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SENT VIA EMAIL

Dr. Gerald Meral
Deputy Secretary
California Natural Resources Agency
1416 Ninth St, Suite # 1311
Sacramento, CA 95814

**RE: LAND Comments on the September 13, 2011 Draft of BDCP Chapter 7
– Governance**

Dear Dr. Meral:

This letter contains the comments of Local Agencies of the North Delta (“LAND”) on the September 13, 2011 draft of Chapter 7 – Governance in preparation for the upcoming Governance work group meeting on January 26, 2012. LAND is a coalition comprised of eleven reclamation and/or water districts in the North Delta with an area of over 70,000 acres. The Governance work group last met in July 2011.

LAND participant agencies would be directly affected by the actions proposed by the Bay Delta Conservation Plan (“BDCP”) and for that reason are participating in the Governance work group. BDCP Governance is important because it addresses how the project will actually be carried out. Construction and implementation of the project will have major impacts on local agencies and local landowners, and the Governance provisions of the BDCP should provide an effective process by which these issues can be addressed.

While we appreciate that some of our comments on the July 12, 2011 draft of the Governance chapter were incorporated into the current draft, we have several significant areas of ongoing concern, as described below.

7.1.2.1 Authorized Entities

The September draft Governance Chapter reflects the decision of the Resources Agency and the Bureau of Reclamation to “support” the State and Federal Water Contractors (“SFWCs”) becoming Authorized Entities/obtaining permittee status. The draft goes so far as to state that the SFWCs are “expected” to be Authorized Entities,

although it recognizes that it will ultimately be the decision of USFWS, NOAA Fisheries and DFG. Along these same lines, the SFWCs are no longer referred to as Supporting Entities in section 7.1.7.

Notably, the SFWCs already arguably have too much decisionmaking authority under the draft Governance Chapter, including a role in selecting and hiring the Program manager, serving on the Implementation Board and in the Stakeholder Group. Should the SFWC members, in one form or another, become Authorized Entities, there will be yet another venue in which the SFWCs can advance their interests. No credible explanation as to why permittee status is necessary or would better advance the goals of the ESA or CESA has yet been provided for this proposal, yet the Governance chapter is written as though the SFWCs *will be permittees*. If it is really possible that the SFWCs may not become permittees, then another version of the Governance chapter should be written to address the possibility that the SFWCs are not ultimately Authorized Entities.

7.1.2.2 Other Authorized Entities

While the Governance Chapter now assumes that the SFWCs will become Authorized Entities, the definition of Other Authorized Entities continues to be far too constrained. The limited two-tier status is unreasonable and inconsistent with habitat conservation planning. While normal HCPs provide a framework into which *any landowner or entity needing take coverage* can participate, the Governance Chapter has an unnecessarily narrow view of which entities could potentially be Other Authorized Entities. The draft indicates that the names of these entities will be filled in when they are known. However, as we have commented before, there should be a process by which a party in the future could participate in the HCP with the same responsibilities and standing as the Authorized Entities.

The problems of the Delta ecosystem demand a comprehensive approach. Stressors on the environment were previously called “other stressors” in earlier versions of the BDCP. Conservation measure to address these stressors, however, have largely been removed from the plan because they may not be caused by or are not controlled by the state and federal Projects. But just because the problems may have been caused by other factors does not mean that the BDCP HCP/NCCP should not provide a pathway to address them.

For instance, abandoned vessels and structures in the Delta may provide habitat for striped bass and other non-native species. Efforts to remove such structures may require take authorization. If an appropriate entity and the necessary funding could be identified in the future, would it not be a good thing for the BDCP to cover those activities? For a plan of a 50-year duration with the geographic scope of the BDCP, it is

short sighted to take a narrow view of covered activities and other entities that may be in a position to assist in enhancements to the Delta in furtherance of the goals of the BDCP in the future.

As explained previously, there is also a concern that if the BDCP is successful, more special status species will occur in the area. As a result, activities that do not currently require take authorization, such as agricultural water supply intakes, may require take authorization in the future.¹ The BDCP, like other HCPs, should provide a pathway by which parties may become Other Authorized Entities in the future.

7.1.8 Stakeholder Council

LAND appreciates the changes to the composition of the Stakeholder Council. There is an ongoing concern, however, that the structure of the Stakeholder Council is not designed to resolve problems that local landowners and districts are likely to have during implementation of the BDCP.

7.1.8.3 Dispute Resolution

The dispute resolution procedures in the Governance Chapter are still far too narrow. A workable framework must be provided whereby disputes that are likely to arise in the implementation of BDCP can be addressed and problems can prospectively be prevented from arising. Currently, this section only permits objections “on the basis that the proposal (i) will not adequately contribute to achievement of the goals and objectives of the BDCP or (ii) is inconsistent with the requirements of the Plan and/or the permits/authorizations.” We continue to believe that a broader basis for objections be provided, such as “negative impacts on local landowners.”

7.2.8 Coordinating with Local Governments, Delta Protection Commission, and Other Public Agencies

While we appreciate the addition of water and reclamation districts as entities that information will be shared with, we believe this section should go further in using “best efforts to ensure that the Council is an effective forum for stakeholder concerns to be heard and addressed.”

¹ Currently, “small agricultural Delta agricultural diversions are likely to have a minor effect on pelagic (open water) fish, such as the [D]elta smelt.” (Ecosystem Restoration Program, Ecosystem Strategy for Stage 2 Implementation Sacramento San Joaquin Delta Ecological Management Zone (July 21, 2010) http://www.deltacouncil.ca.gov/delta_council_meetings/workshops/march_2011/Conservation_Strategy_for_Stage_2_Implem_ERP.pdf, p. 50) As a result, only larger diversions (such as those over 250 cfs), have been the focus for consideration of screening.

7.2.12 Implementing Mitigation Measures Identified in BDCP-related Environmental Documentation under NEPA and CEQA

This section still does not refer to “adopted measures” as it should. As explained previously, some mitigation measures identified in a final EIR/EIS may ultimately not be adopted in conjunction with the project. Required mitigation measures would be included the adopted Mitigation Monitoring and Reporting Program under CEQA and in the Record of Decision under NEPA.

7.3.1 Implementation of the Habitat Protection and Restoration Conservation Measures

LAND’s August 2, 2011 comments regarding habitat creation were largely ignored in the current draft. LAND continues to be concerned that there are no restrictions on where habitat might be created in the future, which makes the identification of Restoration Opportunity Areas meaningless. LAND had also suggested that “in carrying out its duties under this section, the IO will strive to minimize impacts on local landowners and ongoing agricultural and other economic activities in the Delta.” This important intent language was ignored.

7.3.1.1 Acquisition and/or Lease of Property Interests

In other major HCPs, FWS has committed to not to use eminent domain for purposes of habitat restoration. A sub-recommendation should be added to preclude use of eminent domain for habitat projects. Local Habitat Conservation Plans (“HCPs”) do not allow condemnation of land for the simple reason that these lands are already managed effectively by local residents and their support is needed to maintain the conservation benefits. Consistent with this practice, FWS has recently committed to no use of eminent domain in the Everglades Headwaters restoration project. (See <http://www.npr.org/2011/09/12/140403285/agency-takes-new-approach-to-save-everglades-land>; see also <http://www.fws.gov/southeast/greatereverglades/pdf/GEPIProjectProposal.pdf>.)

This section does not address LAND’s suggestion to use, as required elsewhere by the resource and fish and wildlife agencies, the Property Analysis Record (“PAR”) quantification method to calculate adequate endowments for perpetual management. Developed by the Center for Natural Lands Management, the PAR is “a computerized database methodology that is extremely effective in helping land managers calculate the costs of land management for a specific project. The PAR helps analyze the characteristics and needs of the property from which management requirements are derived.”

(http://cnlm.org/cms/index.php?option=com_content&task=view&id=21&Itemid=155.)

LAND is also concerned that adequate funding for weed and other invasive species, in particular, is planned for and set aside as part of the ongoing operations and maintenance of lands acquired for the BDCP. Funding for local firefighting, levee districts and other local assessments must also be provided up front by the BDCP. The history of DFG's opposition to payment of local district assessments for habitat lands and chronically underfunded state lands illustrates how the burden ends up placed on local communities when restoration projects are not adequately funded.

7.3.1.2 Management of Land

LAND appreciates the addition of our suggestion to include payment of appropriate in lieu payments when private lands are acquired for habitat purposes.

7.4.1 Maintaining Permits/Authorizations and Obtaining Amendments


Given the serious impacts of the BDCP on local landowners and districts, it would be appropriate for the Authorized entities to also consult with Stakeholders on Permit amendments.

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Thank you for considering these comments. In addition to taking these comments into account for the next draft of the Governance Chapter, we request that the Resources Agency re-review the detailed redline comments provided by LAND on the July 12, 2011 Draft of BDCP Chapter 7 – Governance, which LAND submitted on August 2, 2011.

Very truly yours,

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