

Ben Miller
Office of Congressman George Miller
October 28, 2011

Dear Ben,

The following are answers jointly prepared by the state and federal agencies to the questions you asked. Please let me know if you need any additional information.

Best regards,

Jerry Meral

Cc: Assembly Member Jared Huffman; Commissioner Mike Connor

QUESTION (1): What is the Role of Laura King Moon?

RESPONSE from CA DWR: Ms. Moon is working for the California Department of Water Resources to assist Director Mark Cowin in the completion of BDCP. She also assists with communications between DWR and the contractors, NGOs and other interested parties. She is serving on loan from the State Water Contractors until the completion of the BDCP. In this capacity, she is responsible to and representing DWR solely, and is subject to all applicable DWR rules, protocols and confidentiality requirements.

QUESTION (2): Why do the contractors get to see draft work product, and are they being afforded preferential treatment over others? (MOA, Page 8, Paragraph II.K).

RESPONSE: It is important to distinguish between the NEPA process (discussed below) and the conservation planning process. Preparation of an HCP or NCCP is typically an applicant driven process -- paid for, directed by and under the control of the applicant. While extensive public involvement is typically part of the planning process, the ultimate decision as to contents of the proposed or draft plan is that of the applicant(s) preparing and submitting the plan. Thus, contractor involvement in the development of the plan is appropriate and consistent with the development of other plans. Nonetheless, DWR is the "pre-eminent" applicant and, under the terms of the MOA, the ultimate decision maker on all aspects of the draft plan that will be submitted for regulatory review and approval.

Because the Natural Resources Agency and DWR want to have ample stakeholder input in development of the plan, they are providing certain stakeholders with expertise in particular areas the opportunity to review the consultant work products at the same time as the contractors. With respect to specific documents, preliminary drafts of the goals and objectives and technical appendices of the effects analysis have already been shared with some of the stakeholders, and the next draft versions of these documents will be published on the BDCP website. The public may comment on these documents, although the formal comment and response period will not

begin until the draft plan, including the draft effects analysis, is issued for public comment in the spring of next year.

The rules that address development of the EIR/S are different. As described in the MOA, development of the EIR/S must be - and is - under the jurisdiction of the lead agencies (see page 4, paragraph Q). The June 2010 Agreement Regarding Preparation of a Joint Environmental Impact Report/Environmental Impact Statement For the Bay Delta Conservation Plan signed by the four lead agencies and HDR, Inc. (Lead Agency Agreement), sets forth the roles and responsibilities of each of those parties in the CEQA/NEPA process in detail. Drafts of portions of the EIR/S will be provided to cooperating (NEPA) and responsible (CEQA) agencies. There will be opportunity for the public to review and comment on the draft EIR/S when it is released next year.

The MOUs executed with Cooperating Agencies provide that these agencies will have access to certain drafts; however, we recognize that once documents are shared with others outside the group of lead agencies they are potentially available to the public under FOIA or under California's Public Records Act.

Administrative drafts of portions of the EIR/S will be provided to responsible agencies under CEQA and to cooperating agencies under NEPA, consistent with cooperating agency agreements executed in the spring of 2010 and applicable regulations. In addition, when the draft EIR/S is completed next year, it will be released for a formal public review and comment period consistent with the requirements of NEPA and CEQA.

QUESTION (3): Why should the contractors be invited to collaborate on agencies' responsive comments? (Page 8, Paragraph II.K).

RESPONSE: As the water supply agencies, it is important that DWR and USBR coordinate with their water contractors as responses are prepared to comments on draft versions of the BDCP and the EIR/S. Moreover, NEPA contemplates close coordination between lead agencies and cooperating agencies during the preparation of the EIS. See 40 C.F.R. § 1508.5; 43 CFR § 46.225(d); 40 Most Asked Questions on CEQ NEPA Regulations, no. 14 (46 Fed. Reg. 18028-29 (1981)). This section does not give the water contractors any right to have veto power or any other form of control over the final BDCP, or over the preparation of the EIR/S. As stated in the MOA, DWR is primarily responsible for the development of the BDCP. (First Amendment MOA, page 4, paragraph Q; *Id.* at page 7, paragraph II.E.), and the lead agencies have the ultimate responsibility for preparation of the EIR/S.

The role of the contractors in the EIS process is that of cooperating agencies. The MOA does not change other existing agreements, including the June 2010 Lead Agency Agreement, or the fact that the federal lead agencies each retain discretion and authority for preparation of the draft and final NEPA documents ("Nothing in this section or elsewhere in this First Amended MOA modifies the federal responsibilities for the content of the draft and final EIS and preparation of the ROD." MOA at paragraph II.E.). Accordingly, the Federal lead agencies are fully and legally responsible for the content of both the draft EIS and the final EIS, including responsive comments. Coordination with the contractors and others regarding their input on proposed

responsive comments will be in accordance with the Cooperating Agency agreements executed in the Spring of 2010 and consistent with NEPA, the Council on Environmental Quality's NEPA regulation regarding Cooperating Agencies, 40 C.F.R. § 1501.6, 1508.5; Interior's NEPA regulations, 43 C.F.R § 46 et seq., and its regulation regarding Cooperating Agencies, 43 CFR § 46.225(d). Input on particular responsive comments will depend on the expertise of the particular Cooperating Agency.

QUESTION (4) - Why should the contractors have authority to enter into and administer contracts with the consultants? (Page 7, Paragraph II.G).

RESPONSE: It is important to understand the distinction between managing a consultant contract versus management of the consultant work-product. In some cases, the contractors have the ability to fund consultants more quickly than DWR, and this has proved helpful in a number of instances. A number of the independent science panels convened by the Delta Science Program on BDCP issues have been paid for directly by the contractors, for example. In the context of the MOA at Paragraph II.G, administrator simply means the agency administering the contract. Note that the program manager continues to report to the Director of DWR, which means DWR retains final control over the consultants and all work products in conjunction with the federal NEPA lead agencies (who, as noted above, each retain discretion and authority for preparation of the draft and final NEPA documents).

Paragraph II.G was included in the MOA because it may become necessary to ask for help from the contractors in the day-to-day administration of the consultant contracts.

In summary, DWR is (and will remain) in charge of, and direct, the preparation of BDCP. The state and federal lead agencies will direct the consultants' work in preparing the EIR/S, and retain complete and final say over the work products. They will assure that all laws requiring public disclosure and participation are carried out.

QUESTION (5): What authority is there for the offer of assurances equivalent to those offered under Section 10 of the Endangered Species Act? (Pages 7-8, Paragraphs II.H and J).

RESPONSE: While federal agencies cannot receive Section 10 permits, it is the desire of the state and federal governments that BDCP also serve as a plan that provides the basis for the section 7 consultation regarding Reclamation's actions within the Delta. This approach has provided the pathway for the development of a comprehensive, unified conservation plan for the Delta and a way to avoid the all-too frequent reinitiated consultations under ESA and CESA.

State and federal agencies are authorized to grant permittee status to qualified participants of HCPs and NCCPs.

Any proposals that are developed by the parties to the MOA pursuant to paragraph II.J will be posted as drafts on the BDCP website, and will be subject to public comment and review. No meetings or discussions pursuant to MOA paragraph II.J to evaluate the issue of assurances have taken place to date. The fish agencies (FWS, NMFS), who are not parties to the MOA, remain responsible for the ultimate resolution of this and other issues in the exercise of their regulatory

authority.

With respect to “essential elements” of ecosystem recovery, under Section 10 of the ESA, the BDCP must include measures to minimize and mitigate, to the maximum extent practicable, the impacts of the SWP on Delta species covered by the Plan and also to ensure that these impacts will not appreciably reduce the likelihood of survival and recovery of listed species. Under the NCCPA, the BDCP must also contribute to the recovery of the covered species. As required under these federal and state laws, the biological agencies will determine whether the Plan meets those standards.

The conservation elements of the BDCP are still under development, and accordingly the form and scope of any assurances have yet to be developed. Ultimately, the assurances provided through this process will be heavily dependent on the entirety of the conservation plan as well as the provisions of the implementing agreement. It is anticipated that the BDCP will contain a strong adaptive management component that will allow adjustments to be made over time as necessary to meet the goals of ecosystem recovery.

QUESTION (6): Is the schedule consistent with NEPA? (Page 7, Paragraph II.E).

RESPONSE: The participating agencies believe the identified schedule is consistent with NEPA. The Departments of the Interior and Commerce are committed to the schedule, and do not anticipate failing to submit comments in a timely manner. If such a failure were to occur, and result in a failure by the consultants to fully reflect agency concerns in the EIR/S, Paragraph E includes the following sentence:

“Nothing in this section or elsewhere in the First Amended MOA modifies the federal responsibilities for the content of the draft and final EIS, and preparation of the ROD.”

This means that all the lead agencies retain their control over and responsibility for the content of the draft and final EIR/S, regardless of whether they have met timelines agreed to by the state and federal governments.

The timeline in Exhibit 1 of the MOA (referenced in paragraph II.E.) was separately agreed to by the state and federal governments before the MOA was prepared. While the timeline is very demanding, the state and federal governments are determined to meet it, and are also determined to produce a quality Plan and EIR/S which will fully meet the requirements of all applicable laws.

As stated in a letter of August 10, 2011 regarding the timeline from Interior Deputy Secretary David Hayes to California Natural Resources Secretary John Laird, in order to meet the schedule for the draft EIS/EIR, “ it is critical for the consultant team to produce high quality documents on schedule and for agency reviews to be focused and expeditious, “ and that “[a] key measure of the overall viability of the schedule” will be the ability to produce documents that are “scientifically sound and legally defensible.”

QUESTION (7): In light of the support for a conveyance facility and the additional regulatory assurances for the export contractors that Interior is supporting in the MOA, what has Interior agreed to (or preliminarily agreed to support) within the BDCP that constitutes a measurable improvement over the status quo in terms of salmon and Bay-Delta estuary recovery?

RESPONSE: The Department of the Interior is not in a position to answer this question at this time. Participants in the BDCP process working with outside scientists have made substantial progress toward the development of biological goals and objectives that are intended to be included in the plan. Ultimately, any answer will depend on the projected operation of the additional facility and what is determined by the applicable effects analysis.

QUESTION (8): What progress has been made on securing increased environmental flows, in addition to the habitat restoration and “other stressor” work, as required by the 2009 state law?

RESPONSE: Regarding “increased environmental flows,” the State Water Resources Control Board (SWRCB, or Board), a responsible agency under CEQA for the BDCP EIR, has issued a report entitled “Final Report on Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem.” The Board is now holding hearings regarding necessary flows in the San Joaquin River. These hearings will be completed next year, and then the Board will move on to the Sacramento River and its tributaries. An alternative proposed by the SWRCB is being considered as part of the BDCP EIR/S process. The Environmental Protection Agency has requested comments on an Advanced Notice of Proposed Rulemaking for Water Quality Issues in the San Francisco Bay/Sacramento-San Joaquin Delta Estuary and is proceeding to examine a wide variety of stressors in the Sacramento-San Joaquin Bay-Estuary System. The final draft of the rulemaking should be issued soon, and could include examination of the need for additional environmental flows.

QUESTION (9): What, if anything, has been evaluated in terms of financing – how restoration (or even the mitigation for the project) will be paid for, or what the consequences will be if that funding does not materialize?

RESPONSE: Section 10(a)(2) of the federal ESA requires as a condition of plan approval that the applicant ensure adequate funding for the plan.

The water exporters are committed to paying for any facilities constructed, and mitigation for those facilities. The State Treasurer has been asked to examine the ability of the water contractors to pay for any facilities, and mitigation for those facilities, which might be recommended in the final Plan. The contractors have submitted data at the request of the Treasurer. No date has been set for the release of a report by the Treasurer.

A bond act is scheduled to appear on the November, 2012 California statewide ballot which, if passed, would provide for at least \$2 billion in funding for some of the habitat restoration work the Plan is expected to include. While the Legislature could defer that measure (as was done before), reduce the size of the bond, or even remove the bond from the ballot, they have not yet acted to do so.

Whatever the fate of this specific measure, the track record of both federal and state governments over the last few decades has been to fund Delta-related ecosystem programs at the level of many millions of dollars per year, and the NCCPA explicitly provides for a public commitment to plan costs. It is reasonable to expect that, over the fifty-year lifetime of the permit, public funding will become available.