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July 24, 2014

Ms. Laura King Moon
Chief Deputy Director
Department of Water Resources
1416 9th Street
Sacramento, CA 95814

SUBJECT: Review of the Draft Implementing Agreement
Bay Delta Conservation Plan

Dear Ms. Moon:

I'm writing to provide comments on the Draft Implementing Agreement (IA) of the Bay Delta Conservation Plan (BDCP) on behalf of the Delta Stewardship Council (Council). This document, along with the release of the Draft BDCP and the BDCP's draft Environmental Impact Report/Environmental Impact Statement, represent a significant milestone in the development of the BDCP. The Council has a strong interest in the development and implementation of a successful BDCP. The Council is charged with furthering California's coequal goals for the Delta. Because the BDCP represents a comprehensive program to both improve statewide water supply reliability and enhance and restore the Delta ecosystem, the success of the Council's Delta Plan can be aided by the success of the BDCP. In addition, the Council has a statutory appellate role in determining the adequacy of the BDCP in meeting the specific requirements contained in the Delta Reform Act, specifically Water Code Section 85320.

I recognize the complexity of not only developing a successful plan, but also developing an institutional structure that can effectively implement the BDCP over the next 50 years. To meet the needs of local water agencies, the Department of Water Resources, the Bureau of Reclamation, state and federal regulatory agencies and the complex objectives of a Habitat Conservation Plan/Natural Communities Conservation Plan, the BDCP must be carefully implemented.

"Coequal goals" means the two goals of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem. The coequal goals shall be achieved in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place."

- CA Water Code §85054

As a legally enforceable contract that describes the rights and responsibilities of the parties to the BDCP, the IA is a critical document. I appreciate the effort it has taken to codify a level of agreement between the parties to develop this initial draft of the IA.

This letter presents the results of our review of the draft IA for the BDCP. The majority of our comments can be separated into three categories:

1. Role of the Bureau of Reclamation (Reclamation) and its Contractors. The IA (and any future memorandum with Reclamation) should be clear about the roles, rights and responsibilities this agreement provides for the Bureau of Reclamation, the San Luis and Delta-Mendota Water Authority, and other Central Valley Project contractors.
2. NCCPA Road Map. We recommend that the IA provide more explicit, point-by-point cross-references linking the contents of the IA to the requirements of the Natural Community Conservation Planning Act (NCCPA). In many cases it is not clear if the information required by the NCCPA is contained in the IA or if it is supposed to be included by reference to the BDCP. The IA should provide a clear road map to where each requirement of the NCCPA is addressed within either the IA or in specific provisions of the BDCP referenced in the IA.
3. BDCP Governance and Adaptive Management. Sections of the BDCP, particularly those portions regarding Governance and Adaptive Management, did not answer some of the Council's June 24, 2014 questions regarding adaptive management planning. Others deferred the development of key aspects of the BDCP to a later date.

I am grateful for your efforts in discussing the IA with Council staff during our conference call on Thursday, July 10, 2014. I was encouraged to hear the expectation that, while your agencies had released the IA for public comment, both the BDCP and the IA are likely to be revised to address the questions the Council has presented.

More detailed comments on the IA are attached. These comments are based upon the Council's current understanding of the IA and they will not have a pre-decisional effect on any possible future appeal of the Department of Fish and Wildlife's determination that the BDCP complies with Water Code Section 85320. The Council will determine any appeal made under Water Code Section 85320 (e) based on the complete record before it at that time, part of which may include these comments and the responses to these comments. The Council will conduct any appeal according to the Delta Reform Act and the Council's adopted appellate procedures.

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We look forward to working with you over the coming months as you complete the BDCP's final Implementing Agreement and move toward completion and final action on the BDCP. These comments are intended to be helpful and as always, we offer the opportunity for your staff to meet with ours for additional details on any of the comments in the attachments. Through consultation among our agencies, we believe the comments we offer can be addressed satisfactorily.

Please contact Dan Ray at (916) 445-4294 if you would like to discuss these comments further.

Sincerely,



Jessica R. Pearson, Executive Officer
Delta Stewardship Council

Enclosure

Delta Stewardship Council's Comments Regarding the BDCP's Draft Implementing Agreement

Role of the Bureau of Reclamation

- Reclamation is defined as an "Authorized Entity" and is represented in the Authorized Entity Group, which has been established to provide oversight and guidance regarding implementation of the BDCP. As currently written, however, the IA excludes Reclamation as a party to the agreement, and indicates that Reclamation's roles and responsibilities in the implementation of the BDCP will be described in a forthcoming memorandum or similar agreement. The discussions on July 10, 2014, were helpful in providing a better understanding of this issue. The IA (and any future memorandum with Reclamation) should: 1) clearly articulate the roles and responsibilities of all entities involved in the implementation of the BDCP; 2) more clearly describe the regulatory assurances (if any) that will be provided to Reclamation and its contractors including the San Luis and Delta-Mendota Water Authority; and 3) more clearly describe the conservation assurances that Reclamation and its contractors will provide in return.

Funding Issues

- The descriptions of funding commitments in both the IA and the BDCP are vague and difficult to understand, particularly for monitoring and adaptive management. The IA provides limited details and it is not clear how funding for effectiveness monitoring (IA Section 10.4.1) and compliance monitoring (IA Section 16) will be accomplished. Both sections incorrectly reference tables in Appendix 3.E of the BDCP. In Appendix 3.D, Table 3.D-1 (Compliance Monitoring Actions) and Table 3.D-2 (Effectiveness Monitoring Actions) of the BDCP do not appear to align with BDCP Chapter 8, Table 8-30, Cost Estimate for Effectiveness and Compliance Monitoring.
- For Adaptive Management, who will fund the Supplemental Adaptive Management Fund (SAMF) and on what timeline?
- The Supplemental Resources Fund (SRF) appears to be a new feature that was not previously included in the BDCP documents. The IA states that the SRF will be used as part of real time operations for the purpose of maximizing conservation benefits to covered fish species and maximizing water supplies, which appears to be a positive addition worthy of support. Nevertheless, how will the SRF interface with the SAMF? And how will both the SAMF and the SRF interface with funding described in Chapter 8 of the BDCP? The IA should clearly describe how much money will be available to the SAMF and the SRF, as well the sources and timing for contributions to these funds.

- The funding provided by the Authorized Entities (AEs) for CMs 2-22 is capped and it is not clear how shortfalls will be funded despite the fact that some costs are sure to escalate. In the event of shortfall, what effect will cutting back on, or not implementing some of the CMs, have on achieving the BDCP's biological goals and objectives? In addition, it appears that AE funding for CMs 2-22 could be shifted to offset funding shortfalls in CM1; is this what is intended?

Retained Authority of Other Regulatory Agencies

- Other important regulatory agencies are not party to this IA, particularly the State Water Resources Control Board (SWRCB). The IA does not address how potential future regulatory permits or requirements imposed by other regulators might impact assurances provided to the parties of the IA.

The Implementing Agreement's Compliance with the NCCPA

The IA should provide a clear road map to the location in which each requirement of the NCCPA is addressed within either the IA or in specific provisions of the BDCP referenced in the IA.

- In Section 4.2.1 on page 13, the IA states: "...concurrent with its approval of the BDCP, the CDFW will establish a list of species that are authorized for take pursuant to [Fish and Game Code] Section 2835 and make specific findings to support coverage pursuant to [Fish and Game Code] Section 2820." However, the NCCPA requires that an implementing agreement for a Natural Communities Conservation Plan (NCCP) include "provisions defining species coverage, including any conditions of coverage," neither of which is presented in the IA (See Fish and Game Code Section 2820 (b) (1)). We have reviewed both the East Contra Costa County HCP/NCCP (ECCC HCP/NCCP) Implementing Agreement (January 22, 2007), and the Santa Clara Valley Habitat Plan (SCV HCP) Implementing Agreement (August 14, 2012) as examples of other IAs. Both of these agreements included a list of the species covered by the NCCP or HCP.
- Is Section 10.3.7, pages 36-38, of the IA, which appears to place significant limitations on adaptive management for water operations, fully consistent with the NCCPA's requirement that the adaptive management strategy be designed "to assist in providing for the conservation of covered species and ecosystems within the plan area" (see Fish and Game Code Section 2820 (a) (2))?
- The required monitoring program is not well developed in the BDCP. The NCCPA requires a fully developed biological monitoring program that meets the detailed criteria specified in Fish and Game Code Sections 2820 (a) (7), 2805 (g), and 2820 (b) (5).

- Section 11.0, pages 40-44 of the IA, does not appear to include “provisions for oversight of plan implementation for purposes of assessing mitigation performance, funding, and habitat protection measures” as stipulated in Fish and Game Code Section 2820 (b) (6).
- Section 14.4.1, Page 53 of the IA: While assurances from CDFW are described, there do not appear to be the commensurate conservation assurances that are required by Fish and Game Code Section 2820 (f). In our review of the ECCC HCP/NCCP IA and the SCV HCP IA, we found that both documents included provisions explicitly describing the conservation assurances that are being provided by the signatories to those agreements. We recommend the BDCP IA also include a discussion of commensurate conservation assurances.
- Section 22.4, page 82 of the IA describes suspension or revocation of the state permit. It is not clear how this section meets the requirements in Fish and Game Code Section 2820 (b) (3), which states that an IA for an NCCP must include specific terms and conditions, which, if violated, would result in the suspension or revocation of the permit. Those terms, for example, include failure to provide adequate funding; failure to maintain rough proportionality between impacts on habitat or covered species and conservation measures; adopting, amending or approving any plan or project that is inconsistent with the BDCP without obtaining the wildlife agencies’ concurrence; or exceeding the amount of take authorized under the BDCP permits.

Additional BDCP Comments Based on the Implementing Agreement’s Contents and Omissions

BDCP Governance and Implementation

- As currently described within the draft BDCP, many future decisions depend on achieving consensus at many organizational levels before meaningful actions can be taken to implement the BDCP. The IA appears to take pains to ensure that issues in dispute are discussed, but methods to speed decision making or resolve disputes are not well described. The relationship between the Parties, the Authorized Entity Group (AEG), and the Permit Oversight Group (POG) needs clearer definition; e.g., who is in charge and when? The governance of the BDCP could be substantially improved with clearer, crisper lines of authority and responsibility.

Science and Adaptive Management

- The relationship of the Delta Science Program (DSP) to the implementation of the BDCP is not clear. The IA should articulate a strong relationship between the

DSP and the BDCP, especially its adaptive management program, its incorporation of best available science and, its use of independent peer review.

- According to the IA, the BDCP Adaptive Management Team (AMT) comprises management personnel, not scientists. The IA further states that "...the Adaptive Management Team will identify relevant policy, legal, and regulatory principles and will make decisions regarding routine or administrative matters consistent with the schedule, budget and the adaptive resources available..." In addition, there is no requirement to include scientists on the Technical Facilitation Subgroup of the Stakeholder Council, which will provide technical support to the AMT. These observations prompt the question: What is the role of science and scientists in implementing the BDCP?
- How will decisions/disputes regarding the adaptive management and monitoring programs be managed/resolved? Both the adaptive management and monitoring programs could benefit from stronger involvement of science and scientists working closely with those responsible for implementation.
- Section 14.2.2, pages 14 and 15, of the IA state that the BDCP includes "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", consistent with the Delta Reform Act and Water Code Section 85321. Neither the BDCP nor the IA define those biological performance measures. It would be helpful if the IA made clear what those performance measures are, where those performance measures are found in the BDCP, and how they relate to the operating criteria that will guide real-time decision making.
- The Implementation Office (IO) will provide logistical and technical support but will not administer the adaptive management and monitoring program. It is not clear what, if any, management control the IO will have over the adaptive management and monitoring program even though the Science Manager reports to the Program Manager. The relationship between the Program Manager and the Science Manager in general is not clear.

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