to do so would appear to be compromised by the commitments made in the MOA.

Finally, EDF concurs that the export contractors have an essential role to play in working with the agencies and other stakeholders in developing the BDCP and in implementing key aspects of the Conservation Plan. However, this role does not require that these contractors be afforded co-equal permittee status with the state and federal agencies. This is an unnecessary over-reach that jeopardizes the likely success of the BDCP process rather than supporting it.

RECOMMENDATION: Eliminate Sec. II(H).

Federal Contractor Assurances

As drafted, the MOA provides that it is an “essential element of a successful BDCP” to provide one set of stakeholders, the CVP export water contractors, with “the greatest measure of certainty” equivalent to ESA Section 10 ‘no surprises’ assurances. Section II(J). The MOA goes on to commit the federal and state governments to an expeditious process for evaluating such measures. EDF objects to this provision on several grounds.

First, the BDCP has yet to grapple seriously with its primary objective – the establishment of a credible Conservation Strategy that will make a sufficiently meaningful contribution to the recovery of 63 Covered Species to support incidental take permits for Project operations in the Delta. EDF, NGO and National Academy of Sciences concerns regarding science, analysis, technical review, the range of alternatives, goals and objectives and the overall efficacy of the draft BDCP are detailed elsewhere. Until the federal and state agencies produce a credible Conservation Plan, driven by quantified goals and objectives, and committed to achieving those goals and objectives, it is premature to focus limited resources on measures to provide the Projects, or their contractors, with assurances limiting ESA and CESA liability.

Second, Sec. II(J) violates the principle that assurances regarding Project operations must be commensurate with assurances of biological performance. Issuance of an incidental take permit turns on the extent to which the HCP/NCCP is reasonably likely to contribute substantially to recovery of the covered species. It is inappropriate for the agencies to commit to assurances of regulatory relief while making no concomitant commitment to biological performance. EDF respectfully disagrees that pledges from the agencies that they intend to comply with legal requirements constitute a sufficient balance for a written agreement, signed by agency heads, that commits those agencies to one set of assurances for one set of parties while remaining silent on assurances for the ecosystem.

Third, as the Federal White Paper acknowledges, Federal agency actions do not qualify for Section 10 ‘no surprises’ assurances. As established above, the federal subject of the potential incidental take permit is the operation of the CVP, a water project owned and operated by the U.S. government. We concur that the BDCP should be able to serve as both a Section 10 program for the SWP and as a sound basis for ESA Section 7 consultation for the CVP. *See*

Federal White Paper at 3. However, this does not require providing Section 10 assurances to federal export water contractors.

The reason that such assurances are not provided to Federal agencies is that they have a higher and ongoing duty of care to listed species than non-federal entities. *See*, 50 CFR Sec. 17.22(b)(5) (stating that no surprises assurances “cannot be provided to Federal agencies.”) This rule was promulgated specifically to clarify that ‘no surprises’ assurances “do not apply to Federal agencies who have a continuing obligation to contribute to the conservation of threatened and endangered species under section 7(a)(1) of the ESA.” 63 Fed. Reg. 8867 (Feb. 23, 1998). NMFS and FWS cannot be precluded from imposing additional terms or conditions on a federal agency as needed to minimize or mitigate harm to listed species as needed. Thus, ‘no surprises’ guarantees cannot be extended with regard to the operations of a federal water project – or the deliveries of water from that project – under the control of the federal government.

Fourth, by identifying assurances for the export water contractor assurances as an explicit federal priority, the MOA opens the door to assertions that agency discretion must be exercised in the contractors’ favor with regard to a wide range of decisions and determinations going forward. The provision could be read to suggest that agency action regarding Project operations, as well as a host of other issues, must maximize certainty for federal export water contractors over other considerations. This is inappropriate and improper in light of the CVP’s authorizing statute which requires Interior to operate the CVP for the purposes of fishery restoration, protection and enhancement on par with obligations to deliver water for consumptive purposes. At the least, Sec. II(J) invites further challenges to agency actions that benefit fish and wildlife if such actions could be construed to conflict with the goal of maximizing contractor “certainty.” The federal export water contractors in particular have made clear their enthusiasm for litigation to enforce perceived, if not actual, entitlements.

We are also concerned that this explicit federal priority to maximize the delivery of water to south-of-Delta contractors might impair other CVP environmental obligations, including but not limited to the Trinity River Program, the San Joaquin River Restoration, and managed wetlands.

EDF respectfully disagrees that these issues are addressed or mitigated by the inclusion of generic “to the extent provided by law” language. It is assumed that agencies do not intend to violate laws. More critically, this phrase does not represent a limitation on the agencies’ obligation, but rather a commitment that the agencies will go to the maximum lengths allowed to accommodate the contractors’ “certainty” interest. The concern and the issue is how these agencies will use their discretion to make innumerable decisions, particularly those affecting Project operations and ecosystem recovery. MOA Section II(J) puts a thumb on the scale and represents an extraordinary agency commitment to elevate the parochial interests of one set of stakeholders over others, and over other key fish and wildlife protection and restoration considerations as well.

Finally, we recognize that the MOA does not state that the interests of the federal contractors are the only “essential element” of a successful BDCP. But in singling out one interest – and failing to identify any others – the agencies have placed unwarranted emphasis upon this issue and the interests of that one set of stakeholders.

RECOMMENDATION: Eliminate Sec. II(J)

Characterization of Peripheral Conveyance as a “Conservation Measure”

The MOA suggests that a Delta conveyance facility could be considered a “conservation measure.” Recital R(c). This is incorrect as a matter of law and EDF opposes the agencies signing any document to this effect. Federal and state endangered species laws define conserve and conservation to mean “methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.” A peripheral canal or tunnel is a water development project. It is intended to divert large amounts of water out of the ecosystem for purposes of export for consumptive use. Such a facility can under no reasonable definition be considered a “conservation measure.”

If properly constrained and operated for ecosystem purposes, it appears to be possible that a northern diversion point could have a less deleterious effect on the Delta ecosystem than excessive pumping at the federal and state pumping stations in the south Delta, (although potential adverse environmental impacts associated with such diversions have yet to be assessed). Such operational constraints and parameters themselves may be reasonably considered to be mitigation measures addressing the adverse impacts of the Projects’ diversion of freshwater from the Estuary.

RECOMMENDATION: Eliminate this reference.

Assurance Parity Issues

The Federal White Paper and related correspondence states that because the BDCP Conservation elements are still under development, “the form and scope of any assurances granted under the BDCP have yet to be developed.” Similarly, in response to Congressional inquiry about the status of measurable benefits for salmon and the estuary, the agencies state that: “The Department of Interior is not in a position to answer this question at this time,” and indicate that answers will depend on “the projected operation of the additional facility and what is determined by the applicable effects analysis.” Joint Agency Response at 5.

The BDCP’s incomplete status has not prevented the agencies from proceeding with development of regulatory relief assurances for the export water contractors (see above). The agencies have also indicated their support for the construction of major new water conveyance, which will substantially alter flows within the Delta and present new risks of entrainment for

Sacramento River salmon, notwithstanding the unfinished status of the effects analysis and other elements of the BDCP. If sufficient information has been developed to initiate detailed discussions about conveyance and contractor assurances, it would appear time for the agencies similarly to develop ecosystem performance assurances.

RECOMMENDATION: Initiate a process to develop meaningful and enforceable ecosystem performance assurances.

Financing and Affordability

The MOA provides that the contractors will “release” a financing plan for the “design, construction, operation, and maintenance” of any conveyance facility to be permitted as part of the BDCP. Sec. II(R). This provision is unclear and raises several concerns. While the MOA provides that the contractors must “coordinate” with the Bureau and DWR, Section II(R) suggests that these agencies are delegating to the export contractors primary responsibility for developing and preparing the conveyance financing plan. If this is the intent, the provision is inappropriate. These costs are intimately tied to assumptions about the design and operational elements of a facility. These are not issues properly delegated to the contractors. Whether a canal or tunnel, the peripheral conveyance will be a major public works project and the financial analysis, as well as questions of affordability and the relationship of the cost of the project to viable alternatives, are critical questions that the lead agencies must assess in order to ensure that reasonable and viable alternatives and potential impacts are fully considered.

Many critics are unconvinced by representations that the conveyance facility will cost only \$12-\$13 billion (*see* evolution of high speed rail cost estimates), and are equally skeptical that agricultural water interests, and some urban water users, will be able or willing to pay the full price for the water this facility will deliver. EDF and others have called for the BDCP agencies to address cost and financing for several years with limited success. It is concerning that this set of issues could be handed off to the export contractors with no obligation to conduct the work in public view until quite late in the process, the issuance of the draft EIS/EIR. State law requires the State Water Resources Development System to be operated as one project "for the benefit of all people of the state" and authorizes DWR to sell bonds for the construction of units of the system and to repay those bonds through contracts for water and power.

The agencies’ response to Congressional inquiries notes that the California State Treasurer has been asked to examine the ability of the water contractors to pay for conveyance and mitigation costs. Joint Agency Response at 5. It would seem that this report is vital to the BDCP since cost and affordability directly impact the feasibility of ‘alternatives to take’, as well as alternatives to the proposed project for purposes of the EIS/EIR analysis.

Finally, the agencies’ response to Congressional queries regarding BDCP financing states that even without committed funding for the ecosystem program “it is reasonable to expect that, over

the fifty-year life of the permit, public funding will become available.” Joint Agency Response at 6. We concur that funding for Delta-related ecosystem projects has been forthcoming over the last twenty years. However, we respectfully disagree with the assumptions in the agency response in three respects.

First, if we have correctly understood the agencies, the notion inherent in the response is that legal and ecological requirements can be satisfied if they are amortized over the 50-year life of the permit. The species and estuary at risk represent critical public resources that, as has been well documented, are on the brink of extinction today. Incidental take permits for Project operations and new conveyance cannot be issued on the premise that the ecosystem efforts can be delayed until funding becomes available, so long as it becomes available within 50 years.

Second, past funding success may no longer be a reasonable indication of future funding potential. Many have observed that government at all levels is entering a new era of limited resources for even the most critical services that may extend for decades to come.

Third, the BDCP needs to grapple with the possibility that anticipated public funding may not be available, or may not be available at the appropriate times in the necessary amounts. It is essential that these contingencies be addressed, particularly as they affect the financing plan for conveyance and the BDCP overall.

RECOMMENDATIONS:

- Revise the MOA to establish a date for the receipt of the Treasurer’s report, and require its inclusion into the BDCP analysis.
- Revise II(R) to provide that the financing plan will be developed in an open process including interested stakeholders and independent economic review of cost and affordability data and analysis.
- Revise II(R) to provide that the issue of what constitutes “mitigation” costs, as opposed to costs of the restoration program, will be determined by an independent panel.
- Revise II(R) to require that any financing plan must provide that the contractors are required to bear some portion of the cost of restoration program financing, including a schedule for the delivery of funds, in the event that public funding is not available in the short or long term.

Purpose of BDCP and EIS/EIR

Recital R merges the HCP/NCCP planning and EIS/EIR processes. EDF has concerns about this legally and practically. Consideration of ‘alternatives to take’ is a fundamentally different exercise than consideration of project alternatives pursuant to NEPA and CEQA. Efforts to ensure a credible BDCP, and one that complies with the 2009 Delta Reform Legislation, by considering an appropriate range of alternatives including higher flow alternatives, have not yet

met with success. Recital R also appears to refocus the BDCP from its original planning goals (Recital H) to a set of objectives more in line with the economic interests of the export water contractors.

Surprisingly, the MOA does not reference the 2009 Bay Delta Reform legislation which set forth a number of legislative directives for the BDCP essential to its success and ability to be incorporated into the Delta Stewardship Council's Delta Plan, most critically the fact that it is now California state policy to reduce reliance on the Delta for consumptive water supply.

The MOA also selectively "recites" the existence of various documents while ignoring others. For example, the recitals list a Schwarzenegger Administration letter regarding conveyance, but fail to list the NGO letter issued in connection with the 2010 transition documents detailing that those documents do not reflect a Steering Committee position. Similarly, the recitals fail to list the May 2011 National Academy of Sciences report indicating that the BDCP's foundational work – the draft Conservation Plan – was fundamentally flawed. Highlighting certain documents in the MOA recitals signals that they have a different stature and status than those excluded. Agency approval of this type of selective elevation of certain documents produced in connection with the process is inappropriate.

RECOMMENDATIONS:

- Eliminate Recital R
- Eliminate references to selected documents and letters in connection with the BDCP with the exception of the Planning Agreement and other formal Steering Committee products.

Schedule Issues

The MOU commits the agencies to an "aggressive" schedule because the agencies believe it is important to move the BDCP forward as quickly as possible. There has been considerable discussion about whether the work needed to be done can reasonably be accomplished in the time available under the schedule. We appreciate Deputy Secretary Hayes' statement that the schedule "will not compromise our ability to produce a plan based on scientifically sound and legally defensible analyses." EDF notes that the NGO community has for many years, and in many letters, urged the agencies to use their time and resources more prudently, and it is clear that had those running the BDCP adhered to our recommendations regarding scientific process, goals, objectives, definition of alternatives, etc., the BDCP would have been substantially farther down the road than it is today.

Our concern is not with the timeline per se, but with the possibility that the schedule will undermine the science, alternatives and other analysis necessary to ensure a successful BDCP. The failure to do things correctly in the past cannot be the excuse to continue to fail to do so into the future. We do not seek perfection. But given the enormous stakes involved in the issuance

of 50-year incidental take permits, covering 63 species, the viability of most of California's commercial salmon runs, and the very substantial environmental consequences associated with building new water conveyance (even a 3,000 cufs facility would be quite considerable), EDF believes that it is essential that the agencies conduct the foundational work necessary to establish that the Conservation Strategy they intend to approve will in fact provide substantial contribution to recovery for those species and the Bay Delta ecosystem.

The MOA does not reflect the balanced approach with regard to the schedule outlined in the Deputy Secretary's letter to Representative Miller. Taken together the schedule-related provisions indicate that meeting the schedule is the single most important driver in the BDCP process. For example, Section II(E) provides that DWR and the Bureau may proceed without Fish Agency input if not received in conformance with the schedule which establishes limited windows for comment on documents and analyses that are highly technical, complex and of considerable significance. Similarly, Section II(L) establishes conformance with schedule as a special priority. It contains no mention of the need to conform the schedule to accommodate appropriate review and analysis or development of alternatives if more time is needed to conduct these tasks than anticipated.

RECOMMENDATION: Revise Sections II(C), II(D) and the other MOA provisions listed above to establish that the schedule is not paramount to other key considerations, and that the schedule cannot be used as a reason for failing to do science, analysis or development or consideration of alternatives reasonably needed to ensure that the BDCP results in an appropriate contribution to recovery of the covered species.

Export Water Contractors Influence Over BDCP Planning and Science

The MOA has drawn considerable heat over provisions that appear to provide the export water contractors with outsize access to information and opportunities to influence the BDCP planning process, the EIS/EIR development, and the science to support both. Unfortunately, the responses provided to Congressional queries, as well as the Federal White Paper, do not satisfactorily address these concerns.

EDF concurs with the White Paper's observation that the MOA does not alter the legal responsibilities of the state or federal lead agencies under NEPA, CEQA or the relevant endangered species statutes. This observation, however, is non-responsive to the issues raised. The fact that these agencies will make the final decisions does not alleviate legitimate concern that the MOA provides export water contractors with an inappropriate level of influence over the BDCP planning, analysis, science and environmental review, and the extent to which such influence could affect the substance of those final agency decisions. Nor is it responsive to note that the public will have opportunity to comment at the draft EIS/EIR stage. Providing comments on an EIS/EIR is not reasonably comparable to the opportunities to influence analysis,

decisions and outcomes the MOA affords the export contractors throughout the drafting and analytical process leading up to the draft EIS/EIR.

The MOA provides the export contractors with substantial opportunities to shape the approach and analytic framework adopted by the consultants preparing the Effects Analysis and the selection and review of potential alternatives. These opportunities include but are not limited to:

- Authorization to serve as contract administrator for the BDCP consultants. Section II(G)
- Early access to all non-public consultant work product and project management documents, including but not limited to draft task orders, preliminary engineering, and draft Notice To Proceed Agreements. Sections II(K), III(C)
- Monthly meetings with the agencies re BDCP and EIS/EIR progress. Section II(L)
- Right to consultation with DWR and Bureau if it appears to any export contractor that any task may not be adhering to the schedule. Section II(L)
- Right to terminate funding agreement any time export contractors' demands regarding task completion and schedule are not adhered to. Section II(L)
- Ability to serve as co-drafters of responses to comments on the BDCP and EIR/EIS submitted by any other parties. Section II(K)
- Special access to the Program Manager. Sections II(L), (M)

RECOMMENDATIONS:

- Revise the provisions identified above to clarify that the export contractors shall not have any greater access to information or drafts or meetings with agency staff than any other member of the Steering Committee or other key stakeholders. At the very least, their access to information, documents and agency personnel should be no greater than that of other Responsible or Cooperating Agencies, such as the Fish Agencies or Delta Counties.
- Eliminate provisions allowing contractors to prepare comments, manage consultants, and tasks.
- Limit the export contractors' ability to withdraw funding to only those circumstances where the agencies are violating law, and include provisions that withdrawal of plan funding for reasons other than violations of law terminate the exporters' opportunity to receive no surprises assurances.

Thank you again for the opportunity to provide these comments. We look forward to a continued constructive collaboration with the state and federal agencies.

Sincerely,



Cynthia Koehler
California Water Legislative Director



Spreck Rosekrans
Economic Analyst

cc: Dr. Gerald Meral

MEMORANDUM

From: Cynthia Koehler, Environmental Defense Fund
Kim Delfino, Defenders of Wildlife
Doug Obegi, Natural Resources Defense Council
To: Jerry Meral, California Natural Resources Agency
David Nawi, U.S. Department of the Interior
Re: PERMITTEE STATUS FOR WATER CONTRACTORS IN BDCP

This memorandum addresses issues associated with granting permittee status in the Bay Delta Conservation Plan (BDCP) process to the state and federal water contractors who divert water south of the Delta from the Central Valley Project (CVP) and State Water Project (SWP), and/or to the joint power authority, State and Federal Contractors Water Agency (SFCWA), which is controlled by those entities.

The question is whether granting the contractors status as holders of the Natural Community Conservation Plan/Habitat Conservation Plan permit – in addition to DWR – would impair the independent ability of the state and federal agencies to administer the BDCP and protect public trust resources.

In our view, the answer is that it clearly would. Granting permittee status to the contractors would critically impair the state and federal governments' independent ability, over the next fifty years, to administer the BDCP for the benefit of public trust resources by allowing entities located outside the Delta to directly and indirectly control administration, adaptive management and operations of a Delta-based plan through funding control, decision-making authority, contractual claims and litigation. Granting permittee status to the contractors is likely to violate provisions of state and federal law, jeopardizing the entire BDCP project. It could also undermine confidence in the BDCP process by other stakeholders and the public at large.

We respectfully recommend against this course of action.

I BACKGROUND: CESA, NCCPA and ESA

State Law: The California Endangered Species Act (CESA)(Fish & G. Code §§ 2050 et seq.) prohibits the taking of any species listed as endangered or threatened with extinction (collectively referenced hereinafter as “endangered species”) without authorization from the California Department of Fish and Game (DFG).¹ With respect to state agencies, boards and commissions, CESA requires a higher duty of care than for non-state entities stating:

[I]t is the policy of this state that all state agencies, boards, and commissions shall seek to conserve endangered species and threatened species and shall utilize their authority in furtherance of the purposes of this chapter. (§ 2055.)

CESA defines “conserve” broadly as using:

¹ All statutory references are to Fish and Game Code unless otherwise indicated.

[A]ll methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary. These methods and procedures include, but are not limited to, all activities associated with scientific resources management, such as research, census, law enforcement, habitat acquisition, restoration and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Although the State Water Project operated by the Department of Water Resources (DWR) and the Central Valley Project, operated by the U.S. Department of the Interior, Bureau of Reclamation (Reclamation or Bureau) are operated in tandem under the *Coordinated Operations Agreement*, the Bureau of Reclamation asserts it is not subject to state law.² This means that, at present, DWR is the only clear BDCP permittee and the SWP are the only facilities which will be permitted under the Natural Community Conservation Planning Act (NCCPA) (§§ 2800 et seq.). Note that the California legislature declared that for the BDCP to be eligible for state funding, it *must* be a Natural Community Conservation Plan (NCCP).³ This settled the issue of whether the BDCP would seek a CESA permit under § 2081 or instead proceed under the State’s Natural Community Conservation Planning Act.

The NCCPA provides that at the time a NCCP is approved CDFG “may authorize by permit the taking of any covered species whose conservation and management is provided for in the [plan].” (§ 2835.) As noted above, “conservation” is a recovery standard. This is a higher standard than the avoidance and mitigation required under CESA § 2081 permits, and it is the reason public funds are contributed to NCCPs.

In California, water is a public trust resource belonging to all of the people of the State. Cal. Water Code § 102. Because of this, water rights are “usufructory,” meaning the right to use something you do not own. Similarly, DWR is an agency for all of the people of the state. Its mission is to “manage the water resources in cooperation with other agencies, to benefit the State’s people and to protect, restore, and enhance the natural and human environments.” As an agency of the Executive Branch, DWR can also be held responsible to all of the people of the state through the checks and balances of legislative oversight by a representative government.

Federal Law: The federal Endangered Species Act is similar to CESA in many respects. Overall, the statute prohibits “any person” from taking or harming any listed species.⁴ Section 7(a)(2) of the ESA applies to federal agencies and requires that they “insure that any action

² This is an untested theory and we do not concede its legal validity. The Reclamation Law of 1902 (43 USC § 383) states, “Nothing in this Act shall be construed as affecting or intended to affect or in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation...and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws...” One can assume, *arguendo*, that CESA, as applied to CVP impacts on aquatic species, relates primarily to the control, appropriation, use, or distribution of water used in irrigation. *See, e.g., NRDC v. Patterson*, 333 F.Supp.2d 906, 913-914 (E.D. Cal. 2004) (holding that section 5937 of the Fish and Game Code was not preempted by Section 8 of the Reclamation Act of 1902, and holding that this provision of state law applied to Bureau of Reclamation’s operations at Friant Dam).

³ Delta Reform Act of 2009 (SB 1 (Simitian) 2009-10 Seventh Extraordinary Session); Water Code § 85320(b)(1).

⁴ ESA, Sec. 9.

authorized, funded or carried out ... is not likely to jeopardize the continued existence” of any listed species or otherwise “result in the destruction or adverse modification of” critical habitat.⁵ Section 7(a)(1) of the ESA requires that, “All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.” In this sense, like CESA, the federal statute imposes a higher standard on federal agencies than private or other non-federal parties.

Federal agencies, in this case Reclamation, whose actions may result in such damage must “consult” with the Fish and Wildlife Service (FWS) or National Marine Fisheries Service (NMFS), as appropriate. Those agencies must issue Biological Opinions identifying alternative approaches to be taken by the agency in implementing the agency action, in this case, operation of the CVP.

Section 10 of the ESA applies to non-Federal parties and allows the incidental taking of listed species by states, local governments and private parties pursuant to an incidental take permit. In order to receive such a permit, an applicant must submit a Habitat Conservation Plan (HCP) that meets certain criteria.⁶ An approved HCP gives rise to “regulatory assurances” under the federal No Surprises policy.⁷

Critically, 50 CFR Sec. 17.22(b)(5), which codifies HCP regulation, states expressly that No Surprises assurances **“cannot be provided to Federal agencies.”** (Emphasis added.) When promulgated, the federal government stated that it was issuing the revised rules in part to clarify that No Surprises assurances “do not apply to Federal agencies who have a continuing obligation to contribute to the conservation of threatened and endangered species under section 7(a)(1) of the ESA.” 63 Fed. Reg. 8867 (Feb. 23, 1998). In addition, the notion that the FWS and/or NMFS would be precluded from imposing on a federal agency additional terms and conditions designed to minimize or mitigate excessive take conflicts with the obligation to reinitiate consultation under Section 7(a). Thus, the law expressly prohibits Reclamation and federal water contractors from obtaining Section 10 “No Surprises” assurances and prohibits the FWS/NMFS from approving permits that are structured to undermine the agencies’ Section 7 obligations.

The legal consequences of permittee status under the ESA and NCCPA:

In the simplest terms, the permittee has primary responsibility for implementation of the HCP/NCCP, authority to regulate the activities covered by the permit, and standing to challenge a finding of noncompliance by the permitting agencies. In the case of BDCP, this could include operations of the isolated conveyance facility, but also all decisions about funding, priorities, how to proceed with implementation, monitoring, staffing etc. As all parties acknowledge, the permit holder would have tremendous sway and influence over virtually every aspect of BDCP

⁵ 16 USF 1531, et seq.

⁶ See, 50 CFR parts 17 and 222

⁷ The Services codified the “No Surprises” policy into a final rule, 50CFR 17.22(b)(5), 17.32(b)(5) and 222.307(g), on February 23, 1998 (63 FR8859).

implementation. Permittees occupy an entirely different legal relationship to the program than non-permittees.

As discussed further in this memorandum, granting permittee status to the contractors may result in the following consequences:

- Provide the contractors with the authority to amend the terms of the BDCP NCCP, which may restrict the authority of DWR to amend its terms;
- Provide CVP contractors with regulatory assurances, in violation of federal law; and
- Provide the contractors with additional influence and authority over implementation of BDCP, which may limit the ability and authority of DWR and Reclamation with regard to implementation.

Inconsistency with State and Federal Laws:

At bottom, the problem with granting the contractors permittee status is that this ignores the fact that BDCP implementation – which will be run by the permittees -- involves fundamental state and federal governmental functions that cannot, and should not, be delegated to the water contractors. Numerous state and federal laws, such as the Central Valley Project Improvement Act (CVPIA), require that the SWP and CVP be operated by the state and federal governments, respectively.⁸ Federal law prohibits delegating the Secretary’s policymaking role and authority. *See National Park and Conservation Association v. Stanton*, 54 F. Supp. 2d 7 (D.D.C. 1999).

State and federal laws also mandate that the agencies oversee and implement programs to manage and restore the Bay-Delta estuary.⁹ Similarly, the Delta Reform Act of 2009 (ch. 5, stats. 2009) reinforces the obligation that the State and Federal agencies are to establish policy for and management of the Bay-Delta estuary. That Act explicitly finds that the Bay-Delta estuary is a “critically important natural resource for California and the nation.” Water Code § 85002. It establishes numerous state policies for management of the Bay-Delta, including the co-equal goals, protection of the historic and cultural values of the Delta, and establishing a new governance structure “with the authority, responsibility, accountability, scientific support, and

⁸ *See, e.g.*, CVPIA, P.L. 102-575, Title 34, § 3406(b) (“The Secretary, immediately upon the enactment of this title, shall operate the Central Valley Project to meet all obligations under state and federal law, including but not limited to the federal Endangered Species Act, 16 U.S.C. s 1531, et seq., and all decisions of the California State Water Resources Control Board establishing conditions on applicable licenses and permits for the project.”); Cal. Water Code §§ 12931, 11451, 12895; *see* Cal. Water Code § 85321 (“The BDCP shall include a transparent, real-time operational decision-making process in which fishery agencies ensure that applicable biological performance measures are achieved in a timely manner with respect to water system operations.”).

⁹ *See, e.g.*, CalFed Bay-Delta Authorization Act, P.L. 108-361, § 102(1) (“The terms “CalFed Bay- Delta Program” and “Program” mean the programs, projects, complementary actions, and activities undertaken through coordinated planning, implementation, and assessment *activities of the State agencies and Federal agencies as set forth in the Record of Decision.*”) (emphasis added); Cal. Water Code § 78536.5 (requiring that the Secretary of the Resources Agency shall carry out the CALFED Bay-Delta program).

adequate and secure funding to achieve these objectives.” Water Code § 85020. Elevating the exporters to permittee status and giving them significant influence over BDCP management decisions would necessarily lead to a bias in implementation, as Delta, fishing and environmental interests would not be granted equal status.

The CVPIA also established ”mitigation, protection, and restoration of fish and wildlife” as a project purpose of the CVP, along with other purposes, such as water supply (P.L. 102-575, Title 34, § 3406(a)). Thus, both state and federal law establish environmental protection and restoration as co-equal project purposes for the CVP and SWP. Granting water users broad control over the BDCP is inconsistent with state and federal requirements regarding co-equal goals.¹⁰

In addition, under the Endangered Species Act and its implementing regulations, the water contractors lack the authority to be a permittee. For instance, page 3-2 of the HCP handbook states that, “The permittee must therefore be capable of overseeing HCP implementation and have the authority to regulate the activities covered by the permit.” The water contractors lack the authority to change water operations of the CVP and SWP, they lack rights to the water that would be diverted under BDCP, and they lack the authority to seek a permit to change the point of diversion, which are key activities proposed in BDCP. Therefore, they lack the legal authority to be permittees under BDCP. The only appropriate, legal permittees in the BDCP process are state and federal agencies.

Finally, as indicated above, federal agencies cannot obtain “No Surprises” assurances under section 10 of the Endangered Species Act. 50 C.F.R. § 17.22(b)(5). Authorizing the CVP contractors to be permittees appears intended to circumvent this prohibition and give Reclamation’s contractors assurances that would not be available to the agency itself. As noted above, the Bureau is the only proper and legal operator of the CVP, and the Bureau holds the water rights for the CVP. To the extent that the assurances provided to CVP contractors could reduce or eliminate the ability of the CVP to change operations and/or reduce diversions so as to avoid jeopardy to listed species or protect the environment in the future, such assurances violate the ESA and its implementing regulations. See, *Sierra Club v. Marsh*, 816 F. 2d 1376 (9th Circuit 1987).

II APPROPRIATE ROLES FOR THE PARTIES IN BDCP

The BDCP will involve federal incidental take permits (and Biological Opinions) and state incidental take permits for the SWP and CVP. These are massive water facilities owned and operated by the state and federal government for a variety of public uses including but not limited to the benefit of the water contractors. Given the analysis above, it is our view that DWR is the appropriate permit applicant under both state and federal endangered species schemes.

¹⁰ The Delta Reform Act also implies that the Department of Water Resources, with the Department of Fish and Game, are the appropriate agencies charged with BDCP implementation. See Water Code §§ 85320(c), (f). Indeed, the Legislature Council digest states that, “The bill would impose requirements on the Department of Water Resources in connection with the preparation of a specified Bay Delta Conservation Plan (BDCP).” SB 1 as amended November 3, 2009, Legislative Counsel’s Digest, at 3.

At the same time, we concur that the focused involvement of the water contractors in implementation is not only desirable but essential to the success of the BDCP. That role, like that of the NGOs, the local communities and other keenly interested parties, can be fully addressed without the extraordinary step of extending permittee status to parties that neither own nor operate the facilities at issue. These roles include participation on the proposed steering and management committees, and potentially direct implementation of a number of conservation plan actions.

III PERMITTEE STATUS FOR THE CONTRACTORS IS NOT APPROPRIATE AND PRESENTS SUBSTANTIAL RISKS TO BDCP IMPLEMENTATION AND SUCCESS.

A. Conflicts of Interest.

Permittee status for the contractors is inappropriate in light of the substantial conflicts of interest involved. As all parties recognize, the BDCP permittees will control a wide range of decisions, including most critically the adaptive management program at the heart of the BDCP. In smaller HCPs or NCCPs much of the decision-making is embodied in the conservation plan, with implementation requiring limited determinations – the plan is either being implemented or it's not. BDCP is not a shopping center with a few acres of associated wetland mitigation, but a massive five-decade ecosystem restoration and water delivery effort that is premised on the concept of a constantly evolving plan driven by an untested adaptive management approach. It will be an ongoing exercise in science and professional judgment that will affect future ranges for water project operations and water exports.

These decisions must remain squarely within the purview of the state and federal agencies responsible for the CVP and SWP. To use just one example, effective monitoring and research are necessary for adaptive management to work, but if BDCP's research and monitoring priorities are structured to avoid answering some of the tough questions, these programs will fail to achieve their mandates. The credibility of BDCP's scientific research and monitoring depends upon its independence from the contractors.

Moreover, as all parties agree, the decisions involved in BDCP's implementation go well beyond operations and include the hiring of staff, establishing and managing budgets, priority setting, selection of consultants, determination of consultant scopes of work, review and approval of consultant work products, integration of the results of scientific reviews, negotiating permit amendments, making adaptive management decisions, managing day-to-day operations, addressing the concerns of non-permittee stakeholders and more. Granting the exporters substantial control and influence over these issues would create additional potential conflicts and jeopardize restoration efforts.

B. Increased Risk of Conflict in Plan Implementation and Reduced Ability of State and Federal Agencies to Implement a Cohesive Program.

While there will be many voices engaged in implementation, the permittee will be in charge of a cohesive plan of implementation. This will necessarily involve substantial negotiation between different stakeholder and agency views and priorities as well as the differing professional judgment of various experts. But it is the permittee(s) who will decide, for example, to subcontract with those entities it determines will most effectively carry out various aspects of the Plan -- including the SFCWA, any individual water contractor, the Delta Conservancy, or non-governmental entities.

If DWR is the permittee, these decisions will ultimately be made by the State. However, if the contractors are also permittees, they will have their own coverage and could claim that actions that they wish to implement are part of the plan because those actions fall under "their permit." They can also fund their actions independently, regardless of DWR's priorities and reduce, or attempt to reduce, funding to the program by an equivalent amount by claiming those actions contribute to the program whether or not DWR agrees. This could leave key portions of the program underfunded and compromise the ability of DWR (and the Executive branch) to administer the program on behalf of all of the people of the state.

This potential bifurcation of funding is already evident in the existing relationship between DWR and the water contractors. In regard to the existing contractor-influenced "off-budget" funding for DWR, the Legislative Analyst's Office remarked that the SWP is "integrally linked to other programs, but its operation has created significant liabilities for other programs and funding sources, including the General Fund, without any legislative oversight...There is also growing recognition of SWP's role in contributing both to the causes of, and the potential solutions to, water-related problems in the Delta. This has major policy and fiscal implications for a number of state programs."¹¹

Moreover, as permittees, the SFCWA and the contractors could go beyond their own relationship with DWR and insist that their names be included on all contracts between DWR and other entities to implement the program by claiming a need to ensure that "their" permit remains valid. This would both dilute DWR's authority and could place other contracts at risk for leveraging or termination if the SFCWA disagrees with a decision of DWR regarding implementation of the project.

As indicated above, as a state agency, DWR is under a higher duty of care for the ecological resources at issue than the water contractors. The BDCP is certain to be extremely complex and contentious to implement; the chances of different views with regard to ecological priorities, operations, funding and professional determinations regarding science are reasonably foreseeable. Providing the contractors with permit status on par with the agency runs counter to its ability to satisfy this legal mandate in myriad ways.

C. Creating Problems in Related Agency Efforts .

The BDCP will have substantial implications for many related agency processes (e.g. upstream ESA requirements for the CVP and SWP, State Board requirements for the CVP and SWP, State

¹¹ LAO: http://www.lao.ca.gov/analysis_2009/resources/res_anl09004005.aspx.

Board requirements for other water users, and CVPIA requirements for the CVP.) Establishing the water users as permittees could give them far greater influence these related processes for years to come. In each of these forums, the exporters might assert that, unless their position prevails, terms of the BDCP would need to be renegotiated. In our view, this position would be incorrect, because, as discussed above, the exporters lack the characteristics of a permittee under state and federal law. Nevertheless, elevating the exporters to permittee status could create confusion and delay in the implementation of the BDCP.

D. Standing of Contractors to Claim Certain Sovereign Powers Related to the SWP or to Modify Permit Terms.

Elevating the SFCWA and its members from subcontractor status to permit holders would fundamentally impair DWR's ability to administer the Plan for the benefit of all Californians. As permittees, the water users would be signatories to the Implementation Agreement, a legally binding contract to which they would then be direct parties, unlike any of the other stakeholders. They would thus have elevated legal standing with regard to any governmental effort to change that Agreement, or even an effective veto power in this regard.

DWR is the sole entity responsible for the State Water Project's compliance with state and federal endangered species laws today. If the Department of Fish and Game had concerns about implementation of the BDCP and/or the effect of project operations on covered species, it would provide notice to DWR under the legal process to address and cure whatever defects are at issue.¹² *Permittees* may file objections to a proposed action, and it is the *permittee* who negotiates with DFG as to how a potential or actual failure to meet permit terms must be cured. Allowing the contractors to be permittees interposes the contractors between two state agencies under the Natural Resources Agency.

The legal problem stems from the complexity of the plan and the high stakes involved. For example, imagine DFG approaches DWR with new science which indicates export pumping should be curtailed because impacts to the fisheries are greater than anticipated. If DWR holds the permit, DWR can agree and make a change. The contractors could have input into this discussion via their representation on a "BDCP Implementation Board." But ultimately, DWR, as the sole agency holding the permit, would make the decision. If the contractors disagree with that decision, they would have legal remedies in court to assert that the decision is "arbitrary and capricious," etc. However, if the contractors are the co-holders of the permit, they could choose to independently disagree and attempt to preclude the State from proceeding. It would be their permit too.

Indeed, the same contractors who seek to be permit holders in BDCP have gone to court making the extraordinary claim that the Department of Water Resources is not subject to the California Endangered Species Act because this statute "infringes" on DWR's "sovereign function of operating the State Water Project." *Kern County Water Agency v Watershed Enforcers*, -- (2010) The California Court of Appeal rejected that challenge noting, among other reasons, that the contractors themselves lacked standing to "assert the protection of DWR's sovereign

¹² California Code of Regulations, Title 14, Section 783.7 sets out the criteria for permit suspension and revocation which includes notice *to the permittee* and an opportunity to cure.

powers.” *Id.* Granting the contractors permittee status for an NCCP/ESA take permit for the SWP potentially opens the door to that argument once again. As permittees, the contractors could be empowered to challenge permit conditions, fight adaptive management measures, or refuse any action with which they disagree and do so while standing essentially in the same (legal) shoes as DWR. Again, given the history of disagreements among the parties regarding protections for the Delta in court and elsewhere, elevating the water contractors to permittee status could risk institutionalizing conflict and gridlock.

E. Changed Relationship with DWR and Lack of Legislative Oversight.

While the members of SFCWA are public agencies, their missions are narrowly tailored to preserving and increasing export water supplies in their own service areas. For example MWD's mission “is to provide its service area with adequate and reliable supplies of high-quality water to meet present and future needs.”¹³ Likewise KCWA's mission is “to preserve and enhance Kern County's water supply, the main ingredient for the well-being of the economy.”¹⁴ Neither MWD nor KCWA is located in the Delta.

If the contractors are co-permittees, they do not need to invest in DWR's program through a fixed charge. They can argue that as BDCP permittees they can manage their portion of the program. They can pay their own employees and “loan” them to DWR (the current proposal), they can underwrite an office that is not under the physical jurisdiction of DWR (also the current proposal), they can fund the portions of the program that meet their own objectives -- other stressors, certain restoration actions, specific science (what has occurred during the planning of the BDCP), and then they can threaten to pull all of that support if they do not agree with management decisions (also what has occurred during BDCP planning). In other words, if the funding for the program is not integrated through the contracts managed by DWR as the permittee, it could become tied to specific outcomes desired by the contractors as permittees. This damages the independence and ultimately the success of the program.

The response that this scenario is unlikely because it would threaten the continuity of the program and DFG would “pull the NCCP permit” (thus cutting off at least part of the domestic water supply for 25 million Californian's and 3 million acres of irrigated agriculture) is politically unpalatable and legally questionable. We are not aware of any situation in which the fishery agencies have been willing to take such a controversial step.

IV GRANTING THE CONTRACTORS PERMITTEE STATUS IS UNNECESSARY.

The contractors maintain that they should be permittees for a variety of reasons that boil down to the following assertions: (1) they are better placed to run a program of this magnitude than the state and federal agencies; (2) they are paying for the facility and therefore should have an elevated role in decision making; and (3) as permittees they would share a direct legal obligation to ensure compliance. These arguments are not compelling and do not overcome the weight of the objections set forth above.

¹³ <http://www.mwdh2o.com/mwdh2o/pages/about/about01.html>

¹⁴ http://www.kcwa.com/about_kcwa/about.shtml

First, as indicated above, everyone fully expects the water contractors to play a large and substantial role in BDCP implementation as they have throughout the process. Permittee status is not necessary to ensure a meaningful level of input and participation. The governance proposals envision various boards, committees and direct implementation opportunities. There is little question that the water contractors views, priorities and demands will be heard throughout the implementation process without elevating their participation to permittee status.

Nor is the financial role the contractors may play relevant to permittee status in this situation. Large public water projects are intended to be paid for by the contractors who benefit primarily from them. Indeed, the anticipated financing for a Delta facility under the BDCP is a continuation of current and past policies. SWP contractors have largely financed the costs of current State Water Project, without being awarded permittee status or direct control over key SWP decisions. State law already requires that the contractors pay the full costs of planning, construction, environmental analysis, and mitigation for any new facilities. That financial obligation does not confer ownership or operator status on those contractors.

Moreover, DWR has already signed agreements with the water contractors assuring them that if new conveyance "is approved to proceed with construction, DWR intends to issue Revenue Bonds to pay for such construction. DWR shall include in the first issue of Revenue Bonds...an amount sufficient to reimburse the Contractor and all other Participating SWP Contractors for all planning costs paid."¹⁵ These revenue bonds are to be repaid through the contracts for water and power over the next fifty years. Much could change in fifty years. This means that the current contractors who are advancing funds will be made whole and leaves the state the flexibility to contract with whom it wishes. The existing entities do not need to be locked in by virtue of also holding the permits. In addition, nothing in the BDCP has established who will pay for what other aspects of the project to date.

Finally, there are many vehicles to ensure that the water contractors comply with their legal obligations well short of becoming permittees. Implementation agreements or other contractual arrangements that include third party rights of enforcement, state and federal agencies – and other stakeholders – can play this role as well as other legal assurances beyond the scope of this memorandum.

CONCLUSION

There is broad opposition among non-export water users, fishing interests, environmental organizations, local governments, Delta agriculture and others to taking the unusual step of granting permittee status to the water contractors. Many perceive that the export contractors have had a disproportionate influence within the BDCP process, and granting them permittee status could exacerbate concerns and increase the obstacles facing BDCP, thus jeopardizing the success of this program.

¹⁵ *State of California Natural Resources Agency, Department of Water Resources, Agreement for Funding Between the Department of Water Resources and Metropolitan Water District of Southern California for the Costs of Environmental Analysis, Planning and Design of Delta Conservation Measures, Including Delta Conveyance Options (SWPAO #09900)(March 12, 2009)*

In our view, the issue of permittee status has become an unnecessary distraction from the important work that needs to be done in the BDCP. As established above, there is no need for the contractors to be elevated to the status of the federal and state agencies that own and operate the State and Federal Water Projects that are the subject of the HCP/NCCP. Moreover, moving in this direction is more likely to destabilize rather than promote the success of this vital program. The conservation caucus, both organizations that have been part of the BDCP planning and those with an important interest in that process, are continuing to work together on this important issue.

Thank you for your consideration of our views.