Bay Delta Conservation Plan
Governance Working Group

Revised Preliminary Recommendations for Governance Structure

March 25, 2009 Draft for Steering Committee Review

The Governance Workgroup revised the Feb. 26 draft in response to the Steering Committee's Feb. 27 comments. In particular, we have clarified: (i) the terminology of regulatory authorization and authorized entity (replacing "permit" and "permittee"), (ii) the relative functions of implementing and supporting entities, (iii) the difference between routine and non-routine changes, (iv) the use of science in all such changes, (v) and the boundary between such changes (which are within the four corners of the regulatory authorizations) and a plan modification.

Authorized Entities

1. The Bay Delta Conservation Plan will be the basis for regulatory authorizations to take listed species of fish and wildlife, and cause other environmental impacts, incident to Delta water operations and related covered activities. The authorized entities will be legally responsible for compliance with their regulatory authorizations, including the conditions requiring implementation.

    1.1. A primary purpose and use of the plan will be compliance with the federal Endangered Species Act (ESA), California Endangered Species Act (CESA), and the California Natural Community Conservation Planning Act (NCCPA). Incidental take authorizations will issue to: (i) each non-federal entity authorized under ESA section 10(a)(1)(B), NCCPA section 2835, and CESA section 2081, or (ii) each federal entity authorized under ESA section 7(a)(2), to take endangered or threatened fish and wildlife species incident to water operations and other covered activities, subject to the plan conditions.

    1.2. The entities receiving incidental take authorizations for covered activities ("authorized entities") will also obtain authorizations under other applicable regulatory statutes. These include but are not limited to: California Water Code sections 1000 *et seq*. (water rights), Water Code sections 13000 *et seq*. (water quality), California Fish and Game Code sections 1600 and 5900 *et seq*. (fish screens, channel modification), and Clean Water Act section 404 (dredge and fill).

        1.2.1. A separate authorization will likely issue under each such statute.

1.2.2. The plan will be designed to comply with the statutes listed in point 1.1 and will be consistent with the requirements of the statutes listed in point 1.2.

1.3. Each authorized entity will have the legal and financial capacities to:

1.3.1. Perform those responsibilities assigned to it by regulatory authorizations. If responsibilities are jointly assigned to several authorized entities, each will have such capacity.

1.3.2. Remedy inadequate (including untimely or ineffective) performance of the plan as authorized.

1.3.3. Respond to changed circumstances that affect plan implementation.

1.3.4. Modify the covered activities as may be necessary for continuing compliance with applicable laws.

1.4. The plan and regulatory authorizations will specify the distinct responsibilities of each of the authorized entities to implement the conservation strategy described in plan Chapter 3.

1.4.1. The conservation measures that are identified in the conservation strategy, as described in Chapter 3, will include (i) operational rules for the covered activities to avoid or minimize take of listed species (Chapter 3.4.1), (ii) measures to restore habitat (Chapter 3.4.2, 3.4.4), and (iii) measures to manage other stressors (Chapter 3.4.3).

1.4.2. The responsibilities of authorized entities to implement the conservation strategy will be set out, as appropriate, in the plan, regulatory authorizations, implementing agreements, and other agreements described in point 6.1.

2. California Department of Water Resources (DWR) will be an authorized entity.

2.1. The State of California, through DWR, will construct and own the new conveyance facility.

2.2. Under existing authority, DWR constructed and owns the State Water Project's (SWP) existing Delta facilities, including the Banks Pumping Plant. It will seek and obtain regulatory authorizations consistent with the plan to continue to operate such facilities.

3. SWP and CVP Contractors have established a Joint Powers Authority (Contractor JPA) in order to assist with plan implementation.

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3.1. Subject to continuing discussion between DWR and Contractors and within the Governance Workgroup, the JPA will be a separate authorized entity, or a supporting entity (receiving coverage under DWR's regulatory authorizations) as described in point 9.

3.2. The Contractor JPA's responsibilities will be contained or reflected in the plan, implementing agreement, and other related agreements.

4. U.S. Bureau of Reclamation (USBR) will receive incidental take and other applicable regulatory authorizations under the statutes described in points 1.1 – 1.2.

4.1. USBR is expected to enter into an agreement with DWR to provide for wheeling of Central Valley Project (CVP) water through the new conveyance facility.

4.2. The United States owns, and USBR operates, the CVP's existing Delta facilities, including the Jones Pumping Plant. USBR is expected to seek and obtain regulatory authorizations consistent with the plan to continue to operate such facilities. The plan will recognize that USBR's authorization under ESA section 7(a)(2), and DWR's authorization under ESA section 10(a)(1)(B), will have different scopes and assurances.

5. Mirant will be an authorized entity for the purpose of its power operations.

Implementing and Supporting Entities

6. Each authorized entity will be designated as an implementing entity responsible to implement the plan's conservation strategy consistent with its regulatory authorizations.

6.1. The plan and implementing or related agreements will designate specific responsibilities to each implementing entity.

6.1.1. An implementing agreement is that agreement which runs between the regulatory agency and authorized entity under NCCPA section 2820(b), and as appropriate under ESA section 10(a)(1)(B), to describe responsibilities for implementation.

6.1.2. Other agreements may run between the authorized entities, or between the authorized entities and supporting entities (as described in point 8), to describe such responsibilities. An example is the agreement described in point 4.1.

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6.1.3. The plan or implementing or other agreement may assign a responsibility (which is the regulatory responsibility of one authorized entity) to another implementing entity for cost-effectiveness or other reasons.

6.2. Each implementing entity will have the legal and financial capacity to implement its assigned responsibilities.

6.3. Each authorized entity will retain ultimate responsibility for implementation of each measure which a regulatory authorization requires of it, even though the implementing or other agreement designates another implementing or supporting entity to implement that measure.

7. DWR and USBR will be designated as implementing entities for the purpose of water operations, among other things. Subject to continuing discussion as described in point 3.1, the Contractor JPA may be so designated. Responsibilities of each implementing entity may vary, as specified in the plan, and implementing or other agreements.

7.1. DWR will be an implementing entity responsible for construction, operation, and maintenance of the new conveyance facility. It will continue to have responsibility for operation and maintenance of the Banks Pump Station and other State Water Project facilities.

7.2. The Contractor JPA may be an authorized entity and implementing entity as described in point 3.2.

7.3. USBR will be an implementing entity responsible for operation and maintenance of the Central Valley Project facilities.

8. Entities other than authorized entities will assist implementing entities (hereafter, "supporting entities") in the implementation of the conservation strategy.

8.1. The plan, implementing or other agreements, or any combination will designate each such supporting entity and specify its tasks for implementation.

8.2. The relevant authorization of an authorized entity will cover each such supporting entity for take of listed species or other environmental impacts.

8.3. An authorized entity will oversee each supporting entity's performance of its responsibilities for plan implementation. The authorized entity may terminate such other entity's responsibility (under the plan or any implementing or related agreement) for tasks which that other entity does not perform adequately.

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8.4. Designation of a supporting entity will be a function of its jurisdiction, expertise, or other practical capacity to increase the likelihood of timely and successful plan implementation.

9. Supporting entities may assist in implementation of the conservation strategy, as described in the plan, regulatory authorizations, and implementing or related agreements. These entities may include, among others:

9.1. Delta Conservancy, if established by new state statute as proposed by Delta Vision for the purpose of implementing certain conservation measures. The Delta Conservancy will be able to accept public funds directly or through another State or Federal agency for such implementation.

9.2. Other public agencies and private entities that have jurisdiction, capacity, and expertise to perform such measures in a cost-effective, reliable, and timely manner.

9.3. Regulatory agencies (USFWS, NMFS, and CDFG) which will participate with the appropriate implementing entities in real-time decision-making regarding operations of a covered facility or other covered activity to avoid or minimize take of covered species.

BDCP Implementation Council

10. An Implementation Council will be formed for the purposes of (i) coordination between implementing entities and other Council members on plan implementation and (ii) non-binding procedures to resolve disputes between members that relate to the adequacy of such implementation. Both functions will be advisory to the implementing entities.

10.1. The plan will specify eligibility criteria for membership. Such criteria will cover: (i) authorized entities and any other implementing entities; (ii) regulatory agencies (in ordinary or *ex officio* capacity, as they may specify); (iii) other members of the BDCP Steering Committee; (iv) Delta counties and other local governments; and (v) other stakeholders whose assistance will increase the likelihood of success in plan implementation.

10.2. The plan will specify procedures for these functions. These procedures will be designed and implemented to be efficient and specifically to permit the implementing entities to timely implement their responsibilities. These procedures may vary by plan element.

10.3. Such procedures will fully preserve the existing authorities of any member, including implementing entities and regulatory agencies, to act as required

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by such authorities. These entities will not delegate any such authorities to the Implementation Council.

10.4. Such procedures will comply with applicable requirements of open meeting laws.

11. The implementing entities will periodically coordinate with Council members on past activities and upcoming plans for water supply operations, conservation measures, and adaptive management.

11.1. Such coordination will permit the implementing entities and other members to exchange information, comments and recommendations.

11.2. The purpose of such coordination is to maximize mutual understanding of plan implementation, document the outcome and basis for decisions in order to facilitate such understanding as well as adaptive management, and minimize risk of disputes. As stated in point 10.3, such coordination will complement and not substitute for the ordinary communication between the authorized entities and regulatory agencies in oversight of the authorizations.

12. The Council will use a non-binding procedure for dispute resolution related to adequacy of plan implementation, including the performance of adaptive management.

12.1. Such procedure will be designed and implemented to minimize the risk and scope of litigation related to plan implementation, while fully reserving each Council member's legal rights.

12.2. This procedure will generally be prospective, such as a periodic review of plan implementation to improve going-forward performance.

Plan Implementation and Regulatory Compliance

13. The implementing entities will implement the plan as required by regulatory authorizations.

14. The plan will describe routine and non-routine changes to the conservation measures. The description of each measure, as stated in Chapter 3, will include, as appropriate: (i) triggers for such potential changes, (ii) substantive criteria which the implementing entity will apply, (iii) a range of permissible change, and (iv) responsibilities for coordinating with, or obtaining concurrence from, regulatory agencies before implementation of the change.

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14.1. As described in Chapter 3.6.1, where successful implementation of a measure requires responsiveness to variable circumstances, the plan and regulatory authorizations may provide for routine changes. An example is a water operations rule which changes by water year-type, season or month, or other real-time variables.

14.2. The plan will provide for non-routine change when routine change will not effectively achieve the stated objective. A non-routine change may require greater level of coordination with the regulatory agencies before implementation.

14.3. The plan may provide that some measures will be fixed.

14.4. For those measures authorized to be changed, the plan will describe a starting boundary between routine and non-routine changes. As described in plan Chapter 3.6, in the early years of implementation, the implementing entities and regulatory agencies will develop a better understanding of the circumstances that justify greater coordination. They may adjust that boundary on the basis of their experience.

14.5. Such routine and non-routine changes will be substantially informed by the scientific approach to adaptive management – consisting of new research as well as analysis of monitoring results (Chapter 3.7) to test hypotheses about the mechanisms, effects, and effectiveness of measures (Chapter 3.6).

14.6. Any change beyond the routine and non-routine changes described in the plan and regulatory authorizations will require a plan modification, as described in Chapter 6.3 – 6.4. The plan will explain how these procedures comply with regulatory requirements for responses to changed and unforeseen circumstances.

15. Compliance with the plan will be enforceable and enforced under the regulatory statutes listed in points 1.1 and 1.2, as applicable.

15.1. The plan will be a condition of each regulatory authorization issued for covered activities.

15.2. The plan will describe how it will be enforceable under each applicable regulatory authorization. For example, water operations (whether by federal or non-federal entity) will continue to be subject to applicable provisions of the California Water Code, with respect to water rights and water quality. The plan will reflect the view that existing statutes, as listed in points 1.1 – 1.2, provide sufficient authority to assure adequate plan implementation as a condition of the authorizations issued under those statutes; and that use of the Coastal Zone Management Act (CZMA), as

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recommended by the Delta Vision Task Force, is not necessary to assure such implementation.

15.3. Each regulatory authorization necessary for plan implementation should recognize that certain covered activities, including water operations, are governed by other authorizations and requirements, such as the water quality standards in the *Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary*. To the extent feasible, each such authorization should provide for integrated approach to compliance with the several authorizations, such as routine coordination between the regulatory agencies regarding the status of plan implementation, while recognizing that each regulatory agency has independent authority.

15.4. Major plan modification will require amendment of all applicable regulatory authorizations.

16. By April 30, 2009, the Governance Workgroup will make a recommendation to the Steering Committee on mechanisms that should be used to govern real-time operations to enhance species recovery and water supply reliability beyond what otherwise will be accomplished by regulatory authorizations.

Coordinated Governance

17. The plan will contain appropriate provisions so that governance of plan implementation is compatible with the overall governance of Delta natural resources that may be established pursuant to the recommendations of Delta Vision Task Force or otherwise.

17.1. Each regulatory authorization under the statutes listed in points 1.1 – 1.2 will be enforced by the regulatory agency.

17.2. Coordination between any new regional government and the regulatory agencies will not be necessary to assure compliance with such authorizations.

18. By separate agreement concurrent with plan adoption, the authorized entities and other stakeholders expect to establish provisions to advance coordinated regulation of all facilities and activities that affect achievement of plan goals or performance of plan responsibilities in the Delta watershed.

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