

Assembly Water, Parks and Wildlife Committee  
Information and Oversight Hearing  
Bay Delta Conservation Plan  
Status and Update

November 16, 2010  
California State Capitol, Room 437

BACKGROUND  
SACRAMENTO-SAN JOAQUIN DELTA REFORM ACT OF 2009  
AND  
BAY DELTA CONSERVATION PLAN REQUIREMENTS

The Bay Delta Conservation Plan (BDCP) is a proposed Habitat Conservation Plan and Natural Community Conservation Plan to provide State Water Project facilities in the Sacramento-San Joaquin River Delta (Delta), which are operated by the California Department of Water Resources, with federal Endangered Species Act (ESA) and California Endangered Species Act (CESA) coverage for a fifty-year permit term. The BDCP may also provide ESA/CESA coverage for Mirant Delta LLC's Delta Power Plants. It is anticipated that an ESA consultation on the BDCP would also enable the U.S. Bureau of Reclamation to obtain new federal biological opinions and incidental take statements for the federal Central Valley Project. Planning on the BDCP has been ongoing since 2006.

The BDCP is being prepared by state and federal water contractors, the California Department of Water Resources, the U.S. Bureau of Reclamation, the California Department of Fish and Game, U.S. Fish and Wildlife Service, the National Marine Fisheries Service, environmental organizations, and other interested parties. These organizations have formed a Steering Committee tasked with identifying covered activities and water flow and habitat restoration actions to both ensure a more reliable water supply and recover endangered and sensitive Delta species and their habitats. Currently, the BDCP Steering Committee is analyzing an isolated conveyance facility around, or under, the Delta in conjunction with habitat restoration and other measures as the basis of the plan.

Senate Bill 1 (Simitian) from the Seventh Extraordinary Session on water issues includes the Sacramento-San Joaquin Delta Reform Act of 2009 (Delta Reform Act) (Water Code §§ 85000 et seq.). Several provisions of the Delta Reform Act have bearing on the development and implementation of the BDCP. First, the Delta Reform Act set out a new governance structure for the Delta. To help achieve this it created three new entities, the Delta Stewardship Council, the Delta Independent Science Program and the Delta Conservancy (as well as a new Delta Watermaster). It also restructured an existing entity, the Delta Protection Commission.

The primary task of the Delta Stewardship Council is to implement, by January 1, 2012, a long-term management plan for the Delta (Delta Plan) that meets the co-equal goals of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem. The Delta Reform Act requires the coequal goals to 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.

The Delta Reform Act also anticipates that the BDCP will be included in the Delta Plan if it meets certain requirements. But prior to listing those requirements, the Act sets out several "Early Actions" that also have bearing on the BDCP. Importantly, it states that the State Water Resources Control Board shall, "[f]or the purpose of informing planning decisions for the Delta Plan and the Bay Delta Conservation Plan...[and] pursuant to its public trust obligations, develop new flow criteria for the Delta ecosystem necessary to protect public trust resources."<sup>1</sup> It adds that these "flow criteria shall not be considered predecisional with regard to any subsequent board consideration of a permit, including any permit in connection with a final BDCP." (Water Code § 85086(c)(1).)

The Delta Reform Act Early Actions also require that the California Department of Fish and Game, "in consultation with the United States Fish and Wildlife Service and the National Marine Fisheries Service and based on the best available science, shall develop and recommend to the [State Water Resources Control Board] Delta flow criteria and quantifiable biological objectives for aquatic and terrestrial species of concern dependent on the Delta."<sup>2</sup> (Water Code § 85084.5.)

The specific requirements for the BDCP are set out in Chapter 2 of the Delta Reform Act's provisions on Comprehensive Delta Planning. They are as follows:

## CHAPTER 2. BAY DELTA CONSERVATION PLAN

**85320.** (a) The Bay Delta Conservation Plan (BDCP) shall be considered for inclusion in the Delta Plan in accordance with this chapter.

(b) The BDCP shall not be incorporated into the Delta Plan and the public benefits associated with the BDCP shall not be eligible for state funding, unless the BDCP does all of the following:

- (1) Complies with [the California Natural Community Conservation Planning Act (NCCPA) (Fish and Game Code §§ 2800 et seq.)].
- (2) Complies with [the California Environmental Quality Act (CEQA) (Public Resources Code §§ 21000 et seq.)], including a comprehensive review and analysis of all of the following:

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<sup>1</sup> The State Water Resources Control Board adopted its final report on August 3, 2010:

[http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/deltaflow/final\\_rpt.shtml](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/deltaflow/final_rpt.shtml)

<sup>2</sup> Information about the draft report can be found here: <http://dfg.ca.gov/news/news10/2010092201-Delta-Water-Report.html>

(A) A reasonable range of flow criteria, rates of diversion, and other operational criteria required to satisfy the criteria for approval of a natural community conservation plan as provided in subdivision (a) of Section 2820 of the [NCCPA], and other operational requirements and flows necessary for recovering the Delta ecosystem and restoring fisheries under a reasonable range of hydrologic conditions, which will identify the remaining water available for export and other beneficial uses.

(B) A reasonable range of Delta conveyance alternatives, including through-Delta, dual conveyance, and isolated conveyance alternatives and including further capacity and design options of a lined canal, an unlined canal, and pipelines.

(C) The potential effects of climate change, possible sea level rise up to 55 inches, and possible changes in total precipitation and runoff patterns on the conveyance alternatives and habitat restoration activities considered in the environmental impact report.

(D) The potential effects on migratory fish and aquatic resources.

(E) The potential effects on Sacramento River and San Joaquin River flood management.

(F) The resilience and recovery of Delta conveyance alternatives in the event of catastrophic loss caused by earthquake or flood or other natural disaster.

(G) The potential effects of each Delta conveyance alternative on Delta water quality.

(c) The [Department of Water Resources] shall consult with the [Delta Stewardship Council] and the Delta Independent Science Board during the development of the BDCP. The [Delta Stewardship Council] shall be a responsible agency in the development of the [CEQA] environmental impact report. The Delta Independent Science Board shall review the draft environmental impact report and submit its comments to the [Delta Stewardship Council] and the Department of Fish and Game.

(d) If the Department of Fish and Game approves the BDCP as a natural community conservation plan pursuant to [the NCCPA], the [Delta Stewardship Council] shall have at least one public hearing concerning the incorporation of the BDCP into the Delta Plan.

(e) If the Department of Fish and Game approves the BDCP as a natural community conservation plan pursuant to [the NCCPA] and determines that the BDCP meets the requirements of this section, and the BDCP has been approved as a habitat conservation plan pursuant to the federal Endangered Species Act (16 U.S.C. Section 1531 et seq.), the [Delta Stewardship Council] shall incorporate the BDCP into the Delta Plan. The Department of Fish and Game's determination that the BDCP has met the requirements of this section may be appealed to the [Delta Stewardship Council].

(f) The [Department of Water Resources], in coordination with the Department of Fish and Game, or any successor agencies charged with BDCP implementation, shall report to the [Delta Stewardship Council] on the implementation of the BDCP at least once a year, including the status of monitoring programs and adaptive management.

(g) The [Delta Stewardship Council] may make recommendations to BDCP implementing agencies regarding the implementation of the BDCP. BDCP implementing agencies shall consult with the council on these recommendations. These

recommendations shall not change the terms and conditions of the permits issued by state and federal regulatory agencies.

**85321.** The BDCP shall include a transparent, real-time operational decisionmaking process in which [the California Department of Fish and Game, U.S. Fish and Wildlife Service, and National Marine Fisheries Service] ensure that applicable biological performance measures are achieved in a timely manner with respect to water system operations.

**85322.** This chapter does not amend, or create any additional legal obligation or cause of action under, [the NCCPA] or [CEQA].

Finally, in addition to the above requirements, the Delta Reform Act prohibits the State Water Resources Control Board from approving any change in the State Water Project's existing point of diversion (i.e. any change from the existing facilities to a new conveyance facility, as is currently proposed in the BDCP) unless the order approving the change includes, "appropriate Delta flow criteria and shall be informed by the analysis conducted pursuant to this section. The flow criteria shall be subject to modification over time based on a science-based adaptive management program that integrates scientific and monitoring results, including the contribution of habitat and other conservation measures, into ongoing Delta water management." (Water Code § 85086(c)(2).)