

RTD Teleconference
14 May 2014
Remarks of Bill Jennings, CSPA

Almost two years ago in the fall of 2012, Jerry Meral, in response to questions, acknowledged that the Implementation Agreement was long overdue and said it needed to be ready by January 2013. As I recall, he said that it was time for the proponents to “fish or cut bait.”

Well, two Januaries have come and gone, we’re almost to the close of the comment period for the draft BDCP and environmental review documents and we’re still waiting to see it.

Apparently, the Implementation Agreement is going to be kept secret until the final BDCP and EIR/EIS.

Basically, BDCP has scheduled a wedding, reserved the chapel, sent out invitations and ordered flowers and cake but the bride hasn’t agreed to get married and is balking on the prenuptial agreement.

The Implementation Agreement is the heart of BDCP. Many of the specific structural details are only generally described in the BDCP and EIR/EIS and have been relegated to the Implementation Agreement.

It is the Implementation Agreement that defines obligations, provides assurances, ensures adequate funding, specifies responsibility for implementing measures, provides for enforcement and remedies for failure and establishes the process for changes, among numerous other things.

And these details reach into critical sections throughout the documents, from governance to finance to adaptive management to assurances to the very project description.

Several examples:

1. BDCP Chapter 8 says that “funding of CM1 Water Facilities and Operation will come from state and federal contractors,” and “The actual funding share that is provided by the state versus federal water contractors for CM1 will be determined near the time that permits are issued for the BDCP.”

However, financial assurances are unsupported. Critical information is lacking on:

- The respective financial obligation of urban and agricultural contractors;
- The ability and willingness to pay on the part of the agricultural contractors, who will use approximately 70% of the yield;

- How the \$2 billion obligation previously assigned to the Friant Water Users will be paid; and
- The financial obligation, if any, of the CVP contractors who are not BDCP permittees.

Delaying important financing decisions to the end of the permitting process effectively prevents the public from identifying and communicating concerns. This is particularly important as the state's taxpayers may end up as the guarantor of any default by the permittees, or that a statewide water use surcharge might be enacted to cover unmet costs.

Will permits to operate the tunnels be suspended or revoked if California voters disapprove bonds and/or Congress withholds appropriations for habitat restoration and other non-water projects conservation measures?

2. BDCP Chapters 6 and 7 discuss implementation but details are obscure. How does adaptive management to achieve biological goals and objectives coexist with No Surprises protection of "no net loss to exports?"

The 4-member Authorized Entity Group (DWR, the Bureau and State and Federal Contractors) and the 3-member Permit Oversight Group (fishery agencies) are given "joint" responsibility for making decisions on adaptive management.

- How will votes be handled? By what quorum rules will they operated?
- Will decisions be made by a majority, super-majority or by consensus? Will water agencies and contractors allow scientists to decide how much water can be exported?
- How will BDCP determine which of the operational scenarios will be the initial starting point? Is it high outflow or low outflow? What is the project yield or water supply reliability?
- If additional measures become necessary and permittees are guaranteed no surprises, where will any additional water and funding come from?

The Authorized Entity Group is given sole authority to make final decisions over the handling of conservation measures 2 through 22. Does this mean that DWR, the Bureau and State and Federal Contractors will have final authority over habitat restoration, even though taxpayers will put up 90% of the funds? Details are needed.

The Authorized Entity Group is given final say over compliance monitoring and reporting requirements. But these details have been poorly specified. Effectiveness

monitoring is not discussed although it is mentioned in an appendix concerning research, monitoring and adaptive management. Again, details are needed.

3. What assurances or guarantees will be included in the Implementation Agreement to ensure that the project will be operated properly, given that the State Water Board has never taken a single enforcement action against the state and federal projects, despite thousands of documented violations of water quality and flow standards over the last thirty years? Indeed, the Board has arbitrarily changed the standards themselves eight times in the last ninety days.

So if the Implementation Agreement is the core of the project containing the critical details of how it will be financed and operated – where the rubber hits the road. Why hasn't it been released?

The answer, I believe, is expressed in the Critical Issues Memo discovered through a Public Records Act request and included in the packet being distributed. These are the critical threshold issues that project proponents have laid before the Governor.

The first was met when DWR Director Mark Cowin announced the formation of a Joint Powers Authority and the delegation of construction-related decisions to the state contractors. The Authority will become active in three weeks but the details haven't been worked out.

But, the contractors are also insisting upon:

- A commitment that the federal agencies will become full project proponents;
- A reliable water yield of 75% of CVP/SWP contracts;
- A guaranteed minimum water supply;
- Publically funded programs to meet environmental water demands; and
- Regulatory assurances that a lack of funding by state and federal agencies won't invalidate the permits for the tunnels.

Without these assurances, BDCP simply doesn't pencil out financially. With them, Adaptive Management is just a slogan and BDCP is inconsistent with the EIR/EIS. It can't meet the legal mandates for an HCP/NCCP.

Failing to reveal the Implementation Agreement sabotages the ability of the public to substantively comment on the project. It makes of mockery of transparency, due process and meaningful public review.

It wastes the many thousands of dollars and hours spent reviewing, analyzing and commenting on documents that are going to have to be re-circulated because crucial operational and financial details are excluded.

I'll conclude by observing that we've spent countless hours reviewing and analyzing BDCP and the EIR/EIS. We've identified a universe of omissions, factual errors, unsupported

conclusions and unwarranted assumptions from modeling to financing to operations to habitat restoration.

But even if we were to uncritically accept all of BDCP's claims and accept the lack of critical details, their own modeling and evaluation reveals that the project will:

- Reduce Delta outflow;
- Increase Delta exports;
- Decrease salmon smolt survival for Winter-run, Spring-run and Sacramento and San Joaquin Fall-run;
- Degrade critical low salinity zone habitat for resident Delta species;
- Reduce dilution and increase the residence time for pollutants to interact with the environment;
- Increase violations of salinity standards for fish and agriculture; and
- Increase the concentration of mercury and selenium in fish tissue.

And that disaster is the best that BDCP offers. The worst – if it includes contractor demands – will be a nightmare for California.