Hand Delivered

BCDP Steering Committee
c/o Karen Scarborough
California Natural Resources Agency
1416 Ninth Street, Suite 1311
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RE:   Comments on HCP/NCCP Mitigation Funding Requirements and Latest DHCCP Western Alignment

Dear Steering Committee:

This letter addresses two new issues of concern to Reclamation District 999 ("District") with respect to the Bay Delta Conservation Plan ("BCDP") process.

1. Concerns Regarding Mitigation Funding Requirements/Implementation Costs (Draft Chapter 8)

The July 15, 2010 presentation by David Mitchell, the BDCP consultant for financial analysis, discussed the costs associated with implementation of the BDCP actions described in Chapter 8. At that time, the District raised the question as to what costs had been, or would be, identified for coverage by a non-wasting endowment or other financially assurance mechanism. Incredibly, the response was that no endowment was needed to implement the BDCP, which would result in issuance of 50-year take authority. With no upfront funds identified in the cost analysis, it appears that the BDCP does not propose to provide financial assurances for the implementation of all project components and mitigation. At a minimum, this includes the extensive habitat restoration/creation, necessary mitigation for the loss habitat from restoration/creation, and mitigation for habitat impacts from conveyance construction.

This approach to funding of project components and mitigation is contrary to applicable authority under the Endangered Species Act ("ESA") and the Natural Communities Conservation Planning Act ("NCCPA"). To issue an incidental take permit, the U.S. Fish and Wildlife Service ("FWS") must find that the HCP minimizes and mitigates the impact of the incidental take to "the maximum extent practicable."
(16 U.S.C., § 1539, subd. (a)(2)(B)(ii.) For HCPs, “the applicant will ensure that adequate funding for the plan will be provided.” (16 U.S.C. § 1539, subd. (a)(2)(B)(iii.) Likewise, the California Department of Fish and Game (“DFG”) has stated that establishing “funding assurances” is a necessary component to developing a draft plan under the NCCP program. (NCCP Phases, California Department of Fish and Game, at p. 1, available at http://www.dfg.ca.gov/habcon/nccp/publications.html.) In fact, the NCCP statutory scheme requires that a “plan contains provisions that ensure adequate funding to carry out the conservation actions identified in the plan,” and that the permitting authority must consider “[t]he sufficiency of mechanisms for long-term funding of all components of the plan and contingencies.” (Cal. Fish and G. Code, § 2820.)

Failure to demonstrate the requisite level of funding prior to permit approval or to meet funding obligations after the permit is issued are grounds for denying a permit application or revoking an existing permit. (FWS HCP Handbook at pp. 68-69; Cal. Fish and G. Code, § 2820, subd. (b)(3)(A).) Indeed, the courts have consistently struck down agency permitting decisions in which the requisite level of mitigation funding is too vague or speculative.

In Sierra Club v. Babbit (1998) 15 F.Supp.2d 1274, 1280, the court held that the level of mitigation funding was inadequate to satisfy ESA requirements. Specifically, the court explained that “[t]he applicant cannot rely on speculative future actions of others to satisfy the ESA.” (Id. at pp. 1280-82.) The court concluded that speculative reliance on mitigation funding sources was contrary to the law. (Id. at p. 1282.) Similarly, in National Wildlife Federation v. Babbit (2000) 128 F.Supp.2d 1274, the court held that a funding scheme that was simply projected to be adequate failed to satisfy the requirements of the ESA. (Id. at pp. 1294-95, italics added.) The court further held that the threat of permit revocation was inadequate to ensure funding. (Id. at p. 1295.) In Southwest Center for Biological Diversity v. Bartel (2006) 470 F.Supp.2d 1118, 1155 (Bartel), the court held that identifying undependable and speculative sources of mitigation funding is a violation of section 1539, subdivision (a)(2)(B)(iii) of the ESA. (Ibid.) In Bartel the City failed to create a concrete budget and relied on future actions to fund mitigation measures. (Id. at p. 1156.) In striking down the permitting approval, the court likened the case to National Wildlife v. Babbit, supra, 128 F.Supp.2d at pp.1294-95, because the adequacy of mitigation funding was not ensured, depended on third party participation, and in both cases no entity was identified to be responsible for making up any funding shortfalls. (Bartel, supra, 128 F.Supp.2d at p. 1157.)
In sum, the HCP/NCCP process requires that mitigation fees be paid up front, typically through a non-wasting endowment using PAR Analysis. (See FWS HCP Handbook, at pp. 3-34.) There is no indication that the BDCP is or should be exempt from this requirement, which ensures that issuance of take permits are properly mitigated and minimized. Moreover, the fact that the Potentially Responsible Entities (“PREs”) are largely public entities does not change the analysis.

A related and equally concerning issue is that the benefits of the project for the PREs (new diversion points and conveyance) are proposed to be front-loaded, while the mitigation (habitat restoration/creation) occurs far later and is back-loaded. An endowment or other form of financial assurance is therefore even more important because of the proposed duration of this permit. Endowments can provide an additional advantage in that interest can buffer cost inflation. Thus, Chapter 8 should be revised to clearly explain how the BDCP will provide the necessary financial assurances to implement the entire BDCP.

2. Concerns Regarding Current Versions of Proposed West Conveyance Option, Use of the Deep Water Ship Channel Bypass and Approach to Alternative Fish Pathways

The BDCP Steering Committee presentation on alternative fish pathways on September 9, 2010 again raised critical concerns for the District regarding the lack of coordination and communication by the Steering Committee and BDCP consultants with affected communities. The BDCP and the closely associated Delta Habitat Conservation and Conveyance Program (“DHCCP”) continue to complete analyses and project proposals within the District’s service area, and even over the top of existing infrastructure. These proposals would severely impact the District’s ability to operate, provide service to its customers, and perform its flood protection and water delivery functions.

Despite the District’s repeated requests for information and collaboration, we and other stakeholders continue to be given little or no information during the planning process. For example, the currently proposed West Conveyance Option cuts along the District’s western boundary, along the town of Clarksburg and perpendicularly across most of the District’s infrastructure. (See attached Proposed Conveyance and Habitat Restoration Options Map, dated June 23, 2010.) Along the same lines, during the
September 9th Steering Committee meeting, we heard that the fatally flawed proposal to run a new channel of the Sacramento River through the western side of the District (the Deep Water Ship Channel Bypass proposal) was being analyzed again. The Elk Slough fish bypass was discussed as well, without reference to the thus far productive conversations that have occurred with the affected community about the conditions under which this idea could be acceptable to the community. Even more remarkable is the fact that the BDCP baseline model conditions described in the presentation would result in levee failure and the destruction of the town of Clarksburg and the surrounding community and farms. This is unacceptable and must be modified.

By communicating with the District and the affected communities, these fatuous proposals and their analyses would not need to be completed as they fail on a variety of obvious technical grounds. Or in the case of Elk Slough, such communication would help clarify the current state of design discussions with the affected community. It is unclear why the BDCP would not seek out the local knowledge of site specific conditions and community concerns that the District can provide. Indeed, various project proponents for other activities within the District have prudently taken these steps, and we have worked closely with them to ensure that the projects are effective and to develop the necessary mitigation measures to ensure local community support.

Given that the North Delta Water Agency and the District were previously promised a collaboration forum for local issues that was later cancelled, we again request that a local public forum be made a priority. Additionally, the Steering Committee and BDCP consultants (including consultants for the related DHCCP process) should work directly with the District on the development of any project components that are proposed to occur within District Boundaries. Last, the District strenuously objects to any further consideration of both the currently proposed versions of the West Conveyance Option alignment and the Deep Water Ship Channel Bypass. Both of these proposals have several technical fatal flaws and lack any public support; thus they should be removed from any further consideration by the BDCP and the DHCCP.

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We expect that these comments will considered in the formulation of the proposed BDCP scheduled for release these fall. Please contact me or the District’s biologist, Erik Ringelberg, with any questions.

Very truly yours,

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By:
Osha R. Meserve

ORM/mre

cce:  Dan Castleberry, FWS
       Mike Tucker, NOAA Fisheries
       Carl Wilcox, DFG
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**Temporary Entry Permits are being pursued in order to study the Pipeline/Tunnel Option, as well as potential intake locations along the Sacramento River from Freeport to Courtland.

**Intakes**
A number of possible intake locations are under consideration in the area from Freeport to Courtland. River intakes with pumping plants transfer water to conveyance facilities on the East, West, Pipeline/Tunnel and Through-Delta Options.

*Not all intake options are shown.*

**East**
- Up to 5 intake facilities with fish screens along the Sacramento River
- 6 pump stations
- 42 miles of canal
- 3 tunnels (2 miles combined length)
- 8 siphons
- 600-acre forebay near the existing Clifton Court Forebay

**Pipeline/Tunnel**
- Up to 5 intake facilities with fish screens along the Sacramento River
- 6 pump stations
- 40 mile tunnel (2 bores, each 33 feet inside diameter)
- 750-acre forebay near Courtland
- 600-acre forebay near the existing Clifton Court Forebay

**Through-Delta**
- 2 supplemental intake facilities with fish screens along the Sacramento River
- 12 miles of supplemental canal
- 66 miles of levee retrofit/setback levees
- 9 to 11 operable barriers
- Victoria Canal modification
- New fish salvage facility

**Restoration opportunities** may include:
- Floodplain
- Intertidal marsh
- Channel margin
- Riparian
- Shallow sub-tidal

**Overview: Proposed Conveyance and Habitat Restoration Options**