

Donald R. Glaser
Regional Director
United States Bureau of Reclamation
Bay-Delta Office
801 I Street
Suite 140
Sacramento, CA 95814

Re: Comments on BDCP 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.

Comments Regarding Improved Transparency and Stakeholder Involvement in the BDCP Process.

Dear Director Glaser:

This office represents the Save the California Delta Alliance (“STCDA”). STCDA is a membership organization headquartered in Discovery Bay, California, and comprised of individuals and organizations interested in preserving and restoring the California Delta. Among others, STCDA represents the interests of recreational boaters who use the California Delta, individual homeowners who own waterfront property in the Delta and obtain their drinking water from the Delta, and businesses that earn their living from Delta-oriented activities, including recreational activities centered on the waters of the Delta. STCDA’s primary mission is to improve habitat, support the recovery of listed species, improve water quality, and enhance recreational opportunities in the Delta.

STCDA represents an active and enthusiastic constituency and regularly turns out three to four hundred people at our town hall style meetings held in Discovery Bay.

STCDA would like to thank the United States Bureau of Reclamation (“Reclamation”) for the opportunity to comment on the First Amendment to the Memorandum of Understanding (“Amendment”) and for the opportunity to comment on ways to improve stakeholder participation in the BDCP process. We believe the invitation to comment is a much needed step in the right direction for a process that has gotten off track.

STCDA is particularly concerned with the dramatic change in the role and status of State Water Project Contractors (“SWP Contractors”) and Central Valley Project Contractors (“CVP Contractors”), (collectively “Water Contractors”) reflected in the Amendment. Below, we discuss the Water Contractor problem in the context of what we believe are systemic problems with the BDCP process that are manifested in the current Water Contractor controversy.

I. The Process Got Off On The Wrong Foot By Inaccurately Stating What The Major Federal Action Under Contemplation Actually Is.

We believe that one important problem with the BDCP process thus far is the failure to accurately describe and categorize the actions that are being taken within the well-established NEPA regulatory framework. Once actions are accurately described and categorized a better understanding of what is being done and what is and is not appropriate (and lawful) follows.

We believe that the entire process got off on the wrong foot because Reclamation has never accurately stated what the “major federal action” being contemplated is. 42 U.S.C. § 4332(c). The February 13, 2009, Notice of Intent to prepare an Environmental Impact Statement, 74 Fed. Reg. 7257, (“NOI”) states that the proposed federal actions are issuance of ESA permits and implementation of one or more components of the BDCP. However, this is incorrect. The major federal action is continued operation of the CVP at increased rates of export through one of three alternative conveyance options (“Peripheral Canal”). Reclamation may recall that in recent litigation against the CVP Contractors it successfully argued that the major federal action at issue in that litigation was not the issuance of biological opinions but rather “planned coordinated operation of the Projects [CVP] that creates the jeopardy found by the BiOp.” *Delta Smelt Consolidated Cases*, 686 F. Supp. 2d 1026, 1042 (E.D. Cal. 2009); *see also* U.S. Fish & Wildlife Service, *Habitat Conservation Plans*, available at http://library.fws.gov/Pubs9/hcp_section10.pdf (last visited Nov. 14, 2011) (noting that “[t]he purpose of the incidental take permit is to authorize the incidental take of a listed species, not to authorize the activities that result in the take”). Here, it is the continued operation of the CVP and SWP at increased export levels and with a Peripheral Canal that creates the jeopardy to the smelt and other listed species (and the take); the Habitat Conservation Plan (“HCP”) and the take permits are incidental to the underlying activity.

The NOI’s misstatement of the major federal action¹ has carried through the process and resulted in widespread public perception that the BDCP is “a twelve billion dollar canal dressed up as a habitat plan.”

¹ We are aware that BDCP prevailed against a similar claim in *Cent. Delta Water Agency v. U.S.F.W.S.*, 653 F. Supp. 2d 1066 (E.D. Cal. 2009). Two observations are in order with regard to *Central Delta Water Agency*: first the court dismissed the action on standing and ripeness grounds. *See id.* at 1083. The court did not reach the merits of whether the NOI was inadequate. Challenge to the project based on an inadequate NOI upon issuance of the Record of Decision is in no way impaired by *Central Delta Water Agency*. Second, and more to the point for BDCP policy guidance going forward, the court and the parties in *Central Delta Water Agency* entirely missed the appropriate claim, which is “informational injury.” Had a properly framed complaint bringing an informational injury claim been brought, none of the factors cited by the court would have precluded the standing, ripeness, and finality requirements being satisfied. *See, e.g., Ctr. For Biological Diversity v. Brennan*, 571 F. Supp. 2d 1105, 1118 (N.D. Cal. 2007) (noting that “[i]t is well settled that plaintiffs may suffer injury as a result of a denial of information to which they are statutorily entitled” and “recognizing that a purely informational injury may be sufficient to confer standing”) (citation omitted); *see also*

The term “peripheral canal” is the conventional label for transporting water from the north Delta to the Clifton Court Forebay outside of the rivers and sloughs of the Delta. Its use engenders instant public recognition and understanding of what is at stake. And it provokes instant response and controversy. Not using a conventional label when one is available strongly suggests to the reader that the writer is not referring to the object conventionally so labeled. It is misleading, particularly to the general public. *See also Railroaded Salmon*, available at <http://vimeo.com/31740676> (last visited November 15, 2011) (noting “outrageous claim that new diversion facility is a conservation measure”); San Jose Mercury News, October 30, 2011, *Federal Delta water pact fails on every count*, available at http://www.mercurynews.com/opinion/ci_19217860 (last visited November 15, 2011) (criticizing BDCP “lack of transparency” and “favoritism toward water-export agencies”).

The habitat plan and conservation measures are actually very much needed and if properly fleshed out and evaluated could provide great benefit to the Delta. We think a robust habitat plan deserves broad public support. It would receive public support more readily if Reclamation were more forthcoming about identifying the Peripheral Canal for what it is, more clearly making a commitment to the HCP with or without a canal attached to it, and clearly stating an enforceable, ironclad, mechanism for ensuring that harmful levels of water export will never occur.

The current Water Contractor problem is another aspect of the mis-designation and lack of clarity in the BDCP process.

II. The Amendment Dramatically Changes The Role Of The Water Contractors From That Contemplated In All Previous Documents And Understandings By Inappropriately Designating Them As “Responsible Agencies” Under CEQA and “Cooperating Agencies” Under NEPA.

The Water Contractors are described for the first time in the BDCP process in the Amendment as “responsible agencies.” Amendment, Recital E and Paragraph II(I). The Federal White Paper on the 2011 Bay Delta Conservation Plan MOA (“White Paper”), issued in response to concerns expressed by Congressman Miller, is the first document to describe the Water Contractors as “Cooperating Agencies.” White Paper at 2. The term “Responsible Agency” is a statutorily defined term with a specific role under CEQA. Cal. Pub. Resources Code § 21069; CEQA Guidelines §§ 15096, 15381. The term “Cooperating Agency” is a term defined by the NEPA Implementing Guidelines with a specific role under NEPA. 40 C.F.R. §§ 1501.6 & 1508.5. Elevation to Responsible Agency and Cooperating Agency status gives the Water Contractors the ability to influence the process shielded from public view. *See* 43 C.F.R. § 46.225(d) (requiring Cooperating Agencies to make “a commitment to maintain the confidentiality of documents and deliberations during the period prior to the public release by the bureau of

Daniel L. Mandelker, *Nepa Law and Litigation* § 4.17 (informational and procedural injury as injury in fact). Because informational injury was not litigated *Central Delta Water Agency* has no preclusive effect with respect to informational injury claims.

any NEPA documents, including drafts”). It also provides them with much more influence over the process. *See* 40 C.F.R. § 1501.6(a)(2) (Lead Agency must “[u]se the environmental analysis and proposals of cooperating agencies . . . to the maximum extent possible”); 40 C.F.R. § 1501.6(b)(3) (Cooperating Agency may prepare “environmental analysis including portions of the environmental impact statement”); 40 C.F.R. § 1501(b)(4) (Cooperating Agency to provide its own staff to work on preparation of EIS); 43 C.F.R. § 46.230 (Cooperating Agency may analyze data; develop alternatives; evaluate alternatives; estimate effects of implementing alternatives; carry out any other task related to the development of the EIS); 40 C.F.R. § 1506.5(c) (Cooperating Agency may select consultants engaged to prepare EIS).

Elevating the Water Contractors to Cooperating Agency status through a federal white paper that explains and defends the Amendment, when the term Cooperating Agency was nowhere used with respect to the Water Contractors prior to the White Paper, including in the Amendment, is not consistent with NEPA implementing regulations or standard agency practice.

Rather, NEPA implementing regulations contemplate that Cooperating Agencies will be designated through a formal process and will be publicly announced prior to beginning the scoping process, usually in the NOI. *See* 40 C.F.R. § 1501.5 (c) (“lead agencies *shall* determine by letter or memorandum which agency shall be the lead agency and which shall be cooperating agencies”) (emphasis added); 40 C.F.R. § 1501.6(b)(2) (requiring that “[e]ach cooperating agency *shall* . . . [p]articipate in the scoping process”) (emphasis added); Memorandum for the Heads of Federal Agencies, Subject: Reporting Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act (Dec. 23, 2004) (requirement for all federal agencies for “reporting the designation of Federal and non-federal cooperating agencies”); Memorandum for the Heads of Federal Agencies From James Connaughton, Subject: Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act (Jan. 30, 2002) (instructing heads of agencies to “identify as early as practicable” Cooperating Agencies); Memorandum For The Heads of Federal Agencies From James L. Connaughton, Subject: Report on Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act (May 26, 2005) (noting Lead Agencies are “designating formal cooperating agencies when beginning their NEPA process”).

Here Reclamation did in fact comply with the regulations and standard agency practice by formally announcing the Cooperating Agencies in the NOI. However the Cooperating Agencies selected did not include the Water Contractors. Instead Reclamation properly designated The Army Corps of Engineers (“ACOE”) and the United States Environmental Protection Agency (“USEPA”) as the Cooperating Agencies. NOI, 74 Fed. Reg. at 7257. On the other hand, the NOI designates the Water Contractors as “Potentially Regulated Entities or PREs.” NOI, 74 Fed. Reg. at 7258. It is clear that at issuance of the NOI, which is the appropriate time to select Cooperating Agencies, the Water Contractors were not to be designated as Cooperating Agencies because it is not appropriate for a *regulated* entity to serve as a Cooperating Agency.

Rather the federal *regulators*, ACOE and USEPA, were appropriately designated as the Cooperating Agencies².

Likewise, if the Water Contractors were to be Responsible Agencies under CEQA, the Notice of Preparation (“NOP”) filed by DWR did not follow required procedures for doing so. CEQA Guideline³ section 15082(a) provides that “the lead agency shall send to the Office of Planning and Research and each responsible and trustee agency a notice of preparation stating that an environmental impact report will be prepared.” The distribution list attached to the NOP indicates that it was sent to twenty-two public agencies. The list does not include the Water Contractors. CEQA Guideline § 15096(b)(2) provides in pertinent part that “not longer than 30 days after receiving a Notice of Preparation from the Lead Agency, the Responsible Agency shall send a written reply by certified mail or any other method which provides the agency with a record showing that the notice was received. The reply shall specify the scope and content of the environmental information which would be germane to the Responsible Agency’s statutory responsibilities in connection with the proposed project.” The reply must also be sent to the State Clearinghouse. The State Clearinghouse website indicates that no reply was received from the Water Contractors. *See* SCH Number: 2008032062. That DWR did not follow required procedures for designating the Water Contractors as Responsible Agencies is not surprising because, like the NOI, the NOP identifies that Water Contractors not as Responsible Agencies but as “Potentially Regulated Entities.” NOP at 2. Public accountability is the cornerstone of CEQA. Whatever discussions or understandings the Water Contractors may have had with DWR regarding their roles at the time of preparation of the NOP are irrelevant. CEQA requires a specific *public* process to be followed in designating Responsible Agencies.

The original Memorandum of Agreement Regarding Collaboration on the Planning Preliminary Design and Environmental Compliance for the BDCP (“Original MOU”) referred to the Water Contractors as “SWP contractors” and “CVP contractors.” Original MOU at 1. Like the NOI and NOP, the Original MOU designates the Water Contractors as “Potentially Regulated Entities.” Original MOU, Recital B. Paragraph II(H) of the Original MOU deals with roles under NEPA and CEQA and describes DWR as the “lead agency under CEQA” and Reclamation as “one of the lead agencies under NEPA.” Paragraph B(3) identifies the California Department of Fish and Game as a Responsible Agency but does not designate the Water Contractors as Responsible Agencies.

² For an example of the formalities observed in the Cooperating Agency designation process *see Letter From U.S.E.P.A to U.S.F.W.S.*, Nov. 12, 2008, *available at* http://www.epa.gov/region9/water/watershed/sfbay-delta/pdf/EPA_CooperatingAgencyStatus_BDCP_111208.pdf (formally accepting designation as BDCP Cooperating Agency, outlining EPA’s expected role, and identifying areas of EPA expertise that will be applied).

³ We refer to the Guidelines by their common name. The Guidelines, however, are not suggestions. They are published in the California Code of Regulations at Title 14, Chapter 3. They are “binding on all public agencies in California.” Guideline § 1500.

The Agreement Regarding Preparation Of A Joint Environmental Impact Report/Environmental Impact Statement For The Bay Delta Conservation Plan (“Lead Agency Agreement”) spells out how tasks will be assigned to the consultant and how the work of the consultant will be directed. Lead Agency Agreement at C(1)(b). It reserves all these tasks to the Lead Agencies. Under the Amendment much of this critical phase of environmental review may well be ceded to the Water Contractors.

Through the White Paper, Reclamation has reached out to calm public concern about the new role of the Water Contractors by explaining that there is really nothing new or different. But that is not consistent with elevation to Cooperating and Responsible Agency status, which the record demonstrates is a new development, and which the relevant statutes and regulations demonstrate is a very different and elevated role.

III. The Underlying Purposes Of Cooperating/Responsible Agency Status Are Not Served By Designating the Water Contractors as Cooperating/Responsible Agencies.

The underlying purpose of Responsible Agency designation under CEQA is to ensure that an agency will consider the environmental impacts and develop mitigation measures to the maximum extent practicable before carrying out or approving any portion of a project for which it is responsible. CEQA Guideline § 15096. The underlying purpose of Cooperating Agency designation under NEPA is to help the Lead Agency identify and analyze environmental impacts. 43 C.F.R § 46.230. These purposes are not served, or intended to be served, by designating the Water Contractors as Responsible/Cooperating Agencies. The special expertise to identify impacts and require mitigation measures and the discretionary approval power for the project do not lie with the Water Contractors, but with other agencies (DWR, Reclamation, DFG, NMFS, USFWS, USEPA and several others who are already intimately involved in the project). Further expertise on Delta ecology and impacts will be obtained by engaging the CalFed Delta science team for independent peer review at the appropriate time. The Water Contractors’ interest here is to obtain more water for their customers. This is a legitimate and essential purpose, but it is not commensurate with the underlying environmental protection purposes of Responsible and Cooperating Agency status.

We find unpersuasive the argument that because the Water Contractors must participate in decisions about diversion rates and are responsible for developing and implementing the HCP they need to be intimately involved in non-public portions of a coterminous NEPA/CEQA review of that plan as it is being developed. We also believe, as discussed below, that this combined process is contrary to NEPA-implementing regulations.

On the other hand, it is standard practice for project beneficiaries to finance, in part or in whole, the costs of preparing an EIR with explicit guarantees to the public that they will have no control over or participation in the process as a means of assuring the public that there is no undue influence. For example, typically developers applying to build a shopping center or hotel collaborate with planning staff on developing their project, make a payment into a trust account to cover the cost of preparing an EIR, then

sit back and wait like everyone else while the EIR is being drafted. Why isn't this well-settled procedure, aimed at maintaining public trust, applicable here?

IV. The Combining of Scoping, Project Development and EIS Preparation “On The Fly” Leads To Outcome-Driven Results Rather Than Objective Analysis, Is Contrary To NEPA Implementing Regulations, And Is Particularly Troublesome If The Water Contractors Are Cooperating/Responsible Agencies.

The melding of scoping, project development, and formal environmental review tends to lead to outcome-driven results rather than an effective development of alternatives and an objective appraisal of the project's impacts. A better process would be to fully develop the Peripheral Canal alternatives and other elements of the project in a public scoping process before beginning the formal EIS/EIR preparation process. At this point the description of the canal alternatives is skeletal and several important alternatives have not yet been considered at all (at least not publicly). The most controversial aspects of the project remain as wholly unsettled controversies. We are aware that a menu of algorithms to determine levels of water export has been included in the latest public draft of the BDCP at section 3.4.2.1. The introduction to that section appears to indicate that adaptive management protocols might be used to determine how the diversion rates stated in section 3.4.2.1 might be modified if conditions require it. The introduction also seems to indicate that “a process has begun” to determine how long term operating criteria will be established. We are unsure if it is this process that will address adaptive management protocols. The introduction also refers the reviewer to the February 11 steering committee agenda and attached handouts for more information. However, the steering committee agenda/handout link on the website appears to be broken.

Although the short time allowed to prepare these comments did not afford us the luxury for a comfortable review of all BDCP documents, from what we have seen so far it appears that operating criteria, adaptive management protocols and triggers, and scoping of alternatives for diversion rates is very preliminary. Section 3.7.3.2 reveals that no “decision body” has yet been formulated to decide when water export levels need to be curtailed. Section 3.7.3.2, as it is currently formulated, could result in an indefinite impasse in any effort to change export rates in response to new information. For thirty years the crux of the Peripheral Canal issue has been how to attach iron clad guarantees that the canal cannot be operated in a way that will harm the Delta. Colloquially put, once the canal is built how will we ever be able to wrest control of the faucet from the Water Contractors? This issue must be resolved through public dialog before any NEPA review begins. Frankly, failure to address this issue up front spells doom for the Peripheral Canal this time around just as it did in 1982.

The BDCP appears to take the approach of using a simplistic algorithm to determine diversion rates. We believe that if a simplistic algorithm is to be used (which, given an algorithm's ability to peg a bright line standard, might well be the best approach), the trigger for allowing diversion to commence should be set at flood stage of the Sacramento River. This would require building additional storage capacity as flood flows may exceed the capacity of the CVP. We discuss this approach in more detail

below under the heading “Yolo Bypass Alternative.” It would seem at first blush that diverting only peak flows would produce abundant water (if there was capacity to store it) and would have the least potential for environmental harm. It would also set a bright line standard as to when diversion could take place. We would also like to ask how the algorithms published thus far capture a situation in which the preceding several years have been very dry years? Aren’t ecological conditions different and in-stream flow more critical after a series of dry years? We did not see this in the materials that we were able to find. We think all of this needs to be addressed in one complete document with adequate time for the public to digest it and offer suggestions before NEPA review can begin. We think that these questions, and the fact that the reader has to scurry around gathering up meeting agendas to understand what the BDCP is about when EIS preparation is but weeks away confirms that the process is unduly rushed.

The combination of scoping with EIS preparation is also not consistent with NEPA implementing regulations. CEQ regulations indicate that if an agency intends to engage in combined scoping and EIS preparation, it should first adopt procedures that will govern such a combined process through notice and comment rulemaking. *See* 40 C.F.R. § 1501.7(b)(3) & § 1507.3. Neither DOI nor Reclamation has adopted the required regulations. We believe that such regulations would provide much needed guidance as to how a condensed scoping/EIS process would work and would provide safeguards that would prevent rushing into the process in a way that truncates public participation when it is needed in the development of alternatives⁴.

One of the most contentious of the open questions is what level of water exports are being guaranteed to the Water Contractors. This is related to the failure to properly describe what the major federal action is. *See supra* Section I. The statement of project purpose in the NOI provides that deliveries of “full contract amounts” will be restored to the Water Contractors. However, this would be inconsistent with law because California Water Code section 85021 states that “the policy of the State of California is to reduce reliance on the Delta in meeting California’s future water supply needs” and that each water district should develop its own supplies regionally. What is meant by restoring full contract amounts has never been settled and is the subject of heated controversy. *See, e.g., Letter from U.S.E.P.A. to Reclamation, USFWS, and NMFS, June 10, 2010, available at <http://www.epa.gov/region9/water/watershed/sfbay-delta/pdf/EpaR9CommentsBdcpPurpStmt6-10-2010.pdf>* (noting unclear purpose statement because “within the federal family, as well as in the broader debate, there seems to be little agreement on exactly” what is being promised to the Water Contractors).⁵ Reclamation has been subject to repeated criticism for lack of transparency for this kind of issue from both the scientific community and the public at large. *See generally CalFed Science Review of the 2-Gates Project.*

⁴ Where a regulation contemplates notice and comment before adopting a procedure and the regulation is not followed a cause of action stating a claim for procedural injury immediately accrues. *Brennan*, 571 F. Supp. 2d at 1118.

⁵ We are aware that the Lead Agencies replied to EPA’s concerns by letter dated October 26, 2010.

It is our understanding that the project purpose statement will be revised and that revision will be announced to the public through publication of the draft EIR/EIS. This is particularly inappropriate. The project purpose statement and the effect of Water Code section 85021 are *threshold questions*. They should be addressed through *public* scoping at the very beginning of the process. It is also offensive to the public that issues of central public concern and controversy will be decided behind closed doors through negotiations with the Water Contractors, justified by the fact that the Water Contractors are Responsible/Cooperating Agencies.

V. The Rushed Process Has Overlooked Important Alternatives And May Amount To Impermissible Segmenting.

The Yolo Bypass Alternative Has Been Overlooked.

One of the BDCP guiding concepts is the “big gulp, little sip” principle, meaning that water diversion will be greatest at periods of high river flow and minimized when flow is less. We want to suggest that this concept should be applied to the canal alternatives through what we will call the Yolo Bypass Alternative(s)⁶. The Yolo Bypass intake is located upstream of the City of Sacramento and provides flood control for the City of Sacramento. During periods of very high river stage, the river overtops the Freemont Weir and vast quantities of water are diverted from the Sacramento River and down the Yolo Bypass. The limited time available to prepare these comments did not allow for hydrological research and exact figures, but those involved with the BDCP will be well aware that very large quantities of high quality water are diverted in this way. An intake for the Peripheral Canal could be located in some portion of the Yolo Bypass so a portion of these very high stage flows could be diverted and stored for use during the summer months. A variation of the Yolo Bypass Alternative would be to place an intake for the Peripheral Canal upstream of Sacramento on the Sacramento River. This intake would then capture the flood flows (and only the flood flows) and divert them for storage and beneficial use. Perhaps this intake could relieve the Yolo Bypass of its flood control function and the Freemont Weir could be operated solely for conservation values, enhancing the habitat and conservation functions of the Yolo Bypass. We are aware that the current capacity of the CVP is 15,000 cfs and this might present an operational limitation on how much water could be diverted at peak flow. Could some of the flood flow (in excess of 15,000 cfs) be stored underground? Could any of the Delta Islands be converted to storage (perhaps with a conservation and recreation benefit as well)? Could Los Vaqueros Reservoir accommodate some additional storage? What other storage options might be available? Again, we do not endorse any of these measures, but they are important aspects of the Peripheral Canal problem not currently being considered because they are the only canal alternatives thus far broached that would take no water that currently flows through the central and south Delta.

The Yolo Bypass Alternative also presents a tight fit with the purpose of the CVP:

⁶ This in no way implies that STCDA supports a Peripheral Canal. However, we point out that if a Peripheral Canal is to be analyzed under NEPA, all reasonable and prudent canal configurations should be analyzed.

[The CVP's purpose is to] improve navigation, regulate the flow of the San Joaquin River and the Sacramento River, *control floods, provide for storage* and for the delivery of the stored waters thereof, for the reclamation of arid and semiarid lands and lands of Indian Reservations, and other beneficial uses, and for the generation and sale of electric energy.

Westlands Water District v. U.S., 337 F.3d 1092, 1095 (9th Cir. 2003) (citing Pub. L. No. 75-392, 50 Stat. 844, 850 (1937) (emphasis added)). In creating the CVP, Congress intended that flood control and providing water for beneficial use were two sides of the same coin: water diverted to control floods would go to beneficial use. Failure to consider the Yolo Bypass Alternative, with its flood control and storage features, and unique attribute of taking no Delta flows, might amount to failure “to consider an important aspect of the problem” and/or a failure to consider “the relevant factors” as specified by Congress. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). In this same vein, we have not yet seen where BDCP has considered improvements to navigation or even impacts on navigation. STCDA intends to look more closely at the BDCP and to provide substantive comments on the issue of navigation under separate cover.

We believe these examples demonstrate that the formal preparation of the EIS/EIR is not ready to start; that more time and public involvement should be put into identifying alternatives and fleshing out what are now skeletal plans into a complete plan before preparation of the EIR/EIS begins.

Failure To Include The 2-Gates Project And Other Gates Projects May Amount To Impermissible Segmenting.

Reclamation has been considering the 2-Gates Project and other gates projects in the Delta for some time. Recent inquiries were unable to determine what the exact status of these projects is. We understand that Reclamation is trying to validate the smelt-turbidity hypothesis through research currently being conducted by Jon Burau and Bill Bennett. It appears that the gates projects are still under consideration. The gates projects are within the BDCP project area and are intimately related to the water supply purpose of the BDCP as well as being proffered to benefit the smelt and reduce or eliminate the incidental take of smelt by operation of the CVP and SWP. Unless Reclamation has made a decision and will shortly be issuing a ROD on the gates projects adopting the no project alternative, failure to include the gates projects under the BDCP could well be impermissible segmenting of environmental review. The gates projects should be included as part of the BDCP (if they are still under consideration) or as alternatives to the Peripheral Canal. NEPA review of the gates projects should be conducted as a part of BDCP NEPA review. Given the potential for impermissible segmenting if the gates are not considered as part of BDCP review, the entire BDCP EIR/EIS might be found inadequate if the gates are not addressed.

VI. Improving The Stakeholder Process.

We believe that the credibility of the BDCP as a stakeholder driven process (as opposed to the current perception of a water grab by the Water Contractors) can only be restored by reconstituting the steering committee. We understand that the Brown administration has considered and rejected this idea. We believe that recent events portend an abrupt downhill slide for the BDCP in the court of public opinion unless decisive action is taken. We urge the Brown administration to reconsider.

All current members of the steering committee should be invited to stay on. It should be made clear that reconstituting the steering committee does not imply that current members have done anything other than contribute heroic amounts of time and energy in a selfless effort of public service.

A public outreach effort aimed at defining the additional slots on the steering committee should be undertaken. At a minimum, we believe additional slots should include representation of 1) navigation (this would include the interest of Delta marinas); 2) fishing (certain salmon fishing organizations have been among the BDCP's most vocal critics and they should be considered to fill a stakeholder slot); 3) local government; 4) Delta related business (perhaps the Delta Chamber of Commerce); and 5) Discovery Bay.

We include Discovery Bay because of the unique position of Discovery Bay and its extreme vulnerability to impacts of the BDCP. Discovery Bay is a community of waterfront homes built around a series of deep water bays connected to Delta waterways. An engineered water circulation system maintained by Reclamation District 800 moves water from Kellogg Creek to Old River through the bays. Approximately 3500 homes have attached docks fronting the bays. There is approximately two billion dollars worth of investment in direct boating access to the wider Delta from the bays and recreational use of the bays themselves.

First, Discovery Bay represents by far the largest concentration of waterfront homes in the Delta. Virtually all 13,000 residents of Discovery Bay are regular users of the Delta for recreation and many of them derive their livelihood from Delta related businesses. A broad cross section of currently unrepresented Delta interests would be captured by a Discovery Bay slot. Second, all BDCP alternatives are designed to change the hydraulic regime of the rivers and sloughs that feed our bays. What might appear as a minimal impact from the perspective of a coarse grained Delta-wide analysis might well prove catastrophic if examined with a specific focus on the bays of Discovery Bay. Silting of the bays could well result from increases in hydraulic residence time, which is a stated goal of several BDCP elements. Increases in dissolved oxygen are also of significant concern, as are changes in turbidity. Recent years have seen an epidemic of invasive weeds in Discovery Bay. The weeds have just recently been gotten under control. Changes in any or all of the parameters mentioned above could thwart our efforts to control these invasive species, which, if left unchecked, would obliterate the boating and recreational value of our bays.

Upon proper study, mitigation measures might be identified that could ameliorate these impacts. Such measures might include BDCP funding for ongoing weed control, BDCP funding for construction and operation of wing dams or other hydraulic structures at the mouth of each bay that could offset changes in circulation patterns, BDCP funding

for implementation and ongoing operation of other yet to be identified measures to offset impacts to water quality. Likely, Discovery Bay mitigations measures could also contribute to enhanced habitat value and recovery of listed species.

VII. Specific Recommendations

Based upon the foregoing, we offer the following specific recommendations;

- 1) Reconstitute the Steering Committee as discussed above;
- 2) Reverse the decision to appoint the Water Contractors as Cooperating/Responsible Agencies.
- 3) Establish a process for the Water Contractors to fund the preparation of the EIR/EIS but with hands off the process itself.
- 4) Separate scoping, project development, and preparation of the EIR/EIS into distinct sequential phases with a tentative schedule as follows: complete scoping by June 30, 2012; complete project development by Jan 30, 2013; preparation of draft EIR/EIS Jan 30, 2013–June 30, 2013; public comment draft EIR/EIS June. 30, 2013–Nov. 30, 2013; preparation final EIR/EIS Nov. 30, 2013– Feb. 30 2014; public comment final EIR/EIS Feb.30, 2014–May 30, 2014; adopt ROD July 30, 2014.
- 5) Explicitly identify the most contentious issues and resolve them or develop a menu of resolutions for study through the public scoping process.
- 6) Reorganize the BDCP plan chapters so the Peripheral Canal is no longer referred to as a conservation measure and has its own chapter titled “Peripheral Canal Alternatives.”
- 7) If the agencies wish to engage in combined scoping and EIS preparation in the future, initiate notice and comment rulemaking to adopt the appropriate procedures.

VII. Invitation To Make Public Presentation At Discovery Bay Town Hall Meeting And Conclusion.

We would like to take this opportunity to extend an invitation to hold a town hall meeting in Discovery Bay some time after the new year. We would envision a presentation of the BDCP by appropriate agency staff followed by a Q & A. Likely many attendees will be adamantly opposed to any Peripheral Canal. But talking to opponents is part of the NEPA process. This also might serve as an opportunity to explain the very real benefits of the HCP. It would also be an important gesture in

reaching out to the general public, as opposed to interest group representatives who have dominated the BDCP process to date.

Conclusion

Thank you again for extending the invitation to comment and for considering our view.

Sincerely,

s/Michael Brodsky
Michael A. Brodsky

Dated: Nov. 16, 2011