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September 3, 2010

Via First Class Mail

Karen Scarborough, Undersecretary
Natural Resources Agency
1416 Ninth Street, Suite 1311
Sacramento, CA 95814

Re: BDCP Modeling for Proposed Project Operations

Dear Ms. Scarborough:

This firm serves as General Counsel for the Glenn Colusa Irrigation District (GCID). GCID has been monitoring the Bay Delta Conservation Plan (BDCP) process, along with other ongoing processes related to the Sacramento-San Joaquin Delta (Delta). GCID supports efforts to achieve the coequal goals set forth in SB 7x 1, but remains concerned that the obligations for meeting these goals will fall upon parties not responsible for the Delta's existing conditions and who will not benefit from the activities contemplated by SB 7x 1. In this context, GCID has repeatedly requested, but has not received, sufficient modeling information to understand precisely what the BDCP is modeling and what assumptions are being made in the modeling process. The purposes of this letter are to request greater clarity with regard to certain BDCP activities and to identify certain deficiencies within and concerns about the BDCP process.

The BDCP is currently being undertaken by "Potentially Regulated Entities" (PREs), which are various water contractors¹ that export or divert water from the Delta, the Department of Water Resources, the United States Bureau of Reclamation, and Mirant Corporation. If completed, the BDCP will allow the PREs to conduct activities in the Delta, including operation of the State Water Project (SWP), Central Valley Project (CVP), and any proposed alternative conveyance structure, that might otherwise conflict with current laws pertaining to endangered and threatened species. Indeed, the purpose

¹ The BDCP Planning Agreement identifies the following contractors as BDCP participants: The Metropolitan Water District of Southern California; Kern County Water Agency; Santa Clara Valley Water District; Alameda County Flood Control and Water Conservation District, Zone 7; the San Luis & Delta Mendota Water Authority, and Westlands Water District. Certain of these entities are participating on behalf of their individual members.

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of the BDCP planning process, according to the BDCP Planning Agreement, is to create a legally defensible Habitat Conservation Plan (HCP).

Our immediate concerns with the BDCP process revolve around consideration of an adaptive range of project operations, as outlined in a document entitled "SAIC Proposed Long-Term BDCP Water Operations Analytical Range," dated February 5, 2010 (draft) (hereinafter "Proposed Operations"). This document was circulated at the February 11, 2010 Steering Committee meeting. The Proposed Operations identify three "ranges" of operations; "Analytical Range A," "Initial Operational Criteria," and "Analytical Range B." The Initial Operational Criteria appears to be the proposed day-to-day operation of the new diversion facilities and ranges A and B appear to be adaptive ranges that will define the minimum and maximum permit limits. (See e.g. BDCP Concept of Adaptive Range, BDCP Steering Committee Handout, February 11, 2010.) In this regard, GCID is seeking greater clarity on the Initial Operational Criteria and have concerns with the Analytical Range B proposal.

Regarding the Initial Operational Criteria, it is our understanding that the modeling for this proposal assumed all existing uses and deliveries to upstream water users. In other words, the modeling for the Initial Operational Criteria assumed no reductions in upstream water supplies or water deliveries, including deliveries to Sacramento River Settlement Contractors. We believe this to be an appropriate assumption. Indeed, we believe that this assumption is the only legally defensible one that can be made. In this context, GCID requests confirmation that the modeling did not assume any reductions in upstream deliveries.

Regarding Analytical Range B, we are aware that the modeling for this scenario assumes and/or relies upon contributions of flow from upstream water users who are not party to the BDCP. The Proposed Operations, Analytical Range B includes what is identified as an "analysis of NGO watershed unimpaired runoff approach as it relates to PREs *and parties outside of BDCP.*" (Emphasis added.) We understand that this modeling approach will consider the contribution of water taken from upstream users to help achieve the goals and objectives of the BDCP and would, perhaps, be considered as a "related action alternative" as part of the California Environmental Quality Act (CEQA) analysis.

Because the BDCP process is essentially a private permitting exercise, relying in any way on water from parties not participating in the BDCP process as a means to fulfill BDCP's goals (even in the context of an adaptive range of operations) will result in a legally flawed Habitat Conservation Plan and, to the extent this analysis is considered as part of the CEQA analysis, a flawed CEQA document. Moreover, proceeding in this manner raises significant Fifth Amendment issues. As explained above, if the BDCP is approved, the PREs will be authorized to engage in certain activities, and will obtain

coverage under the ESA for any take incidental to those activities: Parties outside the BDCP receive no ESA coverage or benefits and are legal “strangers” to the BDCP process.

The obligations of overseeing implementation of the BDCP fall on the permittees, which is precisely why federal agencies require that the permittees be capable of overseeing HCP implementation and have the authority to regulate the activities covered by the permit, including implementation of all restoration and mitigation measures. Here, none of the permittees have the authority to regulate the diversion and use of water upstream. As such, any analysis of the benefits to the BDCP of non-BDCP participants foregoing water diversions is neither lawful nor appropriate. Further, any suggestion that impairing upstream water right contracts or requiring legal users of water to forego diversions would help achieve the goals of the BDCP would be misleading at best, and would result in a legally inadequate HCP. (*National Wildlife Federation v. National Marine Fisheries Service* (D. Or. 2003) 254 F.Supp.2d 1196, 1205 (“*NWF v. NMFS*”).)

Courts have invalidated HCPs that relied on actions and/or mitigation measures by third parties that were “not reasonably certain to occur.” For example, in *NWF v. NMFS*, NMFS had issued a biological opinion (BO) for the Federal Columbia River Power System (FCRPS). Plaintiffs challenged the BO on several grounds, including challenging the BO’s no-jeopardy conclusion, which relied, in part, on the implementation of off-site mitigation actions by non-permittees. (*Id.* at p. 1205.) Specifically, the BO for the FCRPS identified several actions by adjoining States², various activities being undertaken on a regional level³, and by Tribal governments⁴, including making recommendations on various programs geared towards improving salmon populations. (*Id.* at pp. 1208-1209.) The court invalidated the BO because there was no “binding commitments by the States, Treaty Tribes, and private parties to fund or implement the responsibilities devolved upon them” by NMFS. (*Id.* at p. 1213.) The Court noted that while the BO did provide for a “periodic . . . check-in and monitoring

² State actions identified by NMFS included Oregon’s Plan for Salmon and Watershed, Washington’s implementation of its “Statewide Strategy to Recover Salmon,” “Watershed Planning Act,” “Wildstock Recovery Act,” and “Forest and Fish Plan,” among others, Idaho’s “Forest Practices Act,” and Montana’s implementation of water quality restoration plans. (*Id.* at pp. 1208-1209.)

³ Regional actions considered by NMFS included proposed habitat reforms that would “integrate federal, state, and regional planning,” cooperation with local and tribal governments to implement the “National Estuary Program” for the lower Columbia River, harvest reforms based on yet-to-be conducted research, proposed hatchery reforms, and seeking funding assistance for activities designed to improve ecosystem health. (*Id.* at p. 1209.)

⁴ Tribal actions considered by NMFS included “participation in efforts involving watershed and basin planning designed to improve aquatic and fish habitat,” among other things. (*Id.* at p. 1209.)

program” to be sure these actions were occurring, the court held that NMFS must make a finding that those actions are “reasonably certain to occur” prior to making a no-jeopardy finding.⁵ (*Id.* at p. 1215.)

The District Court’s analysis, therefore, raises serious questions about the legitimacy and legality of an HCP that relies on potential flow contributions or other mitigation or conservation measures from upstream water users. It is inappropriate for the BDCP to consider contributions from upstream water users not party to the BDCP. Masking this otherwise inappropriate exercise by moving it into a CEQA analysis does nothing to cure the underlying defect and, indeed, is an inappropriate application of CEQA.⁶

Moreover, any reliance on flow contributions from upstream, or suggestion that senior water right holders should somehow be required to forego water diversions to make the BDCP a success is inconsistent with California law. The State Water Resources Control Board (SWRCB) recently attempted to impose a condition on senior water rights held by the El Dorado Irrigation District (EID) and the El Dorado County Water Agency (EDCWA) that would have required EID and EDCWA to forgo diversions to the benefit of junior users. EID and EDCWA challenged the SWRCB’s action, arguing that the imposition of the condition, which effectively required EID and EDCWA, senior water right holders, to forego diversions to help meet Delta water quality standards, standards for which the CVP and SWP were responsible for meeting, while junior users could continue to divert water, violated the long-standing principle of water right priorities, among other things. Both the lower and appellate courts sided with EID and EDCWA. (*El Dorado Irrigation District v. State Water Resources Control Board* (2006) 142 Cal.App.4th 937 (*EID v. SWRCB*).

Importantly, the Court of Appeal held that the SWRCB’s attempt to impose this condition “contravened the rule of priority, which is one of the fundamental principles of California water law.” (*Id.* at p. 943.) Indeed, the Court recognized prior pronouncements of the California Supreme Court explaining that a court’s *first concern* when addressing water right controversies is to “recognize and protect the interests of those who have prior and paramount rights to the use of waters.” (*EID v. SWRCB*, citing

⁵ The State of Idaho had argued that the ESA needed to be interpreted in such a way as to be “flexible” enough to accommodate these types of “complex” situations. While the court acknowledged the complex issues facing the Columbia River Basin, the court explained that the issue before the court was simply whether NMFS complied with the ESA. (*Id.* at p. 1215.)

⁶ The concept of a “related action alternative” is not part of current CEQA parlance. While it is somewhat unclear what is intended by the use of this phrase, it is clear that the use of the phrase will mislead the public.

Meridian, Ltd. v. San Francisco (1939) 13 Cal.2d 424, 450.) While the Court recognized that the rule of priority is “not absolute,” the Court was very clear in holding that the SWRCB is *obligated to protect water right priorities* unless doing so would result in the unreasonable use of water, violations of the public trust doctrine, or “other important principles” of California water law. (*EID v. SWRCB* at pp. 966-967.) When these circumstances present themselves, “every effort must be made to preserve water right priorities.” (*EID v. SWRCB* at p. 966.) Thus, any attempt, through the BDCP, to undermine water right priorities, or to attempt to require upstream senior diverters to forego diversions to meet BDCP goals and objectives, thereby allowing the continued export of water by junior appropriators, will violate long-standing principles of California water law.

The California Supreme Court reached a similar conclusion in *City of Barstow v. Mojave Water Agency* (2000) 23 Ca.4th 1224 (*Barstow*). There, the Court rejected a “physical solution” as a method of settling a water right dispute where the physical solution that relied on an “equitable apportionment” and did not consider prior rights. Importantly, the *Barstow* Court noted the need to protect and recognize prior rights when it opined: “In ordering a physical solution, therefore, a court may neither change priorities among the water rights holders nor eliminate vested rights in applying the solution without first considering them in relation to the reasonable use doctrine.” (*Barstow* at p. 1250.) Like *Barstow* and *EID v. SWRCB*, any analysis of flow contributions needed to make BDCP a success cannot be conducted under the assumption that water right priorities are somehow irrelevant. Instead, and as explained by the *Barstow* Court, “a prior appropriator . . . cannot be compelled to incur any material expense in order to accommodate the subsequent appropriator.” (*Barstow* at p. 1250, citing *City of Lodi v. East Bay Mun. Utility Dist.* (1936) 7. Cal.2d 316, 341.)


In addition to the foregoing, “area of origin” statutes⁷ mandate that water use within the area of origin – in this case Northern California – not yield to the export of water for use outside of the area of origin. In fact, the water rights granted by the state for the operation of the SWP and CVP are conditioned upon compliance with area of origin laws. Any attempt to subvert the area of origin statutes, whether through a private HCP process or through CEQA, will result in clear violations of those statutes intended to protect areas- of origin, including the protection of Northern California water supplies from injury by export projects.

⁷ The area of origin statutes include Water Code sections 10500 et seq. and 11460 et seq.

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GCID looks forward to its continued work with others in the water and environmental communities to develop meaningful methods of achieving the coequal goals. It is critical, however, that the BDCP process remain open and transparent and that parties not participating in BDCP be able to fully understand the real and practical implications of the BDCP proposals under consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Stuart L. Somach". The signature is fluid and cursive, with the first name being the most prominent.

Stuart L. Somach
General Counsel of Glenn Colusa Irrigation District

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