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May 5, 2011

The Honorable David Hayes
Deputy Secretary of the Interior
Department of the Interior
1849 C Street, N.W.
Washington, DC 20240

Subject: Request for Revised Notice of Intent for the Bay Delta Conservation Plan (BDCP) that Recognizes Water Supply Realities.

Dear Deputy Secretary Hayes:

Thank you for your most recent pledge to ensure that the Bay-Delta Conservation Plan (BDCP) process is more open and public. As you know, some of the undersigned groups were barred from membership to develop the plan because they would not agree to the proposed peripheral canal/tunnel as a precondition of participation.

Thus, as a coalition of 18 organizations impacted by diversions from the Delta, we request that you direct Interior Department agencies to revise the Notice of Intent (NOI) for the BDCP so that it is consistent with currently acknowledged actual water supplies available rather than promising to deliver inflated water contract demands.

Adding the goal of attaining "up to full contract deliveries" in the February 2009 revision of the NOI creates confusion and likely delay. As EPA notes, there is no definition of "full contract amounts" and, depending on the definition, that amount has never been delivered in the past 50 years.[1] Moreover, new information suggests even existing amounts of diversions are not sustainable and raises serious concerns with regard to the changes made to the statement and purpose for the Bay Delta Conservation Plan (BDCP) published in the Federal Register February 2009 Notice of Intent.[2] The changes suggest that the underlying purpose and need of the BDCP, which will drive the alternatives and decision making, is to provide "*….conveyance facilities to enhance operational flexibility and water supply reliability…..to Restore and protect the ability of the [State Water Project and Central Valley Project] to deliver up to full contract amounts ….*" **The addition of the objectives of a conveyance facility to deliver full contract amounts is a significant change from the first NOI for the BDCP that was jointly issued by National Marine and Fishery Service and U.S. Fish and Wildlife Service**. (73 Fed. Reg. 4178 (January 24, 2008). Moreover, such a goal is in conflict with constraints that have already been clearly identified by the State of California[3] and US EPA.[4]

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[1] EPA June 10, 2010 Letter from Alexis Strauss and Enrique Manzanilla to D. Glaser, R McInnis and R. Lohoefener. RE Purpose Statement for Bay Delta Conservation Plan (BDCP) see:

http://www.epa.gov/region9/water/watershed/pdf/EpaR9Comments-BdcpPurpose-ExportPolicy.pdf

[2] http://baydeltaconservationplan.com/Libraries/General_Documents/BDCP_NOI.sflb.ashx).

[3] SWRCB letter May 15, 2009 see http://baydeltaconservationplan.com/Libraries/EIR_EIS_Public_Comments/California_State_Water_Resources_Control_Board.sflb.ashx

April 19,2011 Letter from SWRCB to Gerald Meral http://www.pcl.org/files/SWRCBLetterBDCP.pdf

[4] Ibid. EPA Correspondence June 10, 2010 & May 14, 2009 EPA correspondence from Kathleen Goforth and Karen Schwinn to to Lori Rinek US Fish and Wildlife Service Re Scoping Comments for the BDCP. See

http://209.210.252.50/Libraries/EIR_EIS_Public_Comments/US_Environmental_Protection_Agency.sflb.ashx

These inflated promises of water create a confusing mirage that does a disservice to all involved. Water contractors that expect to benefit from increased water diversions threaten to leave unless they are given a guarantee, which clearly is not the Department's intent and would be impossible to achieve without further damaging the environment and other beneficial users. [5]

As you know, the State of California State Water Resources Control Board recently reported that a 75 percent increase in net Delta flows (not exported) is needed to protect public trust values, beneficial uses, fisheries and water quality. Furthermore, the Department of Interior's most recent report to Congress regarding the impact of climate change predicts that already scarce water supplies in the western US will probably dwindle further as a result of climate change, causing problems for millions in the region.

We agree with EPA, that the revised NOI purpose "....***promises to deliver a significant increase in exports out of the Delta which is inconsistent with state law"..*** **and that "*****significantly increasing exports out of a stressed Delta is the wrong policy****."*[6]

The Bureau's implicit exaggeration of the amount of water available for export creates false expectations among its contractors and tends to override wise planning because such expectations of water supply promises are created that cannot be met. Water contract clauses that limit delivery and construction obligations to cases where they are "physically and financially feasible" are conveniently ignored. Compounding the false expectations for increased water supplies, these exaggerated water diversion promises are used to secure debt and financing where payments are due regularly regardless of climatic fluctuations or more realistic water supplies. **Ratepayers are left on the hook to fund these huge capital projects that do not deliver much water, yet damage water quality, the environment, and the economic base of local communities dependent on local fishing and farming jobs.**

State water code 11460 and 11463, included as part of the State's original Central Valley Project act passed in 1933, clearly protects area of origin water rights. Additionally, the Delta Protection Act of 1959, protects both the quantity of water needed in the Delta, as well as, its quality. Existing diversions of water from the Delta have resulted in violations of water quality standards causing impacts on Delta communities, fisheries and aquatic ecosystems of the estuary. The Bureau of Reclamation and the Department of Water

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[5] http://blogs.edf.org/waterfront/files/2010/12/Westlands-resigns-BDCP-Nov-2010.pdf

[6] http://www.epa.gov/region9/water/watershed/pdf/EpaR9Comments-BdcpPurpose-ExportPolicy.pdf pg. 5

Also: The Sustainable Water Use and Demand Reduction Act (Water Code Section 85021)states:

> *"The policy of the State of California is to reduce reliance on the Delta in meeting California's future water supply needs through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency."*

Resources are currently in violation of Delta water quality standards.[7] The Board issued a strongly worded "cease and desist" order to the federal and state agencies for violations of the SWP and CVP permit and license conditions requiring compliance with salinity objectives in the California Delta. Diverting even more water would further violate these water quality standards. The original intent of the CVP was to export "only surplus water" – that which was no longer needed to meet the needs of the Sacramento valley, and to repel salt water from entering the Delta. Can it be scientifically proven that additional diversions from the Delta to meet contract obligations will only be "surplus water?" Frankly, it is questionable that even current diversions are "surplus." These are but a few examples of inconsistencies with state law that pose a significant hindrance to the Delta Stewardship Council progress. There are additional examples of inconsistencies with federal law. [8]A revised NOI is essential to ensure its legal integrity if the BDCP is to be legally acceptable to the council for inclusion in the Delta Stewardship Plan.

The NOI is also inconsistent with the Reclamation Projects Authorization and Adjustment Act of 1992 (Public Law 102-575), which included Title XXXIV- Central Valley Project Improvement Act (CVPIA), signed into law October 30, 1992. The CVPIA amended previous authorizations of the CVP to include fish and wildlife protection, restoration, and mitigation as a project purpose having equal priority with irrigation and domestic water supply uses, and fish and wildlife enhancement having an equal priority with power

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[7]http://www.swrcb.ca.gov/waterrights/board_decisions/adopted_orders/orders/2010/wro2010_0002.pdf

[8] The CVP authorization of the New Melones Dam is one example where Congress (76 Stat 1191-92, Pub. L. 87-874) included the following provisos: "before initiating any diversions of water from the Stanislaus River basin in connection with the operation of the Central Valley project, the Secretary of the Interior shall determine the quantity of water required to satisfy all existing and anticipated future needs within that basin and <u>the diversions shall at all times be subordinate to the quantities so determined</u>" (emphasis added). . . Provided further, "That the Secretary of the Army adopt appropriate measures to insure the preservation and propagation of fish and wildlife in the New Melones project and shall allocate to the preservation and propagation of fish and wildlife, as provided in [the 1946 Fish and Wildlife Coordination Act]. . . an appropriate share of the cost of constructing the Stanislaus River diversion and of operating and maintaining the same." This is by no means an exhaustive list, but another example is in the Trinity River division authorization where Congress included unique area-of-origin protections for the Trinity River basin by including exceptions or provisos to the "integration" requirement. The first proviso of the 1955 Act in section 2 requires that the Secretary determine the flow releases to the Trinity River that would be necessary for the preservation and propagation of Trinity River basin fish and wildlife, subject to a statutory minimum release. That proviso is the basis for the Trinity River ROD flows determined by the Secretary in 2000 with the concurrence of the Hoopa Valley Tribe as required by section 3406(b)(23) of the Central Valley Project Improvement Act. The second proviso of the 1955 Act states: "That not less than 50,000 acre-feet shall be released annually from the Trinity Reservoir and made available to Humboldt County and downstream water users."

generation. Diverting even more water to meet inflated water contract demands would put further stress on an already over-stressed fishery and its habitat. It certainly puts in question BDCP's conformity with CVPIA goals and objectives for fish recovery and water quality requirements.

In addition, Congress has not specifically authorized a new conveyance facility either a peripheral canal or a tunnel that would require a new canal from the Sacramento River to the SWP Harvey O. Banks and the CVP C.W. Jones pumping plants near Tracy. Nor has Congress appropriated funds for this new conveyance project. The cost estimates range from $10 billion to $53 billion to construct and mitigate such a huge project.[9] The redirection of funds authorized by Congress for operation and maintenance funds to instead conduct environmental reviews for this new conveyance facility likely runs afoul of federal law.[10] While these shifts in federal funds did not take place under this administration, the Federal Anti-deficiency Act prohibits agencies from entering into a contract that is not "fully funded" because doing so would obligate the government in the absence of an appropriation adequate to the needs of the contract. [11] Defining the purpose of the project to, in effect, construct a new tunnel, or peripheral canal or dual facility to deliver more water than is available, defines the range of alternatives before Congress has acted to even authorize a project.

The Bureau's response of October 26, 2010, to EPA, suggests that, "consistent with federal law and the NOI, the alternatives must represent a reasonable range of potential conveyance configurations, water operations, habitat restoration measures and measures …capable of achieving the two coequal goals of water supply reliability and Delta ecosystem restoration.[12] ***We can find no reference in federal statute to an obligation of federal agencies to provide, a new conveyance canal.*** The project is likely to cause navigation and salinity impacts necessitating a Corps of Engineers issued permit.[13] These water quality, navigational, and water diversion changes alone likely will require another full environmental impact statement to consider the range of alternatives. In addition to all the state and federal permits needed this change in the NOI demands that the impacts from increasing diversions by over 1 million acre feet from the existing Delta diversion amounts

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[9] http://www.cvbizjournal.com/general/local-news/secret-meeting-agenda-pushes-peripheral-canal-option.html?print=1&tmpl=component

[10] San Luis Delta Mendota Water Authority Minutes, 9-26-08 & Memo 1-8-09 See http://www.c-win.org/webfm_send/148 and http://c-win.org/webfm_send/149

[11] The Anti-deficiency Act prohibits federal agencies from obligating or expending federal funds in advance or in excess of an appropriation or apportionment per 31 U.S.C. § 1351 and 31 U.S.C. § 1517(a).

[12] http://www.epa.gov/region9/water/watershed/sfbay-delta/pdf/LeadFedAgncysBdcpPurpose-NeedLtrOct262010.pdf

[13] Sections 10 & 14 of the Rivers and Harbors Act of 1899, 33 U.S.C. §403 § 408 (1970)

need to be disclosed and analyzed.[14] These are all additional reasons why increased diversions from the Delta cannot be attained, and will likely need to be reduced. Changing the NOI to eliminate the goal of increased water exports will help clarify this issue.

EPA, quoting the California Supreme Court, noted: "*The CALFED program is premised on the theory, as yet unproven, that it is possible to restore the Bay-Delta's ecological health while maintaining and perhaps increasing Bay-Delta exports through the CVP and SWP. If practical experience demonstrates that the theory is unsound, Bay-Delta water exports may need to be capped or reduced.*"[15] **EPA goes on to note that in the intervening ten years the theory has not been proven accurate and they do not believe it is possible to sustain the estuary and export an additional 1 million acre feet.[16]**

The State Water Resources Control Board echoes these concerns in their comments on the revised notice, **"Uncertainty remains concerning the amount of water that can be diverted from the estuary without significantly impacting fish and wildlife beneficial uses. These impacts must be analyzed under CEQA before significant changes are made to the plumbing and hydrology of the Delta. In addition, independent of CEQA, the State Water Board has an obligation to consider the effect of the proposed project on public trust resources and to protect those resources."** [17]

At the present time the proposed purpose of the project is a large scale habitat restoration program and a major construction project to reconfigure export water conveyance in or around the San Francisco Bay Delta Estuary. The adoption of a Habitat Conservation Plan (HCP) under the federal Endangered Species Act is subject to NEPA as are numerous other permits that are likely needed for the project. Science and federal laws protecting endangered species are ignored by suggesting that a new canal project expecting to export even more water from the Delta ecosystem will restore this imperiled ecosystem.[18] As EPA mentions, "Delta inflows will also be restricted in future years

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[14]See:http://209.210.252.50/Libraries/EIR_EIS_Public_Comments/US_Environmental_Protection_Agency.sflb.ashx

[15]Ibid. EPA June 10, 2010 at page 5.

[16] Ibid. at page 4.

[17]http://baydeltaconservationplan.com/Libraries/EIR_EIS_Public_Comments/California_State_Water_Resources_Control_Board.sflb.ashx pg 2.

[18] http://www.nmfs.noaa.gov/pr/pdfs/laws/hcp_handbook.pdf "Thus, the HCP process is designed to address non-Federal land or water use or development activities that do not involve a Federal action that is subject to section 7 consultation….. A section 10(a)(1)(B) permit only authorizes take that is incidental to otherwise lawful activities. In this context, "otherwise lawful activities" means economic development or land or water use activities that, while they may result in take of federally listed species, are consistent with other Federal, state, and local laws." Pgs 1-4 to 1-5.

(compared to the historical record) due to changes in Trinity River Diversions into the Sacramento River system and due to upstream water resource development by senior water rights holders."[19] Tribes whose heritage and livelihood are dependent on these diverted water supplies have not been consulted nor included in the planning, project definitions or in the discussions with affected communities.

In conclusion, we strongly urge you to revise the Notice of Intent for the proposed BDCP so that it is consistent with California's Delta Reform Act and the Sustainable Water Use and Demand Reduction Act. It appears the provisions of the NOI were added to benefit specific water contractors rather than the interests of the state or the nation as a whole. Specifically our organizations request is that the following phrase be deleted from the NOI:

> *"Restore and protect the ability of the [State Water Project and Central Valley Project] to deliver up to full contract amounts, when hydrologic conditions result in the availability of sufficient water, consistent with the requirements of state and Federal laws and the terms and conditions of water delivery contracts held by SWP contractors and certain members of SLDMWA."*

Thank you for your consideration of this request.

Respectfully submitted,

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[19]http://209.210.252.50/Libraries/EIR_EIS_Public_Comments/US_Environmental_Protection_Agency.sflb.ashx May 14, 2009 correspondence to Lori Rinek. Page 6.

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