

ASSEMBLY
WATER, PARKS & WILDLIFE COMMITTEE AND
BUDGET SUBCOMMITTEE NO. 3
ON RESOURCES & TRANSPORTATION

**JOINT OVERSIGHT HEARING:
BAY DELTA CONSERVATION PLAN
STATUS AND UPDATE**

**Wednesday, October 19, 2011
State Capitol, Room 4202
9:00 a.m.**

BACKGROUND

The problems in the Sacramento-San Joaquin Delta (Delta) are legion, including crashing fisheries, unreliable export water supplies, and a seemingly endless cycle of litigation. The [Bay Delta Conservation Plan](#) (BDCP or Plan) process, which officially kicked off in July of 2006 with a Memorandum of Agreement (MOA) signed by multiple state and federal agencies and export water suppliers who provided initial planning dollars, has been viewed by many as a potential long-term solution for balancing water supply reliability and improving ecosystem restoration and protection. But BDCP is at a critical juncture. At its core, it must achieve two things: wed [State Water Project](#) (SWP) and Federal [Central Valley Project](#) (CVP) (collectively "the Projects") operations to export water out of the Delta to sufficient in-stream flow and other actions within the Delta such that species conservation goals are met and not only are the adverse impacts of the Projects' exports offset but the species are boosted on a trajectory towards recovery.

Much attention has been directed at environmental stressors in the Delta other than the export project operations. But it is important to understand that the purpose of the BDCP is not an academic review of every problem in the Delta, but to determine an appropriate level of "contribution to recovery" from the Projects. BDCP will result in the issuance of "take" permits and authorizations that will allow the Projects to export water for fifty years without running afoul of the [California Endangered Species Act](#) (CESA) and the [Federal Endangered Species Act](#) (FESA) for those species named in the plan (the "Covered Species").¹ That requires that the effects of the Projects' operations on those species become the central focus of evaluation. In addition, the BDCP hopes to achieve all of this as a state [Natural Community Conservation Plan](#) (NCCP)² and FESA Section 10 [Habitat Conservation Plan](#) (HCP).³

¹"Take" under CESA refers to the direct or indirect killing of species. "Take" under FESA also includes adverse habitat modification. "Covered Species" can include both species listed as threatened and endangered under CESA and FESA ("listed species") and non-listed species.

² The Natural Community Conservation Planning Act, Fish and Game Code § 2800, et seq.

³ For additional information see: *USFWS Habitat Conservation Plans: Section 10 of the Endangered Species Act* (http://library.fws.gov/Pubs9/hcp_section10.pdf).

Arguably, all of the alphabet soup comes down to this: If the BDCP process succeeds in crafting a Plan that meets NCCPA and HCP standards, then the Department of Fish and Game (DFG), the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS)⁴ will issue those fifty-year permits to the state Department of Water Resources (DWR) for SWP Delta operations. The permits will include regulatory "assurances" that if the plan is implemented as approved then no further money, water, or land can be required to address the impacts to Covered Species from the impacts of SWP operations and all of the other activities covered in the Plan beyond what is anticipated in the Plan.

Because DWR and the U.S. Department of Interior, Bureau of Reclamation (Reclamation) operate the Projects in tandem under the 1986 [Coordinated Operations Agreement](#) (COA), it is anticipated that Reclamation will amend its description of its own Project operations, called the "[Operations Criteria and Plan](#)" or OCAP, to incorporate the BDCP wholesale and then asking for new biological opinions and incidental take authorizations under FESA [Section 7](#) for the CVP. This is a new twist because up to now DWR has relied upon Reclamation's ESA coverage as the basis for its own endangered species act compliance. If, in the future, Reclamation relies upon BDCP then somewhat the reverse will occur: the Federal agency may be relying upon the successful implementation of measures in the State permit for lawful compliance. This is important because even though both agencies may rely upon BDCP, they could be doing so differently. For example, "assurances" the State receives under its permits do not become part of the federal agency consultations and authorizations.

In November of 2009, the world in which BDCP was being negotiated shifted somewhat when the California Legislature passed [Senate Bill 1 \(Simitian\)](#), Chapter 5, Statutes of the 2009-10 Seventh Extraordinary Session. SB 1 was part of the [historic five bill package](#) that emerged when then-Governor Arnold Schwarzenegger called the Seventh Extraordinary Session to address pending water issues that had remained unaddressed when the Regular Session adjourned. SB 1 focused on Delta governance and contained the Sacramento-San Joaquin Delta Reform Act of 2009 (Delta Reform Act), among other provisions. SB 1 enshrined in California statute the "coequal goals" for the Delta, which are "providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem." SB 1 also acknowledged that the "coequal goals shall be achieved in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place."⁵ Central to SB 1 was the creation of the [Delta Stewardship Council](#), a seven-member body tasked with drafting an implementing a long-term management plan for the Delta that achieves the coequal goals. SB 1 also specified that BDCP would only be incorporated into the [Delta Plan](#) (and receive public funding) if it met designated criteria, such as being an NCCP and including a specified range of criteria in its environmental analysis, among other requirements.⁶

⁴ NMFS has jurisdiction over marine species, including anadromous fish such as salmon and steelhead which spend most of their lives in the sea and migrate to fresh water to breed. USFWS has jurisdiction over all other species.

⁵ Public Resources Code § 29702; Water Code § 85054.

⁶ Principally Water Code §§ 85320 and 85321.

Even prior to SB 1 however, it was anticipated that the BDCP would be crafted as an NCCP. One of the main attractions for this was that the NCCPA's higher conservation standard (a project must help achieve species' recovery as opposed to simply, or not-so-simply, mitigating its own impacts) means that 1) assurances can be provided to the project applicant, as discussed above; and, 2) it is not only appropriate, but anticipated, that some level of public funding will be invested in the Plan. In other words the public is expected to pay some up-front fraction of the conservation actions (habitat restoration, etc.) that form the underpinning of the Plan and then, if the plan actions prove insufficient to conserve the covered species, the public may be obligated to provide additional money, land and water needed to adequately conserve the species.

In the case of BDCP, these costs could be significant. In a "[BDCP Costs Illustration](#)" released by the California Natural Resources Agency on September 17, 2010 for "discussion purposes," it was estimated that \$948 million would be required to run the Plan annually with \$668 million assigned to cover costs of a new conveyance facility and \$286 million estimated for the habitat actions, program oversight and monitoring that make up the Plan. Of the non-conveyance facility costs, \$53 million was proposed to be allocated as "Required SWP/CVP Contractor Costs" and \$233 million, or 82%, allocated as "Remaining Costs."

From the outset DWR and the export water agencies have suggested that a new peripheral conveyance of 15,000 cubic feet per second (cfs)⁷, either around or under the Delta, should be part of the BDCP. They've reasoned that a large facility will provide increased flexibility to move water from the north Delta as opposed to directly from the south Delta where the export pumps are located and many of the fisheries conflicts are currently occurring. A size of 15,000 cfs was because it is the maximum physical capacity of the six pumps located at the federal C.W. "Bill" Jones Pumping Plant and the eleven pumps located at the State Harvey O. Banks Pumping Plant combined.⁸ Various estimates have been given of the cost of building a new five-intake 15,000 cfs facility with some estimating infrastructure alone at upwards of \$12 billion.

While new conveyance of some size in the northern Delta could alleviate pressures on Delta smelt and other fish species currently affected by water operations in the southern Delta, the unresolved issue is how any new conveyance would be specifically linked to an operational regime that is demonstrably likely to improve ecosystem health for degraded species and the Estuary overall. While it is clear that many factors are at play in the decline of California's salmon and other Bay Delta native fishes, including but not limited to habitat loss, toxic discharges and invasive species, the State Board and others have also found that increased

⁷ In California water volume is generally discussed in three ways: cfs, acre-feet, and gallons. Cfs is the rate at which a given volume of water passes a given point in a given rate of time. 1 cfs running for a day is about two acre-feet of water. One acre-foot is the amount of water it takes to flood an acre a foot deep. It is almost 326,000 gallons and will provide, depending on where you live, from 1 to 4 average families enough water for a year.

⁸ It is worth noting the projects have never operated to 15,000 cfs. They are currently constrained by physical limitations, Army Corps of Engineers permits, and the *Water Quality Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary*, to an average of 4,600 cfs for the CVP and 6,680 cfs for the SWP, although the SWP has been allowed during the summer to increase to 8,500 cfs when water quality requirements can still be met and, due to lethal water temperatures in the south Delta and other factors, there are lower risks of effects to fish species than at other times of the year. In contrast, subsidence in the federal Delta-Mendota Canal, which carries CVP export supplies, has historically constrained the federal facility to about 4,200 cfs.

freshwater flows are a crucial part of the mix for this already over-subscribed Estuary. Thus, a key question for the BDCP is the extent to which it will result in a plan that addresses not only habitat restoration, but also the increases in freshwater flows needed to contribute and support the ecosystem recovery standards.

On November 18, 2010, following the election of Governor Brown, the Natural Resources Agency under the Schwarzenegger Administration released a "[BDCP Working Draft](#)." The working draft stated that it represented the "progress toward a conservation strategy intended to achieve the co-equal goals, as described in 'Points of Agreement' (2007) and 'An Overview of the Draft Conservation Strategy for the BDCP' (2009). The approach includes integrated elements: new conveyance infrastructure and operational criteria, restoration of habitat for covered species and their communities, measures to address stressors other than water supply operations, and provisions for adaptive management over the plan term."

On December of 2010, following the release of the BDCP Working Draft, the "[Highlights of the BDCP](#)" was issued. The Highlights document stated that it was "to provide the reader with an overview of the Plan's most central elements, approaches to some of its most challenging issues, and concerns or differing opinions from participants in the BDCP process. While we have consulted with various BDCP interests, this document does not represent any final positions. It is not intended to substitute for the years of effort by the Steering Committee and the more than 3,000 pages of material available [on the BDCP web site]. While the effort awaits new leadership from the State of California, it is absolutely critical that we not lose momentum in completing a draft Plan. Scientific and technical analysis is ongoing and will provide valuable insight and refinements to the contents and structure of the conservation plan. This important work must be completed prior to the issuance of a draft BDCP and draft [Environmental Impact Statement/Environmental Impact Report (EIS/EIR)] in 2011."

Following the release of the BDCP Working Draft, the National Academy of Sciences was asked to examine the scientific underpinnings of the process. The review was in response to a request from the U.S. Departments of Interior and Commerce and conducted over approximately seven months. In May of 2011 the National Academy of Sciences released its report [A Review of the Use of Science and Adaptive Management in California's Draft Bay Delta Conservation Plan](#) (NAS BDCP Review). In a strongly-worded conclusion the National Academies stated, "The [BDCP] plan is missing the type of structure usually associated with current planning methods in which the goals and objectives are specified, alternative measures for achieving the objectives are introduced and analyzed, and a course of action is identified based on analytical optimization of economic, social, and environmental factors. The lack of an appropriate structure creates the impression that the entire effort is little more than a post-hoc rationalization of a previously selected group of facilities, including an isolated conveyance facility, and other measures for achieving goals and objectives that are not clearly specified." (NAS BDCP Review p. 50.) Importantly it was acknowledged that the BDCP Working Draft lacked any detailed effects analysis, a critical component. The effects analysis is intended to provide the best scientific assessment of the likely effects of BDCP actions on the species of concern, and ecological processes of the Bay-Delta system.

Over the spring and summer the new State Administration grappled with the NAS BDCP report and other issues. Then, on August 9, 2011, the process took on a renewed sense of urgency when California Resources Agency Secretary John Laird sent Deputy Secretary of the Department of the Interior David Hayes a [letter](#) emphasizing the need for progress and included a schedule calling for a completed effects analysis ("BDCP Chapter 5") by April 9, 2012 and a final Record of Decision on the BDCP EIS/EIR by February 15, 2013. On August 10, 2011, Deputy Secretary Hayes's [responded](#) by acknowledging the "importance" of the BDCP and the need for "an aggressive time line" but cautioned that applying "sound scientific principles is fundamental to this effort and its importance cannot be overstated." On August 11, 2011 Resources then issued a [press release](#) stating that "with an agreed upon schedule it now had "impending financial commitments of roughly \$100 million" from export water agencies involved in the planning process.

However, on August 23, 2011 the environmental non-governmental organizations (NGOs) directly involved in BDCP planning, together with Natural Resources Defense Council and the Planning and Conservation League, sent a [letter](#) to the Undersecretary of Resources, Jerry Meral, who is in charge of BDCP coordination and to Deputy Secretary Hayes raising concerns that would need to be addressed for the planning process to reach a successful conclusion. They stated that the "array of current alternatives in the BDCP is insufficient to achieve ecological recovery of the Bay-Delta Estuary" and that "[c]urrently, there is no discernible logic behind the alternatives proposed for analysis. They are mostly a hodge-podge of operational scenarios and canal sizes, which will make it difficult to complete a useful apples-to-apples comparison..."

Thereafter, on August 30 and 31, 2011, respectively, DWR and Reclamation signed a [*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*](#) ("Collaboration MOA") with, primarily, Metropolitan Water District of Southern California, Kern County Water Agency, and Westlands Water District. The Collaboration MOA details how the remaining planning process will be funded and conducted, including the role of those export water agencies in the review of draft consultant work and draft documents. The Collaboration MOA also states that DWR may not proceed with releasing a public review draft of the BDCP EIS/EIR, or a final BDCP EIS/EIR, using funds provided by those water agencies until the Director of DWR receives written authorization to proceed from those agencies.

Currently, the scientific underpinnings to the BDCP process are receiving renewed attention. In September the consultants working under DWR on the BDCP process, submitted their "[Conceptual Foundation and Analytical Framework for Effects Analysis](#)" to an [Independent Science Review Panel](#) convened by the Delta Science Program. The purpose of that review is to ensure that the working draft BDCP Effects Analysis Conceptual Foundation and Analytical Framework is of sufficient scientific quality to serve its intended purposes. The Panel will make recommendations for how these might be improved with respect to achieving their stated goals. It will also review a second document, the working draft Entrainment Appendix, as an example of the application of the conceptual understanding, methods and analyses discussed in the Foundation and Framework. The panel meets October 25-26, 2011.

Given the recently-adopted schedule for releasing a complete public draft BDCP EIS/EIR in eight months, the purpose of this hearing is to revisit issues of governance, science, funding, transparency, local outreach and consistency with the Delta Reform Act that have been previously raised and must be addressed before a draft BDCP can be successfully completed. At this hearing we will also be receiving a report from the Legislative Analyst's Office (LAO) as to whether there are potential funding alternatives that could allow the State to successfully move the BDCP process forward should the export water agencies withhold their permission from DWR to release a draft public document.