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Sent: Mon 8/2/2010 6:48:06 PM
Subject: #2 --- SPK Regulatory on BDCP Baselines for EIS/EIR

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----- Forwarded by Karen Schwinn/R9/USEPA/US on 08/02/2010 11:45 AM -----

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Date: 08/26/2009 11:35 AM
Subject: SPK Regulatory on BDCP Baselines for EIS/EIR

The purpose of this email is to provide the Bay Delta Conservation Plan's (BDCP) BDCP Environmental Compliance Team (BECT) information, analyses, and processes which appear necessary to support the USACE permit decisions for those components of the BDCP for which the applicants are seeking permits and which constitute complete projects based upon my current understanding of the BDCP.
The USACE has jurisdiction over the BDCP under section 10 of the Rivers and Harbors Act of 1899 (section 10), section 14 of the Rivers and Harbors Act of 1899 (section 408, so called as it's also listed as 33 USC 408), and section 404 of the Clean Water Act (section 404).
The topics within this email are specific to section 10 and 404 permit decision needs.
The USACE is a cooperating agency under the National Environmental Policy Act for the Environmental Impact Statement/Environmental Impact Report (EIS/EIR) which is being prepared for the BDCP by the BECT. I am looking forward to working with the applicants to ensure the EIS/EIR prepared for the BDCP is adequate in both process and content to support the permit decisions of the USACE. I expect the topics discussed below will be further discussed at the next BECT meeting or another meeting to ensure the right information, analyses, and processes are incorporated into the EIS/EIR to support the permit decisions of the USACE. Without the right information, analyses, and processes incorporated into the EIS/EIR, additional NEPA processes and documentation would be necessary for completion of the permit decisions of the USACE.
Section 10 Regulatory Baseline
The USACE has jurisdiction over the diversion of waters from navigable waterways under section 10 of the Rivers and Harbors Act of 1899. The baseline operations of the CVP and SWP must be compared to the proposed operations of the BDCP in the analyses in the EIS/EIR.

On July 19, 1977, structures or work completed before December 18, 1968, or in waterbodies over which the District Engineer had not asserted jurisdiction at the time the activity occurred provided, and in both instances there is no interference with navigation, were Grandfathered by Nationwide Permits and unless modified, do not require further permitting. Based on that, the USACE established on October 13, 1981, that the SWP baseline operations for purposes of section 10 of the Rivers and Harbors Act of 1899 are as follows:
"The SWP is limited to daily diversion into Clifton Court Forebay would not exceed 13,870 acre-feet and the three day average diversions into Clifton Court Forebay would not exceed 13,250 acre feet. In addition, the SWP can increase diversions into Clifton Court Forebay by one third of the San Joaquin River flow at Vernalis during the period from mid-December to mid-March when the flow of the San Joaquin River at Vernalis exceeds 1,000 cubic feet per second (cfs)."
On October 31, 1979, the Ninth Circuit Court, in Sierra Club v. Morton (Andrus), held that Congressional approval or authorization to construct a Federal project without a section 10 permit may be found in virtually any type of statute, including appropriations statute, so long as it is demonstrated that Congress had knowledge of the precise action and was explicitly and specifically addressing that project. For the Jones Pumping Plant, the basic enactments authorizing the CVP in 1937, and the annual appropriations acts for the operations and maintenance of the CVP, constitute affirmative Congressional authorization. Based on that, the baseline operations of the CVP is a rate of diversion of 4,600 cfs at the Jones Pumping Plant.
This then means that the Corps baseline for what is already authorized under section 10 of the Rivers and Harbors Act of 1899 is essentially the same as the OCAP for the CVP and SWP diversions in the south of the Delta as authorized by the 2004/2005 biological opinions with the exceptions that the temporary barriers are not included, CVP capacity of the Delta Mendota Canal is not limited by subsidence, and the 500 cfs additional pumping as just approved by the SPK Regulatory (permit number SPK-1999-00715, dated June 23, 2009) is not included.
CEQA Baseline
The CEQA Baseline is the current conditions without the project. The Current Conditions is the OCAP for the CVP and SWP diversions in the south of the Delta as authorized by the 2008/2009 jeopardy biological opinions and their Reasonable and Prudent Alternatives. This should include temporary activities currently authorized, such as the increase in pumping approved by permit SPK-1999-00715.
NEPA Baseline
The NEPA baseline is the Future No Action. This may be the same as the CEQA baseline above, but we should discuss this to make sure we all understand and agree, for the entire process is built upon the foundations of the baselines and such baselines need to be adequate to meet the needs of all the decisions which will rely upon this EIS/EIR.
For the purposes of supporting the permit decision process, both (or all three) baselines should be in the NEPA document.
Mike

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