

## **Summary of Public Comments** **On the BDCP MOA**

The State and Federal agencies received approximately 500 comments on the “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). The comments range widely from those asking the agencies to rescind and re-write a new MOA, to those in support of the MOA and strongly objecting to any modifications of the current draft.

Summaries of the various categories of comments are set forth below.

### ***General comments***

A number of comments raise concerns about the fairness of the overall BDCP process. Some believe that the MOA reinforces an exclusionary process that demonstrates a bias in favor of water export contractors south of the Delta. Several comments emphasize the need to ensure that all stakeholder involvement is fair, equal and transparent; establish a realistic timeline; and commit to the co-equal goals of ecosystem restoration and water supply reliability.

### ***Current Schedule***

A number of MOA comments refer to the current BDCP schedule as unrealistic and express concerns that the schedule will preclude a full analysis of alternatives and other necessary scientific reviews. Some comments state that the MOA binds BDCP participants to an unrealistic timeline that has the serious potential to rush the many important decisions that have thus far been put off, avoid a full consideration of alternatives, and undermine the much-needed scientific analysis that remain to be done. Another concern is that the “aggressive” timeline does not provide stakeholders adequate time for input as the MOA emphasizes schedule as the single most important driver of the BDCP process. Many comments question the ability to produce a legally defensible plan under the current BDCP schedule. Specifically, the commenters believe that the schedule does not allow time to respond to comments. Additionally, some comments state that the schedule calls for completion of the BDCP before the State Water Resources Control Board hearings on the Delta Water Quality Control Plan take place. Several comments imply that the MOA schedule has already slipped.

### ***Permittee/Applicant Status***

Some comments address the issue of what entities should appropriately be issued Incidental Take Permits in connection with the BDCP. Some commenters believe that granting permittee status to the PWAs would critically impair the state and federal governments’ independent ability to administer the BDCP for the benefit of public trust resources by allowing entities located outside the Delta to directly and indirectly control administration, adaptive management and operations of a Delta-based plan through funding control, decision-making authority, contractual claims,

and litigation. They believe that granting permittee status to the PWAs is likely to violate provisions of state and federal law, jeopardizing the entire BDCP project, and could also undermine confidence in the BDCP process by other stakeholders and the public at large.

### *Assurances*

A number of comments express concerns with a provision of the MOA describing the goal of providing long-term guarantees of certainty to PWAs receiving water from the Central Valley Project (CVP) as “an essential element of a successful BDCP.” A number of comments state that this is an unreasonable standard to establish, especially as no equivalent assertions have been offered to any other BDCP participants. Specifically, commenters are concerned that establishing certainty for the PWAs is in conflict with other state and Federal responsibilities under various laws, such as doubling the populations of salmon and other anadromous fish, providing water for wildlife refuges, preserving water quality and availability of Delta agriculture, and meeting the needs of other water users. Other comments express that co-equal goals would require equal, specific, and certain commitments to restoring the Bay-Delta to health. Some commenters believe that this provision provides a clear intent by Reclamation to favor water contractors south of the Delta over other interests and invites future challenges to agency actions the PWAs if discretion is not applied in their favor.

Other comments state that the assurances that would be provided to PWAs south of the Delta are in conflict with state and Federal laws that establish fishery and ecosystem protection as coequal goals such as CVPIA and California’s 1988 Anadromous Fisheries Program Act.

### *Roles and responsibilities*

#### *Public Water Agencies’ review of documents and response to comments*

A number of comments express concern that the MOA provides PWAs south of the Delta special privileges and guarantees with regards to document review, and that the MOA establishes an unequal process going forward. Commenters are concerned that the MOA provides PWAs south of the Delta with an inappropriate level of influence over the BDCP planning, analysis, science, and environmental review. Of particular concern is the right of the PWAs to address all comments received during the BDCP-DHCCP planning phase. Commenters are concerned that the MOA would make available to PWAs internal drafts of the planning phase documents, preliminary engineering results, and drafts of the EIS/EIR for review and comment, and allows them an unacceptable role in responding to public comments in the NEPA/CEQA process. This is seen as objectionable, since the PWAs are neither impartial nor objective. Many comments discuss the inequity of this section, stating all stakeholders should have equal access and funding of the BDCP should not buy special access to or control of the project.

#### *Control of Consultants - Public Water Agencies as contract administrators*

The comments voice concerns that the MOA allows the PWAs south of the Delta to administer BDCP contracts without granting similar authority to other stakeholders. There is concern that the authority will be used to influence the BDCP process and the MOA does not include provisions to preclude using the authority inappropriately. Commenters assert this level of control presents a conflict of interest by allowing PWAs to be the contract administrator and

provide funding for the independent analysis. Some believe that the MOA provides the PWAs with substantial opportunities to shape the approach and analytic framework adopted by the consultants preparing the Effects Analysis and the selection and review of potential alternatives.

*State and Federal agencies' role*

In addition, commenters express concerns regarding the proper roles of state and federal agencies and their requirements under ESA, NEPA, and CEQA. There is concern that the end result has already been decided without input from a diverse group of stakeholders. Some question if the MOA ignores the public trust obligations of DWR and Reclamation.

***Withdraw and re-write new MOA***

A number of comments request that the agencies rescind the MOA and write a new MOA that addresses the interests of all parties to the agreement, including NGOs, Delta residents, farming and business organizations, environmental justice groups, recreational and commercial fishing organizations, and Native American Tribes.

***Funding/Financing Plan***

There is concern that the PWAs south of the Delta are to prepare a plan for financing conveyance facilities and that the financing plan is to be released concurrent with the draft EIS/EIR. There is concern that the plan would not have any public input prior to release and may rely heavily on public funding especially for habitat restoration. There is no similar requirement to develop a funding plan for the habitat conservation measures of the DHCCP. In addition, mitigation for impacts due to the existing projects is required by law to be financed by the contractors who benefit from the existing project. Public funding of conservation measures is appropriate only if it is not mitigation for existing project impacts.

***Stakeholder Involvement***

A number of comments emphasize the need to ensure that all stakeholder involvement is fair, equal and transparent and that all stakeholder groups have equal access to BDCP draft documents and consultant products and equal ability to provide direction to BDCP consultants. Comments also request that meetings involving the export contractors, state and federal agencies and the BDCP consultants should be open to all stakeholders. Commenters stated that, as currently written, the MOA grants the water exporters unprecedented influence over the BDCP process, to the exclusion of the many other constituencies who have justified interests in the Bay Delta. There is great concern by Delta interests that their wants and needs are not being considered and will not be considered in the BDCP process.

***MOA Specific comments***

A number of comments were specific to particular MOA provisions and have been considered and taken under advisement by the agencies. Several modifications to the MOA are being considered by the agencies and as described above, will be presented to the parties to the MOA.

***Comments outside the MOA and/or BDCP scope***

Some comments suggest that the BDCP must: (1) maintain state and federal agencies' ability to implement other statutory mandates including, but not limited to, the CVPIA's anadromous fish restoration program (including CVPIA §3406(b)(2) water, the Restoration Fund, and other activities), the refuge water supply program, Trinity River restoration, and the requirement that beneficiaries must pay for the mitigation of any project; and 2) ensure that any final BDCP preserves water quality and water availability for farmers, families, and businesses in the Bay-Delta area, and preserves flood protection for communities in the region. There were also concerns that the BDCP is focusing on water supply and not fully exploring flood protection.

***Comments in Support of the MOA***

In addition to comments summarized above that oppose many provisions of the MOA, a number of comments supporting the MOA were submitted. Those comments supporting the draft MOA urge the agencies to leave the MOA unchanged. They advocate that agreements and inter-agency relationships governing participation of the PWAs are instrumental to successful BDCP implementation. Supporters believe that the MOA creates a path for successfully completing the BDCP on a reasonable schedule. They also believe that sharing documents in a timely and coordinated fashion is a standard procedure and is essential to successfully coordinating this complex planning effort. They comment that the BDCP represents the only viable process toward an on-the-ground investment in the Delta's water supply and environment that sustains California's economy. Some supporting comments state that the MOA not only complies with the statutory requirements for public participation, it far exceeds them.