



April 24, 2013

Alexander R. Coate
General Manager
East Bay Municipal Utilities District
375 Eleventh Street
Oakland, CA 94607

Dear Mr. Coate:

I am writing in response to your March 28, 2013 letter regarding the Bay Delta Conservation Plan (BDCP). Your letter was addressed to both me and former State Water Resources Control Board Chairman Charles Hoppin. Although your letter was written to the two of us, we have decided to respond separately, given the differing roles and responsibilities of our agencies.

Your letter raised concerns about the following regulatory processes of interest to the East Bay Municipal Utility District (EBMUD):

- The environmental review for the BDCP
- The likely future consideration by the State Water Resources Control Board (State Water Board) of a BDCP-related "change petition" that, if approved, would allow new points of diversion in the north Delta for existing water rights of the State Water Project (SWP) and Central Valley Project (CVP)
- The State Water Board's ongoing process for updating the San Francisco Bay and Sacramento/San Joaquin Delta Estuary Water Quality Control Plan (Bay-Delta Water Quality Control Plan)

Although you will receive a separate response from the State Water Board, I will address each of these processes below from the standpoint of the Natural Resources Agency and the Department of Water Resources (DWR). As you will see, the Natural Resources Agency and DWR, in pursuing the BDCP, are determined to avoid any adverse effects on your agency.

While the three processes described above are interrelated, they also serve different purposes and involve different regulatory schemes. As you know, the BDCP is intended to be a habitat conservation plan/natural community conservation plan (HCP/NCCP) for the ongoing joint operation of SWP and CVP. DWR and the Bureau of Reclamation (Reclamation) will have to bear any burdens imposed on them under federal and state endangered species laws by the Department of Fish and

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Wildlife, the U.S. Fish and Wildlife Service (USFWS), and the National Marine Fisheries Service (NMFS). Because of numerous environmental issues historically and currently associated with sole reliance on the existing south Delta pumps for water exports from the SWP and CVP, most of the BDCP alternatives being addressed in the upcoming Environmental Impact Report/Environmental Impact Statement (EIR/EIS) would require new points of diversion in addition to those in the south Delta already specified in the current water rights permits held by DWR and Reclamation. Because of this need, these two agencies will have to formally petition the State Water Board to modify the current water permits. Because such approvals will be necessary for the BDCP to succeed, the State Water Board is a responsible agency under CEQA for the EIR portion of the EIR/EIS, and has been providing valuable input to DWR, which is acting as the CEQA lead agency. Prior to approving any such change petition, the State Water Board will have to find that the proposed change will not cause injury to any legal user of the water involved and will not unreasonably affect fish, wildlife, or other instream beneficial uses. On the other hand, the Bay-Delta Water Quality Control Plan will involve many more players, as the function of the plan, under applicable water quality laws, is to reasonably protect all beneficial uses of the Delta, taking into account the effects of all diversions that may affect Delta water quality.

Keeping these distinctions in mind, I hasten to emphasize that the Natural Resources Agency and DWR generally agree with the principles and positions articulated in your March 28, 2013 letter. None of the alternatives addressed in the BDCP EIR/EIS will directly adversely affect the existing water rights of any upstream water users in the Sacramento-San Joaquin Rivers watershed other than DWR, Reclamation, and their SWP and CVP contractors. Furthermore, any environmental impacts to the Sacramento and San Joaquin watersheds that could indirectly affect non-SWP and non-CVP water purveyors will be fully analyzed and disclosed. With respect to the BDCP change petition, the Natural Resources Agency and DWR agree with EBMUD that the State Water Board should recognize water rights priorities and protections provided by the Water Code in determining whether to approve any changes in water rights proposed by the BDCP. Lastly, with respect to the Bay-Delta Water Quality Control Plan, we agree with EBMUD that, in revising the plan, the State Water Board should allocate any new requirements under an updated plan that go beyond mitigating the impacts of the BDCP in an equitable manner, which includes considerations of water right priorities, an entity's proportionate contribution to a required action and the need to prevent waste and unreasonable use or diversion of water. Each of these points is discussed more fully below.

I. The BDCP EIR/EIS

The first point in your March 28 letter concerns the BDCP EIR/EIS. In particular, you have requested that the document analyze the BDCP's potential impacts to the water supplies of purveyors that are not participating in the BDCP, and you have suggested a mitigation measure to minimize potential impacts to such water purveyors.

I can assure you that, as noted above, a key underlying principle of the BDCP is that it will not adversely affect existing upstream water rights in the Sacramento and San Joaquin watersheds of water purveyors who are not participating in the BDCP. During the 2009 scoping process for the EIR/EIS, DWR made a commitment to eliminating from further analysis any alternatives that could interfere with the legal rights, including water rights, of entities that are not participating in the

BDCP.¹ Therefore, only alternatives that would not negatively affect the water rights of such entities have been carried forward in the Draft EIR/EIS. Consistent with this commitment, the modeling analyses performed for the draft BDCP EIR/EIS conservatively assume that the SWP and CVP must be solely responsible for providing any water needed to meet the mitigation and recovery standards of the Endangered Species Act and the Natural Community Conservation Planning Act, including any additional outflows required for fish species such as Delta smelt and longfin smelt.

Although the BDCP alternatives would not adversely affect the water rights of any entities not participating in the BDCP, our EIR/EIS is anticipated to identify physical changes within the Sacramento and San Joaquin watersheds, a small number of which could, in some fashion, indirectly affect water purveyors not participating in the BDCP. All such reasonably foreseeable environmental impacts will be fully vetted in the EIR/EIS, and any significant impacts on upstream water rights will be fully mitigated to avoid such impacts. Moreover, in determining whether to approve any SWP and CVP water rights changes required for implementing the BDCP, the State Water Board, acting as a responsible agency under CEQA, will be aware of DWR's commitment to aggressive mitigation and will inevitably take it into account.

Of course no project of the size of the BDCP can be implemented without some unavoidable significant environmental effects. Some such effects may include diminished water quality in certain parts of the Delta, which in turn could indirectly affect municipal, industrial and agricultural water purveyors that draw water directly from the Delta. With such an outcome in mind, DWR will commit to making any such affected purveyors "whole" by providing the financial and technical assistance necessary to deal with any increased financial costs affected purveyors may face in making adjustments to new physical conditions resulting from implementation of the BDCP. More specifically, the BDCP proponents will commit to making financial contributions, offering technical contributions, or forging partnerships that will put these Delta water users in the same position that they would be in but for the BDCP's water quality impacts.

In your March 28 letter, you suggested that the EIR/EIS include a "mitigation measure" requiring that, in petitioning for any water rights permits or permit changes for implementation of the BDCP, "the project proponents will request the inclusion of terms ensuring that the permits or permit changes are granted subject to the continuing authority of the State Water Resources Control Board and to impose specific requirements on the BDCP permittees to implement the San Francisco Bay/Delta Estuary Water Quality Control Plan, as amended[.]" We agree that such an outcome will be necessary, as the language you proposed reflects existing law, which we readily acknowledge. Our only reservation about your specific suggestion relates to your use of the CEQA term of art "mitigation measure." Because there will be no specific significant environmental impact to which we

¹ Although the final public Draft EIR/EIS is still under preparation, several preliminary draft chapters of the Draft EIS/EIR were made available to the public in early 2012, including online at <http://baydeltaconservationplan.com/Home.aspx>. An updated administrative draft will be made available online in early May. The draft description of the EIR/EIS alternatives screening process, as described in early 2012, is available at: http://baydeltaconservationplan.com/Libraries/Dynamic_Document_Library/EIR-EIS_Chapter_3_-_Description_of_Alternatives_2-29-12.sflb.ashx.

could attach your proposed "mitigation measure," we do not anticipate taking your language and making it a formal mitigation measure. Any such measure would not fit the legal definition or use of that CEQA term of art. (See Pub. Resources Code, § 21100, subd. (b)(3); 14 Cal. Code Regs. ("CEQA Guidelines"), §§ 15126, subd. (e), 15126.4, 15370.)

Nevertheless, the California Natural Resources Agency and the Department of Water Resources whole-heartedly agree that your proposed measure accurately states existing law, and therefore must be followed. Specifically, we concur with EBMUD that any water right permits or changes to permits required to implement the BDCP will necessarily be subject to the State Water Board's continuing jurisdiction, and that BDCP permittees will be subject to the requirements of the Bay-Delta Water Quality Control Plan as they may change over time. This principle is consistent with the Court of Appeal's holding in *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 98, 126 (the *Racanelli* decision). It is also consistent with the standard permit term that the State Water Board imposes. In coordinating the preparation of this response with the one you will be getting from the State Water Board, we learned that, indeed, that agency also agrees with your assessment of this legal point and would likely impose such a permit term as part of any approval of the change petitions.

The third point in your letter related to the forthcoming BDCP EIR/EIS is your request that the EIR/EIS "establish the baseline environmental conditions and baseline operations (in reference to which the BDCP beneficiaries are entitled to divert water) at present CVP and SWP operational levels." DWR agrees with this approach, which will be reflected in the "CEQA Baseline" in the EIR portion of the EIR/EIS. (The EIS component will assess impacts based on the No Action Alternative, consistent with long-standing interpretations of the National Environmental Policy Act.) Consistent with your suggestion, our CEQA analysis uses, as the CEQA baseline, conditions existing in the Delta when we conducted scoping in 2009, at which time both the USFWS and NMFS had already issued their respective biological opinions for the long-term operations of the CVP and SWP. Although the CEQA baseline, consistent with case law, does not assume implementation of the so-called Fall X2 requirement, as it had not yet been carried out as of 2009, the No Action Alternative does assume such implementation, allowing readers to understand the impacts of the BDCP assuming that Fall X2 will be carried out. Regarding your concerns over increased water reliability above present levels, we agree with you that, as discussed below, the BDCP beneficiaries must make equitable contributions to any requirements that the State Water Board may subsequently or separately impose through an update to the Bay-Delta Water Quality Control Plan.

II. State Water Board Actions on the BDCP

Under CEQA, because the State Water Board has permitting authority over the proposed new points of diversion, the State Water Board is a "responsible agency" for the BDCP EIR/EIS, as I mentioned above. (See Pub. Resources Code, § 21069; Cal. Code Regs., tit. 14, div. 6, ch. 3 ("CEQA Guidelines"), § 15381 [defining "responsible agency"].) As a responsible agency, the State Water Board will rely on the EIR/EIS being prepared by the BDCP proponents in acting on any petition for new points of diversion of the existing water permits. (CEQA Guidelines, § 15096, subd. (a).) The State Water Board will also be required under CEQA to adopt its own findings regarding the feasibility of relevant mitigation measures or project alternatives that can substantially lessen or

avoid significant environmental effects attributable to its actions, and will also have to issue its own statement of overriding considerations if necessary. (CEQA Guidelines, § 15096, subds. (f), (g), (h).)

Your March 28 letter also asks the State Water Board to acknowledge its role in implementing the BDCP and its future reliance on the BDCP EIR/EIS in approving any petitions to authorize new points of diversion for the SWP and CVP. While your request was addressed to the State Water Board, the Natural Resources Agency and DWR can assure you that, in the several years in which preparation of the EIR/EIS has been underway, DWR has consistently treated the State Water Board as a responsible agency, and the State Water Board has consistently interacted with DWR in that capacity. More particularly, DWR has dutifully consulted with and considered the recommendations of the State Water Board in order to ensure that the information and analysis set forth in the EIR/EIS will address the environmental impacts of the BDCP alternatives that will fall within the State Water Board's jurisdiction. As an example of DWR's commitment to addressing the concerns of the State Water Board, the BDCP EIR/EIS will include an alternative, Alternative 8, which was recommended in the scoping comments on the EIR/EIS provided by the State Water Board in 2008 and 2009, as well as in subsequent correspondence. In fact, DWR staff worked diligently with State Water Board staff to develop the details of that alternative in order to ensure that the latter agency can get from the EIR/EIS the information and analysis it will need to take action in response to the petitions for new points of diversion. DWR intends to continue to consult with, and to meaningfully consider, any issues or concerns identified by the State Water Board throughout the remainder of the BDCP environmental review process.

III. Bay-Delta Water Quality Control Plan

The remaining issues presented in your March 28 letter pertain to the Bay-Delta Water Quality Control Plan and how any revisions to the plan will factor in changes to water quality and other beneficial uses as a result of the BDCP and any independent new regulatory requirements that might emerge as part of the plan update. These issues will be best addressed during the State Water Board's procedures for revising the Bay-Delta Water Quality Control Plan. Even so, the Natural Resources Agency and DWR want to go on record stating that any new restrictions or requirements included in the updated Bay-Delta Water Quality Control Plan made solely due to direct impacts of the BDCP should be borne by the beneficiaries of the BDCP. With respect to any new restrictions or requirements that the State Water Board might impose for reasons independent of the BDCP, DWR agrees with EBMUD that in addition to the State Water Board recognizing water right priorities, the board should equitably allocate any actions to address new requirements in consideration of an entity's proportionate contribution.

In closing, I would like to emphasize that in pursuing the BDCP, the Natural Resources Agency and DWR will do their best to avoid causing any adverse effects to EBMUD and similarly situated water purveyors who divert from points upstream of the Delta. In the regulatory processes we control, we will do our best to keep this pledge. Although we cannot control the actions of the State Water Board, which, as a decision-maker with respect to a change petition and the Bay-Delta Water Quality Control Plan, cannot make any promises about eventual outcomes, we can say that we will continue to appropriately consult with our sister agency and have every confidence that the BDCP will comply with all applicable laws, including those Water Code provisions that will protect other water

users against injury in the context of the change petition. I hope that this letter has addressed your concerns. Mark Cowin, Jerry Meral, and I look forward to continuing discussions with you and seek your input as we proceed with the BDCP, which we believe is extremely important for the future of the great state of California.

Sincerely,

A handwritten signature in black ink that reads "John Laird". The signature is written in a cursive style with a large, looping initial "J".

John Laird
Secretary for Natural Resources

cc: Felicia Marcus
Board Chair, State Water Resources Control Board