

Congress of the United States
Washington, DC 20515

November 16, 2011

Bureau of Reclamation
Bay-Delta Office
801 I Street, Ste. 140
Sacramento, CA 95814

To whom it may concern:

We appreciate the opportunity to comment on the Bay Delta Conservation Plan (BDCP) and in particular the recent Memorandum of Agreement (MOA) between state and federal agencies and selected water export contractors who receive a portion of their water supply from the Bay-Delta.

As you know, several of us have already expressed our serious concerns about the direction of the BDCP and the recent MOA. The present comment period was provided as a response to the widespread criticism that the BDCP planning process does not give all stakeholders an equal place at the table, and that it prioritizes some interests over others. We incorporate by reference the October 24, 2011, letter to Secretary Salazar that prompted the opening of this public comment period. Now that the state and federal agencies have determined that modifications to the BDCP MOA are possible, the specific criticisms outlined and recommendations made in that letter should be reconsidered in full.

The state and federal mandates regarding the BDCP are clear: it must be based on the best available science, and it must lead to a healthy Bay-Delta estuary and rebuilt fishery populations. By these metrics, the BDCP is not headed toward success. We hope that the state and federal agencies will consider this letter, and this comment period more generally, as an opportunity to make a substantial course correction so that the BDCP can be turned into a balanced and widely accepted long-term plan to restore these natural resources, including the salmon and many other fish populations that are so important to California and the West Coast.

A massive undertaking like the BDCP Habitat Conservation Plan will only succeed if it is the result of a credible public process. Yet by the terms of the pending MOA, it is clear that the water export contractors south of the Delta are in the driver's seat: they are given early and exclusive access to draft consultant work product and have direct control over the consultants who are writing the documents. In response to criticism, the state and federal agencies have not denied that the MOA provides the water export contractors with critical opportunities to influence BDCP decisions not afforded other stakeholders. Instead, they cite a variety of justifications for this unequal treatment, including the possibility that the water exporters will be considered "permittees" or "applicants" under the relevant statutes. Although the language of the MOA includes a hedge against this outcome, it is not credible that the water exporters would seek this permittee status if that status genuinely provided them with no new authority — and now that Interior and DWR have officially promised to support their controversial claim to this status, no amount of work by the fishery agencies is likely to end the debate.

But more importantly, the state and federal replies to these concerns entirely miss the point: the BDCP is not a typical Habitat Conservation Plan — neither in its geographic scope and focus on major project operations, nor its relationship with the local communities that it will effect — and cannot be treated as such. This Habitat Conservation Plan process (and the similar state process) is being used to justify the construction of a mammoth new water supply project with far-reaching consequences for the ecosystem, the West Coast's salmon fisheries, and the communities through which this facility will be built.

Moreover, even if this *were* a typical Habitat Conservation Plan, nothing would prevent your agencies from providing to other interested parties the same information and the same ability to comment on drafts and influence consultants' tasks that is being given to the exporters. Meanwhile, at the water contractors' behest, the state and federal agencies are apparently classifying the proposed massive water infrastructure project as a "conservation measure" in and of itself. This is outrageous. Until the water export contractors are removed from their privileged place within the public process, the plan will fail.

Furthermore, the privileged role granted to water exporters in the MOA is in conflict with the state and federal laws that establish fishery and ecosystem protection as co-equal goals in the management of the Bay-Delta and the state and federal water projects. California and the federal government each have unambiguous and independent legal obligations to restore the salmon, steelhead, and other species that rely on the Bay-Delta estuary — above and beyond mitigating the impacts of a given water conveyance project. This has been true for the better part of two decades, dating to California's 1988 Anadromous Fisheries Program Act, which established as state policy the goal of doubling those fishery populations. In the case of the federal government, the 1992 Central Valley Project Improvement Act (CVPIA) not only requires the Bureau of Reclamation to operate the Central Valley Project (CVP) in a manner that restores fish and wildlife, but directs the Secretary of the Interior to make all reasonable efforts to double the naturally spawning populations of salmon, steelhead, and other anadromous fisheries by 2002. Clearly, these goals have not been met, nor will they ever be met on the current trajectory.

In response to OMB criticism of the Interior Department's implementation of the CVPIA, the Department commissioned an independent science review. That review, released in 2008, found that the Interior Department is not appropriately operating the Central Valley Project to address fishery recovery as required by law, and suggested a number of improvements to the implementation of the Act. Further, the report recommended that Interior use the CVPIA program to "take a leadership role in collaboration with the other efforts attempting to improve fish populations, habitat conditions, and ecosystem function in the Central Valley." Three years on, Department has still not addressed the recommendations of that report, and fisheries of the West Coast continue to suffer. Meanwhile, neither the MAO nor the ensuing letters and explanations establish an appropriate role for the Bureau of Reclamation. Given that the BDCP appears to be central to the Bureau of Reclamation's efforts to comply with the Endangered Species Act and the National Environmental Policy Act, and given the need for the Bureau to incorporate the CVPIA into its Bay-Delta planning, the Bureau and other federal agencies must take a leadership role to ensure that the BDCP is developed in an open, transparent, balanced and science-driven process.

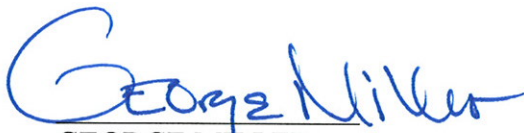
To date, however, the MOA is silent on restoration goals for fish populations or the Bay-Delta's health, while identifying "certainty for the CVP contractors" as an "essential element" of the plan's success. Meanwhile, although the public agencies have not committed to any specific ecosystem benefits or assurances of restored Delta flows during the BDCP process, they have indicated in the MOA and elsewhere strong support for a water supply conveyance facility (even going so far as to classify it as a "conservation measure" as noted earlier) and unprecedented regulatory guarantees for the water export contractors. This is untenable: if the science is too uncertain for Interior and the state of California to seek any particular outcome for the salmon, steelhead, and other dwindling fisheries despite longstanding unmet obligations, it is surely too uncertain to determine what the water export contractors can expect from the BDCP.

In addition, the BDCP was the focus of California's 2009 Delta Reform Act. Yet that law is left entirely unaddressed in the MOA, and its mandates, such as the requirement that California reduce its water supply reliance on the Bay-Delta and analyze a full range of alternatives, appear to be missing from the BDCP altogether.

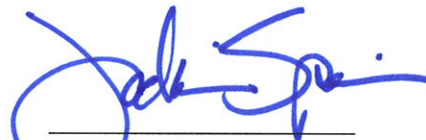
In short, we believe that the MOA must be withdrawn, and that the state and federal agencies must dramatically recalibrate the BDCP process. A successful BDCP will:

- Treat all stakeholder involvement fairly, equally, and transparently.
- Set priorities based on the public interest, not the priorities of the water export contractors.
- Make specific and certain commitments to restoring the Bay-Delta and its fisheries to health as required by decades of state and federal law.
- Include the best available science in designing conservation measures, such as providing adequate flows to restore the Bay-Delta ecosystem and the fisheries that depend on it.

Again, thank you for this opportunity to provide comments. We look forward to working with you to make this process a success.



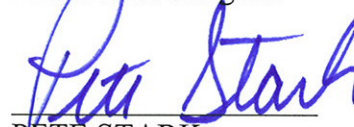
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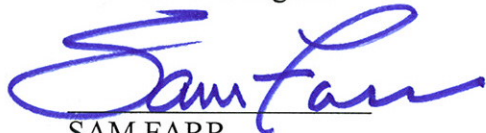
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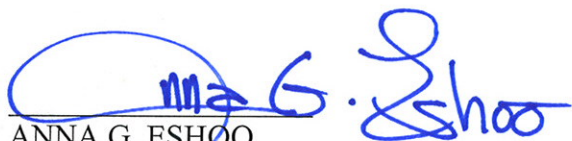
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