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FEATURE ARTICLE**THE CALIFORNIA BAY DELTA CONSERVATION PLAN:
WHERE DOES IT STAND?**

By Barbara Brenner and Uzunma Kas-Osoka

On November 23, 2010, the California Bay Delta Conservation Plan (BDCP) Steering Committee issued the first draft BDCP. The BDCP is being developed to provide for the conservation of sensitive species and their habitat in a manner that will protect and stabilize the water supplies in the Sacramento-San Joaquin Delta (Delta). The BDCP Steering Committee consists of state, federal, and local water agencies, state and federal fish agencies, environmental organizations, and other interested parties. The BDCP will provide the basis for the issuance of Endangered Species Act (ESA) authorizations for the operation of the State Water Project (SWP) and the Central Valley Project (CVP). The BDCP is also intended to serve as a "habitat conservation plan (HCP) and "natural communities conservation plan" (NCCP) for the Delta.

In accordance with the Delta Reform Act of 2009, for the BDCP to take full effect as a planning document for the Delta, the Delta Stewardship Council (Council) must certify the BDCP's consistency with the goals of and incorporate the BDCP into the Delta Plan. The Delta Plan can be characterized as the over-arching land use planning document that will govern throughout the Delta. The Delta Reform Act requires that the Delta Plan be implemented by January 1, 2012. Thus, under the Delta Reform Act, the Council has a short timeframe to begin implementing the Delta Plan, and has the ultimate authority to make the BDCP effective by making it part of the Delta Plan.

Background

The creation of the BDCP began in 2006, well before the Delta Reform Act was adopted. The 2009

Delta Reform Act contemplates making use of the significant information that has been developed through the BDCP process, and incorporating that effort into the new Delta governance structure. As of April 2010, a complete draft of the BDCP was scheduled to be released by the end of November 2010. In June 2010, a status update on the BDCP was released. The update set forth the preliminary details of the BDCP: habitat restoration and other stressors; new water conveyance facilities options; and preliminary flow criteria.

The objectives listed under the area of habitat restoration and other stressors included: (a) habitat restoration targets (up to 80,000 acres) for aquatic species, (b) preserving and enhancing approximately 45,000 acres of habitat for plant and wildlife species, and (c) developing a refined list of measures to address water quality and other stressors on aquatic species. With regard to new water conveyance facilities, the update mentioned consideration of up to five intakes along the Sacramento River. It also pointed out that there would be an additional study of two underground 33-foot diameter tunnels/pipelines designed for a combined capacity of up to 15,000 cubic feet per second. In addition to the underground facilities, an above-ground canal was also being considered as a conveyance option.

Though the June 2010 status update showed that a number of issues had been considered and evaluated to some extent by the BDCP Steering Committee, it also revealed that significant issues remained to be analyzed. These remaining issues included, but were not limited to, identifying funding mechanisms, refining biological goals, developing a governance structure, identifying terrestrial communities and species

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conservation measures, and developing the adaptive management plan and implementation schedule. With these issues left to be tackled by the BDCP Steering Committee, the November 2010 date for the release of a complete draft of the BDCP appeared to be a lofty goal.

Oversight Hearing on Bay-Delta Conservation Plan

On November 16, 2010, the California Assembly Committee on Water, Parks and Wildlife held its third oversight hearing in 2010 regarding the BDCP. The purpose of this oversight hearing was to obtain a status update. Despite having met over 120 times in their efforts to prepare a draft BDCP, the testimony from members of the BDCP Steering Committee revealed significant disagreement among the members regarding: the effectiveness of the BDCP Steering Committee, the focus of the BDCP, the criteria to consider in creating the BDCP; the scientific support for the BDCP, and the likelihood of the current BDCP document being approved under the ESA and as a NCCP. The testimony also made clear that while many issues had been considered by the BDCP Steering Committee, a number of very substantial matters were left to be evaluated. These issues included, among other things, the funding source(s) to implement the BDCP, the type and size of Delta conveyance facilities to recommend, and the operational criteria for the eventual Delta conveyance facilities. Given these outstanding issues yet to be considered, the BDCP Steering Committee members stated that a complete draft document would not be ready by the end of November. Instead, a partial BDCP document was scheduled to be "finalized" on November 18, 2010 and released for public review on November 21, 2010.

According to Lester Snow, Secretary of the California Natural Resources Agency, a complete draft of the BDCP would be publicly available in mid-2011 when the draft environmental review documents for the BDCP are scheduled to be publicly released. Secretary Snow also stated that the State would prepare a "transition" document regarding the BDCP for incoming Governor-elect Brown.

The Draft Bay Delta Conservation Plan

On November 23, 2010, the BDCP Steering Committee released an approximately three thousand page

working draft BDCP. Albeit incomplete, this is the first time a draft plan in any form has been assembled. The draft BDCP includes:

- Introduction, an overview of the planning process and planning goals;
- Ecological Conditions;
- Conservation Strategy;
- Covered Activities;
- Assessment of Effects of the Plan and Levels of Take;
- Plan Implementation;
- Implementation Structure;
- Implementation Costs and Funding Resources;
- Alternatives to Take, a description of alternatives to the BDCP that would either reduce the amount of 'take' or increase the level of conservation of listed species; and
- Independent Science Advisory Process.

The BDCP identifies as vital the continued effort to resolve scientific issues related to the analytical methods used to evaluate benefits for covered species, and the use of the effects analysis to refine conservation measures. The projected date of completion is not specified, other than a note that the draft plan and the associated draft environmental impact statement/report (EIR/EIS) will be completed in 2011. The final BDCP is expected before the end of 2012. Although the draft BDCP is representative of progress toward a conservation strategy, the draft BDCP is still not complete. The projected completion of the final BDCP by the end of 2012, coupled with the January 2012 deadline for implementation of the Delta Plan, make integration of the BDCP into the Delta Plan a seemingly impossible endeavor.

Effects Analysis

The effects analysis is the principal analytical component of a habitat conservation plan. It presents conclusions regarding the expected outcomes of the conservation strategy and covered activities. The analysis includes the effects of the proposed project on covered species, including federal and state listed species, and other sensitive species potentially affected by the proposed project. The effects analysis is a systematic, scientific look at the potential impacts of a proposed project on these species and how these species would benefit from conservation actions.

The BDCP analysis evaluates the construction of a new water diversion, isolated conveyance and other water-related facilities, operations of current system components, dual operations of current and proposed facilities, power plant operations, physical habitat restoration, protection and enhancement of existing habitats, control of nonnative species, and other actions described in the conservation strategy that address ecological stressors on the system and covered species. Assumptions used in this analysis regarding the footprint locations of new conveyance facilities and descriptions of construction-related activities (e.g., construction schedule, construction methods) and maintenance activities and schedules for new facilities have been provided by California Department of Water Resources.

The effects analysis provides a brief description of the methodologies used, the current status of the Effects Analysis, and a summary of the preliminary findings presented in previous drafts. The analysis does not include comments developed in the weeks preceding this draft, but represents findings as of September 9, 2010. This draft is a work in progress and will continue to be reviewed. Several key issues have been identified that will necessitate revisions to this analysis:

- North Delta intake configuration related to predation concerns (in river vs. on bank)
- Spring-run salmon egg mortality on the Sacramento River in the Fall
- Reduced Sacramento River flows downstream of the north Delta intakes
- Refinement of April-May south Delta operations
- Winter-spring salinity and outflow effects on longfin smelt
- Summer and fall salinity and delta smelt abiotic habitat

Implementation Structure

The Implementation Structure of the BDCP is incomplete in that it fails to discuss the critical role of the Council. It describes the institutional structure and organizational arrangement that will be established to govern and implement the BDCP, and sets out the roles, functions, authorities and responsibility of the various entities that will participate in plan implementation. The implementation structure is reportedly designed to ensure that sufficient insti-

tutional expertise, capacity, resources, and focus are utilized to ensure effective and efficient plan implementation and ongoing compliance with the terms and conditions of the plan and its associated regulatory authorizations. This implementation approach is said to facilitate the clear delineation of roles and responsibilities among the range of public and private entities participating in the process and help define the nature of their engagement.

The BDCP implementation structure is proposed to be organized around a program manager who will direct a new "BDCP Implementation Office," and have responsibility for plan implementation and oversight. The BDCP Program Manager will coordinate implementation actions with the authorized entities (i.e., all entities receiving permits or other authorizations under ESA, NCCPA, and/or the California Endangered Species Act), the state and federal contractors, the fish and wildlife agencies, and a range of stakeholders. The state and federal fish and wildlife agencies will continue to ensure that the implementation of the BDCP is consistent with regulatory authorizations issued under the BDCP. Additionally, a "BDCP Implementation Board" is proposed to be established to assist with BDCP implementation, and will consist of representatives of the DWR and the U.S. Bureau of Reclamation (Bureau), the State and Federal Contractor Water Authority (SFCWA), the state and federal fish and wildlife agencies, and certain other entities. Also, a "BDCP Stakeholder Committee" will be created to serve as a forum in which other public agencies, nongovernmental organizations, interested parties, and the public may offer recommendations regarding BDCP implementation. The BDCP Implementation Office will also purportedly coordinate with the Council, Delta Science Program, Sacramento-San Joaquin Delta Conservancy, and the Delta Protection Commission to ensure appropriate engagement and collaboration on matters of common interest.

The implementation structure set forth in the draft BDCP completely ignores the Delta Plan and the role of the Council. The extent of any mention of the Delta Plan or the role of the Council is as an observer and collaborator, rather than the body implementing the plan. The BDCP states that the program manager will facilitate and monitor the effective and efficient incorporation of the BDCP in the Delta Plan. The program manager will report, at least annually, to the

Council on the progress of BDCP implementation. The BDCP Implementation Office is tasked with responding to any concerns of the Council. This is in stark contrast to the Reform Act, however, which authorizes the Council to assume a more assertive role in the governance of land use matters in the Delta and to implement the Delta Plan by January 1, 2012. (Wat. Code, § 85300.) Moreover, with an implementation deadline of January 1, 2012, the Reform Act suggests that the Delta Plan must be adopted and operable prior to that date. To incorporate the BDCP into the Delta Plan in any meaningful way, there must be some semblance of its completion sooner rather than later in 2011. Even upon the completion of the BDCP, the Council, not any other entity, must ultimately certify that the BDCP is consistent with the Delta Plan and its coequal goals of providing a more reliable water supply and protecting, restoring, and enhancing the Delta ecosystem. The extent of the communication with the Council, although specified as annual reports from the program manager, does not truly address the timing issues and potentially, the simultaneous production of mutually exclusive reports. What is expected is that the Council will incorporate a complete draft BDCP into the Delta Plan at some point in the future when the BDCP is finalized and the Council has determined that it meets the requirements of the Delta Reform Act.

Financing

There is no funding plan in place to implement the strategies and conservation measures developed in the draft BDCP. The draft BDCP specified that no agreement has been reached on the apportionment of the funding of the various components of the plan beyond the state and federal contractors' commitment to funding the new conveyance and related mitigation costs. The draft BDCP also specified that substantial public and other sources of funding are expected to contribute to the cost of implementing the other elements of the plan. However, the lack of a funding plan is a two-fold failure because the costs analyses are not complete and the funding sources and assurances, as earlier expressed, are unknown. This is an increased concern given two major contractors, Westlands Water District and San Luis and Delta Mendota Water Authority have announced they are not currently supporting the BDCP efforts.

Transition Document

Various state agencies developed a transition document to facilitate Governor-elect Brown's administration's understanding of the BDCP. The responsible agencies included the California Natural Resources Agency, the California Department of Water Resources, and the California Department of Fish and Game. The agencies released the "Highlights of the BDCP," a ninety-two page report that provides a summary of the central elements of the BDCP and the state's approach to many of the issues addressed in the BDCP. The document highlights the background and overview of the BDCP, the BDCP's conservation strategy, implementation of the BDCP, the expected outcomes of the BDCP, the next steps in the BDCP process, and environmental review of the BDCP. The core elements of the BDCP described in the Highlights document include:

- A new water conveyance facility to move water from north of the Delta to south of the Delta;
- Science based operating criteria to manage the operation of new diversions and conveyances in the Delta;
- Significant measures to restore, enhance and protect tidal marsh, floodplain, and habitats throughout the Delta;
- Measures to address stressors on the Delta other than the Central Valley Project or the State Water Project; and
- A detailed monitoring program and adaptive management plan that measure the effects of conservation measures under the BDCP and provides a mechanism to adjust implementation of the BDCP to ensure its effectiveness.

Federal Action Plan for the California Bay-Delta

In conjunction with "Highlights of the BDCP" issued by the state, the federal government issued a status update describing a variety of federal actions and investments the federal government has been or will undertake to address the water supply and ecological issues surrounding the Bay-Delta. The status update is called the December 2009 Interim Federal Action Plan for the California Bay-Delta. The federal agencies involved in issuing the status update include the Department of the Interior, Department of Com-

merce, Department of Agriculture, Department of the Army, Environmental Protection Agency, and the Council on Environmental Quality. The status update is intended to complement the "Highlights of the BDCP" report and inform the incoming administration and other key leaders in California of issues surrounding the Delta and the BDCP. The status update includes a review of the federal agencies' progress in carrying out the Interim Federal Action Plan for the California Bay-Delta and sets out the agencies' priorities for addressing the issues of water supply reliability and ecosystem health. The status update also reports on near term accomplishments with regard to assistance provided to farmers, water conservation and efficiency, and water quality and other stressors. The status update also focuses on the federal government's involvement in and assessment of the development of the BDCP. The assessment addresses several key issues related to core elements of the BDCP and provides the federal agencies' perspective on the path going forward. The key issues of the BDCP assessed in the status update include: biological goals and objections; adaptive management; new north Delta diversions and conveyance; effects analysis; operational

criteria; habitat restoration; water quality; other stressors; and regulatory certainty and "assurances." Overall, the status update is intended to show that the federal agencies support the major elements of the BDCP as an effective way to address the goals of protecting the Bay-Delta ecosystem while working to ensure a reliable water supply for California.

Conclusion and Implications

The federal and state governments are seemingly on board with the implementation and development of the Bay-Delta Conservation Plan. However, the tight deadlines associated with development of the Delta Plan do not facilitate incorporation of a document that is currently missing critical elements. The drafters of the BDCP have a long way to go before the Delta Stewardship Council could viably assert that such document should be included in the Delta Plan as they await new leadership from the State of California. But as recognized, successful completion and implementation is imperative for California's future. More information on the BDCP and Delta planning efforts can be found at www.deltacouncil.ca.gov and www.baydeltaconservationplan.com.

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