BDCP: Performance Assessment From the Conservation Perspective

September 2011

After five years of intensive effort, California's Bay Delta Conservation Plan (BDCP) is not producing the anticipated results. Viewed from virtually all angles – political, legal, technical, scientific, financial and procedural – it is unlikely that the BDCP's current path, if unchanged, will produce a positive environmental or socioeconomic outcome. Without a substantial shift, this process could lead from a very poor status quo to an even more dismal future in terms of environmental sustainability and economic rationality.

The BDCP is of unprecedented magnitude – the issuance of a 50-year endangered species 'take' and natural community conservation permit, and related water rights permits, for one of the largest and most expensive public works projects in California history; a peripheral canal (or tunnel) that will run for more than 40 miles, capable of moving enormous quantities of water from north to south.

This project and related permits and operations will dominate water management for the next century and beyond, affecting most of the state, with the potential for either ecological salvation or destruction.

What is BDCP Success?

Success is a thriving and resilient San Francisco Bay-Delta Estuary ecosystem, supporting healthy populations of salmon and other native species, in conjunction with a sustainable water management system that provides reliable supplies for cities and agriculture. To merit our support, the BDCP must:

(1) Establish clear and measurable biological performance goals and objectives for

the Estuary and aquatic species, and

(2) Provide a high degree of confidence that those goals and objectives will be achieved and maintained in the context of the overall management of water and other resources over the 50 year life of the permits.

Conservation organizations have invested intensively in BDCP's success, and have made numerous accommodations in support of the co-equal goal of water supply reliability. They have advocated for improved and sustainable ecological health ***-- not a return to a state of nature --*** by focusing on scientific and modeling information to guide decisions, and developing the institutional processes/structures to assure that goals and objectives, once established, are met. They have participated in hundreds of meetings, reviewed thousands of pages, and written dozens of letters and comments. Nevertheless, those recommendations for the most part are not reflected in BDCP decisions thus far.

In brief, while BDCP documents refer to co-equality of water supply and ecosystem goals, the effort is trending strongly toward:

- Higher levels of assured contract deliveries out of the Delta
- Limited or no assurances of ecosystem performance
- Substantial regulatory assurances for exporters
- Substantially increased water exporter control and influence over the resource management decision making process
- Marginalization of fishery and water quality agencies
- Marginalization of environmental and other stakeholder influence and legal protections

BDCP's Premise: An Untested Theory of Ecosystem Recovery

BDCP has become predicated on the theory that the projects can divert substantially more water out of the Delta consistent with the promise of a healthy ecosystem -- that new conveyance infrastructure, associated Project operations, restored wetland habitat, and dealing with "other stressors" will produce meaningful ecological recovery even as less water overall is provided for the ecosystem. In other words, at this point, the BDCP is premised largely on the conjecture that increased flows are not a necessary part of the plan to achieve ecological restoration, a conjecture that is wholly unproven. We continue to be strong supporters of restoring wetland habitats; the point is that there is no basis for assuming that wetland restoration alone will recover many of the species and habitats most affected by water project operations. The BDCP's embrace of this untested restoration hypothesis makes the program requirements outlined below all the more important from an environmental perspective.

Changes Needed for Success

The responsible agencies should clarify that they intend to take the following steps:

1. Goals, Objectives & Science

- Use independent scientists in the development of goals and objectives;

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establish conflict of interest rules.

- Commit to establishing ecosystem performance objectives that are consistent with "SMART" criteria.
- Commit to a revised Effects Analysis (per NAS and NGO recommendations) that evaluates how effective conservation actions are in achieving objectives and modifies the actions accordingly
- Establish an independent science entity (or use an existing one) to oversee the adaptive management process and provide guidance for adaptive management decision-making
- Commit to establishing a "reasonableness" versus a "certainty" standard in adaptive management decision-making

2. Assurances of Ecosystem Performance

- Commit to linking regulatory relief and ecosystem performance assurances
- Commit to parity of assurances such that the ecosystem does not carry the primary risk that theories of recovery may prove incorrect
- Commit to provision of adequate and reliable freshwater flows for restoring the ecosystem
- Commit to large-scale restoration of floodplain and other critical habitats
- Establish clear and enforceable consequences in the event that ecosystem funding is not available as anticipated.

3. Funding

- Establish secure funding stream for all aspects of the ecosystem program
- Prepare financing plan for public elements of BDCP, including the extent and schedule of receivable funds, and the consequences of those funding levels not being met.
- Conduct independent analysis of project costs, ability of beneficiaries to pay.
- Prepare financing guidelines ensuring that exporters pay for conveyance and appropriate levels of mitigation without the expectation of government subsidy or below markets loans, but with the understanding that exporters may develop their own formula for sharing costs and benefits

4. Decision-Making

- Commit to full analysis of the SWRCB proposed EIS/R alternative (4/2011)
- Commit to development and full analysis of alternatives incorporating water supply reliability options that reduce exporter reliance on the Delta, including groundwater management, efficiency, recycling, etc
- Provide a clear decision-making role for fish agencies in Project operations that impact attainment of performance objectives.
- Provide a clear role for fish/environmental agencies in guiding implementation of the restoration program in parity with the Project agencies
- Establish a restoration entity (or use an existing entity focused solely on environmental management and restoration) to implement non-operational aspects of the restoration program
- Provide all stakeholders, including but not limited to NGOs and export

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interests, with parity roles in participating in the BDCP restoration program
- Preclude consultants or models used by the exporters in connection with litigation against the government.
- Limit exporter control, or the appearance of same, over consultants, their communications, planning and technical analyses.

NGO Criteria for BDCP Success: Current Status

Elements needed for BDCP success are listed below (in bold), followed by a description of the state of play with regard to each at this point in the process. As indicated in the accompanying letter, BDCP is not on track to meet conservation community objectives.

1. Ecosystem Restoration Objectives. The BDCP will develop and use SMART (specific, measurable, achievable, relevant and time-bound) objectives that define BDCP's commitment to restoring the ecosystem and recovering covered species, to guide design and adoption of the Conservation Strategy

- While acknowledging that measurable objectives are essential, the BDCP fails to include any. The most recent (Nov. 2010) draft contains only narrative statements, and no quantified biological performance metrics, objectives or measures of success for aquatic species.
- The BDCP Conservation Strategy is not drafted to attain specific biological performance. NAS emphasized this as a central problem in its highly critical review (May 2011).
- Efforts have begun to develop objectives for the Projects' contribution to recovery and restoration. However, it is not clear that -- assuming such objectives are established – the Conservation Strategy will even be evaluated as to its efficacy in achieving these objectives, let alone modified as appropriate in order to better accomplish them.
- The schedule for completion exacerbates these problems.

2. Accountability Mechanisms. The BDCP will produce permit conditions that include clear and enforceable accountability mechanisms for achieving the biological objectives, specifically establishing a parity of "assurances" such that a failure to attain, or delay in attaining, ecosystem performance will affect the status of any "no surprises" guarantees.

- BDCP has not developed accountability tools for biological performance.
- BDCP has declined to link 'no surprises' assurances to biological performance.
- Assurances parity is lacking in light of the political, if not legally binding, commitments that have been made regarding regulatory assurances for the exporters:
    - Permittee status for state water contractors
    - Special efforts to provide federal contractors 'no surprises' guarantees

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- Even in the event of species jeopardy, additional process hurdles may be required before actions could be taken affecting the Projects

3. Secure Environmental Water. The BDCP will provide freshwater flows and operating rules for the CVP/SWP (timing, pulse flows, etc.) as reasonably necessary, in conjunction with other factors, to achieve the measurable biological objectives.

- BDCP has made little progress on addressing the flow needs of the Delta ecosystem and covered species.
- There is strong scientific consensus that increased ecosystem flows are an essential, if by themselves insufficient, condition for ecological health.
- The BDCP has not demonstrated that habitat and accommodations to address other stressors, alone, are reasonably likely to produce ecological restoration and species recovery.
- Exporters continue to press for the BDCP to provide higher diversions from the Delta than allowed by the BiOps under existing permit conditions, and even to "make up" for the Projects' environmental compliance obligations.

It bears emphasis again that we have never maintained that flow is the ***only*** factor at play in the Estuary, but that the best science establishes it is an ***essential*** one.

4. Adaptive Management. The BDCP will establish an appropriate adaptive range to allow for Conservation Strategy modifications as needed to achieve biological performance objectives in response to evolving understanding about the system, climate change, and emerging threats.

- Little progress in addressing the issue, such as setting adaptive management triggers when objectives are not being achieved; identifying the level of uncertainty for specific conservation actions; and developing appropriate range of additional measures or operational flexibility to respond to uncertainty.
- Instead, BDCP has jumped straight to "adaptively" limiting water supply impacts; the new work group to address adaptive management is titled "Adaptive Limits of Water Operations Criteria, " whose purpose is to "develop a set of water operations adaptive limits, especially regarding water export from the Delta".
- Agreements to provide high levels of regulatory assurances further limit opportunities to adaptively manage for the ecosystem as the program proceeds.

5. Governance. The BDCP will include a structure for implementation of the Conservation Strategy, apart from Project operations, controlled primarily by an ecologically oriented body. Decision-making structure for Project operations will include a central role for the fish agencies.

- Current BDCP governance proposal establishes a governing body comprised of exporters and Project agencies with control over budget, hiring, science, priorities,

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funding, adaptive management, etc.
- Fish agencies are not included on the proposed governing body.
- Role of the fish agencies in operational decisions is undefined.
- No role for conservation organizations beyond limited seats on a "stakeholder panel."

Underscoring the exporters' growing decision-making role, the Project agencies have signed an agreement providing exporters with elevated influence over the HCP/NCCP planning and EIS/EIR processes. These agreements include:

- Giving exporters early access to all consultant work
- Commitment to address all exporter comments
- Commitment to an aggressive schedule that could limit analytical work, range of alternatives considered
- Exporter control over consultant contracts
- Exporter control over financing analysis
- Fish agency comments on consultant work may not be considered if not received in accordance with schedule

6. Science. The BDCP will employ a science program to integrate the effects of water project operations, habitat, invasive species, and pollution and serve as the basis for the adaptive management process.

- The Effects Analysis – the central effort to establish the effects of the Project on the covered species – has been widely panned as poorly conceived and executed.
- Science problems stem in part from deference to exporter prerogatives.
- NAS issued a scathing review of the BDCP Effects Analysis:

> "Overall, the panel concluded that the [BDCP] is little more than a list of ecosystem restoration tactics and scientific efforts with no coordinated strategy for reaching the goals of the plan."

- Our organizations have provided significant proposals to improve BDCP science, including but not limited to:
    1. Delta Regional Ecosystem Restoration Implementation Program (DRERIP) conservation action vetting process
    2. Conceptual Life History Models for longfin smelt, Chinook salmon, and steelhead
    3. "DRERIP review" of the Chapter 3 Conservation Strategy (2009)
    4. "Range B" operational scenario
    5. "Scenario 7" operational scenario
    6. The Logic Chain (various iterations and several scientific panel reviews), including its emphasis on and definition of Goals, S.M.A.R.T. objectives, and a specific adaptive management process
    7. Principles for Prioritization of conservation measure implementation
    8. Substantive reviews of at least two draft "Effects Analyses"

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9. Mini-effects analysis
10. Effects Analysis management panel
11. 8-fold path for the Elimination of Suffering (plan to revise EA processes to contribute to a real adaptive management strategy)
12. "Caveats" in the November 2010 draft which BDCP to iterate between an effects analysis process (among other things)
13. Numerous letters describing specific and systemic flaws with the Plan's current progress and direction

Not one of these proposals has been fully or successfully integrated into the BDCP.

7. Ecosystem Funding. The BDCP will establish dedicated and secure funding for the habitat restoration program as well as the science program.

- No progress on financing for the ecological costs of the program to date.
- No proposal regarding the consequences if such funding is not secured.
- No basis for allocating costs of restoration to the public, projects, exporters, or other parties as appropriate; lack of clarity regarding the difference between mitigation of existing or projected impacts and restoration.

8. Beneficiary Pays. The BDCP will incorporate the beneficiary pays principal for purposes of infrastructure financing.

- The BDCP assumes that exporters will pay for the cost of any new conveyance estimated at $13 billion, but:
- No substantial cost analysis prepared.
- No outside review of current cost estimates.
- No assessment of who beneficiaries are, and ability/willingness to pay.
- No financing plan prepared.
- Per the recent MOU, the exporters will develop their own financing plan for the costs of design, construction, maintenance and operations of a new export facility.
- No plan to evaluate cost of supply alternatives to Delta diversions.

9. Water Supply Reliability. The BDCP will comply with the state policy to reduce export water supply reliance on the Delta and address actions to provide reliable water supplies through conservation, recycling, and other measures that increase local self-reliance.

- No progress on defining water supply reliability in terms other than export withdrawals from the Delta or developing associated performance measures.
- Indeed, no commitment at all by projects or exporters to comply with policy of reducing Delta reliance.
- No options in the EA or alternatives in the EIS/R that actually reduce exporter reliance on the Delta using water management strategies in exporting areas.

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