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June 30, 2010

Bay Delta Conservation Plan
Steering Committee
c/o Ms. Karen Scarborough
Deputy Undersecretary
Resources Agency

Re: Comments on Process and March 23, 2010 draft of Chapters 3 and 4

Dear Steering Committee Members:

This firm represents Reclamation District 999 ("District") in the Clarksburg area of the Delta. This letter provides comments on several draft documents and related issues in an effort to make the outcome of the Bay Delta Conservation Plan ("BDCP") a positive one for all stakeholders.

A. Continuing Concerns with BDCP Process for Consideration of Comments from Interested Stakeholders

Over the course of its participation in the BDCP process as an interested stakeholder, the District has developed comments along specific subject areas (such as methylmercury, adaptive management, the "nutrient" issue, etc.) to assist BDCP in developing a scientifically sound and socially feasible Habitat Conservation Plan/Natural Communities Conservation Plan ("HCP/NCCP"). To date, however, there is no indication that any of the issues addressed in the eight letters and white papers submitted to BDCP have even been considered.¹ To address this process problem, we previously requested responses to our comments (letter regarding Disposition of Comments dated November 20, 2009) and again in various Steering Committee meetings. Also disturbing is the lack of acknowledgment and implementation of critically important feedback on the BDCP from the Independent Science Advisors.

We object to the failure of the BDCP to: (1) acknowledge receipt of stakeholder comments by posting them in a timely manner; and (2) respond to stakeholder and

¹ Moreover, out of the eight comments submitted, two have still not even been posted to the BDCP website.

Independent Science Advisor comments. After more than 2 years of engagement and work on the process, the District's and other stakeholders' comments must receive responses, or at a minimum some kind of indication of disposition. While it has been suggested that verbal discussion of issues at the Steering Committee meetings is the preferred approach, the scale and detail associated with proposed actions makes written comments and responses necessary.

Developing a sound approach to disposition of stakeholder comments is critical to the success of the BDCP. Thus far, there has been a seemingly backwards process of determining the project and then "involving" the stakeholders as an afterthought. Landowners and regional water managers should not be treated as an afterthought. (Please see Assembly Water Parks and Wildlife Committee testimony, dated May 11, 2010, attached hereto as Exhibit A.)

Many stakeholders have acted in good faith to identify various flaws in the fundamental assumptions of the BDCP, as have the authors of the various Independent Science Advisor reports. Moving forward as if none of these technical comments existed is a clear failure to understand and acknowledge the requirement of best available science under the Endangered Species Act (16 U.S.C. § 1536(a)(2)) and to consult with local agencies under the National Environmental Policy Act (42 U.S.C., §§ 4331, subd. (a), 4332, subd. (C)(iv)) and the Natural Communities Conservation Planning Act (Fish & Game Code, §§ 2810, 2815). Moreover, the District's technical comments should have been provided to the first meeting of the Independent Science Advisors. Going forward, the District's and other stakeholders' comments must be provided to the Independent Science Advisors whenever they pertain to a subject matter the Advisors are asked to assess if there is any credibility to that process.

B. Specific Comments on Chapters 3 and 4

1. Important Related Actions Fail to Address Major Sources of Pollution in the Delta

In Chapter 3, "Important Related Actions" that have been removed from Chapter 3 are referred to in the introduction, but left in the SAIC Recommended Revisions (dated January 29, 2010). The "Note to Reviewers" refers to "Important Related Actions" including "agricultural pesticide load reduction." This reference is apparently to the goal of reducing contaminant loading from agricultural runoff within the Delta. A broader spectrum of pollution sources, however, should be examined and addressed within the BDCP with specific actions. As just an example of the sources that should be addressed, readily available peer-reviewed data indicates that agricultural pyrethroid pesticide concentrations are much lower (up to two orders of magnitude) than urban sources, and

the San Joaquin drainage pyrethroid toxicity is consistently higher than the Sacramento River.²

The San Joaquin River is already impacted by agricultural runoff from current recipients of primarily CVP water (e.g., the Westlands Water District), which contains significant amounts of selenium, boron, and pesticides.³ The BDCP should include measures to reduce the pollution that impairs the ability of the SWP and CVP to provide the highest quality water to customers and protect the Delta. Additionally, the relationship between continued deliveries of Delta water to drainage-impaired lands that then exacerbate pollution within the Delta should be analyzed and addressed. Instead of tackling these issues so critical to the goal of restoring the Delta ecosystem, however, the BDCP appears to be entirely ignoring the issue of agricultural runoff from the San Joaquin River.

In order to conserve the target aquatic species and improve water quality, pesticide and runoff issues should be addressed comprehensively in the HCP/NCCP. Based on the available information, it is not rational to focus solely on sources of these types of pollution solely within the Delta itself. In particular, conservation measures related to endocrine disruptors, agricultural pesticides and herbicides, and toxic contaminants (OSCM2, OSCM4 and OSCM5) as well as the “Important Related Actions” discussions should be expanded to apply to all major pollution sources.

On a related note, Chapter 4 (Covered Actions) discusses the provision of take coverage for re-diversion of San Joaquin restoration flows by the Bureau of Reclamation (“BOR”) potentially upstream of the Delta. (See Chapter 4, p. 4-29.) Given the recognized pollution problems of the San Joaquin River, it would be inappropriate for BOR to substitute polluted San Joaquin River drainage water with relatively cleaner Sacramento River water. Major new points of diversion on the Sacramento River cannot be justified in order to flee poorer quality water of the San Joaquin River that is in large part being caused by the existing CVP water exports.

² Weston, D. P. and M.J. Lydy. *Environ. Sci. Technol.*, 2010, 44 (5), pp. 1833–1840.

³ In recognition of this pollution problem, a Basin Plan Amendment is being considered that would actually *increase* the allowable levels of selenium in tributaries to the Delta. (See CVRWQCB, Resolution R5-2010-0046 Amending the Water Quality Control Plan for the Sacramento River and San Joaquin River Basins for the Control of Selenium in the Lower San Joaquin River Basin (adopted May 27, 2010).)

2. Specific Concerns with Conservation Actions Affecting Existing Farming Activities in the Delta

a. Farming Practices Assumptions for Seasonally Inundated Floodplains

Unfortunately, the BDCP has a track record (confirmed by the Independent Science Advisors) of not using the existing scientific literature, or using narrowly selected, supporting elements of the science. In Chapter 3, page 3-35, line 20 (3.4.13 CM13 Seasonally Inundated Floodplain Restoration) refers to the action of “where farming is consistent with achieving biological and flood control objectives, engaging in farming practices and crop types that provide high benefits for covered fish species.” Technical clarification on this statement in future drafts of Chapter 3 is requested as follows:

- The scientific basis for the range of farming practices and cover types that the BDCP asserts will or will not provide “high benefits” for covered fish species should be described.
- The scientific basis for the apparent conclusion that active farming, such as the farming in the Yolo Bypass (with its concomitant organic matter), is not a significantly positive benefit to covered fish species and waterfowl should be disclosed.
- According to the literature, the “value” of agricultural habitat benefits to species (such as Swainson’s hawks or White-tailed Kites’ use of vineyards), can be greater than freshwater emergent wetlands and open water habitat.⁴ Chapter 3 must correct the habitat “value” to reflect the literature.⁵ In addition, cropping types and patterns have varied significantly over time, as has our understanding of how species use agricultural matrices. Mandating specific crop types and locations for purchase or easement is not a reasonable approach given this factual background.

⁴ Swolgaard, C.A, K.A. Reeves, and D.A. Bell. 2008. Foraging by Swainson’s hawks in a vineyard-dominated landscape. *J. Raptor Res.* 42(3):188-196. See also Whisson, D. 2001.

⁵ K.A. Reeves and J.A. Smith 2004. Survey of Falcons, Kites, Hawks and Owls in the Lower Mokelumne River Watershed, Sacramento and San Joaquin Counties, California. http://www.ebmud.com/sites/default/files/pdfs/A-10%20Raptor%20Report_0.pdf; see also Warner, J.S. and R.L. Rudd. 1974. Hunting by the white-tailed kite. *Condor* 77:226- 230.

Given that economics drive agriculture, crop types and locations, it would be much more efficient to conduct a scientifically based long-term study to identify the specific crops with the most benefits (including when and in what areal size and geometry) and then to provide direct economic incentives to grow those crops.

- The ability to convey floodwater across a seasonal floodplain has significant restriction in the types, orientation, and densities (and trunk diameter) of vegetation. The Central Valley Flood Board and the USACE have restrictions on this “dual-purpose” floodplain, which can significantly reduce habitat value. (See also Chapter 3, p. 3-35 line 9.) The impact of seasonally inundated wetlands and their associated infrastructure on flood conveyance must be assessed and disclosed.
- Setback levees are discussed in the text (Chapter 3, p. 3-35, line 9) but potential locations are not identified. The location of setback levees has significant geomorphologic and flood management considerations. These levees cannot be located effectively without careful modeling and an understanding of risks and benefits associated with their placement. These levees also place additional burdens on adjacent landowners with the potential introduction of listed species, under-seepage, and design impacts. All of these factors must be considered before making any determination that setback levees should be included in the BDCP.

3. Need for Clarification on Habitat Restoration Creation

Chapter 3 describes acquisition of significant areas of land for habitat creation and restoration. (Chapter 3, pp. 3-32, 3-35, 3-18.) In Steering Committee discussions there has been an emphasis on “willing sellers,” however no such language appears in the text. Can the BDCP provide assurances in this regard to local landowners? If not, the feasibility of garnering the necessary local participation to effectively implement the BDCP will be impaired.

Also, when land is acquired for habitat creation, it is critical that the habitat areas include sufficient buffers to protect existing farming operations from the impacts of the habitat creation, as well as to ensure that farming can continue. Right to farm ordinances typically includes minimum buffers to ensure existing farming operations may continue when changes in land use occur on adjacent properties. (See, e.g. City of Davis Right to Farm Ordinance, § 30-50 (requiring a minimum 150-foot transition area between farming

and the new use).) Planning and funding for habitat creation and restoration must therefore include appropriate transition buffers.

C. Conclusion

Thank you for the opportunity to comment. A response or an inventory of the disposition of the District's comments and questions to date is requested. Doing so would indicate that the BDCP is striving to be a collaborative process that at least attempts to address stakeholder concerns. Such disposition would also document that the BDCP process is consistent with the coordination and consultation requirements applicable to HCPs/NCCPs.

Very truly yours,

SOLURI MESERVE
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By: 

Osha R. Meserve

ORM/mre

Enclosure: Exhibit A – Assembly Water Parks and Wildlife Committee testimony dated May 11, 2010

EXHIBIT A

Assembly Water, Parks and Wildlife Committee
Oversight Hearing on Delta Stewardship Council and Bay Delta Conservation Plan
Progress and Updates
Tuesday May 11, State Capitol, Room 437

Testimony of Osha R. Meserve

On behalf of Reclamation District 999 and Stone Lakes National Wildlife Refuge Association

Introduction

I would like to thank the Chair of the Committee for holding this oversight hearing because the Legislature's oversight is desperately needed in these processes. I have been involved in the Bay Delta Conservation Plan (BDCP) process for over two years, advocating for consideration of local concerns, including those of Reclamation District 999 and Stone Lakes National Wildlife Refuge Association. In this capacity, the BDCP process has been frustrating because local concerns have not been afforded any consideration at times, and even when they are considered, they have not been a priority.

Any major capital project generates concern from those that will be affected by it. For any development project, there is a calculus that occurs with respect to how engaged and responsive to be to the concerned community. Unlike a normal or even large development project, however, BDCP is proposing the largest engineering project in modern California history with massive new intakes and conveyance structures on the Sacramento River, along with up to 110,000 acres of created or restored habitat located in various "opportunity areas" – all within existing fragile habitat and communities. Two of these intakes are proposed to be located just west of the Stone Lakes National Wildlife Refuge shown map I have provided. (Attached hereto.) Working directly with local communities to solve the myriad of challenges and opportunities created by the BDCP is the only equitable way to move forward.

Five Critical Issues that Must Be Resolved for the BDCP to Move Forward Successfully

- 1. Affected Communities Must be Included as Stakeholders**
- 3. The BDCP Must be Supported by Best Available Science**
- 2. The BDCP Must Address All Major Stresses on the Delta Environment**
- 4. The BDCP Must Include Benefits for Local Communities**
- 5. Publicly Funded Elements of the BDCP Must Confer Public Benefits**

Detailed Discussion

- 1. Affected Communities Must be Included as Stakeholders**

Normally, Habitat Conservation Plans (HCPs) are developed by landowners within the project area, among other stakeholders. In this instance, third-parties from outside the region are

proposing to dramatically alter the Delta landscape without regard for existing communities, and without their participation as equals in the process. In short, the local community has been treated as an outsider though the community's support for this project is essential to its success.

Three years into the process, the feedback loop for addressing local concerns, which is critical to the success of the project, has still not been developed. BDCP has focused on getting its messages out to the exclusion of getting messages in from the interested public. This is not for lack of trying on the part of stakeholders to present their concerns in an organized, concise manner. For instance, out of the seven technical comments that have been submitted Reclamation District 999, only three were even posted to the BDCP website. Despite numerous written (November 19, 2009) and other requests for "disposition" of comments from affected stakeholders, there have been no responses to any of these comments, or any other stakeholder that does not sit on the Steering Committee.

Moreover, the process for obtaining the most basic information is nonexistent. For instance, the BDCP has recently focused on developing the details of an all tunnel project. While on-the-ground impacts could be lessened through this alternative, a tunnel entails a larger footprint for the associated facilities. When we learned of the potential siting of two intakes directly west of the Stone Lakes National Wildlife Refuge, we asked for the maps to see where intakes and associated facilities, including the 730-acre forebays, would be located to allow collaboration on the manner in which these facilities are designed. The Stone Lakes National Wildlife Refuge Association was told by BDCP to formally request the maps; later DWR responded that the requested maps would not be made available for almost four months. A collaborative process would not ignore, then stonewall, the local Refuge Association concerned with preserving habitat around an important migratory bird stopover on the Pacific Flyway.

Conflict will always accompany a large project, but successful large projects and HCPs actively involve affected landowners. Many problems can be avoided or lessened by a better understanding of, and making adjustments for, community and landowner concerns. *For a watershed-scale project such as this to succeed in the long-term, Delta landowners and land managers must be treated as stakeholders in the process.*

2. The BDCP Project Must be Supported by Best Available Science

The basic components of the BDCP – massive new conveyance and habitat creation and restoration – were selected in 2007, before it was even possible for the public to access basic information about the process and the project. The BDCP Steering Committee gained its first Delta agency in 2009, the North Delta Water Agency, in 2009. Under the BDCP Planning Agreement, only the Potentially Regulated Entities, such as the Westlands Water District and the Metropolitan Water District, have decisionmaking authority. Neither the public resource agencies, the environmental group representatives or any in-Delta interests have voting authority on the Steering Committee. Thus, key decisions about the BDCP's basic components

(including the decision to maximize the size of conveyance, create/restore up to 110,000 acres of habitat with questionable species benefits according BDCP's own Independent Science Advisory panel and the National Academy of Sciences report, and exclude consideration of water conservation) were all made by the *applicants* for the take authorization, as if this was an average-sized, private development project.

The scientific basis for proposed actions needs to be established, documented, and independently verified and has not been. The BDCP's own Independent Science Advisory panel, Reclamation District 999 and others have repeatedly identified flaws in the science underlying major components of the BDCP, such as reliance on habitat creation to address species needs. These comments have been left completely unanswered. *The Legislature must require the BDCP to respond to and address the questions raised by its own scientific advisors.*

3. The BDCP Must Address All Major Stressors on the Environment

The BDCP purports to be a comprehensive package of actions to address the decline of special status species in the Delta. The BDCP, however, myopically focuses on certain issues of concern while completely ignoring others. For instance the BDCP includes a conservation measure to address pesticide runoff from farming within the Delta, but completely ignores that most of the pollutants have been documented to come from urban runoff or other non-Delta sources of pollutants. In particular, the BDCP has ignored this issue, failing to recognize that water from the projects are part of a serious, existing pollution problem that must be addressed as part of any comprehensive HCP. The San Joaquin River and its tributaries are contaminated with selenium and other salts, herbicides, and pesticides which threaten Delta water quality and listed species. The RWQCB is poised to again extend, not enforce, the deadline for reducing selenium discharges into the Delta from the Projects. Continued exports of Delta water to the San Joaquin Valley without solving the drainage issues will just make the impacts of this contamination from the Projects worse, and it must be resolved.

The BDCP must face up to the part current and future water exports out of the Delta will play when those same waters pollute the Delta. The repercussions of a poorly designed and implemented project will affect all of California, not just a few people. *The Legislature must require the Projects and the BDCP to reduce its load of contaminants to the Delta.*

4. The BDCP Must Include Benefits for Local Communities

Under the current BDCP approach, Delta communities receive only the burdens, and not any of the benefits of the project. If the attempts to improve habitat and listed species populations actually succeed, existing agricultural uses have to have legal protection from ESA take provisions. The project cannot legitimately protect itself from legal jeopardy and provide the community with no legal protections from the take provisions of ESA and CESA.

Moreover, protecting key Delta islands from earthquakes and the consequences of flooding is one of the key arguments that the BDCP advocacy machine uses, yet the BDCP includes only the most minimal efforts to fix these key levees. The main way the BDCP proposes to address seismic and flooding concerns is by adding new diversion points on the Sacramento River even though the pumps in the South Delta will continue to be relied upon by the Projects. Fixing and maintaining key Delta levees has to be a primary, fully funded effort for the BDCP to have any legitimacy. *The Legislature must make this a mandatory provision.*

5. Publicly Funded Elements of the BDCP Must be Confer Public Benefits

The BDCP is being promoted as part of the solution for the serious challenges facing the Delta. Beyond securing a more reliable water supply for the water exporters, the BDCP will allegedly improve conditions for listed species. This is an important goal that Delta communities support. As explained above, however, the scientific basis for the key components of the BDCP is lacking.

Public resources are pouring into the BDCP planning process through the participating agencies at all levels of government, including funding from our limited budgets simply to have participate in the process. The \$11+ billion project that is currently being discussed can only be accomplished with the help of public funds. As the BDCP progresses, the public will continue to pay for the costs of planning for and implementing the BDCP and because of that the public deserves the best possible outcomes.

The exporters and others have repeatedly claimed that the project will be funded on a user pays basis. But federal, state, and other public funds have, and are planned to be, expended in support of the BDCP. Moreover, a considerable portion of the Water Bond (up to \$2.25 billion) is directed at funding the BDCP planning process and paying for the mitigation that will be required to carry out the BDCP. With so much public investment in this project, it is essential that the project actually confer benefits on the public at large by helping to address the challenges of the Delta – not just replumbing it so certain interests can have better quality water and leaving the rest of the state, including the people of the Delta, paying for a project from which they will receive no benefits.

Conclusion

The deep flaws in the BDCP process can *only be fixed by the Legislature*. Additional sideboards need to be placed on this process in order for it to result in anything that will begin to meet both the goals of the water exporting community while also respecting and preserving the communities in which the BDCP is proposed to take place.

The 2009 Water Package could be a positive step forward in addressing statewide water issues and the Delta. The Legislature's work on these issues, however, is not done. To begin to address the concerns listed above, we recommend:

BDCP Specific Proposals

1. The Legislature should exercise approval authority over any new diversion point, associated facilities and conveyance that: (1) has a volume of over 3,000 cubic feet per second, or (2) is located above ground. Besides irreparably altering the Sacramento River and the Delta and permanently disrupting existing human and natural communities, the larger sized facilities being discussed are terribly inefficient with respect to waste of both water and power. Moreover, at the larger size being contemplated, the asset would be stranded much of the time because of limits on pumping for instream flows and to avoid reverse flows. Moreover, above ground facilities will divide existing natural and human communities and cannot be seriously considered. Should BDCP choose to press forward with projects as large as are being discussed, the Legislature must be involved to protect the public interest.
2. The Legislature should specify that the BDCP is required to operate on a willing seller only basis, at the very least for the habitat mitigation, creation and restoration components of the plan. Take of property in the context of an HCP sets a terrible precedent for future conservation and polarizes rural communities that have been doing their part to protect special status species in the Delta.
3. The Legislature should require that the BDCP pay in lieu taxes to the counties when lands for habitat will be acquired and removed from the tax rolls by the BDCP. Counties need to maintain their tax base despite being included within the BDCP planning area.
4. The Legislature should require the BDCP proponents and other stakeholders to report back on how the process for incorporation of stakeholder concerns is being improved in two months. We cannot wait for the BDCP to be finalized, which is planned for Fall 2010, to address this issue. Process issues should have been addressed years ago and it is critical that process be addressed now, before it is entirely too late.

Proposals Regarding the 2009 Water Package

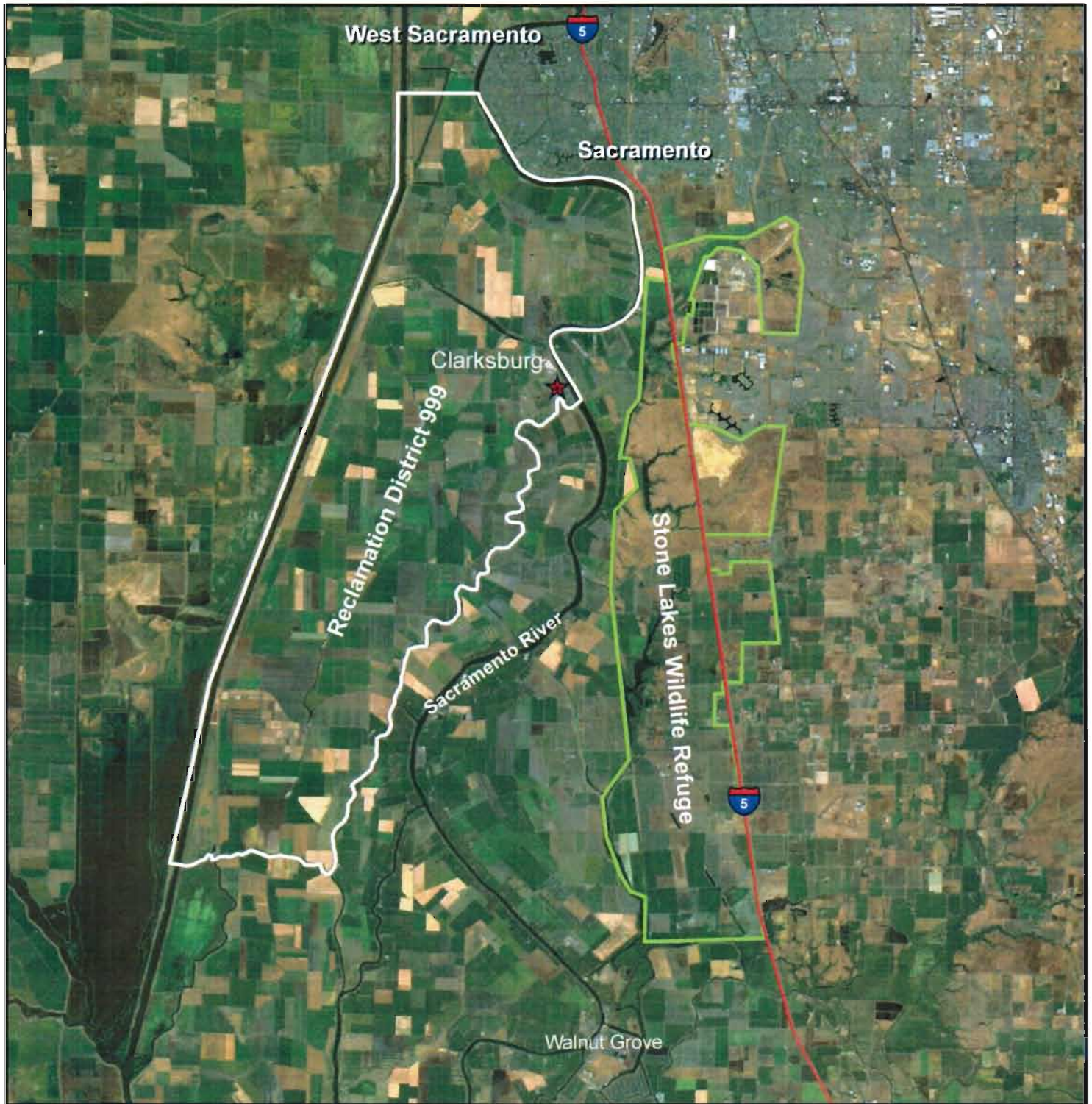
1. The Legislature should add conflict of interest provisions for appointments to the Delta Stewardship Council. The appointment process has already been mired in controversy over incompatible offices, which undermines the Council's credibility and ability to carry out its mission. The lack of such criteria in SB 7x1 was an oversight that should be corrected.
2. The Legislature should freeze appointments to the Water Commission to ensure that the public interest at large is served by the Commission, especially if the Water Bond should pass. The Governor should not be allowed to appoint Commissioners that will make key decisions about the Delta and the expenditure of Water Bond funds as he is leaving office.

By moving forward on these action items, the Legislature will advance the co-equal goals described in the 2009 Water Package and help avoid the certain failure the BDCP appears to be headed toward.

* * *

Thank you for the opportunity to share this information with you today. I would be happy to answer any questions.

Reclamation District 999, Stone Lakes Wildlife Refuge



Aerial Imagery from ESRI 2010

Legend

- Interstate Highway 5
- Approximate Border of Stone Lakes Wildlife Refuge
- Approximate Border of Reclamation District 999

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