



County of Yolo

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VIA ELECTRONIC MAIL ONLY

Ms. Ann Chrisney
United States Department of the Interior
Bureau of Reclamation
Mid-Pacific Region, Bay-Delta Office
801 I Street, Suite 140
Sacramento, CA 95814-2536

Re: Comments of Yolo County on Preliminary Draft Chapters of the Bay Delta Conservation Plan
Environmental Impact Report/Environmental Impact Statement (EIR/EIS)

Dear Ms. Chrisney:

This letter responds to your April 5, 2013, letter requesting comments from the County of Yolo (County) on the administrative draft EIR/EIS for the Bay Delta Conservation Plan (BDCP). The County's comments on select chapters of the draft EIR/EIS are included in Attachment 1 hereto.

As you are aware, the County is a "cooperating agency" pursuant to an October 12, 2010 Memorandum of Understanding with the Bureau of Reclamation and other federal agencies responsible for preparation of the BDCP EIR/EIS pursuant to the National Environmental Policy Act (NEPA). The Office of the County Counsel submits this letter in its capacity as the County representative to the federal agencies responsible for the NEPA process (MOU, Section 5). As a cooperating agency, the County sincerely desires to assist the federal agencies in ensuring that the BDCP EIR/EIS is credible, thorough, and legally sound.

Previously, on April 16, 2012, the County submitted written comments on an earlier administrative draft version of the EIR/EIS. A copy of that comment letter is included as Attachment 2 hereto. Those comments focused on identifying key studies and other information that the County believed must be developed and included in future drafts of the EIR/EIS. Over a year later, on June 12, 2013, the EIR/EIS consultant for the BDCP (ICF) provided a one-page written response that is included herewith as Attachment 3. As both the timing and substance of the ICF response makes clear, responding to the comments of cooperating agencies is apparently regarded as little more than an afterthought.

This begs the question of whether the cooperating agency process serves any meaningful purpose. For the time being, the County will postpone judgment on that question with the expectation that deficiencies in the existing process will be remedied with due haste. Specifically, the County respectfully requests the courtesy of a response to the comments in this letter (and more importantly, Attachment 1) within 30 days. The County also

requests that the Bureau (or other agency, as appropriate) ensure that ICF designates a liaison to the cooperating agencies to provide useful non-technical information, such as where to look in the draft EIR/EIS for coverage of particular issues. This will greatly aid the County and other cooperating agencies in reviewing the draft EIR/EIS and engaging constructively in the environmental review process.

Turning now to the County's substantive comments on the draft EIR/EIS, the County provides these comments pursuant to Section IV.b.3, b.5, b.6, b.7, and b.8 of the MOU. The County's comments on specific text in the draft EIR/EIS (including those in the attached comment forms) should be read to apply to all substantially similar text appearing in the document. The County also reserves the right to provide additional comments on the EIR/EIS--including detailed legal and technical comments--as work on the EIR/EIS continues.

1. The EIR/EIS and Certain BDCP Objectives Misstate Yolo Bypass Flooding Data.

A fundamental problem with the BDCP and EIR/EIS is that both rely on a published paper (Sommer et al. 2008) to state the Yolo Bypass floods in 70 percent of all years. The statistic is used as the basis for at least three biological objectives in Chapter 3 of the BDCP (Objectives FRCS1.2, STHD1.2, and WRCS1.2) that are central to certain actions proposed in Conservation Measure 2 ("CM2"). However, there are at least two problems with this statistic.

First, this statistic is potentially inaccurate. Before it is used as the basis for a biological objective or the EIR/EIS baseline, this statistic must be thoroughly evaluated for accuracy. The County has previously been advised that Bypass flooding data prior to 1984 is unreliable. On that basis, the report prepared by UC Davis economists for Yolo County (*Agricultural and Economic Impacts of Yolo Bypass Fish Habitat Proposals* (Howitt et al 2013)) relies on a 26-year time series of hydrologic conditions (1984-2009).

Second, even if accurate, the statistic does not define the extent of Bypass flooding. It likely includes very small overtopping events that caused only localized inundation within the Bypass. This statistic thus cannot be used to define current or "natural" conditions that have any significant bearing on appropriate restoration strategies. Its use in CM2 and the above-referenced objectives is scientifically questionable in the absence of any apparent connection to research regarding the appropriate frequency of inundation for covered aquatic species. Nor is it appropriately used as the baseline for evaluating related impacts in the EIR/EIS. Legally, a properly defined baseline requires reliable data on the frequency, duration, and extent of Bypass flooding.

2. The EIR/EIS Wrongly Ignores or Defers the Analysis of Conservation Measures 2-22 Under the Guise of Taking a "Programmatic" Approach to Review.

In preparing these comments, the County fully considered the "programmatic" nature of the draft EIR/EIS. Just like a project-level, EIR, however, a programmatic EIR must "give the public and government agencies the information needed to make informed decisions, thus protecting not only the environment but also informed self-government." (In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings, 43 Cal.4th 1143, 1162 (2008).) The "semantic label accorded to the [EIR]" does not determine the level of specificity required. (Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners of the City of Long Beach, 18 Cal. App. 4th 729, 741-42 (1993).) Rather, the "'degree of specificity required in an [EIR] will correspond to the degree of specificity involved in the underlying activity which is described in the [EIR].'" (In re Bay-Delta, 43 Cal.4th at 1176, citing CEQA Guidelines § 15146.) The level of detail in the Draft EIR must therefore reflect—at a minimum—the level of detail in the BDCP, including Conservation Measure 2. Similarly, both project-level and programmatic environmental analyses must include "accurate, stable, and

finite” project descriptions. (Rio Vista Farm Bureau Center v. County of Solano, 5 Cal. App. 4th 351, 370 (1992).)

Additionally, while subsequent environmental analyses will “tier” from or otherwise draw upon a programmatic EIR, tiering is not a device for deferring the analysis of present issues. “Tiering is properly used to defer analysis of environmental impacts and mitigation measures to later phases *when the impacts or mitigation measures are not determined by the first-tier approval decision but are specific to the later phases.*” (Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova, 40 Cal.4th 412, 431 (2007) (emphasis added).) “[T]iering” is not a device for deferring the identification of significant environmental impacts that the adoption of a specific plan can be expected to cause,” and “fundamental and general matters” should be addressed in the first-tier EIR. (Stanislaus Natural Heritage Project v. County of Stanislaus, 48 Cal. App. 4th 182, 199 (1996).) The draft EIR/EIS for the BDCP, accordingly, must identify and consider foreseeable significant environmental impacts that will result from the actions authorized by its adoption.

In particular, the County believes the EIR/EIS must specifically analyze the impacts of CM2 given the defined nature of certain biological objectives in the BDCP. Objectives FRCS 1.2 (fall-run/late fall-run Chinook salmon juveniles), STHD 1.2 (steelhead juveniles), WRCS 1.2 (winter run Chinook salmon), and SAST 1.1 (splittail), for example, all specifically identify access to 7,000 acres of inundated floodplain habitat in the Yolo Bypass and/or the Cache Slough ROA. CM2 presents a “plan of action” for realizing these objectives within the Yolo Bypass. More than enough information exists for the EIR/EIS to include specific information about potential impacts using the acreage data, modeling, and other presently available information regarding the seasonal floodplain restoration element of CM2. Indeed, the draft EIR/EIS includes some specific information on such impacts based on a UC Davis study (referenced in the prior section of this letter) commissioned by Yolo County. This approach illustrates that it is presently possible—and thus, required as a matter of law—to include a much more detailed analysis of potential environmental impacts of CM2 in the draft EIR/EIS.

3. The EIR/EIS Existing Conditions Baseline is Out-of-Date and Seriously Flawed.

CEQA Guidelines Section 15125(a) provides that the appropriate baseline for environmental review is “normally” the conditions existing at the time the notice of preparation (“NOP”) is published. Presumably on this basis, the draft EIR/EIS states that it generally uses a baseline tied to the 2009 date of publication of the NOP. This approach is not reasonable for a project like BDCP given its lengthy and tremendously complex planning and environmental review process, as well as the overall timeframe for implementation. Among other flaws resulting from application of the outdated baseline, the EIR/EIS does not appear to consider the Central Valley Flood Protection Plan (adopted in mid-2012) (“CVFPP”). Coordinating the implementation of BDCP and CVFPP, however, will be a very real issue for many years to come, and it deserves consideration in the EIR/EIS. The County thus urges consideration of an updated baseline as work on the EIR/EIS proceeds.

4. Improvements to the MIKE-21 Model are Critical to Ensure Accurate Estimates of Bypass Impacts.

Although the EIR/EIS does not evaluate all impacts of CM2 as mentioned above, the EIR/EIS does appear to use a footprint for inundation in the Yolo Bypass generated with a draft MIKE-21 model to estimate impacts to terrestrial species.¹ Yolo County hired Northwest Hydraulic Consultants (“NHC”) to conduct an independent

¹ Figures 5.J-1 to 5.J-7 in Appendix 5J of the BDCP administrative draft contain maps of the difference between existing and proposed Bypass inundation based on the preliminary MIKE-21 modeling results. Given the

review of the MIKE-21 model being used by DWR, resulting in the September 2012 report entitled *Yolo Bypass MIKE-21 Model Review: Strengths, Limitations, and Recommendations for Refinement*. This report indicates data and modeling results important to answering the questions about potential impacts of CM2 are currently unavailable or inadequate, including insufficient model detail (computational mesh size and extent) to accurately depict shallow flooding on fields adjacent to the toe drain, inaccurate topographic and bathymetric data, unvalidated west side tributary flow information, and improper location of tributary inflow entry points in the model. In addition, there are a number of MIKE-21 assumptions and inputs that need to be tested, including verification of boundary conditions, computational cell sizes, and validation of wetting and drying assumptions. Finally, the model needs to be validated and additional sensitivity analysis performed to verify that shallow flow results are reliable.

The improvements needed are significant enough to call into question any results generated with the MIKE-21 model. Most of these shortcomings, however, can be addressed in the manner described in the Recommended Next Steps” section of the NHC report. This work should occur now, prior to the release of the final draft EIR/EIS, to ensure that related analyses of potential environmental impacts are accurate, credible, and complete.

5. Impacts of CM2 on Yolo Natural Heritage Program and Yolo Bypass Wildlife Area Need to be Further Evaluated.

Chapter 12 of the EIR/EIS lists specific impacts of CM2 on terrestrial species, many of which are covered by the Yolo Natural Heritage Program (YNHP). The YNHP is an HCP/NCCP and a local conservation strategy that is under preparation by a joint powers authority consisting of the County, the cities of Woodland, Davis, Winters, and West Sacramento, and the University of California, Davis (the Yolo County Habitat/Natural Community Conservation Plan Joint Powers Agency (“Habitat JPA”)). In addition, Chapter 12 indicates CM2 will result in both the temporary and permanent loss of managed wetlands in the Yolo Bypass, which includes the Yolo Bypass Wildlife Area.

The first administrative draft of the YNHP was released in June 2013. The next draft of the BDCP EIR/EIS should therefore more fully evaluate the potential impact of BDCP on the YNHP. The YNHP released an issue paper on May 23, 2013 describing the overlap of BDCP and the YNHP entitled *Interface with the Bay Delta Conservation Plan: Background, Summary, and Remaining Issues (Attachment 4)*. The EIR/EIS should build on this work and evaluate issues related to plan overlap, including the potential for BDCP to interfere with the Yolo NHP’s ability to achieve its conservation goals. Current language in the BDCP referring to only considering effects substantial if there is a conflict with an “adopted HCP or NCCP” ignores HCPs and NCCPs like Yolo that are still in the planning process.

Also, the EIR/EIS should specifically evaluate the impacts of CM2 on the Yolo Bypass Wildlife Area. Given there is no inundation footprint specifically referenced for this analysis, it is difficult to isolate the specific impacts on the Wildlife Area. In addition, the EIR/EIS does not (aside from an isolated comment in Chapter 15) reference or appear to utilize the important 2012 work by Ducks Unlimited to evaluate the potential CM2 impacts on managed wetlands entitled *Waterfowl Impacts of Proposed Conservation Measure 2 for the Yolo Bypass – An Effects Analysis Tool*. Yolo County and the state and federal government have worked hard to support the Wildlife Area and the educational programs associated with it, including securing millions of dollars to create the wetlands in the 1990s. The EIR/EIS must fully evaluate the specific impacts on the Yolo Wildlife

Area and utilize the Ducks Unlimited model as the best information available to assess these impacts. These impacts are even more important to understand because the BDCP as a whole will result in a net loss of wetlands in the plan area, potentially impacting decades of work to create additional habitat for migrating waterfowl habitat along the Pacific Flyway consistent with the North American Waterfowl Management Plan and the Central Valley Joint Venture.

Finally, Yolo County questions the EIR/EIS conclusion for a number of terrestrial species that no mitigation is necessary for impacts from CM2 because BDCP will restore or preserve habitat elsewhere in the plan area. This is not a conclusion BDCP should make without close coordination with the Yolo Basin Foundation, the Habitat JPA, and Yolo County. The loss of important habitat in Yolo County may undermine the goals of the YHNP, the Open Space Element of the Yolo County General Plan, and the Yolo Bypass Wildlife Area Land Management Plan.

6. Additional Studies Are Necessary to Ensure a Meaningful Analysis of Certain Potential Impacts.

While Yolo County is pleased that the Bureau of Reclamation is providing funding in 2013 to complete the Yolo Bypass “tipping point analysis” described in the County’s April 16, 2012 comment letter, Yolo County has not received funding for any of the other studies described in that letter. These studies are outlined below. Yolo County would like to partner with the state and federal government to secure funding for all of the remaining studies at one time, including prioritizing studies and developing a schedule to complete the studies by June of 2015.

- A. **Flood Risks.** Yolo County has worked with the Sacramento Area Flood Control Agency to develop an approach to analyze flood impacts, including peer review of any flood impacts analysis performed by the state and federal government related to CM 2. As noted in the April 2012 comment letter, Yolo Bypass levees are already of “high concern” to the California Department of Water Resources. While the County appreciates language in the EIR/EIS that states any modification of the Yolo Bypass will be designed and implemented to maintain flood conveyance capacity at design flow level "and to comply with other flood management standards and permitting processes," Yolo County needs to verify through independent peer review that CM2 will not impact existing flood protection for Yolo County and the Sacramento region. This includes ensuring vegetation maintenance will continue if CM 2 results in the cessation of agriculture in parts of the Bypass.
- B. **Infrastructure Impacts.** As indicated in the April 2012 letter, the Yolo Bypass contains important agricultural water supply, transportation, and other infrastructure that may be affected by the increased frequency and longer duration of flood flows proposed as part of CM2. It is essential that the County evaluate potential impacts of CM2 on Bypass infrastructure before CM2 is further refined.
- C. **Increased Methylation of Mercury.** The EIR/EIS determines, in essence, that effects of CM2 on methylation of mercury are significant and unavoidable, but no specific mitigation is available because nobody knows what the effects will be, they cannot be predicted, and nobody knows how to effectively reduce or eliminate those effects even if they occur. The BDCP states, “seasonal inundation of floodplain areas, such as the Yolo Bypass, has the potential to create anaerobic conditions that contribute to the methylation of mercury, which increases toxicity” (BDCP 2A 3.5.7) and “the highest concentrations [of mercury in sediments] have been reported in Cache Creek and Yolo Bypass...”

(BDCP 3.4.12.1). Given these conclusions, the County's longstanding request for a detailed study of adverse effects of CM2 on methylation of mercury is more critical now than it has been in the past.

- D. **Fish Benefits Analysis.** Given the uncertainty associated with the fish benefits of some CM2 elements, such as the amount of acreage required to provide sufficient habitat and the number of fish that will enter the Bypass through the proposed notch in the Fremont Weir, an independent analysis of the fish benefits of CM2 should be performed in conjunction with the EIR/EIS. The EIR/EIS should include consideration of alternatives to the existing splittail biological objective, for example, which currently requires 7,000 acres of floodplain habitat in the Yolo Bypass (Objective SAST 1.1). It is Yolo County's understanding that splittail, which are not even a threatened species, can successfully spawn in a small area of floodplain.
- E. **Intakes Impacts.** The three proposed 3,000 cfs intakes are located directly across the Sacramento River from Yolo County. The EIR/EIS should analyze the impacts of diverting water at these locations on downstream diversions in Yolo County, as well as other issues.
- F. **Additional Studies.** In addition to the studies identified above, the County also believes that a vector control analysis and a groundwater impact analysis focused on CM2 should be performed in connection with the EIR/EIS. Funding necessary to analyze the impacts of refined CM2 proposals on agriculture and waterfowl habitat should also be provided.

7. An Inclusive Governance Structure—Particularly for Conservation Measure 2—Should Promptly be Developed.

The County is encouraged by some of the language in Conservation Measure 2 related to “minimizing impacts” and “proposing a sustainable balance between important uses of the Bypass” (see Chapter 3 comments). The success of this approach, however, will require the establishment of a robust, inclusive governance structure for CM2 that includes Yolo County and other interested agencies and stakeholders. A "sustainable balance" will not emerge from a governance process that excludes local government, agricultural stakeholders, and others presently left out of the limited group of agencies designated for service on the leading governance entities for the BDCP. Yolo County strongly encourages the BDCP to work with Yolo County immediately to develop a mutually agreeable governance structure for CM2 operations.

As a starting point, Yolo County has developed the attached proposed governance structure for BDCP (Attachment 5). Yolo County hopes to work with interested parties to adapt this proposal to CM2 in the near future.

8. The EIR/EIS is Vastly Complex and Lengthy, and Must be Simplified.

In its April 16, 2012 comment letter, the County stated that “the BDCP and draft EIR/EIS are tremendously complex and lengthy.” This statement should have been reserved for the current draft, which dwarfs the 2012 administrative draft both in volume (increased by many thousands of pages) and overall complexity.

The County is hard pressed to make constructive suggestions for reining in the substance of the draft EIR/EIS. As the County also suggested over a year ago, however, it would be very helpful if the federal (and state) agencies responsible for the EIR/EIS develop a chapter or appendix that concisely summarized the anticipated project features and environmental effects of the BDCP on a county-by-county basis. Such an approach would

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further many of the policy aims underlying both NEPA and its state analog, the California Environmental Policy Act (CEQA), by facilitating informed public participation in the decisionmaking process. (E.g., In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings, 43 Cal.4th 1143, 1162 (2008).) Particularly in an EIR/EIS of such unusual complexity, a county-by-county summary of anticipated project features and environmental effects is both necessary and appropriate.

Even this suggestion, however, is only a starting point. The draft EIR/EIS should be thoroughly revised for the sake of clarity and simplicity. The need for such work is apparent by virtue of the length of the EIR/EIS alone. The length of the document presents an immediate obstacle for reviewers that (like many affected counties and stakeholders) with limited resources. Chapters of 300+ pages in length do not even contain a detailed table of contents, executive summary, or other material intended to aid reviewers.

Certainly, the EIR/EIS will never be an easy read. In its current state, however, it is far too complex to serve its informative purposes under CEQA or NEPA.

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The County appreciates this opportunity to comment on the Administrative Draft of the EIR/EIS. We look forward to hearing from you with respect to the issues raised in this letter.

Very truly yours,

Robyn Truitt Drivon
County Counsel



Philip J. Pogledich
Senior Deputy County Counsel

Attachments:

Att. 1—April 16, 2012 Yolo County Comment Letter

Att. 2—ICF Response (June 2013) to 2012 Comment Letter

Att. 3—January 24, 2013 Yolo County Comment Letter on Agricultural Mitigation

Att. 4—Paper entitled “*Interface with the Bay Delta Conservation Plan: Background, Summary, and Remaining Issues*”

Att. 5—Proposed BDCP Governance Structure