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November 16, 2011

Sent via email to BDO@usbr.gov

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Subject: Comments on First Amendment to the BDCP MOA

Contra Costa Water District (CCWD) appreciates this opportunity to comment 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" (MOA) between the Department of Water Resources (DWR), the Bureau of Reclamation (Reclamation) and a small group of state and federal water contractors ("Export Contractors").

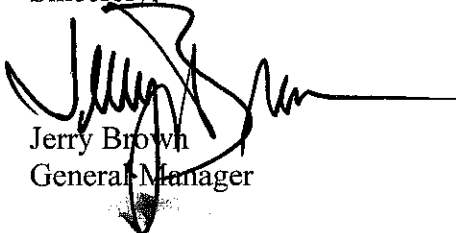
CCWD shares the concerns expressed by Representatives Miller, Matsui, Garamendi, Thompson, and McNerney in their October 24, 2011 letter to Secretary Salazar regarding certain changes the MOA sets forth in how the Bay Delta Conservation Plan (BDCP) will be developed. The BDCP is a landscape-scale conservation plan with potential public funding obligations. As such, it is absolutely critical that the BDCP is developed within an open and transparent process, with equal participation amongst all stakeholders. However, in its current form, the MOA potentially allows the public process to be circumvented by providing the Export Contractors access and influence over BDCP development that unnecessarily removes the perception of fairness, including putting into question the prior commitment to a transparent evaluation of alternatives that was previously agreed to by the BDCP Steering Committee.

The attachment to this letter provides specific issues and changes regarding the MOA for your consideration. In general, we are concerned that the proposed MOA will hinder DWR in exercising its independent judgment, which is a requirement to certify that the Environmental Impact Report (EIR) is complete and accurate. While all stakeholders should be consulted during preparation of the EIR, giving one set of stakeholders extraordinary influence and the ability to respond to other stakeholder comments will call into question the accuracy of the technical information, as well as whether DWR has used independent judgment in making the required findings based on that information. CCWD respectfully requests that the parties reconsider the terms of the MOA to allow for equal and transparent stakeholder involvement and to ensure that DWR acts independently.

CCWD is also concerned that DWR appears to be precluding its future ability to select an alternative that will achieve the project objectives while reducing environmental impacts. CCWD understands the EIR ostensibly includes an evaluation of several alternatives as required under CEQA. The BDCP Effects Analysis, by contrast, will focus on only one alternative. Moreover, the BDCP Effects Analysis will be used to determine whether DWR proceeds with the selected alternative. In testimony before the California State Assembly Committee on Water, Parks and Wildlife on October 19, 2011, Deputy Secretary Meral stated that DWR cannot select an alternative that does not meet the conservation standards, and that the Effects Analysis will inform DWR whether the BDCP meets those standards. As a practical matter, this means that DWR is creating a process under which it may be impossible to select an alternative other than the single alternative that has been evaluated in the Effects Analysis. This is contrary to both CEQA and NEPA's goals of rigorously examining alternatives that are capable of reducing adverse environmental effects, and not precluding their selection prior to completion of the environmental review process.

We look forward to continuing to work with you to make the BDCP process a success for all stakeholders. If you have any questions regarding CCWD's comments on the MOA, or any of our many previous comment letters on the BDCP and the supporting environmental analysis, please call Greg Gartrell at (925) 688-8100.

Sincerely,



Jerry Brown
General Manager

JB/GG/DS:wec

Attachment

cc: Representative George Miller
Representative Doris O. Matsui
Representative John Garamendi
Representative Mike Thompson
Representative Jerry McNerney
Secretary John Laird
Deputy Secretary Jerry Meral
Deputy Secretary David J. Hayes
Commissioner Michael L. Connor

Specific Comments

Role of Export Contractors.

Applicants/Permittees. It is premature for DWR and Reclamation to support listing the Export Contractors as “applicants” or “permittees”. To simply state in the MOA that such status “would not provide them any new authority over water project operational decisions or result in the delegation of authority from any state or federal agency” (MOA paragraph II.H.), is not adequate assurance that such a decision would not impact other stakeholders. This is an issue that requires greater definition and clarity of the BDCP and of what it means to be a permittee, and that necessitates public discussion of the justification and consequences. Also, it is unclear what this status will mean in implementation of the BDCP or whether it would undermine or delegate powers that should remain exclusively with Reclamation, such as water supply allocations and measures to meet fishery protection obligations.

Assurances. According to the MOA (paragraph II.J.), the Parties will meet to evaluate measures to provide the federal contractors the equivalent of the assurances that are provided under section 10 of the federal Endangered Species Act. Any meetings to discuss this topic must be open to the public and allow for meaningful discussion and review. The BDCP measures must not redirect impacts to other water users or hinder Reclamation’s ability to meet other legal responsibilities, and the rationale for the assurances should be applied universally among federal contractors. CCWD would like to better understand the process for developing the assurances. One concern is that DWR and Reclamation and/or Export Water Contractors could receive 50-year operating approvals while the efficacy of the habitat measures is tested over decades. Assurances for the Export Contractors must be tied to the recovery standard for listed species. If the standard is not being met through adaptive management, then the Export Water Contractors may be required to undertake additional measures, including reduced diversions, if necessary. It is unacceptable for the Export Water Contractors’ assurances to shift responsibilities to others in the watershed to increase water releases, adjust operations, or pay for improvements if the habitat measures are not successful. The burden of providing the desired BDCP outcome must remain with the BDCP applicants.

The MOA should be amended to remove the support for permittee status and instead commit to a public process that allows for a full discussion of permittee status and assurances. Any proposals regarding permittee status and assurances should be considered as part of the draft BDCP so that the public and stakeholders can comment and receive responses to comments prior to any commitments.

Alternatives. Although the BDCP MOA recognizes the prior agreement to evaluate a full range of design and operational parameters, the MOA incorrectly states that the Steering Committee delegated that evaluation to the DHCCP (MOA paragraph I.J.). To the contrary, the November 2007 “Points of Agreement for Continuing into the Planning Process” states that “[d]uring the BDCP process, the Steering Committee will evaluate the ability of a full range of design and operational scenarios to achieve BDCP conservation and planning objectives” (emphasis added). However, the Steering Committee has not met since November 2010, and DWR since has taken the approach to only evaluate a single alternative within the BDCP Effects Analysis, which be included in chapter 5 of the HCP/NCCP document.

According to the presentation at August 11, 2011 BDCP public meeting, the associated Environmental Impact Statement / Environmental Impact Report (EIS/EIR) will not include a full Effects Analysis of the project alternatives, indicating that the alternatives will not be analyzed equally. While the EIS/EIR will reportedly consider several alternatives, the fact that the BDCP will only include a single alternative and that only the one alternative will include a full Effects Analysis, means that the other alternatives will not be fully considered. CCWD remains concerned at the limited scope of the alternatives analysis and how the proposed MOA does not appear to create any assurances that a full and complete analysis is to be performed. CCWD has provided comments on alternative development during the scoping process and following the release of an alternatives list at the August 11, 2011 public meeting. CCWD continues to encourage DWR to fully evaluate a phased conveyance approach as discussed in our August 31, 2011 letter to Deputy Secretary Meral.

The MOA should be amended to recognize and commit to the previous agreement that a full range of design and operations scenarios will be fully evaluated.

Financing Plan. The MOA specifies that the Export Contractors will prepare a financing plan “for the design, construction, operation, and maintenance of any conveyance facilities that will be constructed as part of the BDCP” (paragraph II.R.), to be released concurrently with the public draft BDCP and EIS/EIR. As required by law, the Export Contractors must also pay for the *mitigation* required for the construction, operation, and maintenance of any new conveyance facility (California Water Code 85089(a)). The MOA should be amended to include mitigation costs as part of the Export Contractors’ financing plan.

Furthermore, although the Export Contractors have indicated that they do not intend to pay for habitat restoration that would be a part of the BDCP, the draft BDCP must include a comprehensive financing plan to cover all costs of the BDCP, including all habitat restoration. Therefore, the MOA should be amended to clearly present a public and transparent mechanism for discussing the full financing of the BDCP well in advance of the release of a draft BDCP.

Schedule. The aggressive schedule threatens the BDCP's ability to incorporate the best available science and respond to independent science reviews. While CCWD appreciates Deputy Secretary Hayes's assurance in an October 31, 2011 letter to Representative Miller that they "intend to meet the schedule in a manner that will not compromise our ability to produce a plan based on scientifically sound and legally defensible analyses," the MOA appears to defy this commitment by explicitly stating that DWR may proceed with development of the BDCP and DWR and Reclamation may proceed with development of the EIS/EIR if comments are not received in accordance with the schedule (MOA paragraph II.E.). CCWD respectfully recommends that DWR and Reclamation reconsider the agreement to move forward if comments are delayed, as the delivery of draft documents is already behind schedule. The unrealistic schedule (as evidenced by current delays) and agreement to move forward without comments is discouraging to say the least.

Furthermore, the short timeline (85 days) to review and respond to public comments is unprecedented for a project of this magnitude. At the request of Reclamation, CCWD provided the timeline for EIS/EIR milestones of the expansion of the Los Vaqueros Reservoir, which could be considered a "best case" scenario as CCWD's project was relatively small and did not encounter opposition or legal challenges. Full review and response to public comments for the EIS/EIR regarding the expansion of the Los Vaqueros Reservoir took approximately 11 months. The BDCP allotment of only 85 days to respond to public comments is unrealistic if public comments are to be adequately addressed.

The MOA schedule should be amended to allow for adequate time to consider the full range of alternatives, consider the results of preliminary Effects Analyses, incorporate appropriate changes, and allow for adequate time to review and respond to comments received on the draft documents.

BDCP Planning Agreement. Although referenced throughout the MOA (MOA paragraphs I.G., I. H., II.A, II.O., and III.G.b.), the BDCP Planning Agreement is not being fully implemented. For instance, the Planning Agreement specifies that the Steering Committee will "convene in regularly scheduled public meetings," yet the Steering Committee has not met since November 2010, and many tasks to be conducted by the Steering Committee are either left undone or performed outside of the public process. For example, see the discussion regarding "Alternatives" below.

Other Agreements. The MOA references a number of other agreements that have not been released to the public (MOA paragraphs I.G. and III.E.). These documents should be released as they may provide additional details not represented in the MOA.