The Honorable George Miller  
House of Representatives  
Washington, DC 20515  

Dear Representative Miller:

I am writing in response to your letter of October 24, 2011, regarding the Bay Delta Conservation Plan (BDCP).

Your letter expressed concerns regarding a Memorandum of Agreement (MOA) that describes how the Bureau of Reclamation and the California Department of Water Resources (DWR) intend to work with certain State and Federal water contractors who, along with the DWR, are preparing the BDCP for public input and regulatory review. Your letter suggested that under the MOA, the water contractors may have special influence over the approval process for the BDCP, and you requested that the agreement not go into force pending the receipt of public input on the MOA.

As explained below, we believe that your concerns about the MOA are misplaced. Nonetheless, we understand the importance of moving forward in an open and transparent way and, as a result, we have acted on your request and are confirming that the MOA will remain in abeyance pending the receipt of public comment. A copy of the notice inviting public comment on the MOA and a white paper explaining the substance and intent of several provisions of the MOA are attached for your reference. Both of these documents were posted on the BDCP website on October 27, 2011. The MOA itself was posted on the BDCP website, and has been available to the public, since September 6, 2011.

As explained further in the documents that have been publicly posted and are attached, the MOA defines how the DWR and Reclamation work with the water contractors in the BDCP process. It does not alter any of the fundamental roles, responsibilities, or decision-making authority of the Federal or State agencies related to the BDCP, nor does it affect the legal standards that apply to any permits issued under applicable Federal and State law. The MOA does not limit interactions with other key constituencies invested in the BDCP process. There is a significant outreach effort underway to engage parties who are interested in being involved in the development and review of the BDCP, including Delta interests and environmental NGOs. State and Federal officials are hosting monthly public meetings on the BDCP; technical working groups have been formed on topics of special interest; and we have developed new processes to ensure that independent science is a key part of the BDCP development and review process. We are committed to transparency and accessibility as an essential element of developing a successful BDCP.
Your letter also expressed a specific concern regarding the timeline set out in the MOA. The timeline reflects the schedule developed by State and Federal agencies and was provided in August to the Departments of the Interior and the Departments of Commerce by the California Natural Resources Secretary John Laird. As I wrote in my response to Secretary Laird, the aggressive timeline included in the schedule will be challenging to meet, but it is appropriate in light of the importance of the BDCP and our commitment to move it forward as quickly as possible. I emphasize again here what I wrote at that time, that “[a]pplying sound scientific principles is fundamental to this effort and its importance cannot be overstated.” We intend to meet the schedule in a manner that will not compromise our ability to produce a plan based on scientifically sound and legally defensible analyses.

We take very seriously the concerns regarding restoration of the Bay Delta and its fisheries, the needs of local communities, and the quality of local water resources. These are fundamental issues that are critical to the permitting process and we intend to address them in a transparent and effective process. Stakeholders will have the opportunity to participate as the BDCP process goes forward. We are committed to developing a BDCP that will achieve the dual goals of restoring and enhancing the Bay Delta ecosystem and providing a reliable water supply, and we believe that broad and effective stakeholder participation is essential to achieve these goals. This is an ongoing effort and we will continue to improve the process as warranted.

Thank you for your frank expression of concern and to assure you that we will address your concerns and those of your constituents as the process moves forward. Identical letters are being sent to Representatives Doris O. Matsui, John Garamendi, Mike Thompson, and Jerry McNerney.

Sincerely,

David J. Hayes

Enclosures

cc: Honorable John Laird
    Secretary, Natural Resources Agency

    Honorable Gerald Meral
    Deputy Secretary, Natural Resources Agency
FEDERAL WHITE PAPER ON THE 2011 BAY DELTA CONSERVATION PLAN MOA (“FIRST AMENDMENT TO THE MEMORANDUM OF AGREEMENT REGARDING COLLABORATION ON THE PLANNING, PRELIMINARY DESIGN AND ENVIRONMENTAL COMPLIANCE FOR THE DELTA HABITAT CONSERVATION AND CONVEYANCE PROGRAM IN CONNECTION WITH THE DEVELOPMENT OF THE BAY DELTA CONSERVATION PLAN” (BCDP MOA))

Introduction

Following input from a number of stakeholders with an interest in the Bay Delta who have expressed concerns regarding the BDCP MOA, the U.S. Department of the Interior (Department) sets forth in this paper a summary of its understanding of the background and function of the BDCP MOA. The Department believes that signing the MOA is fully consistent with its legal obligations and responsibilities and that stakeholders’ concerns that the BDCP MOA might hinder compliance with Federal laws, including the National Environmental Policy Act (NEPA) and the Federal Endangered Species Act (ESA), are misplaced. The BDCP MOA does not alter the laws or principles guiding Federal participation in the BDCP process. Moreover, the Department remains committed to an open and inclusive BDCP process that is based on best available science and that involves all stakeholders.

The key agreement establishing the roles and responsibilities of the Federal Lead Agencies and other parties with respect to the BDCP NEPA process is not the BDCP MOA; it is the "Lead Agency Agreement" signed in June 2010 by the BDCP Lead Agencies — the Bureau of Reclamation, U.S. Fish and Wildlife Service (FWS), National Marine Fisheries Service (NMFS), and California Department of Water Resources (DWR) — and the BDCP NEPA/California Environmental Quality Act (CEQA) consultant and incorporated into the BDCP MOA. The Lead Agency Agreement makes clear that Federal Lead Agencies are fully responsible for both the content of the NEPA documents and all decisions related to any potential Federal permits associated with the BDCP that may be issued by those agencies.

The BDCP MOA does not affect or change any of the legal or procedural responsibilities, roles, or actions of the Federal Lead Agencies under NEPA or the ESA. Most particularly, it does not and cannot hinder Reclamation, FWS or NMFS (Federal Lead Agencies) from carrying out their legal obligations under NEPA and the ESA. Rather, the BDCP MOA confirms that the three Federal Lead Agencies “shall independently evaluate” and exercise independent judgment as it relates to the “scope and contents” of the NEPA document that is being prepared in connection with the BDCP.

Developing the BDCP and Collaboration and Coordination under NEPA and CEQA

With respect to the role of several State and Federal water contractors, also known as Public Water Agencies (PWAs), under the BDCP MOA, it is important to distinguish between the NEPA process and the habitat conservation planning (HCP) process that takes place pursuant to the ESA. The process of developing the BDCP (an HCP) that will be submitted to Federal and
State agencies for approval under the ESA and California law is fundamentally different from that of developing the Environmental Impact Statement/Environmental Impact Report (EIS/EIR) under NEPA and CEQA in conjunction with the BDCP. Preparation of an HCP is typically an applicant-driven process — paid for and developed by the applicant but subject to the review and approval of the U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service — the Federal ESA permitting agencies. Once FWS or NMFS has reviewed and approved the HCP, it is the responsibility of the applicant/permittee(s) to implement the plan. In light of the important functional relationship between DWR as the primary permit applicant and the PWAs in the development of the BDCP, significant involvement of the PWAs is appropriate and fully consistent with how Federal agencies have developed and permitted other HCPs under the ESA.

As is described in the BDCP MOA, and in contrast to developing the BDCP itself, development of the EIS/EIR for the BDCP must be under the jurisdiction of the Federal and State lead agencies (see BDCP MOA at page 4, Recital para. Q). Working drafts of the EIS/EIR will be provided to Cooperating Agencies in accordance with the requirements of NEPA. NEPA contemplates close coordination between lead agencies and Cooperating Agencies during the preparation of an EIS. See 40 C.F.R. § 1508.5; 43 C.F.R. § 46.225(d); 40 Most Asked Questions on CEQ NEPA Regulations, question no. 14 (46 Fed. Reg. 18028-29 (1981)). Therefore, there will be close coordination between the Federal Lead Agencies and the PWAs, as Cooperating Agencies, throughout the preparation of the EIS. Consistent with applicable NEPA law and regulations, the distribution of Draft EIS material will be made in accordance with the Cooperating Agency memoranda of understanding (MOUs) and public review with respect to the EIS/EIR will take place upon circulation of the formal draft documents. 40 C.F.R. § 1508.5; 43 C.F.R. § 46 et seq., and 43 C.F.R. §§ 46.225(d), 46.230.

In sum, the BDCP MOA must be viewed in the context of a full understanding of the differing legal requirements of the Federal ESA (and California CESA and Natural Community Conservation Planning Act) and NEPA/CEQA. Regardless of the BDCP MOA, in light of the status of Reclamation and DWR as NEPA/CEQA lead agencies and of their coordinated roles in operating the Federal and State projects (Central Valley Project and State Water Project), it is essential that DWR and Reclamation coordinate in an effective manner throughout each step of both the BDCP and the NEPA/CEQA processes and that the PWAs, who are the primary funders of the BDCP, remain closely involved with Reclamation and DWR as the process moves forward. Coordination with all Cooperating Agencies, which include the PWAs, will be in full accordance with both NEPA and the Cooperating Agency MOUs.

Assurances and Section 10 of the ESA

The conservation elements of the BDCP are still under development, and accordingly, the form and scope of any assurances granted under the BDCP have yet to be developed. Ultimately, the assurances provided through the BDCP will be heavily dependent on the entirety of the conservation plan as well as the provisions of the BDCP implementing agreement. The BDCP, projected as a 50-year HCP, will of necessity contain a strong adaptive management component that will allow adjustments to be made over time as necessary to meet the goals of Bay Delta ecosystem recovery in the face of an evolving natural environment and of anticipated increases in scientific data and understanding of the Delta.
It is well-established law that Federal agencies do not qualify for Section 10 permits under the Federal ESA. It is, however, the desire of the State and Federal governments that the BDCP be an integrated plan that both includes a comprehensive ESA Section 10 program and provides a sound basis for the ESA Section 7 consultation regarding Reclamation’s actions. This approach has provided the pathway for the development of a comprehensive, unified conservation plan.

State and Federal agencies are authorized to grant permittee status to appropriate participants in HCPs and Natural Community Conservation Plans. This has been done in some previous cases, such as the Lower Colorado River HCP. This is within the discretion of the regulatory agencies, and clearly within the applicable statutes. The fish agencies (FWS and NMFS), not parties to the BDCP MOA, will be responsible for the ultimate resolution of this and other issues in the exercise of their regulatory authority under the ESA.

**Conclusion/Commitments**

As expressed above, the Department will continue to move forward on all phases of the BDCP in accordance with the legal requirements of applicable provisions of Federal law and regulations. The Department believes, however, that given the concerns and objections raised to date, additional public discussion is appropriate, and there are a number of ways to include a broader set of stakeholders in these discussions.

Accordingly, recognizing ongoing concerns about the BDCP MOA, Reclamation, DWR, and the PWAs are seeking public input and taking additional comments before the BDCP MOA becomes effective. Based on the comments already submitted and any additional comments received, Reclamation, DWR, and the PWAs will consider and provide feedback as to whether modifications to the BDCP MOA should be considered or if the BDCP MOA should be amended or supplemented. In addition, consideration will be given to whether other actions or parallel agreements should be developed to ensure that other stakeholders may have appropriate access to draft environmental documents. As these efforts proceed, identifiable commitments and assurances will be in place to ensure that the dual goals of California’s 2009 legislation remain a fundamental and integral aspect of the BDCP.

**NOTICE INVITING PUBLIC COMMENT ON BAY DELTA CONSERVATION PLAN (BDCP) MEMORANDUM OF AGREEMENT AND ESTABLISHING ADDITIONAL OPPORTUNITIES FOR STAKEHOLDER INPUT ON BDCP**

The U.S. Department of the Interior and the California Natural Resources Agency are announcing an opportunity for members of the public to comment on the "First Amendment to the Memorandum of Agreement Regarding Collaboration on the Planning, Preliminary Design and Environmental Compliance For the Delta Habitat Conservation and Conveyance Program in Connection with the Development of the Bay Delta Conservation Plan" (BDCP MOA). In addition, these agencies and the Department of Commerce are establishing a series of actions.

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1 The BDCP MOA was posted on the BDCP website on September 6, 2011 and can be found at http://baydeltaconservationplan.com/news/news/11-09-06/Memorandum_of_Agreement_MOA.aspx. Comments must be received no later than 5:00 p.m. on November 16, 2011.
designed to enhance opportunities for public input into key issues relating to the BDCP and the related Environmental Impact Statement/Report (EIS/EIR) process.

PUBLIC COMMENT ON THE MOA

The Bureau of Reclamation (Reclamation), the California Department of Water Resources (DWR), and several federal and state water contractor agencies (Public Water Agencies) developed a BDCP MOA intended to enable timely analysis of conservation and water supply measures developed in the BDCP and to address related financial matters. The BDCP MOA is intended to replace in its entirety an earlier MOA on the same topic signed by the same parties in March 2009. The MOA would not alter any of the fundamental roles and responsibilities of Reclamation, other federal agencies, or DWR with respect to preparation of the EIS/EIR for the BDCP. These roles and responsibilities are set forth in the June 2010 "Agreement Regarding Preparation of a Joint Environmental Impact Report/Environmental Impact Statement for the Bay Delta Conservation Plan."

The BDCP MOA has been signed by some, but not all, of the parties and accordingly, by its own terms, is not in effect.

Recently a number of Bay Delta stakeholders and interested legislators have raised questions about various provisions of the BDCP MOA and have requested that an opportunity be provided for public comment on the BDCP MOA. Questions include whether provisions of the MOA conflict with legal obligations of Federal and/or state law, whether the MOA gives Public Water Agencies special access to draft documents, and how schedule-related and other commitments might impact the BDCP decision-making process.

The “Federal White Paper on the 2011 Bay Delta Conservation Plan MOA” (White Paper) provides a summary of the background and function of the BDCP MOA. As explained in the White Paper, many of the questions raised about the BDCP MOA are rooted in misunderstandings about the nature and/or scope of the document. Nonetheless, the agencies agree that the process would be well-served by broadly sharing the BDCP MOA and related documents and by soliciting comments on the BDCP MOA before it is finalized and becomes effective. Therefore, the agencies will accept public comments on the BDCP MOA and the White Paper until November 16, 2011.

Comments may be submitted by e-mail to BDO@usbr.gov or by mail to the Bureau of Reclamation, Bay-Delta Office, 801 I Street, Ste. 140, Sacramento, CA 95814. Comments must be received no later than 5:00 p.m. on Wednesday, November 16, 2011.

The BDCP MOA will not go into effect before the agencies have had the opportunity to review and consider all comments received by the November 16 deadline. Based on comments received, the agencies will provide feedback to the comments and, among the potential future approaches, may decide that no actions are needed; that modifications to the BDCP MOA should be considered by the parties to the MOA; that the MOA should be supplemented or amended by the Parties; or that other actions, such as entering into additional agreements or commitments with other entities, should be taken. In addition, consideration will be given to whether other
actions or agreements should be developed to ensure that other stakeholders may have appropriate access to draft environmental documents.

ADDITIONAL OPPORTUNITIES FOR STAKEHOLDER INPUT ON THE BAY DELTA CONSERVATION PLAN

In recent months, the California Natural Resources Agency, with the support of the U.S. Departments of the Interior and Commerce, has taken a number of steps to enhance opportunities for public input and independent scientific review input into the development of the BDCP. Monthly public meetings are being held in addition to the creation and use of technical working groups with professional facilitation. The increased use of independent science includes input into the development of goals and objectives for the BDCP, as well as reviewing the effects analysis associated with the BDCP. Overall, development of the BDCP is at a key point where many important technical, science-related, and policy issues are under active consideration and are beginning to be addressed. It is therefore increasingly important that the state and Federal agencies continue to look for ways to improve transparency and broad stakeholder involvement as development of the BDCP and its related environmental analyses continue. Accordingly, high-level representatives of both state and Federal agencies are increasing their direct dialogue with a number of different interested parties in order to gain a better understanding of the key issues that must be addressed and resolved. Public meetings will continue to be a high priority and will address a variety of subjects, both procedural and substantive. Additional suggestions for process improvements are also welcome during the comment period and will be considered by the agencies as they continue their efforts to develop a sound and effective BDCP.