

## Bay Delta Conservation Plan – Finance and Regulatory Assurances

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**Summary:** The Natural Resources Agency and the Department of Water Resources (DWR) have announced they will be releasing the final draft of the Bay Delta Conservation Plan (BDCP) soon, following a review of the BDCP by the federal permitting agencies. In addition to the release of the BDCP, DWR will release a public review draft of the BDCP's associated Environmental Impact Report/Environmental Impact Statement (EIR/S). The Council, as a CEQA responsible agency, will be commenting on the BDCP's draft EIR. This information item, the third of several presented to the Council, is provided in anticipation of the release of these documents.

This briefing is an overview of the BDCP's provisions regarding implementation costs, funding sources, and regulatory assurances. Laura Moon-King, the Department of Water Resources' Chief Deputy Director, and staff from DWR's ICF consulting team will provide the briefing.

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### **Background**

The Bay Delta Conservation Plan is being developed as a 50-year Natural Community Conservation Plan (NCCP) with the goal of recovering the Delta's endangered or threatened species, in part by improving the conveyance of water from the Sacramento River to the south Delta pumps of the Central Valley Project and State Water Project, by establishing parameters for operating those projects, and by restoring wildlife and fish habitats in and around the Delta. If the BDCP meets the requirements of the California Environmental Quality Act (CEQA), and the California Natural Community Conservation Planning Act (NCCPA), as well as the requirements set forth in the Delta Reform Act, the BDCP will be incorporated into the Delta Plan and will play a key role in achieving the goals of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta's ecosystem.

An administrative draft of both the BDCP and its EIR/S were released this past spring. These administrative draft documents were a work in progress and may not reflect the final draft BDCP or its EIR/S. The Delta Reform Act designates the Council as a responsible agency in the development of the BDCP's EIR/S, providing a formal opportunity for the Council to comment on the draft plan and its environmental impacts when they are released this fall. The Act also gave the Council a consultative role with regard to plan development, and a possible appellate role with regard to BDCP satisfaction of specified criteria for purposes of incorporation into the Delta Plan.

In adopting the Delta Reform Act, the Legislature declared that inherent in the law's coequal goals is "... establishing a new governance structure with the authority,

responsibility, accountability, scientific support, and adequate and secure funding” to achieve the law’s objectives (Water Code Section 85020). The Council, the Delta Plan, and the BDCP are key elements of that governance structure. Because the BDCP, once approved, will be incorporated into the Delta Plan, recommendations about how the BDCP will be implemented and how its funding will be coordinated with other actions recommended in the Delta Plan are potentially important to the effectiveness of both plans.

### **BDCP Implementation Costs and Funding Sources**

The Delta Reform Act requires that, for the BDCP to be incorporated into the Delta Plan and for its public benefits to be eligible for funding, the BDCP must comply with the state’s Natural Community Conservation Planning Act (NCCPA)(Water Code 85320(b)(1)). Among the NCCPA’s requirements is that the plan must be supported by adequate funding – e.g. must contain provisions that “ensure adequate funding to carry out the conservation actions identified in the plan.”( FGC § 2820(a)(10) and 2820(b)(8)).

Although there are no cases interpreting the “ensured funding” requirement under the NCCPA, there are a number of federal cases, and one state case, interpreting the very similar “ensured funding” requirements for issuance of incidental take permits under the federal Endangered Species Act and the California Endangered Species Act. In general, these cases conclude that meeting this requirement cannot rely on speculative future actions by other parties, but requires the applicant’s guarantee of adequate funds to carry out the plan.

Other provisions related to financing of the BDCP are included in the Delta Reform Act. The Delta Reform Act provides that:

Construction of a new Delta conveyance facility shall not be initiated until the persons or entities that contract to receive water from the State Water Project and the federal Central Valley Project or a joint powers authority representing those entities have made arrangements or entered into contracts to pay for both of the following:

- a. The costs of the environmental review, planning, design, construction, and mitigation, including mitigation required pursuant to Division 13 (commencing with Section 21000 of the Public Resources Code), required for the construction, operation, and maintenance of any new Delta water conveyance facility.
- b. Full mitigation of property tax or assessments levied by local governments or special districts for land used in the construction, location, mitigation, or operation of new Delta conveyance facilities. (Water Code 5089).

Also relevant is the Davis-Dolwig Act, passed in 1961 to authorize fish and wildlife management and outdoor recreation as part of the State Water Project. It provides, in part:

The department, in fixing and establishing prices, rates, and charges for water and power, shall include as a reimbursable cost of any state water project an amount sufficient to repay all costs incurred by the department, directly or by contract with other agencies, for the preservation of fish and wildlife and determined to be allocable to the costs of the project works constructed for the development of that water and power, or either. Costs incurred for the enhancement of fish and wildlife ... shall not be included in the prices, rates, and charges for water and power, and shall be non-reimbursable costs (Water Code 11912).

The BDCP's 22 conservation measures (CMs), including its proposed two tunnels to convey water through the Delta for diversion to water users, including the costs of feasible mitigation measures, are estimated to cost \$24.54 billion (in undiscounted 2012 dollars) over the plan's 50-year term. \$14.6 billion of this is associated with construction of water intake and conveyance facilities. Average annual operations and maintenance costs are estimated to be \$107 million per year near the end of the 50-year permit term (\$4.8 billion over 50 years), of which about \$75 million annually are costs of administration, monitoring and research, and implementation of conservation measures other than water conveyance (Attachment 1. Estimated Cost to Implement the BDCP).

State and federal water contractors would provide approximately 68 percent of the total funding, while state and federal funds would make up approximately 31 percent of the funding to implement the BDCP. (Attachment 2. Estimated Funding to Implement the BDCP). Funding will be provided by the state and federal water contractors for construction and operation of the new water facilities, as well as for mitigation necessary to address impacts to terrestrial and aquatic species associated with construction and operation. Initial state funding is anticipated to come from future water bonds. Funds available through the Delta Stewardship Council are forecast to provide 1.8 percent of the costs of administration, monitoring and research (\$90 million over the plan's 50 year term).

As the Council receives today's briefing, staff suggests it consider the following questions:

- Is the proposed budget sufficient to implement the BDCP? The Legislative Analysts' Office concluded that the BDCP budget's cost assumptions were generally reasonable, but that they do not capture the full range of potential costs.
- Are adequate funds to carry out the BDCP conservation actions ensured? The Legislative Analysts' Office observed that it is unclear whether or if voters will approve the water bonds on which many of the conservation measures depend. Other sources of BDCP funds depend on future Congressional appropriations.

- Are costs properly allocated between the water contractors and others? An independent review of the allocation of the BDCP's costs is not available.

### **BDCP Regulatory Assurances**

If the BDCP is successfully permitted under the NCCPA, and the BDCP is implemented consistent with the substantive terms of the implementation agreement, DFW will provide regulatory and economic assurances to the plan's participants concerning their financial obligations and the overall costs associated with species mitigation and other conservation measures for the 50-year duration of the BDCP. These assurances provide that if there are unforeseen circumstances that result in a substantial adverse change in the status of one or more species that are covered by the NCCP, no additional financial obligations or restrictions on the use of the resources will be required of the permittees without their consent.

However, under the NCCPA, DFW will not provide such assurances if DFW determines that the BDCP is not being implemented in a manner consistent with the Implementation Agreement. For example, implementation of the BDCP must maintain rough proportionality between impacts on habitat or covered species and conservation measures. As a result of the impacts of the BDCP, DFW may require the BDCP to accelerate the schedule to implement the conservation measure. If the BDCP is unable to accelerate the implementation of some conservation measures due to a lack of funding for those measures, DFW may revoke portions, or all, of the NCCP permit.

Even if the BDCP is being implemented entirely consistent with the Implementation Agreement, the NCCPA also requires DFW to suspend or revoke a permit if the continued take of a covered species jeopardizes its continued existence.

As the Council receives today's briefing, staff suggests it consider the following questions:

- Given that the BDCP has acknowledged the uncertainty of the environmental benefits associated with the plan's flow regime and restoration efforts, what kind of long term assurances would be appropriate to ensure the beneficiaries of the BDCP's conveyance facilities further contribute to whatever additional measures are necessary to achieve the anticipated environmental benefits?
- What would be an appropriate response if the future water bond fails to provide adequate funding for the BDCP's 21 conservation measures other than the new conveyance facilities?
- When will the Implementation Agreement, the purpose of which is to assure that the terms and conditions of the BDCP and associated permits are implemented, be made available for public review and comment?

**Agenda Item: 9**  
**Meeting Date: October 24-25, 2013**  
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**List of Attachments**

Attachment 1: Estimated Cost to Implement the BDCP  
Attachment 2: Estimated Funding to Implement the BDCP

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