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Sent: Monday, July 28, 2014 3:43 PM
To: BDCP.comments@noaa.gov
Cc: Andy Fecko; Dan Kelly; Cheri Sprunck
Subject: PCWA Comments on BDCP Implementing Agreement and Draft EIR/EIS
Attachments: 07-28-2014 Letter Comments on BDCP IA & D EIR-EIS.pdf

Attached please find PCWA Comments on BDCP Implementing Agreement and Draft EIR/EIS. An original is being hand-delivered to Mr. Ryan Wulff, National Marine Fisheries Service this afternoon.

Thank you.



Yolanda De La Cruz | *Legal Secretary*
to Daniel Kelly, Kanwarjit S. Dua, and Aaron A. Ferguson

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HAND DELIVERED

Ryan Wulff
National Marine Fisheries Service
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VIA U.S. MAIL

The Honorable Sally Jewell
Secretary
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

The Honorable John Laird
Secretary
California Natural Resources Agency
1416 Ninth Street, Suite 1311
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Re: Comments on Bay Delta Conservation Plan, Implementing Agreement and Draft EIR/EIS

Dear Mr. Wulff:

Placer County Water Agency (PCWA) appreciates the opportunity to provide comments on the proposed draft Bay Delta Conservation Plan (BDCP or Plan), draft Implementing Agreement (IA) and Draft Environmental Impact Report/Environmental Impact Statement (DEIR/EIS). Below we provide introductory background information related to PCWA and our comments on the BDCP, IA and DEIR/EIS. Because the BDCP states that the Plan and supporting documents are incorporated in the DEIR/EIS, our comments on the BDCP should also be considered comments on the DEIR/EIS.

In addition to the comments outlined in this letter, PCWA has participated in the preparation and submittal of comments as part of the North State Water Alliance (NSWA) and the American

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River Water Agencies (ARWA). Both the NSWA and ARWA have submitted comment letters on the BDCP, IA, and DEIR/EIS; PCWA, as a member of each of those groups, joined in those letters. This comment letter summarizes specific comments already made by NSWA and ARWA on PCWA's behalf and makes other comments in more detail. In addition, PCWA has engaged expert consultants to assist in the review of the BDCP and the DEIR/EIS and is providing copies of technical memoranda prepared by those experts. The analysis and conclusions contained in those technical memoranda are attached hereto and incorporated herein.

I. INTRODUCTION

Established in 1957, PCWA is a public agency encompassing the entire 1,500 square mile boundary of Placer County. Placer County is a large and geographically diverse county encompassing elevations from 100 feet on the Sacramento Valley floor to over 9,000 feet at the crest of the Sierra Nevada near Lake Tahoe, and its water supplies are a mix of surface water and groundwater. In the past decade, Placer County has been one of the fastest growing areas in California--growing approximately 23% in the last decade to more than 360,000 residents.

PCWA is the primary water resource agency in Placer County. It is PCWA's responsibility to secure, develop, manage, and protect water rights in Placer County thereby ensuring an adequate water supply for the county and its residents. PCWA holds extensive surface water entitlements within Placer County from its Middle Fork American River Hydroelectric Project (MFP). PCWA also holds contracts for water delivery from PG&E's Drum Spaulding Hydroelectric Project and the U.S. Bureau of Reclamation's (USBR) Central Valley Project at Folsom Reservoir. PCWA provides retail and wholesale water service to approximately 250,000 people in western Placer County.

PCWA fully appreciates the water supply reliability challenges facing California, which will likely get worse with ongoing changes in Sierra precipitation patterns and rising sea level. This future reality is previewed in the BDCP's modeling where the modeling predicts that in the next 50 years, several Northern California reservoirs would reach "dead pool" in the absence of modifications to project operations and regulatory standards. Climate change will irrevocably alter environmental conditions in the Delta and significantly reduce the reliability of water movement from northern California Central Valley Project (CVP) and State Water Project (SWP) reservoirs, through existing Delta facilities, to central and southern California water customers. In addition to the myriad legal and technical flaws in the BDCP project described below, the project fails to fulfil its fundamental requirement to adequately inform the public and decision makers about the effects of the BDCP and climate change on the entirety of Northern California's water systems.

The BDCP's singular focus on improving export water conveyance through the Delta in a changing climate, while pretending that Delta environmental objectives will remain static and ignoring upstream water supply and environmental impacts, fails to render a comprehensive picture of the Delta and the State's water supply issues. Ultimately the BDCP offers only a

simplistic partial solution, at best, to a complex statewide problem. In addition to attempting to solve water conveyance problems through the Delta, the BDCP must deal with the totality of the climate change issue, which includes effects on upstream water user's water supply reliability, Delta environmental conditions, and export water supply reliability.

The BDCP's failure to deal with the imperative that the State's environmental objectives, regulatory regime, and CVP and SWP operations must adapt to the effects of climate change leaves the reader with no basis from which to evaluate the impact of BDCP facilities. The BDCP is singularly proposed to protect the export community's water supply reliability from the impact of climate change. The BDCP does not even attempt to set forth an appropriate operation plan to ensure fulfillment of CVP and SWP water supply obligations to the North State to avoid a complete economic and environmental collapse. By incorrectly assuming that climate change will not affect the State's Delta environmental objectives and by using the environmental baseline presented in the DEIR/EIS that hides all upstream impacts (water supply and environmental) the BDCP does not allow a meaningful assessment of the potential BDCP impacts. The result is that impacts are either not identified or not sufficiently addressed in the BDCP and its DEIR/EIS.

II. COMMENTS ON THE BDCP and DEIR/EIS

PCWA's comments on the BDCP and DEIR/EIS focus on project impacts in the American River basin. PCWA's additional concerns with the BDCP documents are set forth in the NSWA and ARWA comment letters.

A. The BDCP Operational and Hydrologic Modeling Is Flawed

The modeling conducted for the BDCP and its effects analysis, including modeling associated with Folsom Reservoir and the American River, is deficient in several respects. First, while the BDCP anticipates changes in hydrologic patterns as a result of climate change, the BDCP modeling assumes there would be *no change* to CVP operations to respond to those changes.¹ This unrealistic assumption results in an equally unrealistic conclusion that, in the future, Folsom Reservoir will reach "dead pool" in nearly 10 percent of years. Not only would this have untenable impacts on Folsom Reservoir water users but it would also result in unacceptable impacts to Central Valley steelhead and fall-run Chinook salmon populations in the American River. Of course the CVP would not be operated as assumed. Instead, as evidenced by modification of CVP operations this year in response to the severe drought, CVP operations would most certainly change in response to climate change (see below). With these and other errors, the existing BDCP technical analysis cannot support State and federal agencies' project approvals. The technical analysis needs to be updated and corrected to ensure that the best available, accurate, scientific tools are used to evaluate the BDCP's impacts.

¹ While the problems with climate change extend to the CVP and SWP, PCWA here addresses only the flaws as they relate to the American River Basin. Climate changes issues system wide are addressed in the letter submitted by the NSWA.

Because of the significant fundamental flaws discussed above, developing comprehensive and detailed comments on the BDCP and the DEIR/EIS is difficult at best. The lack of any well-defined operating plan for Folsom Reservoir, inappropriate climate change assumptions, basic errors in hydrologic modeling, errors in future upstream demands, and an effects analysis based on this flawed modeling leaves the public in the position of trying to correct the significant flaws in the document in order to assess the true impacts of the project. The burden of producing a comprehensible DEIR/EIS, Habitat Conservation Plan (HCP) and Natural Communities Conservation Plan (NCCP) and supporting analyses should not fall on the public. Instead, a project proponent is required to provide adequate and comprehensible public draft documents for public comment. Once the significant flaws in the BDCP are addressed and the BDCP is recirculated for public review and comment, the public will be in a better position to understand the true impacts of the BDCP and to provide detailed comments.

1. The Modeling Fails to Accurately Depict Climate Change

The BDCP modeling does not reasonably represent future conditions with climate change because it failed to consider whether the CVP and/or SWP operations would adapt to respond to climate change. (MBK Engineers, *Technical Comments on the Bay-Delta Conservation Plan Modeling*, dated July 11, 2014 (MBK Memo), pp. 11-12) The MBK Memo, attached hereto as Exhibit A, notes the CVP and SWP already are implementing various adaptations to their operations to deal with the current and previous droughts. (MBK Memo, pp. 11-12) All of these adaptations, which include updating flood control releases to reflect a changing climate, mandatory conservation, and modifying water allocation rules, reasonably can be expected to continue in response to climate change. Each of these adaptations has a significant effect on the outcome of the model results. The failure to include these adaptations in the BDCP modeling undermines the validity of the results and the DEIR/EIS impact determinations on which they are based.

Indeed, the MBK Memo finds that the CalSim II operations depicted in the BDCP modeling “do not represent a reasonably foreseeable future operation of the CVP and SWP.” (MBK Memo, p. 12) The MBK Memo further finds that the “depicted [No Action Alternative] operations are *so fundamentally flawed* that there can be *no confidence even in the comparative results.*” [MBK Memo, p. 12 (emphasis added)]

In addition to the above deficiencies, the BDCP modeling is inappropriate because the model simplistically assumes that climate change would result in changes to inflow into Folsom Reservoir, without recognizing that reservoirs upstream of Folsom Reservoir would respond to climate change and would therefore impact the timing of flows into Folsom Reservoir. (MBK Memo, pp. 8-10) The MFP and other projects with significant storage capacity upstream of Folsom Reservoir will adapt to climate change, which will significantly affect inflow into Folsom Reservoir, beyond that assumed in the BDCP model. (MBK Memo, pp. 8-9) These changes will

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affect American River operations in a number of ways, including flood control operations, water supply, and downstream environmental water requirements. (MBK Memo, p. 10)

Without an appropriate depiction of climate change, it is difficult to ascertain the true impacts of the BDCP on the American River environment. As explained in the ARWA Letter, and as provided in more detail below, incorrect assumptions could result in devastating impacts to American River fisheries, rendering the BDCP, at best, ineffective in achieving any of the goals of the Plan. At worst, the BDCP could exacerbate the plight of some species. Both the BDCP and the DEIR/EIS fail to comply with applicable law because of these defects.

2. The BDCP and BDCP Modeling Fail to Appropriately Account for Upstream Water Demands

In addition to incorrect Folsom Reservoir inflow data, the BDCP and its associated model have underestimated future American River Basin water demands. As explained in the MBK Memo, future demands for PCWA are not correct. (MBK Memo, p. 3) BDCP modeling assumes MFP demands of 64,000 to 81,000 acre-feet per year; PCWA projects its future demands, based on approved general plans of local land use agencies, to be 120,000 acre-feet from the MFP. The error is significant. The modeling also improperly assumes that water demand in the American River Basin will increase rapidly between 2010 and 2025, but will then remain unchanged for the following 35 years. (MBK Memo, p. 3-4) The failure to appropriately account for future upstream demands calls into question the accuracy of the underlying analysis in the BDCP and the DEIR/EIS. Not only does this error have the potential to affect the availability of water for future operations under the various BDCP operational scenarios, it also denies the public of relevant information regarding the environmental impacts of the proposed project and prohibits thoughtful and meaningful consideration of the effects of the BDCP. For this additional reason, the BDCP and DEIR/EIS fail to comply with applicable law.

Inappropriate consideration of future demands is a concern for another reason. Generally, there are two types of circumstances relevant to the Endangered Species Act's (ESA's) "No Surprises" rule: unforeseen circumstances and changed circumstances. Unforeseen circumstances, also called "extraordinary circumstances," are changes over the life of an HCP that were not or could not be anticipated by the applicants, United States Fish and Wildlife Service (USFWS) or National Marine Fisheries Service (NMFS.) Changed circumstances, on the other hand, are not uncommon and can reasonably be anticipated and planned for. [50 CFR § 17.32 (b)(5)]

One such changed circumstance, as it relates to the BDCP, is that water supplies currently being exported by the CVP and SWP will be needed in the counties or areas where the water currently being exported originates. California law expressly recognizes the prior right of communities in those areas to water currently being exported, to the extent that water will be needed to adequately supply the beneficial needs of those originating areas. (Water Code, §§ 10505, 10505.5, 11460, 11463 and 11128; also §§ 12200-12220) That demand for water will

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increase upstream of the Delta with population growth, and thus the likelihood that less water will be available for export is reasonably foreseeable. At a minimum, the BDCP must account for this increased demand as a changed circumstance. Increased demands in the areas of origin have either been omitted entirely or are otherwise underestimated in the BDCP modeling. As explained above, future demands for PCWA are significantly underestimated. The BDCP must accurately describe future demands in the area of origin and disclose the impacts to species of less water being available for BDCP permittees/participants.

3. The Modeling Fails to Include an Operations Plan

CEQA requires that an EIR include a definite description of the project so that the public can understand what the lead agency is proposing. CEQA imposes requirements regarding: (1) the time at which a project is defined; and (2) the breadth of the definition. Because the EIR is intended to inform an agency's decision regarding the project, CEQA requires that an accurate, stable and finite description of the project be established early enough in the planning stages of the project to enable environmental concerns to influence the project's program and design, yet late enough to provide meaningful information for environmental assessment." [*Planning & Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal. App. 4th 210, 234-35 (internal quotations and citations omitted)] The description of the project is coded into the BDCP model. The model thus becomes the "project" for purposes of CEQA review. It is critical, then, that the model and its assumptions accurately and consistently reflect the proposed operation of the project. The MBK Memo explains that a "detailed operating plan of existing facilities and the proposed facility is essential to create an accurate model of how a proposed action will affect existing water operations." (MBK Memo, p. 2)

The MBK Memo finds, however, that the modeling contains many flaws and recommends that more realistic operating rules be developed to account for hydrologic conditions expected over the next half century. (MBK Memo, p. 13) As explained in greater detail in the NSWA Letter, the BDCP Model contains erroneous assumptions, errors, and outdated tools, which result in impractical or unrealistic CVP operations. These unrealistic operations, in turn, do not accurately depict the effects of the BDCP. Coding errors and operating assumptions are inconsistent with the actual purposes of the CVP, which limits the utility and accuracy of the BDCP modeling results. (MBK Memo, p. 2) The critical failings of the modeling undermine the accuracy and adequacy of the project description, rendering the DEIR/EIS inadequate under CEQA. Moreover, because the CalSim II modeling is the basis for all of the other effects analysis, these errors propagate throughout the entire document. As the MBK Report states, "[a]ny errors and inconsistencies identified in the underlying CalSim II model are therefore present in subsequent models that estimate impacts on water quality, hydrodynamics, hydropower, and other parameters and adversely affect the results of analyses based on those subsequent models." (MBK Memo, p. 2)

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B. The BDCP and DEIR/EIS Do Not Adequately Describe How the BDCP Would Affect CVP Operations

The BDCP's fundamental purpose is to provide the BDCP proponents with 50 years of coverage, or "regulatory assurances," under the ESA and the Natural Community Conservation Planning Act (NCCPA.) The BDCP proponent CVP/SWP contractors are only a subset of the entire CVP/SWP project water service contractors. The BDCP explains that the Department of Water Resources and BDCP proponent contractors' further obligations for maintaining the species covered by the BDCP would be limited under the No Surprises policy and other policies. (BDCP, pp. 6-28 - 6-30, 6-45 - 6-46) The BDCP, however, acknowledges that USBR – and, implicitly through USBR, the CVP contractors who are not BDCP proponents – cannot receive that level of regulatory certainty because USBR's operation of the CVP generally would be subject to possible consultation under ESA section 7(a)(2). (BDCP, pp. 7-9 to 7-10) The BDCP and DEIR/EIS are inadequate because they do not adequately explain how actions under the BDCP could be disentangled from USBR's operation of the CVP. They also do not adequately explain the potential effects on other CVP contractors, other water users, and the environment of implementing the BDCP with the BDCP proponents' having limited responsibilities for the relevant listed species.

The DEIR/EIS describes USBR's action as follows:

"Reclamation's action in relation to the BDCP would be to adjust CVP operations specific to the Delta to accommodate new conveyance facility operations and/or flow requirements under the BDCP, in coordination with SWP operations."

(DEIR/EIS, pp. 3-1, 3-5, 3-40)

This is not a sufficient project description. How will USBR adjust CVP operations? Affected operations are not limited to the Delta – the effects extend upstream to the American River, including Folsom Reservoir operations. This issue is not adequately addressed in the DEIR/EIS.

The BDCP, however, contains no CVP operations plan that could explain how CVP "operations specific to the Delta" could be segregated from other CVP operations so that each set of operations would bear only its appropriate level of responsibility for listed species during BDCP's 50-year term. USBR generally operates the CVP as a coordinated system. For many years, USBR's operation of the CVP has been the subject of ESA biological opinions covering all project operations. The BDCP acknowledges, for example, that in relation to the H4/high outflow alternative, SWP operations may trigger obligations under the Coordinated Operating Agreement (COA) under which the CVP would need to contribute resources as part of "subsequent accounting" due to the SWP's operation to contribute water from Oroville Reservoir to meet the H4 Delta-flow requirements. (BDCP, p. 3.4-19)

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The BDCP creates a significant risk to water users who are not BDCP proponents that their water uses will be affected by events that would be within what the BDCP defines as “unforeseen circumstances.” (See BDCP, pp. 6-45 to 6-46) Under the Plan, BDCP proponents presumably would be immune from most consequences of such circumstances’ occurrence, but the BDCP does not explain how those assurances could affect other water users, and especially CVP contractors who are not BDCP proponents. If the BDCP had contained an operations plan demonstrating how USBR would operate in conjunction with BDCP to address the needs of those non-BDCP CVP contractors, then it might have been possible for the DEIR/EIS to explain how granting BDCP proponents’ desired assurances might affect those other water users. No such operations plan exists. Instead, as discussed elsewhere in these comments, and in the ARWA Letter, the BDCP’s hydrologic modeling assumes that, in the case of climate change, Reclamation generally would operate upstream reservoirs so that they would go dry in 10% of years, which would cut off supplies to many non-BDCP CVP contractors and other legal users of water.

Without a well-described operations plan for at least the CVP that explains how BDCP’s terms – especially, the regulatory assurances its proponents would receive – would be integrated with CVP operations outside the scope of the Plan, the BDCP and DEIR/EIS lack evidence necessary to support the findings under the ESA and NCCPA or adequate environmental analysis under NEPA and CEQA.

C. BDCP Would Have an Adverse Impact on American River Fisheries

The NSWA Letter outlined significant concerns with the BDCP’s effects on Sacramento River Basin anadromous salmonids generally. In addition to those significant concerns, the BDCP will likely have devastating impacts on American River fisheries. [Cardno ENTRIX, *Technical Memo, Effects of Bay Delta Conservation Plan on Central Valley Steelhead and Fall-run Chinook Salmon in the Lower American River*, dated July 2014 (Cardno Memo).] The Cardno Memo is attached hereto as Exhibit B.

Cardno has reviewed information contained in the BDCP and the DEIR/EIS to analyze impacts to American River fisheries – specifically on Central Valley (CV) steelhead and fall-run Chinook salmon. Cardno has concluded that the DEIR/EIS’s effects analysis “is fundamentally flawed and fails to disclose significant adverse impacts on CV steelhead and fall-run Chinook salmon and their habitat in the LAR.” (Cardno Memo, p. 1) By failing to disclose the BDCP’s significant impacts, the DEIR/EIS does not comply with NEPA and CEQA.

Water temperatures in the lower American River (LAR) already exceed threshold tolerances for anadromous fish during critical life stages. (Cardno Memo, pp. 2-3) As explained by Cardno, the No Action Alternative (NAA) contained in the BDCP and DEIR/EIS

“...is a radical departure from existing habitat conditions and has large, significant, unmitigated impacts on anadromous fish in the LAR compared to

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existing conditions. The NAA would likely cause age class failures in drier years and eventual local extinction of the small natural rearing CV steelhead population in the LAR. The NAA would result in large scale fall-run Chinook salmon fish kills in the fall of the drier years.” (Cardno Memo, p. 6)

When comparing future existing conditions (NAA) to the proposed project, the DEIR/EIS applies a significance criterion of a < 5% increase in mean monthly water temperatures. As Cardno explains, a <5% increase in mean monthly water temperature in the summer months (July-September) during CV steelhead rearing and/or in the fall during fall-run Chinook salmon spawning (primarily in November) would result in significant adverse impacts to these species. (Cardno Memo, p. 8) Regarding fall-run Chinook salmon, Cardno explains that “a <5% temperature change in the existing spawning temperature at 60°F results in an increase of approximately 3.0°F, which would result in temperatures of approximately 63.0°F, well above the spawning threshold and mortality water temperature threshold for incubating eggs.” (Cardno Memo, p. 8)

So, and as Cardno explains, “although the temperature significance criteria were not exceeded in the BDCP EIS/EIR analysis, water temperatures under the No Action Alternative (NAA) and Proposed Action Alternative are above the threshold criteria for CV steelhead and Chinook salmon survival, particularly in the drier years (>74°F in late summer months), and greatly exceed existing conditions. (Cardno Memo, p. 8)

The flaws contained in the BDCP and DEIR/EIS’s analysis on these issues relates directly to one of the fundamental flaws with the models underlying BDCP itself – that the NAA, or the environmental baseline, is not a realistic depiction of the environment that would actually exist without the proposed project. The BDCP itself recognizes as much. (Cardno Memo, p. 9)

In any event, even modest temperature changes in the LAR that result from the proposed BDCP project could have devastating impacts on Central Valley steelhead and fall-run Chinook salmon, impacts that are not adequately disclosed or mitigated in the DEIR/EIS.

D. The Assurances Sought by the BDCP Violate California’s No Injury Rule and Contravene the Priority of Water Rights

The BDCP describes the “assurances” the permittees will enjoy as a result of its implementation. The BDCP explains that the assurances provide “durability and reliability” to agreements reached with various agencies as part of the Plan’s implementation. (BDCP, p. 6-28) Generally speaking, “assurances” provided to a permittee are *guarantees* of sorts that, if a permittee lives up to its end of the bargain in implementing an HCP, it will not be required to undertake any additional measures for the benefit of the species covered by the HCP.

The BDCP casts these assurances in an interesting way. The BDCP suggests that, if the terms and conditions of the BDCP are being met, the federal government

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“will not require additional conservation or mitigation measures, including land, water (including quantity and timing of delivery), money, or restrictions on the use of those resources.” (BDCP, p. 6-28)

The BDCP recognizes that these “assurances” will not and cannot apply to USBR, so it is only DWR that will receive the assurance that it will not be required to commit any additional (water) resources for the benefit of species covered by the BDCP. However, the assurances that the BDCP seeks to attain contravene California water law, violating the “no injury” rule and disregarding the rule of priority of water rights. (Water Code, § 1701.2) The no injury rule extends to those receiving water under contract. (*State Water Resources Control Board Cases* (2006) 136 Cal. App. 4th 674.)

There are many reasons why the BDCP, as described in the draft documents, cannot satisfy Water Code section 1702’s “no injury” requirement. If DWR is correct in the BDCP that constructing CM1 relieves it of any further obligation to forego any storage or diversion of water for species covered by the Plan, then any additional water required would have to be provided by other water right holders. As species may continue to decline in the foreseeable future, granting the water-right changes necessary to implement the BDCP, with the assurances that the Plan contemplates, could injure other legal users of water and could require other water users to forego diversions for the benefit of DWR’s and USBR’s diversions of water to BDCP proponents. In addition, as discussed elsewhere in these comments, the CVP/SWP operations incorporated in the No Action Alternative, as well as the “proposed project” Alternative 4, would involve drawing upstream reservoirs down to their dead pools in 10% of years and creating conditions that would prevent other water users from obtaining supplies to which they are entitled under contract rights and water rights.

The BDCP also would fail to meet Water Code section 1702’s “no injury” requirement because of its uncertain impacts on the CVP. As discussed in greater detail in the NSWA Letter, while the BDCP states that releases from Oroville Reservoir would be used to meet Delta outflow requirements associated with Alternative 4, BDCP does not even attempt to determine how those Oroville releases would affect CVP operations under the COA. Without an adequate analysis of *who* will be required to provide water needed for various species, it is impossible to ensure no injury to other legal users of water.

The BDCP statement that DWR, a relatively junior water right holder, will not be required to forego any additional diversions to support environmental needs is contrary to California law. (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal. 4th 1224, 1250; *El Dorado Irrigation District v. State Water Resources Control Board* (2006) 142 Cal. App. 4th 937, 943) In addition to this basic principal, the so-called area-of-origin statutes² mandate that water use within the area of origin – in this case Northern California – not be reduced due to the export of water for

² The area-of-origin statutes include Water Code sections 10500 et seq. and 11460 et seq.

