

## **Comments Collated – December 11, 2008**

### **Questions For Implementation/Governance Workgroup (November 20, 2008)**

Your co-chairs propose to use this punch list to organize the further discussions of our Work Group. This converts our June 11, 2008 outline into discrete issues (stated in the form of questions) which will drive our implementation/governance approach.

We propose to use this document, rather than continue to refine the Working Concepts (Nov. 12, 2008). That prior document described the general directions of our discussion over the past several months. However, as we discovered Nov. 14, it also packed many unresolved issues together into explanation, frustrating organized discussion. This punch list will assist our workgroup in resolving these issues in an efficient manner.

This list states the issues for our implementation/governance approach in a logical order. Our discussion can follow the order below or any other order preferred by the workgroup. The process question is: what is the critical path to timely resolve these issues and develop the governance approach?

Next steps on this critical path are:

- Discuss and agree whether to use this punch list to organize further discussion. Revise for completeness.
- Discuss and agree to the order for discussion of the issues on the punch list. On basis of that agreement, develop and (on BDCP website) publish a schedule so that members and non-members can plan for participation in our further meetings.
- Coordinate with other work groups which are addressing issues on this punch list. For such issues, our function may be limited to just keeping the relevant workgroups on schedule.
- Start discussion of given issue. If we reach rough consensus within workgroup, record resolution (which will function as a recommendation to Steering Committee) and basis for resolution.
- If our workgroup does not reach rough consensus in initial discussion, list potentially attractive options. Assign for options analysis. Resolve issue after options analysis.

## Implementation/Governance Issues

### 1. Implementing Entity(ies) (IE)

Question	Name	Response
	Ann Hayden EDF	See EDF's "Increasing the Flexibility of Environmental Water 10-6-08" for our thoughts on an IE, which we call the Delta Water Manager"
<b>1.1. Will the IEs be the same as, or different than, the plan permittees (defined as the entities who receive regulatory authorizations to implement the plan)?</b>	Sue Fry USBR	Suggest the IE is selected by and represents the permit holder. The Permit Holder retains full responsibility for success of the plan. In this case the Permit Holder would be DWR most likely.
	Stephanie Coupe DFG	Not an issue for DFG to determine. The permittee(s) would need to decide if it/they want to delegate authority to third parties since they are still held responsible for implementing the permit terms.
	Mark Pruner North Delta Cares	IEs should be difference that the plan permittees.
	Roger Patterson	Likely both – same in some cases and different for implementation of other plan requirements.
	Richard Roos-Collins	Permittees are: DWR, USBR, and JPA (see 2.1.1).
	Greg Thomas NHI	Different implementing entities for different functions, as described above. The JPA will hold the permits. It will contract with the Delta Conservancy to undertake the physical habitat improvement measures. It will operate the PC and transfer ownership of a fraction of the capacity to an entity that will operate that share on behalf of the fish under a tradable capacity credit arrangement.
	Cliff Schulz	Answer to 1.1 and 1.2: Mirant aside for the moment, it seems that we should strive to have a single permit from each fishery agency directed to a single IE, members of which would include all entities that have an individual claim to the status of permit holder. The conservation program is too interconnected to be spread among multiple IEs or permit holders. We need a single point of responsibility for management of the program.
<b>1.2. If different, what is nature of relation between IEs and permittees?</b>	Sue Fry USBR	Relationship = representative of the permit holder.
	Stephanie Coupe DFG	IEs will need to be accountable to the permittees. Permittees are accountable to the permitting agencies.
	Mark Pruner North Delta Cares	Standard rules barring conflicts of interests should apply.
	Roger Patterson	IEs would implement certain plan elements under agreement with the permittees.
	Richard Roos-Collins	Agreement must be both enforceable and terminable by permittees.
	Cliff Schulz	See Above

Question	Name	Response
<b>1.3. Who is the IE (either identify or describe characteristics) for:</b>	Sue Fry USBR	All of these items below need to be done in coordination with the operations of the overall CVP/SWP operations criteria. Whatever the process/means to manage the BDCP implementation, there will need to be close coordination with the CVP/SWP operators. Additionally, I would see Reclamation participating in restoration activities as part of CVPIA. Please note that a majority of the CVPIA funds are provided to FWS and FWS decides how those funds will be administered. Reclamation manages a small portion of the CVPIA funding.
<b>1.3.1. Conveyance?</b>	Sue Fry USBR	I need to understand more what you mean by conveyance here. If this is conveyance of water thru the IF, then it will likely be DWR. I have heard that the IF would become a part of the SWP. If that is the case then DWR would be required to operate unless State law is modified.
	Stephanie Coupe DFG	The IE needs to convey water around the delta in coordination with existing SWP/CVP operations. The IE will need to take into account, in real time, the tidal cycles, Sacramento and San Joaquin River flows, as well as the timing of reservoir releases, contractual need for water, etc., in order to optimize both fish species protection and water deliveries.
	Roger Patterson	DWR
	Greg Thomas NHI	JPA and FISH
<b>1.3.2. Habitat restoration?</b>	Sue Fry USBR	Delta Vision suggests a Conservancy. Suggest that this Conservancy actually works under the Resources Agency/DWR who is the ultimate permit holder
	Stephanie Coupe DFG	Depends on who has jurisdiction and control of the areas to be restored. It could be a new Delta Conservancy. It could also be DFG, with planning and administration conducted by the Water Branch and implementation by the DFG Bay Delta Region. It could also be both with DFG as a member of a new Delta Conservancy. Other possible entities may include Wildlife Conservation Board, State Coastal Conservancy, and conservation organizations.
	Roger Patterson	Delta Conservancy
	Greg Thomas NHI	Delta conservancy under revocable contract to JPA
<b>1.3.3. Other stressors?</b>	Sue Fry USBR	Not sure how to handle this because other stressors will be basically addressed via grant programs. Perhaps this is something the Conservancy can handle too under the direction of Resources/DWR

Question	Name	Response
	Stephanie Coupe DFG	Depends on who or what is causing the other stressor, and who has the jurisdiction, control, and regulatory authority to change the factors contributing to the other stressor.
	Roger Patterson	Various entities (State Board, Regional Board, DFG, etc.)
	Richard Roos-Collins	Various entities who are best situated to implement plan (State Board, Regional Board, DFG, etc.) Under agreement with IE (or, if necessary, statute), each IE must be accountable to implement.
	Greg Thomas NHI	JPA
<b>1.3.4. Adaptive management?</b>	Sue Fry USBR	Perhaps via Conservancy in close coordination with CVP/SWP operators.
	Stephanie Coupe DFG	Implements changes to plan within boundaries of what was analyzed in the environmental document and included in the plan, including modifications made pursuant to adaptive management.
	Roger Patterson	Permittees
	Richard Roos-Collins	Each IE has authority to sub-contract.
	Greg Thomas NHI	Not JPA. There are many elements to this. ISP will design the monitoring program around the critical uncertainties in the conservation strategy. Fishery agencies will do the monitoring and reporting. A science jury will determine the necessary adaptations in real time. A biological risk insurance program will operate to keep the PREs whole when adaptations beyond the four corners of the BDCP are required due to a jeopardy determination by the permitting agencies.

Question	Name	Response
	Cliff Schulz	<p>The best approach for providing a single IE would seem to be a JPA. The flexibility of a JPA comes from the fact that is a creature of contract, and that contract can be tailored to provide differing control responsibilities for the four sub-topics listed above. The USBR could not be a party to a State JPA without congressional authorization, but it likely could enter into a contract with the JPA that would provide it a measure of control consistent with its need to protect its Section 7 permits from loss due to failure of the Section 10 permittees to carry out the conservation plan.</p> <p>For conveyance, the IE would not operate the conveyance facilities. That function would continue to be performed by DWR/USBR. The roles of the IE would be (a) to ensure that that operation was consistent with conservation plan requirements and (b) to include the conveyance element in monitoring, science review, and adaptive management considerations.</p> <p>For habitat, the IE would be directly responsible for implementation, but could delegate certain implementation activities, through contractual arrangements, to other entities such as a conservancy. That delegation would not include ultimate policy and implementation strategy decisions that are needed to ensure the plans success.</p> <p>For other stressors, to the extent the actions involve regulatory action by other agencies such as regional quality control boards, the IE would act as the proponent of the action before such boards. To the extent the actions involve infrastructure improvements needed by others to reduce the discharge of toxics, funding could come through the IE or a conservancy.</p> <p>Adaptive management should include monitoring and science. Those functions must be under the direct control of the IE, including the need to integrate certain monitoring and science functions that are currently housed elsewhere.</p>
1.4. In the event of non-performance by IEs:	Greg Thomas NHI	Key question here is what is the permit issuing agencies recourse?
1.4.1. What is permittees' remedy?	Sue Fry USBR	Fire them and hire someone else. Will require constant monitoring....perhaps a "Board" setup could work
	Stephanie Coupe DFG	This is for the permittees and IEs (assuming they are different) to determine by contractual arrangement. (However, permittees are ultimately accountable to permitting agencies for performance.) Permittees and IEs can provide remedies through contractual agreements, e.g., penalties. For example, if there are periodic compliance monitoring reports (such as by an independent plan monitor), the contractual arrangement could require that the permittee provide the IE notice and opportunity to remedy the identified non-compliance or non-performance. If the IE failed to comply or perform, the IE could be required to pay penalties to the permittee. Other options might include civil action to compel performance.
	Roger Patterson	Termination of agreement.

Question	Name	Response
	Greg Thomas NHI	To be established in the terms and conditions of the permit.
	Cliff Schulz	This issue goes away if the IE and the Permittees are one and the same.
1.4.2. What is permittees' obligation for performance?	Sue Fry USBR	Permittees will be required to ensure performance. Not IE's problem as I see it as the IE is not going to be a permit holder.
	Stephanie Coupe DFG	Ultimately the permittees are responsible to the permitting agencies for performance. Failure to comply with the permits could result in suspension or revocation of the permit. However, intermediate remedies, such as penalties, could be helpful in enforcing compliance. The example provided above in 1.4.1 could also apply to the relationship between the permittees and permitting agencies. Assuming there are periodic compliance monitoring reports (such as by an independent plan monitor), if a report shows non-compliance or non-performance, the contractual arrangement could require that the permitting agencies provide the permittee notice and opportunity to remedy the non-compliance or non-performance, which may include permittee failure to enforce IE compliance. If the permittee failed to comply or perform, the permittee could be required to pay penalties to the permitting agencies. Other options might include civil action to compel performance, suspension or revocation of the permit, and other remedies under applicable federal and/or state law.
	Roger Patterson	Meet requirements of HCP/NCCPA.

## 2. Consultation and Decision-making Procedures during Implementation

Question	Name	Response
	Greg Thomas NHI	Consultation and coordination are subordinate considerations. Let's resolve the cornerstone issues first.
2.1. What common or specific procedures will IEs use to consult with the following during implementation?	Sue Fry USBR	I would suggest some kind of management board structure and an executive board structure. Keep in mind that if the direction that comes out of a board is considered advisory to Federal agencies, we could invoke the Federal Advisory Committee Act. That is something we should stay away from. Have a management board with mid-level management representatives from all the entities and and Executive Board with the political appointees, etc. Management board meets monthly or quarterly and maybe Exec Board meets quarterly or bi-annually.
	Roger Patterson	IEs would perform under contract with permittees.
2.1.1. SWP/CVP contractors	Stephanie Coupe DFG	Stakeholder advisory group
	Roger Patterson	Contractor JPA would be permittee.
	Cliff Schulz	The export contractors should be permittees and thus part of the IE. They will be financing and may be directly responsible for implementing certain conservation measures.
2.1.2. Fish agencies	Stephanie Coupe DFG	interagency management team
	Roger Patterson	Would be part of BDCP Implementation Oversight and Advisory Committee (OAC). Also grant the permits pursuant to HCP/NCCPA
	Cliff Schulz	The agencies are the permit issuing agencies. A process to consult with them on adaptive management issues is imperative, particularly on major shifts which could affect the bases on which the permits were issued. They should also have a consulting role in science and monitoring development and as part of a more general stakeholders group.
2.1.3. Local governments	Stephanie Coupe DFG	Stakeholder advisory group/membership on a Delta Conservancy
	Roger Patterson	Member of OAC.
	Cliff Schulz	Answer to 2.1.3, .4, and .5: These should all be members of a formally structured advisory group. Local governments should have a well spelled out additional role when conservation actions affect areas within their jurisdiction. This should probably be spelled out as an obligation of the IE or its contractors.

Question	Name	Response
<b>2.1.4. Conservation and fishery groups</b>	Stephanie Coupe DFG	Stakeholder advisory group
	Roger Patterson	Member of OAC.
	Cliff Schulz	See above
<b>2.1.5. Other stakeholders</b>	Stephanie Coupe DFG	Stakeholder advisory group
	Roger Patterson	Member of OAC.
	Richard Roos-Collins	All consultations will be documented. The IE will provide an issue document in advance of consultation and will record the results of consultation in meeting notes.
	Cliff Schulz	See Above
<b>2.2. What decisions will be subject to, and what decisions will be excluded from, such consultation, within each category below?</b>	Stephanie Coupe DFG	Difficult to determine at this time; depends on who the IE(s) are.
	Roger Patterson	Day-to-day decisions would be made by the IEs. Non-routine decisions would be reviewed by the OAC.
	Richard Roos-Collins	Day-to-day decisions would be made by the IEs. IEs and OAC would have forecast meeting on regular basis, to inform such day-to-day decisions. E.g., forecast summer operations in a spring-time meeting. Non-routine decisions would be reviewed by the OAC in advance.
<b>2.2.1. Conveyance</b>	Sue Fry USBR	Operation of the IF. Operations of the CVP/SWP will not be included. Need to ensure coordination between CVP/SWP and IF operations.
	Cliff Schulz	The conveyance operations will be spelled out in the conservation plan. Therefore, consultation should be limited to receiving reports on operations to ensure they are consistent with the plan and advising on proposed adaptive management changes.

Question	Name	Response
<b>2.2.2. Habitat restoration</b>	Sue Fry USBR	Work with landowners to find willing sellers, set up management plans, do environmental documentation to convert lands, deal with all issues (land use, county tax issues, flood control issues (induced flooding), etc.) surrounding restoration of delta lands
	Cliff Schulz	This is likely the most common area where consultation will be routinely sought as habitat plans are finalized and priorities established.
<b>2.2.3. Other stressors</b>	Sue Fry USBR	Determine process for grants (selection, funding levels), administer process, ensure individual projects and overall program are “working”
	Cliff Schulz	Similar to habitat planning.
<b>2.2.4. Adaptive management</b>	Sue Fry USBR	Monitoring protocols, scientific review, adapt within range provided in permit, engage FWS, NMFS, DFG when move outside of permit terms, ensure the program is “working”
	Richard Roos-Collins	Adaptive management decisions would presumptively be considered non-routine for the purpose of advance consultation with OAC.
	Cliff Schulz	I would perceive that the stakeholders’ advisory group members would routinely have access to monitoring results and scientific study reports. Therefore, their participation at an early stage could result in adaptive management suggestions coming from the advisory group. Certainly the process of considering changes in the plan, from whatever source, would include consultation with the stakeholders.
<b>2.3. What administrative procedures will be used to address and resolve disputes that arise during consultation?</b>	Sue Fry USBR	Perhaps use the management and executive level boards to resolve conflicts. Expect that a Executive Director would be decision maker to initiate dispute resolution first with management board then with executive board if necessary. Expect IE will have process to document decisions in a timely manner.
	Stephanie Coupe DFG	It would depend upon whom the dispute was between. For most disputes, it would be helpful to have a step-wise dispute resolution process. The first step would be to meet and confer to resolve the dispute in a timely manner. Under this process, disputes would be resolved at the lowest level of the organizations as possible, with a process for elevating if necessary to the tops of the organizations. If meet and confer is not effective in resolving a dispute, the second step could be a facilitated forum where, when a dispute arises, disputing parties can work to resolve issues. A third step could be non-binding dispute resolution.  For a dispute regarding or involving science, discussion of the issue could be enhanced by additional scientific review by independent scientists, such as the Calfed science review.

Question	Name	Response
	Roger Patterson	ADR process is needed. Should be available for use by the IEs and permittees, the permittees and the fishery agencies, and the OAC.
	Richard Roos-Collins	ADR process is needed. Should be available for use by the IEs and permittees, the permittees and the fishery agencies, and the OAC. Process should provide for consensus among IEs and OAC, subject to mediation in an administrative venue which has jurisdiction over plan (e.g., ALJ before SWRCB). There will not be remedy for unresolved dispute. Any alleged violation of the plan itself would be subject to whatever judicial remedy may be available under general law.
	Greg Thomas NHI	Again, this is a subordinate issue.
<b>2.3.1. How is dispute resolution initiated?</b>	Stephanie Coupe DFG	It would be initiated by the disputing party in writing.
	Richard Roos-Collins	Notice of dispute resolution. See Section 5 of Oroville Relicensing Settlement Agreement as example (attached).
<b>2.3.2. Who can participate?</b>	Stephanie Coupe DFG	The disputing parties and any others who may be affected. Mediator or facilitator, if applicable.
	Richard Roos-Collins	All permittees, IEs, and members of OAC.
<b>2.3.3. What is the schedule for resolution?</b>	Stephanie Coupe DFG	This would depend on the nature of the dispute.
	Richard Roos-Collins	Presumptive 30 day, subject to shortening or extension based on nature of dispute. Since Permittees are responsible for plan compliance, they will timely implement what they believe is their plan requirement in a given circumstance even if there is dispute and ADR process is ongoing.
<b>2.3.4. How is resolution documented?</b>	Stephanie Coupe DFG	In writing with notice to interested and affected parties. It would be helpful if dispute letters and documentation of the resolution, if any, of the dispute were posted to a central BDCP library.
	Richard Roos-Collins	Written notice of dispute resolution. See Oroville example.

Question	Name	Response
<b>2.4. How do such procedures square with FACA and other sunshine-in-government laws applicable to DWR, USBR, and other public agencies?</b>	Sue Fry USBR	If “advice” is being provided to the Federal agencies, then you could be under FACA rules. A statement from the GSA FACA webpage: Any advisory group, with limited exceptions, that is established or utilized by a federal agency and that has at least one member who is not a federal employee, must comply with the FACA. To find out if a group comes under the FACA, any individual may contact the sponsoring agency's Committee Management Officer, or the GSA Committee Management Secretariat  Go to: <a href="http://www.usdoj.gov/oip/facastat.pdf">http://www.usdoj.gov/oip/facastat.pdf</a> for more information
	Stephanie Coupe DFG	No apparent conflicts if information is publicly available.
	Richard Roos-Collins	(1) State, not US, will convene the OAC. (2) The OAC is for the function of ADR to prevent future litigation. (3) Consensus of OAC is not binding on permittee or any other public agency

### 3. Conveyance

Questions	Name	Response
	Greg Thomas NHI	These issues are addressed above.
<b>3.1. Who will own the conveyance facility?</b>	Stephanie Coupe DFG	It is not for DFG to determine, but ideally it is operated as an integrated part of the SWP and/or CVP.
	Greg Thomas NHI	JPA and FISH
	Ann Hayden EDF	Ownership should be public.
<b>3.1.1. DWR?</b>	Sue Fry USBR	Yes as part of the SWP.
	Stephanie Coupe DFG	Conveyance would probably function most efficiently as a feature of the SWP. The conveyance would be wholly located within California. As the entity with SWP authority, DWR does not need Congressional approval to fund or build additional SWP elements. DWR can already coordinate its operations with the CVP via the Coordinated Operations Agreement and is a “Project Agency” participant in the WOMT. DWR also has broader statutory responsibilities to trustee resources, which would make it the appropriate entity.
	Roger Patterson	Yes
	Cliff Schulz	Yes

Questions	Name	Response
	Ann Hayden EDF	No. DWR, as presently configured, is a conflicted agency – with broad water management responsibilities on one hand and obligations to the State water Contactors on the other.
<b>3.1.2. Public utility?</b>	Sue Fry USBR	No
	Roger Patterson	Perhaps in the future.
	Cliff Schulz	No, but the plan and the form of IE should be flexible enough to allow for the future eventuality.
	Ann Hayden EDF	OK
<b>3.1.3. Other?</b>	Sue Fry USBR	No
<b>3.2. Who will construct?</b>	Sue Fry USBR	DWR in cooperation with SWP water users
	Stephanie Coupe DFG	DWR could construct the conveyance and has the existing authority to require reimbursement, including for fish and wildlife preservation, through its subcontracts
	Roger Patterson	DWR
	Greg Thomas NHI	Who cares?
	Cliff Schulz	DWR.
	Ann Hayden EDF	Low bidder(s) whose competence is assured.
<b>3.3. Who will operate?</b>	Sue Fry USBR	Conveyance IE in cooperation with CVP/SWP operators
	Roger Patterson	DWR
	Greg Thomas NHI	JPA and FISH
	Cliff Schulz	DWR, with CVP usage (and payment obligation) through agreement(s) with appropriate federal interests.

Questions	Name	Response
	Ann Hayden EDF	A state utility or private firm could be the physical operators of the conveyance facility. Operating decisions are very important. Operating rules should include both prescriptive rules but also flexibility to protect fisheries with real-time decision-making to respond to biological needs and hydrologic conditions (See EDF's "Increasing the Flexibility of Environmental Water 10-6-08")
<b>3.4. What are the specific responsibilities of each of the following for such construction and operation?</b>	Stephanie Coupe DFG	Not for DFG to determine.
<b>3.4.1. DWR?</b>	Sue Fry USBR	Construction entity, will coordinate with overall SWP operations, and operate
	Stephanie Coupe DFG	Must operate the SWP in a coordinated fashion per the COA and in accordance with regulatory requirements.
	Roger Patterson	Will construct and operate as a feature of the SWP.
	Cliff Schulz	Construction funding likely provided to DWR from State CVP Act revenue bonds, with construction through contracts with DWR.
	Ann Hayden EDF	EDF supports bifurcation of DWR into a water management agency and a utility agency. The utility agency would work with USBR and fishery agencies to operate Delta conveyance families according to all applicable laws and agreements, including but not limited to those in developed by the BDCP
<b>3.4.2. USBR?</b>	Sue Fry USBR	Will coordinate with overall CVP operations, does not expect to construct
	Stephanie Coupe DFG	Must operate the CVP in a coordinated fashion per the COA and in accordance with regulatory requirements.
	Roger Patterson	Will secure right to convey CVP water through facility by contract. A reverse San Luis Unit arrangement.
	Cliff Schulz	While it may be possible that federal appropriations could be used to construct the IF, it should not be assumed that such funds will be reliable enough to support the plan. Therefore, all initial funding should be assumed to come from State sources, with the USBR possibly entering into contracts for use of the facility to move CVP water, thereby becoming a repayment source. This contract could possibly provide Reclamation with a role in design development given its central role in repayment of its costs. The Reclamation payments would be a pass through of monies it receives from its contractors, which would mean a second set of contracts or use of existing water service contracts.

Questions	Name	Response
<b>3.4.3. SWP/CVP Contractors?</b>	Sue Fry USBR	Put up the money?
	Roger Patterson	Will pay for the construction and O&M.
	Cliff Schulz	The SWP/CVP contractors, as the parties actually coming up with the necessary construction fund repayments, will likely have a central role in design and construction management through agreements with DWR
	Ann Hayden EDF	Contractors should pay for the construction costs. They can advise the USBR and DWR (or its utility successor), but would not operate the project.  EDF believes that other water agencies may use the conveyance facilities from time to time to convey transferred supplies. It is also very possible that other agencies may at some time sign contracts for SWP or CVP supplies. Provisions to accommodate such changes should be considered with a fair process to determine applicable rates
<b>3.4.4. Other?</b>	Cliff Schulz	While the stakeholder advisory group should be well informed on the progress of design and construction, its actual participation in the design and construction seems properly limited to receiving such information. This should be distinguished from the preliminary design needed for NEPA/CEQA compliance, where the Steering Committee will be involved in reviewing that information as part of BDCP development.
	Ann Hayden EDF	Environmental Defense Fund supports a new entity to work with all agencies and focus their efforts on operating water projects in the Delta. We have called it the Delta Water Manager in the concept paper referenced above.  Fishery agencies are responsible for assuring restoration of listed species, and thus must develop operating criteria, including pumping limits, bypass flows etc. Given the declining state of fishery populations and future uncertainties, flows should include a buffer factor to ensure adequate conditions for the population levels to recover
<b>3.5. What are the procedures for IE's consultation with stakeholders, and decision-making, during operations?</b>	Sue Fry USBR	Suggest that the conveyance "IE" is DWR which is separate from Conservancy that is dealing with habitat restoration and other stressors actions. Although Conservancy would have to coordinate with DWR IF operators and overall CVP/SWP operators (Reclamation and DWR)
	Roger Patterson	Through the OAC.
	Greg Thomas NHI	Consultation and coordination are subordinate considerations. Let's resolve the cornerstone issues first.
	Ann Hayden EDF	Real time decisions weekly public meetings as needed to implement flexibility

Questions	Name	Response
<b>3.5.1. How will IE consult with permitting agencies?</b>	Sue Fry USBR	Typical processes already used in other conservation plans. Suggest that the IE is DWR and DWR is the permit holder
	Stephanie Coupe DFG	If the permittee/IE is DWR, it would likely continue to make real-time decisions through the WOMT, or an equivalent entity, as necessary to ensure that the plan is being complied with and that any modifications to the plan are acceptable to the permitting agencies. If the IE is not the permittee, it is unclear what the process should be. A process for this should be outlined.  Any decisions with respect to non-routine modifications should be made through a process that allows for public input, including local governments and other public agencies, particularly where the decision would benefit from coordination with them or would affect them.
	Cliff Schulz	In the monitoring and science areas, the plan should spell out a process for routine involvement of the fish agencies. For operations, if the plan calls for real-time operational modifications that do not reach the level of adaptive management, some sort of permanent process, similar to that now being used could be adopted. Beyond that, one is into adaptive management.
	Ann Hayden EDF	The IE will be the principle point of focus wherein the permitting agencies, the project agencies as well as interested stakeholders and other parties work toward effective, efficient management and transparent of Delta conveyance facilities.  All communications between permitting agencies and project agencies related to conveyance operations shall be made public immediately
<b>3.5.2. How will IE document decisions?</b>	Stephanie Coupe DFG	In writing with an acknowledgment by permittees and permitting agencies. The document repository referenced in 2.3.4 could be utilized to make the decision making open and transparent.
	Cliff Schulz	In writing, available on a public website.
	Ann Hayden EDF	Decisions will be immediately documented and posted online
<b>3.6. What are safeguards against, and remedies for, IE's non-compliance with plan requirements for operations?</b>	Sue Fry USBR	Not sure there are any except for no surprises under Section 10. If outside of the plan then resource agencies (FWS, NMFS, DFG) will have to act on non-compliance with the permit
	Stephanie Coupe DFG	Ultimately the permittees are responsible for compliance. Permitting agencies will hold permittees responsible. If the IEs are third parties, the permittees can work out mechanism with the IEs to ensure compliance. See 1.4. above.
	Roger Patterson	HCP/NCCPA could be voided.
	Greg Thomas NHI	Permit revocation.

Questions	Name	Response
	Cliff Schulz	Loss of FESA/CESA take authority. Violation of SWRCB permit terms and conditions, which can lead to administrative or judicial sanctions, including loss of right to divert
	Ann Hayden EDF	Detailed guidelines for oversight should develop as well as consequences for non-compliance to assure that operations to meet both water supply reliability and ecosystem objectives are met. Any minor errors should be adjusted. Ultimately, if operations flagrantly violate the law, perpetrators should, like everyone else, face legal action

#### 4. Habitat Restoration Measures

Question	Name	Response
4.1. Who is IE for such measures		
4.1.1. Conservancy?	Sue Fry USBR	Yes...but only under direction of DWR who is ultimate permit holder
	Stephanie Coupe DFG	Yes. A conservancy Board could include the DFG and other entities.
	Roger Patterson	Yes
	Greg Thomas NHI	Delta Conservancy under revocable permit to JPA.
	Cliff Schulz	A conservancy may be contracting with the IE to carry out habitat measures as an independent contractor, but should not be the IE. The IE must remain and be governed by those that will operate the conveyance facility, carry out/fund the conservation measures, and be impacted by the loss of the permits. The conservancy must be subject to dismissal by the IE if it is not performing in a manner that protects the permits. This is also true if an entity other than a conservancy is implementing plan elements, such a DF&G.
4.1.2. Other?	Stephanie Coupe DFG	Yes. Existing agencies, conservancies and other entities might be able and willing to accept funding to preserve and restore habitats under the plan for the benefit of covered species. Possible entities may include Wildlife Conservation Board, DFG, State Coastal Conservancy, and conservation organizations.
	Roger Patterson	Agencies or NGOs could implement certain projects.
	Richard Roos-Collins	Agencies or NGOs could implement certain projects, by agreement with Conservancy as IE.
	Cliff Schulz	The answer above includes the SWP/CVP contractors within its definition of the IE. It is likely that significant funding for and implementation of habitat measure will be coming directly from SWP/CVP contractors, rather than through DWR/USBR.

Question	Name	Response
<b>4.2. What are the procedures for IE's consultation with stakeholders, and decision-making, during implementation of these measures?</b>	Sue Fry USBR	Same as with other conservation plans. We should look at other successful plans and use those processes as our guide. Look broadly at programs outside of California. Consider the Chesapeake Bay Restoration or the Upper Colorado Endangered Fish Recovery Program.
	Roger Patterson	Agreement between permittees and IE would provide procedures. OAC provide oversight and advise.
	Greg Thomas NHI	Consultation and Coordination are subordinate considerations. Let's resolve the keystone issues first.
<b>4.2.1. How will IE consult with permitting agencies?</b>	Sue Fry USBR	IE should be under direction of permit holder
	Stephanie Coupe DFG	If the IE and one or more public agencies are on the conservancy board, decision making would occur in a public forum. The IE could also consult, as necessary, to ensure that the plan is being complied with and that any changes to the plan are acceptable to the permitting agencies. If the IE and the permitting agencies were on a conservancy board and constituted a quorum, decision making would occur in public forum. In addition, any decisions with respect to non-routine modifications should be made through a process that allows for public input, including local governments and other public agencies, particularly where the decision would benefit from coordination with them or would affect them.
	Cliff Schulz	Potentially through the advisory group. It seems inefficient to have separate processes for stakeholders and the permitting agencies.
<b>4.2.2. How will IE document decisions?</b>	Sue Fry USBR	Typical processes
	Stephanie Coupe DFG	In writing with an acknowledgement by the permittees and permitting agencies. See 2.3.4 regarding a document repository.
	Cliff Schulz	In writing, available on a public website.
<b>4.3. What are safeguards against,</b>	Sue Fry USBR	I don't think there are any other than the no surprises granted under the Section 10 process.

Question	Name	Response
and remedies for, IE's non-compliance with plan requirements?	Stephanie Coupe DFG	Ultimately the permittees are responsible for compliance. Permitting agencies will hold permittees responsible. The permittees can work out contractual mechanisms with the IEs to ensure compliance. See 1.4. above.
	Roger Patterson	Termination of agreement.
	Cliff Schulz	Same as for conveyance non-compliance.

## 5. Other Stressors

Question	Name	Response
5.1. Who is IE for such measures?	Stephanie Coupe DFG	Depends on the stressor. (See 1.3.3 above.)
	Roger Patterson	Likely will vary depending on the stressor (State Board, Regional Board, DFG, etc.)
5.1.1. Conservancy?	Sue Fry USBR	Resources Agency/DWR driven process
	Cliff Schulz	No.
5.1.2. Other?	Cliff Schulz	Single IE for all elements of plan; possibly differing entities under contract with IE for various elements to recognize need for specialized expertise in differing areas.
5.2. What are the procedures for IE's consultation with stakeholders, and decision-making, during implementation of these measures?	Sue Fry USBR	Same as above
	Roger Patterson	See 4.2

Question	Name	Response
<b>5.2.1. How will IE consult with permitting agencies?</b>	Stephanie Coupe DFG	<p>As necessary to ensure that the plan is being complied with and that any changes to the plan are acceptable to the permitting agencies. Is there a current process or group that would work for this or could be adapted to fit this?</p> <p>Any decisions with respect to non-routine modifications should be made through a process that allows for public input, including local governments and other public agencies, particularly where the decision would benefit from coordination with them or would affect them.</p>
	Cliff Schulz	See, 4.2.1.
<b>5.2.2. How will IE document decisions?</b>	Stephanie Coupe DFG	In writing with an acknowledgement by the permittees and permitting agencies.
	Cliff Schulz	See 4.2.2.
<b>5.3. What are safeguards against, and remedies for, IE's non-compliance with plan requirements?</b>	Sue Fry USBR	Same as above
	Stephanie Coupe DFG	Ultimately the permittees are responsible for compliance. Permitting agencies will hold permittees responsible. The permittees can work out mechanism with the IEs to ensure compliance. See 1.4. above.
	Cliff Schulz	Same as above.

## 6. Adaptive Management and Monitoring Program

Question	Name	Response
<b>6.1. Who is IE (either identify or describe characteristics) for this program?</b>	Sue Fry USBR	Use the Conservancy to do this.
	Mark Pruner North Delta Cares	It is critical that in-Delta interests have full deliberative and voting participating on all IEs. One form of such in-Delta participation is a set of three representatives, from South, Central and North Delta regions, elected by the people residing in each Region, together with two additional residents elected from the Delta on an at-large basis.
	Roger Patterson	Permittees
	Cliff Schulz	IE directly using data developed through monitoring and science programs and experience gained through operation of the plan.
<b>6.2. What are the procedures for IE's consultation with stakeholders, and decision-making, during implementation of this program?</b>	Sue Fry USBR	Management and Executive Boards supplemented by staff at the Conservancy
	Roger Patterson	See 4.2
	Richard Roos-Collins	Also, see 2 generally: adaptive management will be subject to OAC consultation procedure.
	Cliff Schulz	See 2.2.4.
<b>6.2.1. How will IE consult with permitting agencies?</b>	Sue Fry USBR	DWR is the permit holder and the IE will be working for DWR.
	Stephanie Coupe DFG	As necessary to ensure that the plan is being complied with and that any changes to the plan are acceptable to the permitting agencies. Is there a current process or group that would work for this or could be adapted to fit this?  Any decisions with respect to non-routine modifications should be made through a process that allows for public input, including local governments and other public agencies, particularly where the decision would benefit from coordination with them or would affect them.
	Richard Roos-Collins	Same as specified in 2.
<b>6.2.2. How will IE document such decisions?</b>	Sue Fry USBR	Typical processes
	Stephanie Coupe DFG	In writing with an acknowledgement by the permittees and permitting agencies. See 2.3.4 regarding a document repository.

Question	Name	Response
	Richard Roos-Collins	Ditto.
<b>6.3. What are safeguards against, and remedies for, IE's non-compliance with plan requirements?</b>	Stephanie Coupe DFG	Ultimately the permittees are responsible for compliance. Permitting agencies will hold permittees responsible. The permittees can work out mechanism with the IEs to ensure compliance. See 1.4. above.
	Roger Patterson	Termination of agreement or permits.
	Cliff Schulz	Someone will need to explain how decisions on adaptive management can constitute non-compliance with plan requirements.
<b>6.4. What are the necessary elements of adaptive management for this program?</b>	Sue Fry USBR	Science peer review for all decisions....what's working, what isn't, how to modify program.
	Richard Roos-Collins	1) Trackable objectives for results of plan implementation, (2) monitoring of actual impacts, (3) triggers for adaptation if actual impacts do not trend towards achievement of objectives, (4) stipulated range of responses for adaptation, and (5) decisionmaking procedures.
<b>6.5. Under what circumstances will modifications of plan measures be permitted or required during implementation?</b> <b>A. Minor modifications?</b>	Sue Fry USBR	Modifications allowed would be based on permit terms and conditions. I believe a Section 10 permit is specific as to what the permit holder can and can't do without additional direction from FWS, NMFS, and DFG.
	Stephanie Coupe DFG	Reasonably foreseeable routine decisions, analyzed within the scope of the environmental document.
<b>B. Major modifications?</b>	Stephanie Coupe DFG	Reasonably foreseeable non-routine decisions, analyzed within the scope of the environmental document.
<b>C. Limits on such modifications?</b>	Stephanie Coupe DFG	Conflicts with goals and objectives of plan. Conflicts with requirements of law. Not analyzed within the scope of the environmental document (otherwise could be equivalent to a reconsultation/significant new information/project change).

Question	Name	Response
<b>6.6. Who will decide, under what procedures, whether such modifications will occur?</b>	Sue Fry USBR	<p>If you mean changes to the permit, that is something that FWS, NMFS, and DFG will have to agree too. Could use staff and the Boards to vet the decisions. Ultimately FWS, NMFS, and DFG have to agree to changes outside of the permit. The Services should be members of the Boards that way they are engaged with decisions early on and throughout the process.</p>
	Stephanie Coupe DFG	<p>If included within the scope of the Project as analyzed (routine foreseeable modifications), Permittees and IEs (if different) and permitting agencies together.</p> <p>Any decisions with respect to non-routine modifications should be made through a process that allows for public input, including local governments and other public agencies, particularly where the decision would benefit from coordination with them or would affect them.</p> <p>Issue for discussion is the role of scientific review in the adaptive management program, such as regular, ongoing and periodic (annual?) scientific review. In addition to an internal science review process by the IE(s), there should be a provision for independent scientific input, similar to (or perhaps the same as) the services provided by Independent Science Board.</p>
	Richard Roos-Collins	<p>IE, and ultimately, permittee, following consultation with OAC per 2.</p>
	Cliff Schulz	<p>The IE will decide, based on input from permitting agencies, advisory group, and monitoring and science programs.</p>

General Comments Name	
Greg Thomas NHI	<p>1) The punch list is not organized around cornerstone issues. It is still an unsorted mixture of governance issues and consultation/coordination mechanisms. I do not believe that consultation and coordination is the main challenge or that these mechanisms constitute governance.</p> <p>2) The keystone issues that should be brought to the fore are more about “how” than “who” or “what”. They are:</p> <p>I. How will the permittees finance and implement the conservation measures and physical solutions of the BDCP, which will be incorporated as terms and conditions in their permits?</p> <p>Answer: This is a decision for the PREs to resolve in the first instance and to resolve ASAP. The Governance WG should request that they do so expeditiously, as much of the rest of the governance structure depends on this decision. For purposes of our further deliberations, we can assume that the PREs will form a JPA (Roger has stated as much). If a JPA, the subsidiary issues are:</p> <p>(a) Will the JPA hold a single permit on behalf of all of the PREs (or at least the state and federal water contractor PREs)? Recommendation: Yes, to avoid the severability issue.</p> <p>(b) Will DWR be a member? Yes, to preserve the option of having DWR issue the revenue bonds if, at the time of issuance, it has a superior bond rating due to the full faith and credit of the State of California. Having DWR in the JPA may also facilitate coordination of delta operations with Oroville operations, although a coordination mechanism could also be set up through contract.</p> <p>(c) Should USBR be a member of the JPA or contract with it for capacity rights in the PC or wheeling services? Recommendation: USBR should not be a voting member, because that would require federal legislation. It should be an ex officio member, however, in the interest of coordination and consultation. Coordinated operations and conveyance would be accomplished through contract. The trick here will be to set up contracts that the USBR can sign under its existing authorities. We need the full engagement of the DoI solicitor’s office on these issues. A delegation of the WG, comprised of lawyers, should be set up to create this interface. I would be glad to serve. I would also nominate Cliff Schultz and someone from the federal contractor side.</p> <p>(d) Role of the NGO’s? Recommendation: Some should be ex officio members of the JPA. The JPA may not need six NGO members.</p> <p>(e) Should there be an advisory committee to the JPA? Recommendation: Yes, but comprised of scientific experts, rather than stakeholders. The issue for the JPA will be how to best comply with the dictates of the conservation agreement, not whether.</p> <p>II. How should the physical habitat improvements be accomplished. There seems to be a consensus that this should be done by a Delta Conservancy, if and when it is formed, under a revocable contract with the JPA, so the permittees can retain power to assure that their permit terms and conditions will be complied with. Process suggestion: Issues like this that have been resolved should be incorporated into a concept paper that will grow as we go forward.</p> <p>How should operation of the PC be governed, assuming that it will be constructed by the JPA? This cornerstone issue did not even make the punch list! Without acceptable resolution of this, the support of the NGOs for the PC is in serious doubt.</p> <p>We need to rethink the structures of the past. The WOMT process has manifestly failed to stabilize either water supply or the ecosystem. Recommendation: the JPA should transfer title to a fraction of the capacity of the PC to an entity that will be set up to operate that capacity for the benefit of the ecosystem. NHI has described that proposed mechanism in a concept paper previously circulated, and will be glad to spell it out at a more operational level of detail, if the WG is ready to give it serious consideration. If not, I suggest that it is incumbent upon the WG members to come forward with other alternatives that are better able to achieve recovery than the WOMT mechanism as it has functioned in the past.</p> <p>III. The part of Adaptive Management that is not routine is creating a mechanism to handle a jeopardy determination under the “no surprises” assurances of the Planning Agreement. Such a determination is likely under the 50 years that a BDCP permit supposed to remain in place.</p>

	<p>This and III are the two biggest issues that will determine success or failure, and should be moved to the top of the agenda.</p> <p>Let me spell this out in more detail: In the event of a jeopardy determination by any of the permitting agencies, there are only 3 options under current structures, all of them untenable:</p> <ul style="list-style-type: none"><li>• Require renegotiation of the HCP/NCCP while the permits are left intact. Result: extinction. Renegotiation would take years. PREs would have no incentive to accelerate this process.</li><li>• Revoke the permits while the HCP/NCCP is renegotiated. Result: loss of water supply for 25 million people and a \$16 billion per year irrigated agriculture industry.</li><li>• Require additional measures, including perhaps a reduction in water exports, to save the species (the Wanger effect). Result: Under Paragraphs 4.5 and 4.6 of the planning agreement, the permitting agencies would have to pay for substitute water supply or pay for the costs of the additional conservation measures. Given their budget realities, they would not be able to make that commitment. Bailout appropriations would take too long and may not eventuate. Once again, this is a pathway to extinction.</li></ul> <p>The BDCP AMT must provide a better alternative. Randall Neudeck and I started talking about that alternative in the last WG session: a biological risk insurance program. Once again, this cornerstone is not on the punch list. It is very complicated and unprecedented. It will take a lot of time and effort to develop this structure. I strongly urge the chairs to move this to an urgent track if we are to have a credible adaptive management program defined by March.</p>
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