

Assembly Accountability & Administrative Review Hearing
Melinda Terry, CCVFCA Executive Director
February 12, 2014

In existence since 1926, the California Central Valley Flood Control Association membership includes more than 75 reclamation and levee districts, cities, and counties with flood management responsibilities protecting life, property and the environment from Redding to Tracy, including the Delta.

BDCP accountability issues for the Legislature to consider:

- 1) No dedicated funding for Mitigation Measures
- 2) Increased State liability for flood damage
- 3) Conflicts with Other Plans, Programs and Laws
- 4) Accountability for public dollars already invested

**NEED DEDICATED FUNDING AND GOVERNANCE FOR
IMPLEMENTATION OF MITIGATION MEASURES**

- **Significant Accounting Element** – The EIR/EIS contains 750 impacts with 52 “Unavoidable” Significant Adverse impacts – otherwise known as “Sorry Charlie,” such as the loss of agricultural productivity during 10-year construction [Impact AG-2] which is the Delta’s primary land use. This leaves 698 impacts to be mitigated such as providing an alternative source of domestic water supply for homes and businesses for at least 6 years because their wells are dry due to groundwater being lowered 10-20 feet by construction dewatering pumps [Impact GW-1]. If EIR/EIS mitigation measures don’t work, then those significant adverse effects become another “Unavoidable” impact the local area, primarily Delta counties, will be forced to absorb. The cost for Sacramento County to connect the communities of Freeport, Hood, Clarksburg, and Courtland to the county’s water system would be extremely costly. As a state project there are two levels of BDCP mitigation “accountability” for the Legislature to consider: **I)**

whether the full cost of each mitigation measure is properly accounted for in BDCP budget with a secure funding source identified; and 2) whether all of the 698 mitigations are in fact being funded, implemented and effective in reducing severity of the per CEQA.

- **Fiscal Burden on Local Government** – Since Delta counties are the most likely entities to be fiscally burdened with absorbing the high costs of unmitigated unavoidable impacts, this will result in the county having to reduce services to people and portions of county outside of the Delta for at least a decade. Impacts the Delta counties may have to assume financial responsibility if not mitigated include domestic water supply, road repairs, reduced property and sales tax revenues, health services, blight and reduced property values.
- **No Line Item for Mitigation Cost Estimate** – Unknown what the total cost is to mitigate the 698 impacts because the EIR/EIS simply says those costs are included in the amount identified for each Conservation Measure (CM) which is confusing since the EIR/EIS identifies adverse impacts by topic: Water Quality, Groundwater, Geology and Seismicity, Agriculture, Air Quality, etc and isn't always clear which CM is the cause of impact. Also couldn't find any disclosure regarding the costs for developing all the mitigation plans contained in the Environmental Commitments document, so can't determine if the BDCP costs are underestimated in terms of mitigation. These unaccounted for costs could be quite significant since both the Environmental Commitments and EIR/EIS measures all lack description of specific actions and instead rely on funding future studies/reports/analyses that “will be” conducted, developed, analyzed, evaluated, and designed, in order to understand the true extent, severity, intensity, duration, and location of impacts.
- **No Mitigation Oversight** – The BDCP Governance does not identify an oversight entity to monitor and enforce implementation or effectiveness of the individual mitigation measures and

Environmental Commitments or the construction contractors and government agencies responsible for implementing.

INCREASED STATE LIABILITY – FLOOD CONTROL

- **SRFCP Responsibility** - The Sacramento River Flood Control Project system, approved by California in 1925 and Congress in 1928, was transferred to the State of California in 1953 with a MOU confirming the **state's obligation to operate and maintain ALL completed works/facilities**. These State flood facilities include bypasses, weirs, levees which are commonly referred to as **“project levees”**, and other works designed for flood control, reclamation and improvement of navigation. Jurisdiction and authority over the state's flood system is the responsibility of the **Central Valley Flood Protection Board**. (SHOW MAP IN CVFPB BROCHURE) (SHOW DWR Annual Levee Inspection Report)
- **SRFCP Purpose** - Both the State and federal government acknowledge the SRFCP facilities are designed and maintained for flood control, reclamation of lands subject to flooding, and improvement of navigation and that the public works system exists to protect millions of lives and property valued in the billions.
- **Paterno Lawsuit** – The State agreed to pay a settlement over \$400 million after the Third Appellate Court concluded in the 2003 Paterno inverse condemnation lawsuit that flood damages were directly caused by an unreasonable State plan which resulted in the 1986 failure of project levees and the State was liable as the party responsible for the SRFCP facilities.
- **Inverse Condemnation** – Some of the liability issues raised in the Paterno decision include: **1)** the public should pay the costs inherent in public works, including damages, foreseeable or not; **2)** whether the system, as designed, constructed, operated, and maintained, exposed plaintiff to an “unreasonable” risk of harm; **3)** whether the **location and configuration of the system**, and its

purpose to divert the natural flow for flood protection, reclamation, and navigation were themselves “reasonable”; 4) whether damage was “**proximately caused**” by the **public improvement as designed and constructed**; and 5) State failed to undertake any studies to determine its adequacy to meet the waters the State proposed to route against it.

WHY IS THE STATE’S FLOOD CONTROL SYSTEM RELEVANT TO BDCP?

- **SRFCP Alteration** - Because the BDCP proposes the largest modification of the state’s flood control system that has ever been done, constituting a substantial “**public improvement**” to the “**location and configuration**” of the SRFCP. The BDCP Plan consists of 22 Conservation Measures, 10 of which propose to alter the “**location and configuration**” of the existing state flood control system by removing, breaching, moving, modifying, inundating, planting vegetation, or building on SRFCP facilities.
- **Increased Fiscal Liability** - Paterno decision specifically states: *“A public entity is a proper defendant in an action for inverse condemnation if the entity substantially participated in the planning, approval, construction, or operation of a public project or improvement that proximately caused injury to private property. So long as the plaintiffs can show substantial participation, it is immaterial ‘which sovereign holds title or has the responsibility for operation of the project.’”* “Approval and acceptance by the public agency may be implied by official acts of dominion or control of the property and by continued use of the improvement by that agency for many years.” “A public entity is a proper defendant in a claim for inverse condemnation if it has the power to control or direct the aspect of the public improvement that is alleged to have caused the injury.” Conservation Measure 2, includes installing and operating a gate on the Fremont Weir to divert water into the Yolo Bypass for a seasonal fish farm in order to comply with federal endangered species incidental take permit

requirements for jeopardy caused by SWP/CVP South Delta pumps. The new gate will be managed as part of the SWP/CVP water project operations under BDCP permits. Therefore, both the state and federal water projects as well as individual water districts who will be BDCP Authorized Entities and signatories to a BDCP Implementation Agreement may unknowingly be exposing their ratepayers to future flood liability damages under inverse condemnation due to their substantial participation in the planning, approval, construction, and operation of the most critically important portion of SRFCP infrastructure protecting millions of people and billions in property value in the greater Sacramento area.

CONFLICTS WITH OTHER PLANS, PROGRAMS & LAWS

- **Army Corps - Recovery Funding** – At the federal level, after Hurricane Katrina the USACE began increasing its inspection and enforcement program which has resulted in more than 60% of the SRFCP levee system being ineligible for federal recovery money to rebuild damaged flood protection facilities after flood events because the state has not maintained those facilities in accordance with the 1953 MOU. The State therefore has 100% fiscal responsibility for any future repair costs for ineligible SRFCP facilities, but the EIR/EIS didn't analyze whether the modifications BDCP will make to segments in the system will increase the % of ineligible project levees which would increase the State's costs to repair.
- **Delta Reform Act - Flood Flows** – Legislative findings in the 2009 Delta Reform Act declare that reducing risks to people, property, and state interests in the Delta to be an inherent objective in the coequal goals for management of the Delta. River flows are talked about extensively in the BDCP: the amount of river flows for fish, water quality, and water supply. River flows are extremely important to flood management too, but managing those flows for flood protection are **not analyzed** in the Draft EIR/EIS.

One example of how BDCP would reduce the SRFCP's designed flood flow capacity is CMs 1 and 2 require the placement of at least 10 cofferdams in the Sacramento River and Delta channels during construction of the Fremont Weir, 3 intakes, and 6 barge loading facilities. Choking the Sacramento River's flood flows in 10 locations from Natomas to Tracy could cause water to overtop levees in several areas, including up the American River when water starts backing in a flood event.

- **Delta Plan - Emergency Evacuation** – Pursuant to the 2009 legislation the Delta Plan is required to promote effective emergency preparedness, appropriate land uses, and strategic levee investments in the Delta. Based on flood history, the BDCP is guaranteed to experience at least one major flood event during the 9-year construction period for conveyance facilities. In addition to modification of the State's flood management system, BDCP proposes extensive alteration of the existing Delta road configuration by moving, re-routing, and blocking road segments, including state highways, for at least 9 years, but failed to analyze impediments to a safe and timely evacuation during an emergency such as invading floodwaters.

RISK TO PRIOR PUBLIC INVESTMENTS

- **Lost Investments** – Fiscally, the EIR/EIS also failed to analyze whether BDCP's proposed alteration of SRFCP facilities will reduce or eliminate any portion of the public safety benefits achieved with \$4 billion allocated from Prop 1E and 84, approved by local assessments, or allocated by Congress for numerous flood protection projects built in recent years. These public investments would be lost if additional improvements to recently completed local flood projects need additional funding for more improvements to offset increased flood risks created by BDCP projects modifying the SRFCP for water supply reliability.
- **SRFCP Performance/Central Valley Flood Protection Plan** – The BDCP's failure to analyze in the EIR/EIS how the substantial

alteration of flood facilities proposed by CMs 1, 2, and 4-11 will comply with legislatively-mandated objectives contained in CVFPP which the State has spent millions of dollars of bond money to develop. These are costly omissions if BDCP projects increase State's liability exposure or conflict with flood investments identified during CVFPP implementation. **SHOW CVFPP PLAN**

ACCOUNTABILITY QUESTIONS FOR THE STATE TO CONSIDER

- Large HCPs, such as BDCP, include Implementing Agreements signed by all parties to assure the permittee will follow through on their obligation to implement the mitigation program in the HCP. There is currently no signed Implementing Agreement in place. Due to the unknown costs of the 750 impacts and the potential for additional exposure to inverse condemnation liability for the State, should the Legislature, Department of Finance, and Legislative Analyst's Office review the Implementing Agreement to confirm the mitigation measures are being funded by the project beneficiaries? To ensure the Agreement shields the State, Delta counties, and taxpayers from bearing those costs? Is there any fiscal risk to the State if any of the signatories to the Implementing Agreement go bankrupt during the 50-year life of the HCP? Or want to pull out for any other reason?
- Are the State and federal government water supply projects (SWP/CVP) and water contractor agencies assuming flood damage liability under inverse condemnation laws for their participation in and funding of the BDCP's alteration of the "location and configuration" of the SRFCP and continued use of "improvements" such as a new diversion gate on the Fremont Weir? Will BDCP projects increase the State's liability by increasing vulnerability to future Paterno-type litigation for the Central Valley Flood Protection Board which has jurisdiction and responsibility for the SRFCP?
- If future levee failure is determined by a court to be related to BDCP construction and operation then who pays? Ratepayers of

exported Delta water? All CA taxpayers? If the State pays, what is the funding source to be used?

- Will analyzing flood protection impacts and the State's ability to maintain SRFCP facilities to accommodate design flood flows constitute a substantial amendment to the Plan and EIR/EIS that requires re-circulation for public comment? If so, what is the timeline and cost estimate for analyzing flood protection issues and re-circulating for public comment?
- As a State project, will the BDCP expose the State to being named as a defendant in just compensation lawsuits for unmitigated damage from any of BDCP's 750 impacts caused by projects contained in the 22 Conservation Measures? To reduce the amount of litigation against the State for just compensation due to property damage caused by any of BDCP's 750 impacts, should a special fund and process be legislatively established to coordinate the payment of just compensation claims?
- Should the Legislature set up its own oversight process for annual evaluation of the funding, implementation, and effectiveness of BDCP mitigation measures? Is additional legislation necessary to specify Legislative intent and policy regarding funding, implementation, and monitoring of BDCP mitigation measures to assure fiscal impacts that should be the responsibility of SWP/CVP ratepayers are not being redirected to State or local governments?

- **Specific CMs proposing to alter the SRFCP** include: 1) CM1 Water Conveyance Facilities – propose to build on and move project levees; 2) CM2 Floodplain Habitat – proposes to modify the Fremont Weir to divert water into the Yolo Bypass (the major work horse of the SRFCP) more frequently and longer durations than the designed flood control structure currently allows in order to create fish habitat to mitigate for jeopardy under ESA caused by operation of South Delta CVP/SWP pumping facilities; 3) CMs 4-11 – each propose to remove, breach, move, plant vegetation, etc. other state flood facilities throughout the Plan Area.
- **Under BDCP CM1**, the new North Delta intakes are to be built on one mile of project levees in a four-mile stretch **and in CM2** the Fremont Weir is to be modified with an operable gate to be managed in accordance with SWP/CVP water ops contained in BDCP to divert water into the Yolo Bypass more frequently for non-flood purpose to comply with ESA jeopardy mitigation requirement for continued ability of existing CVP/SWP facilities to delivery water supplies.
- **Levee Structure** – Delta’s levee roads, mostly SRFCP project levees, will also be subjected to thousands of extremely construction vehicles making 8 trips per day, 24/7 during 9-year construction, but EIR/EIS fails to analyze or mitigate the damage

to the levees under the road pavement. Annual degradation significant enough to reduce the stability of the levee, so probability of failure increases, which is problematic since these levees are always holding water back.

- **CVFPP/Delta Plan - Levee Stability** – Stability of levees is compromised by conveyance construction activities too numerous to mention in this hearing, but includes: 1) degradation of levee roads from extreme weight of thousands of trucks making 8 trips per day, 24/7 and increased subsidence, sink holes, conveyance collapse, and levee liquefaction from dewatering, tunneling, and over 25,000 daily pile driving strikes. Most of the levees susceptible to these impacts are the State's project levees.
- **SRFCP Habitat Mitigation** – When BDCP is combined with Delta county HCPs, there is little habitat lands left for RDs to mitigate future levee improvements or the State to maintain SRFCP facilities during 50-year life of BDCP and beyond, which increases State's fiscal liability despite sea level rise and earthquake predictions. EIR/EIS does not analyze or provide specific mitigation to ensure availability of sufficient habitat to mitigate future flood protection projects in the Delta.