

**STATE AND FEDERAL COMPREHENSIVE RESPONSE  
TO BDCP MOA COMMENTS**

Recently a number of Bay Delta stakeholders and interested legislators raised serious questions about various provisions of a draft “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 or MOA) proposed among the U.S. Bureau of Reclamation (Reclamation), California Department of Water Resources (DWR) and certain California Public Water Agencies (PWAs).<sup>1</sup> An opportunity for public comment was requested on the BDCP MOA. The U.S. Department of the Interior (Department), Reclamation, the California Natural Resources Agency, DWR and the PWAs agreed that the process would be well-served by soliciting public comments on the BDCP MOA before it became effective. The BDCP MOA had been posted on the BDCP website since September 6, 2011, but a new notice announcing the initiation of a comment period on the document was released on October 27, 2011. That comment period closed November 16, 2011.

Federal and state agencies received comments about the following:

- Current Bay Delta Conservation Plan (BDCP) schedule;
- Permittee/applicant status;
- Assurance provisions;
- Roles and responsibilities;
- BDCP finance and funding;
- Withdrawal of the MOA;
- Stakeholder involvement; and
- Specific MOA provisions.

The comments provided by members of Congress and members of the public raise specific concerns that, among other things, the MOA might bind BDCP participants to a time schedule that would not allow for a full consideration of alternatives and the necessary thorough scientific analysis; by providing a level of certainty in water supplies for south of Delta water contractors the MOA might conflict with agencies’ legal responsibilities under federal and state law; the MOA might provide special privileges and guarantees to south of Delta PWAs that are not provided to other stakeholders; that the MOA might allow the south of Delta PWAs to manage the technical consultants for the BDCP; and that the south of Delta PWAs should not be allowed to be permittees under federal and state law. In addition to comments that oppose provisions of the MOA, a number of comments supporting the MOA were submitted.

A brief summary of the comments by general category is posted on the BDCP website: [www.BayDeltaConservationPlan.com](http://www.BayDeltaConservationPlan.com).

The State and Federal agencies are taking a number of steps to address both the specific concerns about language in the MOA and the related concerns about the need for a full opportunity for meaningful public involvement in the BDCP. With respect to the MOA itself, the State and

---

<sup>1</sup> The PWAs are state and Federal water contractors that are proponents of the BDCP.

Federal agencies are proposing a number of significant modifications to the MOA that the PWAs have agreed to consider in making their decisions to continue funding BDCP-related work. Each of the PWAs' Boards of Directors must act to accept these proposed modifications and re-execute the MOA in order for the MOA to go into effect. This new, amended MOA will become effective if it is adopted by the State and Federal Agencies and each of the Public Water Agencies who are parties to it.

The State and Federal agencies are also initiating a number of additional actions to address issues raised in the comments. The agencies' goals are to enhance transparency regarding the MOA itself, to continue to improve the public process by which the BDCP is being developed, and to clarify that the MOA does not grant the PWAs any special advantages or rights. The actions set forth below make clear that: (1) the goals of the BDCP will guide the efforts of all Parties to the BDCP MOA; (2) the MOA Parties are committed to an open, transparent, and inclusive process; (3) schedule will not take precedence over full compliance with legal requirements and the application of sound science to the complicated analyses necessary to develop a successful BDCP; (4) decisions regarding the provisions of a final approved plan will be made by the regulatory agencies in accordance with their statutory authority; and (5) the State and Federal agencies, as well as the PWAs, desire to engage directly with other interested entities in addition to the PWAs to ensure full and complete participation in developing the BDCP. Upon initiating the public comment period, the Department set forth its view that signing the MOA was fully consistent with its legal obligations and responsibilities and that the BDCP MOA did not, and could not, alter the laws or principles guiding Federal participation in the BDCP process. This fact remains a central tenet of the Department.

The actions and modification to the MOA constitute a comprehensive response to the public comments, and include the following:

- Commitment to transparency;
- A balanced process and level playing field for stakeholder participation;
- Statement of principles and commitments with other entities;
- Specific modifications to the BDCP MOA;
- Schedule and completeness of scientific review; and
- Policy-level engagement.

In addition to process concerns, a number of comments on the BDCP MOA reflect long-standing issues about what the BDCP will ultimately include, and the resources and communities it will affect. All of these are valid issues that will depend on specifics of the Plan that are still being developed in concert with ongoing studies. It is the goal of the State and Federal agencies that the actions initiated here will improve public confidence and involvement in the process while setting the stage for developing those specific provisions of the BDCP that are of such great interest to the public and many stakeholder constituencies. There is much more work to be done and more public outreach and involvement yet to occur. The State and Federal agencies look forward to continuing these efforts with the goal of developing a BDCP that is consistent with the co-equal goals that are so important to California and the Bay-Delta region.

### **Transparency**

A first step in responding to public comments requesting enhanced transparency in developing the BDCP was announced on November 29, 2011, and consists of providing prompt and equal access to key BDCP and preliminary draft Environmental Impact Report/Environmental Impact Statement (EIS/EIR) documents. In the spirit of openness and transparency, these key documents will be posted on the internet and made available to all parties at the same time. These consultant-prepared preliminary drafts will be released to the public and all stakeholders even before State or Federal agencies have had the opportunity to review and comment on the drafts, and before the public drafts of the BDCP and the EIS/EIR are released for formal public review and comment. A list of key BDCP-related documents to be released and the expected release dates has been posted on the BDCP website: [www.BayDeltaConservationPlan.com](http://www.BayDeltaConservationPlan.com).

### **Statement of Principles**

State and Federal agencies welcome the opportunity to develop appropriate agreements or statements of principles with interested local governments, special districts, and non-governmental organizations (NGOs).

State and Federal agencies propose to work with stakeholders to develop a joint Statement of Principles setting forth their public commitments regarding the process for further development of the BDCP and the accompanying environmental review under the National Environmental Policy Act (NEPA) and the California Environmental Quality Act (CEQA). Agency commitments in the Statement of Principles will include matters such as the following:

- the goal of the BDCP planning process is to develop a plan that meets all applicable standards of federal and state law, specifically including the Endangered Species Act (ESA) and Natural Community Conservation Planning Act (NCCPA), as well as the co-equal goals of providing a more reliable water supply for California, and protecting, restoring, and enhancing the Delta ecosystem and the cultural, recreational, and agricultural values of the Delta as an evolving place;
- as it is developed, the BDCP is intended to be complementary to existing HCPs, NCCPs and state and conservation efforts in the Bay-Delta;
- the BDCP will be developed in an open, transparent and collaborative process that provides full and equal access to all interested stakeholders;
- the BDCP and accompanying EIS/EIR will be based on sound and credible scientific analyses that reflect input from stakeholders and review by independent scientists;
- decisions related to the BDCP will be made in an open way that includes meaningful opportunities for input from all stakeholders;
- decisions regarding approval of the BDCP and the content of EIS/EIR will be made by the applicable agencies in accordance with their independent statutory roles and responsibilities;
- it is intended that the BDCP provide reasonable assurances that it will meet both the co-equal goals of improving water supply reliability and restoring the Delta ecosystem, consistent with all applicable laws;
- the State and Federal lead agencies responsible for CEQA and NEPA compliance are committed to ensuring that a reasonable range of alternatives is presented in the EIS/EIR and that the environmental effects of those alternatives are properly analyzed. ; and

- responsibility for review and approval of the BDCP rests with U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) under the ESA and with California Department of Fish and Game (DFG) under the NCCPA, and responsibility for the development and content of the EIS/EIR rests with Reclamation, FWS and NMFS under NEPA and DWR under CEQA.

This anticipated Statement of Principles, together with the other measures announced recently ensuring transparency and equal public access to documents, will confirm that the MOA does not grant inappropriate special status or privileges to the PWAs or any other stakeholder in relation to the BDCP and accompanying NEPA/CEQA process.

### **Schedule and Completeness of Scientific Review**

Numerous comments expressed concern about the schedule for development of the BDCP and related EIS/EIR. Other comments were supportive. The State and Federal agencies acknowledge that the current schedule is aggressive in its timelines. Given the unsustainable and unacceptable status quo of the Bay-Delta and, therefore, the importance of a BDCP that adequately addresses the co-equal goals, an aggressive schedule is warranted.

At the same time, the agencies are well aware of the unprecedented complexity, difficulty, and importance of completing a scientifically and legally sound BDCP. In light of these facts, the BDCP MOA acknowledges the potential need for adjustments to the schedule and allows for such adjustments in paragraph II.C, which notes that the schedule may be revised from time to time.

The State and Federal agencies are committed to using the best available science in the development of a scientifically sound BDCP, assessing it from a regulatory standpoint consistent with State and Federal laws, and implementing the BDCP pursuant to permits issued under the applicable laws. Accordingly, an aggressive schedule will not trump the obligation to develop and evaluate the BDCP using the best available scientific information. This has been true since initiating the process and remains so today.

One of the cornerstones of ensuring the best available scientific information is securing advice from well-qualified independent scientists. An independent review was just conducted on the BDCP effects analysis conceptual foundation and analytical framework. The State and Federal agencies are currently reviewing the findings and recommendations of the panel and determining how to best respond to the review and what impact it might have on the BDCP schedule. Other independent reviews are also built into the schedule (including review of the draft EIS/EIR). In each instance, there will be an assessment of how to address any findings and recommendations in an appropriate manner.

In light of the aggressiveness of the BDCP schedule, the concerns expressed about the schedule, and also taking into account supporting statements submitted during the MOA comment period, the State and Federal agencies will implement a monthly review of the BDCP schedule that will include evaluation of any changed circumstances relevant to the schedule. The agencies will

then publicly disclose any adjustments that are made to the schedule on an ongoing basis and the reasons for such adjustments.

### **Policy-Level Engagement**

Another ongoing effort is that policy-level representatives from State and Federal agencies are engaging in direct dialogue with a number of stakeholder groups. We are also aware that some stakeholders are engaging in separate discussions with the Public Water Agencies. This engagement will allow the policy-level representatives to gain a better understanding of the key issues to further address during development of the BDCP.

The State and Federal agencies intend that the BDCP process will afford interested stakeholders a full opportunity to participate in an open process as the Plan and accompanying environmental review documents are developed. Stakeholder comments and input have been and will continue to be carefully considered. The process to date has not resulted in closed door decision-making, nor will it in the future.

### **Specific Proposed Modifications to the BDCP MOA**

After reviewing comments by members of the public and legislators relating to specific provisions of the MOA the State and Federal agencies have identified proposed modifications to the MOA that need to be considered and adopted by the Parties to the MOA. These specific changes are described below. A redline and strikeout version of the BDCP MOA, as it is proposed to be modified, will be posted on the BDCP website, along with this document.

- *Purpose of First Amended MOA* – The introductory section of the MOA will be amended to specify that the primary purpose of the MOA is to further efforts to develop a BDCP that meets all applicable standards of state and federal law, and is consistent with the co-equal goals. This modification is intended to clarify that any regulatory certainty associated with the BDCP will address both water supply and environmental conditions.
- *NEPA/CEQA vs BDCP Process* – The Recitals section will be amended to include a clarifying description distinguishing the BDCP preparation process from the NEPA/CEQA process. Other sections of the MOA where there is ambiguity on whether provisions apply to BDCP or to both BDCP and the NEPA/CEQA process will be amended to add clarity.
- *NEPA Co-lead Agencies Role* - Paragraph II.B will be amended to clarify that the NEPA co-lead agencies make the final determination on content of all NEPA documents.
- *Schedule* – Paragraphs II.C and II.E will be amended to specify two separate schedules (BDCP Chapter 5 and EIR/EIS). Also, paragraph II.E will be amended to clarify that agencies will evaluate the schedules and consider necessary revisions as described in subsection II.C. Additionally, paragraph II.E will be amended to eliminate ambiguity on whether provisions apply to BDCP or to both BDCP and the NEPA/CEQA process.

- Permittee Status – Paragraph II.H will be amended to expressly state that the paragraph does not grant the PWAs permittee status. Also, the paragraph will clarify that “if permittee status is ultimately granted” (a decision that is the responsibility of USFWS, NMFS, and DFG), the PWAs would not be granted any new authority over operational decisions. Simply put, the determination of whether the PWAs should be granted permittee status under the BDCP, and what specifically that entails is not decided in the MOA.
- Assurances – Paragraph II.J will be amended to eliminate the reference to ESA section 10 while still acknowledging that regulatory certainty with respect to water supply reliability is a fundamental element of the BDCP. Regulatory assurances were directly contemplated in developing the 2006 Planning Agreement and this provision simply specifies the Parties’ willingness to address this issue. This paragraph of the MOA does not, and could not; provide any regulatory assurances to federal water contractors. Any such assurances would be provided by USFWS, NMFS, and/or DFG pursuant to the issuance of permits under Federal and State law. As explained in the “Federal White Paper on the 2011 Bay Delta Conservation Plan MOA,” the conservation elements of the BDCP are still under development, and accordingly, the form and scope of 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.
- Draft Work Product – Paragraph II.K will be amended to delete the sentence stating that DWR, Reclamation, and the PWAs will work cooperatively to address all comments. Also, the paragraph will expressly state that it does not limit the ability of DWR or Reclamation to make draft consultant work product available to other cooperating agencies and members of the interested public. As discussed above, an announcement has already been made to this effect.
- Control of Consultants – Paragraph II.Q will be amended to make clear that no consultants will be retained for BDCP work unless they are approved by DWR, and before retaining consultants for EIS/EIR work DWR shall consult with the NEPA Co-Lead Agencies pursuant to the Lead Agency Agreement.
- Additional edits – Other minor edits are shown on the redline/strikeout version of the MOA posted on the BDCP website.

Stakeholder comments and input have been and will continue to be carefully considered as we move ahead with this historic effort to address the needs of fish populations, the vital agricultural industry, Delta residents, and the 25 million people who rely on the Sacramento-San Joaquin Delta for their water.