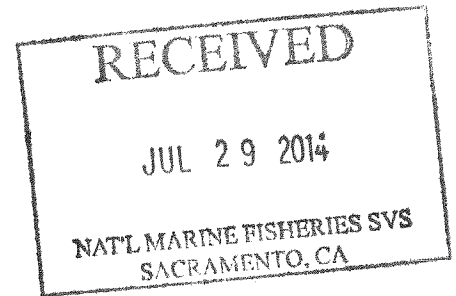




## San Diego County Water Authority

4677 Overland Avenue • San Diego, California 92123-1233  
(858) 522-6600 FAX (858) 522-6568 www.sdcwa.org

July 28, 2014



Mr. Ryan Wulff  
National Marine Fisheries Service  
650 Capitol Mall, Suite 5-100  
Sacramento, California 95814  
ATTN: BDCP Comments

#### MEMBER AGENCIES

Carlsbad  
Municipal Water District

City of Del Mar

City of Escondido

City of National City

City of Oceanside

City of Poway

City of San Diego

Fallbrook  
Public Utility District

Helix Water District

Lakeside Water District

Olivenhain  
Municipal Water District

Otay Water District

Padre Dam  
Municipal Water District

Camp Pendleton  
Marine Corps Base

Rainbow  
Municipal Water District

Ramona  
Municipal Water District

Rincon del Diablo  
Municipal Water District

San Dieguito Water District

Santa Fe Irrigation District

South Bay Irrigation District

Vallecitos Water District

Valley Center  
Municipal Water District

Vista Irrigation District

Yuima  
Municipal Water District

#### OTHER REPRESENTATIVE

County of San Diego

Re: Draft Environmental Impact Report/Environmental Impact Statement for the Proposed Bay Delta Conservation Plan, Alameda, Contra Costa, Sacramento, Solano and Yolo Counties, California – Additional Comments on Draft Implementing Agreement

Dear Mr. Wulff:

The San Diego County Water Authority (Water Authority) is submitting the following additional comments on the joint Draft Environmental Impact Report (EIR) Draft Environmental Impact Statement (EIS) prepared by the U.S Department of Interior, Bureau of Reclamation (Reclamation), and U.S. Department of Interior, Fish and Wildlife Service (USFWS); the U.S Department of Commerce, National Oceanographic and Atmospheric Administration, National Marine Fisheries Service (NMFS); and the California Department of Water Resources (DWR) for the proposed Bay Delta Conservation Plan (BDCP).

While these comments are directed to the Draft Implementing Agreement (IA) dated May 30, 2014, the inter-related nature of the Implementing Agreement, the BDCP and the Draft EIR/EIS make these comments equally applicable to all three documents. Therefore, this letter should be considered a supplement to the previous Water Authority letter dated May 30, 2014.

#### GENERAL COMMENTS

1. While the extension of the review period to accommodate release of the Draft Implementing Agreement is appropriate and appreciated, the Water Authority believes there is a substantial lack of specificity regarding the financial commitments required to approve the BDCP and issue any necessary incidental take permits. The IA provides no additional clarity on how these legally binding funding commitments are expected to be made and the timeline by which they are expected to be executed. We believe the IA should address whether existing water contracts will contain such language, or whether some other type of

- funding agreement (that includes back-stop and assurances for long-term financial commitments) will be developed and executed by the BDCP participants. The Final IA should specify how firm funding commitments with all participants will be assured.
2. The commitment of individual State Water Project (SWP) or Central Valley Water (CVP) contractors to participate in the BDCP has not been determined, and it is possible that some contractors will decline. The Final IA should specify the criteria to be used by DWR and Reclamation in determining how to coordinate and allocate water between the SWP and CVP, and among the BDCP participants and non-participants.
  3. The Draft IA specifically notes that neither the state nor federal government can commit to providing funds in the amounts expected or within the established BDCP implementation schedule. Yet, state and federal funding contributions remain crucial to overall BDCP success. Without such commitments, it remains unclear how the funds required to fully implement the BDCP will be obtained. The Final IA should explain the process that will be followed to make up for any sporadic or prolonged shortfall in BDCP funding by the state or federal governments.

#### DETAILED COMMENTS

1. Page vi: The Table of Contents lists the exhibits attached to the BDCP Draft IA.

*Comment:* None of the listed exhibits were attached to the public review draft. The exhibits form an integral part of the commitments and assurances made by the participants. Please attach the completed exhibits to the Final IA.

2. Page 1, Section 1: Lists the parties to the IA, but does not list the individual State Water Contractor or Central Valley Project contractor agencies that would be signatories.

*Comment:* It is not possible to determine BDCP financial impacts or overall viability without the full list of participating agencies. The Final IA and Final BDCP should list the individual contractor agencies that have financially committed to, and their level of financial participation in the BDCP.

3. Page 2, Section 2.1.6: States that “Reclamation is not a permit applicant... under the ESA or NCCPA”.

*Comment:* This position is further reinforced by the statement on page 1, section 1 that Reclamation has “no obligations” established in the IA. It is

unclear how an agency can participate in the BDCP, yet not be bound by implementation commitments established in the IA. This would seem to suggest that Reclamation can act independent of implementation actions taken by BDCP participants. The Final IA needs additional clarification describing Reclamation's commitments to conform to the terms of the BDCP while not being a signatory to the IA.

4. Page 3, Section 2.1.8: States that "...the BDCP...provides an allocation of responsibility among the Parties for BDCP requirements.....".

*Comment:* The term "Parties," especially as it relates to individual SWP or CVP contractors, is not specifically defined. Does it mean the signatories to the IA, or is there some broader list of agencies that will participate in BDCP implementation without signing the IA? This term should be defined in the Final IA, and include the list of agencies that have committed to sign the IA. Additionally, the "allocation of responsibility" presumably includes funding obligations. To date, no state or federal water contractor has formally committed, in writing, to fund any aspect of the BDCP. As such, the structure of financing the underlying credit for long term debts, and the sources of funds for day-to-day operations are not defined. Without such legally binding commitments, it is unclear how the BDCP can be approved and long-term endangered species act permits can be issued.

5. Page 3, Section 2.1.10: States that "DWR and the participating SWP/CVP Contractors have submitted the BDCP....".

*Comment:* This indicates that individual SWP/CVP contractors have executed and submitted the appropriate permit applications to the federal and state wildlife agencies on behalf of their respective agencies. If so, the individual SWP/CVP agencies that are requesting HCP/NCCP permits should be listed in the Final IA.

6. Page 5, Section 3.1: Describes the membership and roles of the Adaptive Management Team (AMT), including voting members.

*Comment:* It is unclear exactly what the AMT will "vote" on or if the "vote" is expected to be binding on the IA signatories. Implementation of the BDCP is the sole responsibility of those entities receiving incidental take authorizations through the ESA and NCCPA permit process (i.e., an expanded Authorized Entity Group consisting of all permit holders). It is one thing to have the AMT vote to submit a proposed management change to the Authorized Entity Group (the permittees) for consideration. It is quite another if the AMT can unilaterally impose management changes without the consent of the permit holders. The

Final IA and Final BDCP should clarify that the AMT acts strictly in an advisory capacity to the permit holders.

7. Page 7, Section 3.18: States that: “Coordinated Operation Agreement means the agreement... for the coordinated operation of the Central Valley Project and the State Water Project dated November 24, 1986.”

*Comment:* Given that both the SWP and CVP operations will be modified under the BDCP, the Final IA should describe how operations under the BDCP will be coordinated between the two projects and how the Coordinated Operation Agreement will be modified as a result.

8. Page 9, Section 3.46: States that “Permittees means DWR and SWP/CVP Contractors”.

*Comment:* Since the permit applications have been submitted to the wildlife agencies (see Section 2.1.10 above), the individual contractor agencies that have requested incidental take authorization should be listed in the Final IA.

9. Page 10, Section 3.55: States that “Supporting entity...performs task at the request of the Program Manager...”.

*Comment:* Since a supporting entity will not be a BDCP permit holder, implementation of BDCP actions will need to be authorized by a permit holder. Yet, the Program Manager is not a signatory to the IA and is not a permit holder. The Final IA will need to explain how the non-permitted Program Manager can authorize permit coverage for another non-permitted entity.

10. Page 10, Section 3.56: States that “SWP/CVP Contractors means the individual water agencies that hold water delivery contracts... and that have executed this Agreement.”

*Comment:* The listed definition of “SWP/CVP Contractors” also includes joint exercise of power agencies that execute the IA. However, it is unclear how a joint exercise of power agency can be granted a permit unless it has also submitted a permit application and committed to fund, on behalf of all its member agencies, BDCP implementation. In this case, the member agencies of the joint exercise of powers agency will need to have developed and executed a legally binding cost-sharing agreement to ensure adequate funding as required by the ESA and NCCPA permit processes. The Final IA should clarify if any joint exercise of power agency has formally committed to fund and participate in BDCP implementation and include a copy of the actual funding agreement.

11. Page 15, Section 7.1: States that "... Authorized Entities will fulfill all of their respective obligations..."

"• Participating in the Authorized Entity Group...."

*Comment:* As noted in our May 30 comment letter, because permit holders are funding BDCP implementation and are responsible for ultimate success, the Authorized Entity Group should consist of all permit holders, not just the limited subset currently defined in the Draft BDCP and Draft IA. The Final BDCP and Final IA should be revised to state that the AEG includes all individual permit holders.

"• Conferring with the... Permit Oversight Group... and obtaining approval ...where required."

*Comment:* As noted in our May 30 comment letter, the POG should not have any unilateral BDCP implementation decision authority. Implementation is rightfully the sole obligation of the BDCP permit holders. The POG role is limited to ensuring compliance with the BDCP and permits, and providing implementation advice to the Authorized Entity Group. The Final IA and Final BDCP should be revised to reflect this more appropriate compliance oversight role for the POG.

12. Page 17, Section 8.1.1: States that "... take authorizations will cover the Permittees, including all of their respective officers, directors, employees, agents, subsidiaries, member agencies, contractors, and the Supporting Entities ....who engage in any Covered Activity. All contracts... will require compliance with the Permits...".

*Comment:* While this addresses permit compliance for contractual relationships, it is silent on other relationships. For example, what sort of written documentation, if any, is required for an agent, subsidiary, member agency, or Supporting Entity to claim permit coverage? The Final IA should clarify that to obtain take authorization coverage through an existing permit holder, an entity must have a legally binding agreement stating that the entity is acting directly for, and on behalf of the permittee.

13. Page 18, Section 8.2: States that "An Other Authorized Entity will receive take authorization... after executing a Certificate of Inclusion that meets minimum requirements... set forth in Exhibit C... to ensure compliance with... Plan and Permits."

*Comment:* Exhibit C was not attached to the Draft IA, so it is not possible to comment on the specifics contained in the “Certificate of Inclusion” or its applicability to covered activities contemplated by non-SWP/CVP contractors. In particular, it is not clear if the Certificate of Inclusion is the only mechanism available to non-SWP/CVP contractors to allow the use of SWP or CVP facilities for water transfers. The Final IA needs to address the process for non-SWP/CVP contractors to implement water transfers; specifically from willing sellers north of the Delta to willing buyers south of the Delta.

14. Page 20, Section 8.9: The third paragraph duplicates text in the first two paragraphs.

*Comment:* The Final IA should be revised to delete redundant text.

15. Page 21, Section 9.1: States that “Covered Activities and Associated Federal Actions encompass all actions that are proposed for coverage under Take Authorizations to be issued by the Fish and Wildlife agencies on the basis of the BDCP.”

*Comment:* It is unclear, since Reclamation is not a signatory to the IA, how a federal agency can, or even needs to obtain state take authorizations under the NCCPA. It is typical for federal agencies to obtain take coverage for their actions through a federal ESA Section 7 process; for the BDCP, this has been described as the Integrated Biological Opinion. The BDCP permits to be issued pursuant to the IA will provide take authorizations to non-federal agencies pursuant to ESA Section 10 and NCCPA Section 2835. The Final IA should explain how Reclamation will obtain state and federal ESA coverage through issuance of the BDCP permits when that agency is not signatory to the IA.

16. Page 22, Section 9.5: States that “... If CDFW determines....”

*Comment:* The entire section should be revised to replace all occurrences of “CDFW” with “the fish and wildlife agencies”, and the remaining text modified accordingly. The current text is specific to the CDFW process, with no mention of a parallel process for the federal wildlife agencies. This text change is suggested to make it clear that both the state and federal wildlife agencies are included in the conference process. Alternately, a new IA section that mimics this wording, but focuses specifically on the federal agencies (USFWS and NMFS) should be added.

17. Page 25, Section 10.2.1.1: States that “... the applicants propose a project with operational and flow criteria intended to achieve the biological goals and

objectives...”. It further states that “It is expected that the USFWS, CDFW, and NMFS will issue Permits for...the high outflow scenario...”.

*Comment:* While the range of outflow criteria proposed by the BDCP are intended to achieve the biological goals and objectives for the smelt, there is no certainty that those goals will be achieved, even with the proposed “decision tree” process. Page 23, Section 10.1 states that “failure to achieve biological goals and/or objectives shall not be a basis for a determination ... of non-compliance with the Plan or for the suspension or revocation of Permits...”. The Final IA should specifically state that the high spring and fall outflow scenarios as described in the BDCP are the maximum and will not be increased even if biological goals and objectives are not met.

18. Page 26, Section 10.2.1.2 (3): States that “Completion and peer review...will be administered by the Implementation Office under the direction of the Adaptive Management Team.”

*Comment:* The Implementation Office is the focal point for BDCP implementation. All implementation decisions need to be distributed from this single office. None of the support groups, whether it be the Permit Oversight Group or Adaptive Management Team, can have independent decision making authority for implementation or the BDCP is no longer that same one submitted by the permit applicants. For this reason, the following text should be revised as shown:

“This step will be administered by the Implementation Office in coordination with ~~under the direction of~~ the Adaptive Management Team”.

19. Page 26, Section 10.2.1.2(4): States that “... the Implementation Office will provide the report... to the Authorized Entity Group and the Permit Oversight Group for decision pursuant to....”).

*Comment:* Once Permits are issued, the Permit holders are legally responsible for BDCP implementation. Consequently, this group retains sole decision making authority for all aspects of implementation. The POG should have no independent decision making authority when it comes to BDCP implementation. The role of the permitting agencies is to ensure compliance with the terms of the BDCP and Permits, and to provide advice and guidance to the Permit holders on implementation issues. The decision making role of the POG is a repeating theme throughout the Draft IA and Draft BDCP. The Final IA and Final BDCP should be changed to reflect a more limited Permit oversight and compliance role for the POG.

20. Page 26, Section 10.2.1.4: States that “The outflow criteria applicable to CM1 may be within the range of outflow criteria analyzed in the decision tree...”

*Comment:* The BDCP was developed by the Permit applicants with a very specific range of proposed outflow criteria. No outflow should exceed the maximum contemplated in the BDCP. For this reason, the following text should be revised as shown:

“The outflow criteria applicable to CM1 will ~~may~~ be within the range of outflow criteria...”

21. Page 26, Section 10.2.1.5: States that “...changes to the outflow requirements of CM1 associated with these other fish species...”

*Comment:* This provision infers that the maximum outflows contemplated in the BDCP can be increased beyond those in the “decision tree” to encompass other fish species. As already noted in Section 10.1, “failure to achieve biological goals and/or objectives shall not be a basis for a determination ... of non-compliance with the Plan or for the suspension or revocation of Permits...” It is important that the outflows not exceed the amounts proposed in the BDCP, even if all biological goals are not achieved. The Final IA and Final BDCP should state that alternate management methods will need to be considered if flows beyond those in the BDCP are suggested.

22. Page 27, Section 10.2.2.1: States that “The primary BDCP agencies (CDFW, USFWS, NMFS, DWR, and Reclamation will collaborate in making real time operational adjustments.”

*Comment:* This approach excludes the permit holders from any decision making regarding implementation of this aspect of the BDCP. If Permit holders are excluded, then additional language needs to be added to the Final BDCP and Final IA that relieves the Permit holders of responsibility for any adverse effects on BDCP implementation that result from decisions in which they have been excluded from making.

23. Page 27, Section 10.2.2.2.1: States that “The RTO Team will also include one representative of the SWP contractors and one representative of the CVP contractors, who will serve as non-voting members.”

*Comment:* This organizational structure precludes the SWP and CVP contractors from meaningful involvement in deciding how the BDCP will be implemented. Yet, Permit holders are solely responsible for BDCP implementation success. As noted above, if Permit holders are excluded from



the decision making process, then additional language needs to be added to the Final BDCP and Final IA that relieves the Permit holders of any responsibility for any adverse effects on BDCP implementation that result from decisions in which they have been excluded from making.

24. Page 27, Section 10.2.2.2.2: Describes the functions of the RTO Team.

*Comment:* The RTO Team was not fully described in the Draft BDCP (as noted in the preamble to Section 3.4.1.4.5). Consequently, the applicability of state and federal open meeting laws that pertain to this Team have not been described. The Final BDCP should describe this Team in greater detail and reflect that it is bound by the same open meeting laws as all other groups that are assisting in BDCP implementation. It should also clarify how the 1986 Coordinated Operation Agreement will be modified as a result of RTO decisions.

25. Page 28, Section 10.2.2.2.3: States that “The RTO Team shall operate by consensus...”.

*Comment:* This is in conflict with Section 10.2.2.2.1 which lists SWP and CVP contractors as non-voting members. It is not clear if SWP/CVP contractor representatives on the RTO Team will be part of the consensus process or not. The Final IA needs to be revised to reflect that SWP and CVP contractors that are part of the RTO Team have the same roles and rights as other team members. It should also describe the process to follow if consensus could not be reached by the RTO members.

26. Page 29, Section 10.3.2.1: States that “The Adaptive Management Team....shall have authority to make decisions...”.

*Comment:* As noted repeatedly, the Permit holders (represented by an expanded Authorized Entity Group that includes all permit holders), are solely and legally responsible for the successful implementation of the BDCP and compliance with issued permits. Having the Adaptive Management Team function autonomously from the entities legally responsible for BDCP implementation is inappropriate and could undermine overall program success. The Adaptive Management Team should only provide implementation recommendations to the Authorized Entity Group (i.e. permit holders) for decision, and should not be authorized to make any decisions unilaterally. The Final BDCP and Final IA should be revised to reflect this supporting role.

27. Page 30, Section 10.3.2.3: States that “On a periodic basis, the Adaptive Management Team shall open its meetings to the Public.”

*Comment:* To maximize transparency and provide the greatest public involvement, all meetings of the Adaptive Management Team should be open to the public and follow all state and federal open meeting laws. The Final IA should be revised to reflect that all meetings will be open to the public.

28. Page 32, Section 10.3.5.1.1: States that "...decisions of the Adaptive Management Team shall not be subject to review and consideration of the Authorized Entity Group and Permit Oversight Group...".

*Comment:* See above comment 26. All decisions that can affect BDCP implementation must to be made by those entities legally responsible for BDCP implementation and compliance with permits. No other group should be making unilateral decisions that affect the BDCP or the permits. Every group or team formed to assist in BDCP implementation, whether the Permit Oversight Group, Adaptive Management Team, RTO Team or any other body, are all supporting the permit holders in implementing the BDCP. The Final BDCP and Final IA should be revised to reflect that all BDCP implementation and permit compliance decisions must be made by the permit holders.

29. Page 33, Section 10.3.5.1.1: States that "... if the Authorized Entity Group and the Permit Oversight Group are unable to reach agreement, the Permit Oversight Group will decide the matter."

*Comment:* See above comments 26 and 28. The Permit Oversight Group should only be responsible for ensuring compliance with the permits. If the Authorized Entity Group (permit holders) takes an action that the permit issuing agencies believe violates permit terms and conditions, the IA contains specific permit suspension and revocation procedures to force compliance. Only the permit holders can, and should, make decisions regarding BDCP implementation; they are the ones legally and financially responsible. The Final BDCP and Final IA should be revised throughout to note this more limited role for the Permit Oversight Group.

30. Page 36, Section 10.3.5.1.1: States that "In the event that the Authorized Entity Group and the Permit Oversight Group are unable to reach agreement...the appropriate Fish and Wildlife Agency official with authority over the matter... shall decide...".

*Comment:* See above comments 26, 28, and 29. The Draft BDCP and Draft IA contain multiple and repeated references to groups, teams or individuals other than the permit holders being authorized to make decisions that affect BDCP implementation. This approach is entirely inappropriate. The BDCP is a voluntary plan prepared and submitted by the permit applicants. Therefore, the

