

# NORTH DELTA WATER AGENCY

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## LOCAL AGENCIES OF THE NORTH DELTA

1010 F Street, Suite 100, Sacramento, CA 95814 (916) 455-7300

November 4, 2011

Mr. John Laird, Secretary  
Dr. Gerald Meral, Deputy Secretary  
CA Natural Resources Agency  
1416 Ninth Street, 13th Floor  
Sacramento, CA 95814

Mr. David Hayes, Deputy Secretary  
U.S. Department of the Interior  
Michael Connor, Commissioner  
U.S. Bureau of Reclamation  
1849 C Street, N.W.  
Washington, DC 20240

Dear Gentlemen:

We find it necessary at this point in the Bay Delta Conservation Plan (BDCP) process to convey to you significant unaddressed issues to date as well as grave concerns regarding problems with the substance of the BDCP, its process, and its treatment of local Delta interests.

The North Delta Water Agency (NDWA) is a state water contractor with DWR pursuant to a 1981 Contract for the availability of suitable quantity and quality of water to all North Delta water users as well as DWR's responsibility for avoiding and mitigating detrimental impacts such as erosion and seepage damage, altered surface water elevations, and reverse flows associated with Delta water conveyance.

Local Agencies of the North Delta (LAND) is a coalition comprised of eleven reclamation and water districts in the northern geographic area of the Delta.<sup>1</sup> LAND participant agencies have concerns about how the BDCP may eventually impact provision of water, and/or, drainage and flood control services to landowners within their respective districts. Six LAND member agencies have sought and received cooperating agency status under NEPA with the Bureau of Reclamation.

The September 30, 2011 letter by four environmental organizations raises many serious flaws and inadequacies of the BDCP documents and process which we agree need to be addressed in order to meet State and Federal laws governing HCPs and NCCPs. In addition to failing to improve the health of the estuary, we would add that the BDCP is headed toward the destruction of Delta as a Place, the Delta's vibrant economy, and the Delta's 150-year history of agriculture as the primary land use. Such a result is unacceptable.

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<sup>1</sup>/ LAND member agencies include: Reclamation Districts 3, 150, 307, 551, 554, 755, 813, 999, and 1002. Some of these agencies provide both water delivery and drainage services, while others only provide drainage services. These districts also assist in the maintenance of the levees that provide flood protection to homes and farms.

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The NDWA and LAND members have invested considerable time into participation in the BDCP process over the past four years. NDWA, moreover, was the ONLY Delta stakeholder on the BDCP Steering Committee prior to when it was dissolved by the new Governor Brown administration. Despite our attempts at active participation in this process, we continue to be disappointed by the BDCP's so-called inclusive process and the systemic, foundational, and persistent problems with the work product of the BDCP to date.

*We particularly object to the following recent events associated with the BDCP:*

### **Continued Exclusion of Delta Stakeholders from Key Meetings and Decisions**

We are concerned that the BDCP process has deteriorated over the last few months and despite promises to be different than in the past, the BDCP continues to exclude and disenfranchise in-Delta stakeholders and disregards input provided by Delta stakeholders. As long as important discussions and decisions continue to be made behind closed doors, then the so-called public process and numerous public workshops being held are nothing more than a sham. Moreover, we still have no indication than any of our comments *over the last four years* have been considered as there is still no process for disposition of comments from stakeholders.

### **Washington D.C. Briefings**

On October 3-4, 2011 a contingent of BDCP proponents and water contractors, apparently led by Natural Resources Deputy Secretary Jerry Meral, held private meetings with numerous members of Congress to provide an updated status of the BDCP development. Unfortunately, once again, and despite our previous requests to attend Congressional briefings, no local Delta stakeholders were invited to participate in these briefings. The lack of Delta stakeholder representation in these meetings is contrary to the commitment by Secretary Laird and Deputy Secretary Meral for the so-called "new process" to be open and inclusive. We hereby reiterate our request to be invited to attend any future Congressional or State Legislative briefings on the status of the BDCP.

### **MOA for Development of BDCP**

In late August 2011 both DWR and the Bureau of Reclamation signed 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 Bay Delta Conservation Plan (MOA). We raised concerns in the BDCP Governance Workgroup and Management Committee meetings regarding the need for public review of the MOA prior to execution by the agencies. Concerns were also raised regarding the "Public Water Agencies" (Water Contractors) becoming "permittees" of BDCP in a closed door process. The Fall 2011 memorandum written by Environmental Defense Fund, Defenders of Wildlife, and the Natural Resources Defense Council provided an analysis of why permittee status for Water Contractors is inappropriate.

Dr. Meral specifically assured us these decisions would be made with stakeholder input in an open process. Nonetheless, the MOA was executed without public review or input, as was the decision of the State and Federal governments to "support" permittee status for the Water Contractors (Section II, H). Despite our requests, the MOA language was never circulated to

stakeholders until the already signed MOA was posted on the BDCP website, *after the fact*. This is neither open nor inclusive and ultimately was done over the objections of Delta stakeholders and others.

The MOA also provides the state and federal water contractors unprecedented control of the BDCP, even more so than previously. Section II-K of the MOA explicitly grants the state and federal water contractors the right to not only see *all draft consultant work product* before the general public has access to it, but presumably the right to suggest or demand alterations to the work product before it is released to the public. This same section *also requires* that state and federal water contractors be included in addressing all *comments received* during the BDCP-DHCCP Planning Phase, including comments received during development of the BDCP and EIR/EIS. Our questions are: who is in charge of the process? How can the state and federal government agencies remain fair and impartial arbiters in a process corrupted by the control of only one stakeholder group whose interests are neither neutral nor impartial? How can in-Delta stakeholders trust their comments and concerns will be appropriately addressed in the BDCP or the EIR/EIS phases if water contractors are dictating the responses to comments received?

We understand that comments are now being requested on the MOA, now that it has already been approved by the State and Federal governments, as well as many of the Water Contractors. We will provide separate comments on the MOA, but it is clear that the recent decision to circulate an already approved MOA is too little and too late in terms of including the public in the decision-making process regarding the critical issues addressed in the MOA.

We also strenuously object to the state and federal water contractors continuing to be included in the lead agencies' monthly meetings to discuss BDCP-DHCCP Planning Phase Management unless these meetings are open to the public. The NDWA 1981 Contract with DWR makes it clear that DWR bears the responsibility of maintaining adequate water supply of a certain quality for all North Delta water users, as well as obligates DWR to avoid and mitigate detrimental impacts of erosion and seepage, altered water elevations, and creation of reverse flows associated with the SWP Delta water conveyance facilities. Therefore, NDWA and other local water agencies clearly have an interest in also participating in these monthly BDCP-DHCCP Planning Phase Management meetings where the design of the projects, the project's impacts, and the proposed mitigation of in-Delta impacts will be discussed and decided. These meetings appear to be far more important and relevant to in-Delta water agencies than the work groups have been so far.

In addition, almost all Conservation Measures in the BDCP propose altering, breaching, and modifying project levees and bypasses that are part of the State Plan of Flood Control. This could have significant public safety implications if flood protections are reduced as a result of the BDCP activities. The Delta Reclamation Districts that have flood management responsibilities should also be included in important Planning Phase meetings to assure flood protection for the Delta and Sacramento region is not detrimentally affected.

**PR Propaganda Apparently Approved by Resources Agency to Justify Elimination of Delta Agricultural Economy**

At the September 27, 2011 BDCP Public Meeting a summary of the findings of a so-called study on BDCP job creation was presented. The presentation was both insulting and offensive, and apparently given so that it could subsequently be used in public relation promotions touting job creation. To call this a 'study' or a 'report' is ridiculous. This is nothing more than a propaganda piece in support of a currently flawed Plan and is offensive to Delta stakeholders because it FAILS to discuss: (1) the number of JOB LOSSES in the Delta, the region, or the state pursuant to the BDCP actions; or (2) the greater potential for job creation from water/energy efficiency projects as compared to the jobs created by construction of a new BDCP tunnel.

This report was prepared at the request of the DHCCP and was presumably approved for presentation at the September 27, 2011 by the Natural Resources Agency. The report indicates that the Metropolitan Water District commissioned this "independent" research on DHCCP's behalf. Thus, we must question the impartiality of the State and Federal agencies in supporting such a lop-sided and insulting document. Why would the State and Federal agencies present such a skewed and incomplete piece at a BDCP public meeting?

Upon questioning, it was disclosed that a follow up study of the statewide economic impacts of the BDCP was underway. While a statewide perspective may be interesting, as local agencies in the BDCP project area, we are concerned about the negative economic and other impacts that will occur in the Delta from jobs lost as a result of the construction and operation of major new diversions/conveyance and conversion of mostly agricultural lands into 100,000+ acres of habitat. As explained at the public meeting, we request to participate in the development of the assumptions and inputs for the statewide study. We also request that information regarding local economic impacts be developed by BDCP for purposes of full disclosure and also as part of the socioeconomic effects analysis required for by the National Environmental Policy Act. The BDCP has as much potential to be an unemployment public works project as it does an employment boost, yet this was not presented on September 27, 2011. The exchange of sustainable long-term employment in agriculture and related activities with short-term construction jobs is not beneficial from our standpoint.

**Substance of BDCP Still Lacking**

While beyond the scope of this letter, we continue to have concerns about the substance of the BDCP, including:

- The HCP/NCCP standards regarding use of best available peer-reviewed science has been consistently ignored, which is of grave concern for a project of this magnitude.
- The alternatives under consideration for the effects analysis and for purposes of environmental review have been irrationally constrained. Specifically, all of the "dual conveyance" alternatives must include screening of the South Delta pumping facilities at flows of 3000 cfs, which would reduce take of covered species and allow higher pumping volumes in furtherance of a reliable water supply for export. Additionally, none of the project alternatives include the phasing of conveyance as requested by the fish agencies,

which would provide an opportunity to gather data and make modifications as necessary before commitment of resources to a 15,000 cfs facility.

- While the need for massive new diversions in the North Delta (and their designation as “conservation measures”) is premised on the need to reduce entrainment in the South Delta pumps, Appendix B to the Effects Analysis claims that entrainment in the South Delta is not a significant problem in the Delta for the species of concern. Moreover, even with screens in the new diversions, entrainment/entrapment will occur wherever water is diverted in large volumes.
- No pathway toward take coverage for other landowners and entities in the Plan area is provided, despite the fact that if successful, the project could directly increase the probability of take of protected species.
- BDCP includes no commitment to levee improvements even though it would continue to rely on pumping from the South Delta, which in turn requires that key levees be maintained to prevent saltwater intrusion.

### **Unlawful Use of Eminent Domain Laws to Further BDCP Goals and Timeline**

The eminent domain process for just the *investigatory activities* of the BDCP is already causing difficulties. There are numerous stories of frustration from Delta landowners regarding their dealings with DWR on the Temporary Entry Permits for environmental surveys and subsequent actions by DWR to pursue eminent domain to conduct geotechnical drilling on private properties to support the preparation of the BDCP EIR/EIS. Despite alternative public lands nearby the privately-owned proposed drill sites, DWR does not appear to have actually investigated or pursued using those public lands as alternatives to disrupting and permanently altering people’s private property.

DWR’s geotechnical drilling is in some cases exposing landowners to toxic clean-up liability. Soil test results are reported to the Department of Toxic Substance Control if any toxic chemicals are detected. Landowners cannot afford for the geotechnical drilling to cause their properties to become State Toxic Clean-up Sites. DWR has refused to assume liability if the drilling and subsequent reporting results in a toxic clean-up liability; as a result, many landowners cannot agree to a Temporary Entry Permit.

The recent court decision clarified that geotechnical drilling is a “taking” of private property due to the permanent alteration of the property, so now DWR is pursuing the condemnation (eminent domain) of property in order to conduct this drilling. According to California law (Water Code section 11580), however, eminent domain can only be pursued by DWR once a public project has been authorized and funded. BDCP has not even released a draft EIR/EIS indicating various project alternatives and associated location of facilities, let alone a final EIR/EIS and Record of Decision. The MOA recently signed by DWR and the Bureau of Reclamation mentioned above makes it very clear that DWR may not commence with preparing “Public review draft of the BDCP and EIS/EIR” or the “Final BDCP and EIS/EIR,” until and unless “the Public Water Agencies provide the Director of DWR with written authorization to proceed” (Section III-G-b, pp. 10-11).

Therefore, the State is proposing to condemn through eminent domain private property for a project that may not be completed if written authorization and funding is not forthcoming from the Public Water Agencies. Why should Delta landowners have their private property taken

through eminent domain when the EIS/EIR has not yet been completed and approved pursuant to Section III-G-b of the MOA? Moreover, Deputy Secretary Jerry Meral disclosed at the October 19, 2011, Legislative Oversight hearing, that more geotechnical information is not needed to complete the public draft EIS/EIR.

The California statute requiring approval of the project prior to exercise of eminent domain (BDCP) is in place in order to avoid this very circumstance of a public agency “taking” private property for a project that is ultimately never built. If DWR needs to obtain more engineering information via geo-technical drilling then it should either: (1) rely on existing information from drilling already conducted; (2) pursue drilling on public lands; or (3) put additional effort into pursuing cooperative negotiations with property owners with more favorable terms and financial compensation in order to secure voluntary agreement from the landowner.

### **Lack of Respect Toward Delta Landowners is Escalating Mistrust and Resentment**

Unfortunately, there are the numerous examples of in-Delta stakeholders being excluded from important BDCP discussions and decisions, but they are also being treated in an unprofessional and disrespectful manner in conducting geotechnical and other investigations for preparation of the BDCP EIR/EIS. In early October, two separate households were visited at night by employees of a company hired by the State of California to serve them with papers relating to permitting entry and investigation rights on their property for the Department of Water Resources. Arriving at people’s home in the dead of night during a rain storm is neither professional nor respectful. The residents of the Delta deserve and demand better treatment from the government agencies sponsoring the BDCP.

### **Changes Needed for BDCP Success**

We regret the use of such a critical tone in this letter, but we do not know how else to convey the ongoing and mounting level of concern we have regarding the inadequacy of the BDCP process, the continued commitment by the State and Federal agencies to unrealistic timelines, the pervasive exclusion of local Delta stakeholders as impacted parties, and the dismissive and unprofessional treatment of Delta landowners and their concerns. In our opinion, the BDCP process has deteriorated to the point that it is unworkable, and that continued participation in the “public process” may be a waste of our limited resources.

For the numerous grievances outlined in this letter, we must adamantly OPPOSE the BDCP product and process in its current form and encourage the State and Federal agencies to immediately engage in discussions with local stakeholders of assurances and protections that need to be incorporated into this Plan before the release of the public draft of the EIS/EIR in May 2012. This decision did not come lightly, but our extensive time and energy on the process appears to have resulted in little benefit despite stated commitments by State and Federal agencies for the public process to improve. Actions we request immediate attention by the State and Federal Co-Lead Agencies:

- Written disposition of all comments on the BDCP by Delta stakeholders.
- Review of task orders, draft documents and all documents made available to the state and federal water contractors.
- Convening of regular (at least monthly) Cooperating Agency meetings with all cooperating agencies.

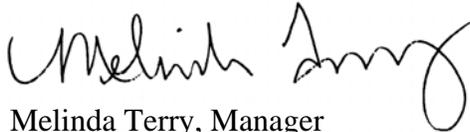
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- Access to all meetings where decisions are made.
- Rescind signatures of and provide an open and transparent process for public input and comment to the first Amendment to the MOA, which puts entirely too much decision-making authority in the water exporters despite the fact that BDCP is a public project with significant local impacts.

We look forward to your response on how and when the State and Federal governments plan to respond to the issues and concerns raised by the North Delta Water Agency, LAND and all Delta stakeholders that the BDCP affects.

Sincerely,



Melinda Terry, Manager  
North Delta Water Agency



Osha R. Meserve, Representative  
Local Agencies of the North Delta

cc:

Nancy Sutley, Chair, White House Council on Environmental Quality  
U.S. Senator Barbara Boxer  
U.S. Senator Dianne Feinstein  
Representative Dennis Cardoza  
Representative Jim Costa  
Representative Jeff Denham  
Representative John Garamendi  
Representative Dan Lungren  
Representative Doris Matsui  
Representative Kevin McCarthy  
Representative Tom McClintock  
Representative Jerry McNerney  
Representative George Miller  
Representative Grace Napolitano  
Representative Devin Nunes  
Representative Jackie Speier  
Representative Mike Thompson  
Senator Mark DeSaulnier  
Senator Darrell Steinberg  
Senator Lois Wolk

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Assemblymember Bill Berryhill  
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Supervisor Larry Ruhstaller, San Joaquin County  
Supervisor Ken Vogel, San Joaquin County  
Mark Cowin, Director of Department of Water Resources  
Senate Committee on Energy and Natural Resources  
Subcommittee on Water and Power  
House Committee on Natural Resources  
Subcommittee on Water Resources and the Environment  
House Committee on Transportation and Infrastructure  
Phil Isenberg, Delta Stewardship Council  
Michael Machado, Delta Protection Commission  
Barbara Barrigan-Parrilla, Restore the Delta  
Greg Gartrell, Contra Costa Water District  
Phil Harrington, City of Antioch  
John Herrick, South Delta Water Agency  
Dante Nomellini, Central Delta Water Agency  
Mark Pruner, North Delta CARES  
Gary Bobker, The Bay Institute  
Kimberley Delfino, Defenders of Wildlife  
Zeke Grader, Pacific Coast Federation of Fishermen's Associations  
Cynthia Kohler, Environmental Defense Fund  
Jonas Minton, Planning and Conservation League  
Barry Nelson, National Resources Defense Fund