UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
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November 6, 2012

Mike Jewell
Chief, Regulatory Division
U.S. Army Corps of Engineers – Sacramento District
1325 J Street
Sacramento, CA 95814-2922

Dear Mike:

We have reviewed the U.S. Corps of Engineers' (Corps) October 26, 2012 letter to the California Department of Water Resources (DWR). In this letter, the Corps provides a "conditional concurrence" with DWR's proposed Clean Water Act (CWA) Section 404 overall project purpose statement for the anticipated Section 404 permit for the Bay Delta Conservation Plan (BDCP) Delta conveyance project. Given the unusual nature of the Corps' letter, EPA would like to clarify our understanding of what your letter says and how the Corps will be moving forward in evaluating this project.

Background

The BDCP is a habitat conservation plan under the Endangered Species Act (ESA) and a Natural Communities Conservation Plan under parallel California law. The purpose of the BDCP is to provide the basis for 50-year permits under ESA for continued operation of the existing export facilities and construction and operation of new water export facilities in the Sacramento-San Joaquin River Delta.[1] Although the plan is still in the development phase, the BDCP will likely include three major components: (a) new diversion and conveyance structures to bring water from the Sacramento River around the Delta to the existing south Delta export pumps; (b) significant restoration of aquatic habitat in the Delta to enhance fishery productivity;

[1] The proposed purpose of BDCP under National Environmental Policy Act is described in the administrative draft EIS *available at* http://baydeltaconservationplan.com/Libraries/Dynamic_Document_Library/EIR-EIS_Chapter_2_-_Project_Objectives_and_Purpose_and_Need_2-29-12.sflb.ashx.

and (c) new long-term operating criteria for exporting water out of the Delta from the CVP and SWP pumps to federal and state water contractors.

Our understanding is that the BDCP Environmental Impact Statement (EIS) will evaluate the BDCP's proposed conveyance and fishery restoration measures, at a programmatic level, as well as the conveyance structure at a site-specific level. This environmental review is not yet complete. Several early chapters of the "Administrative Draft" have been provided to the cooperating agencies (including both the Corps and EPA), but several other chapters, including the critical chapters on Water Quality and Aquatic Resources are still under development. More importantly, the definition of the new diversion and conveyance structures (called "CM1" in the BDCP) continues to be negotiated between the probable applicants and the state and federal fish and wildlife agencies.

For almost two years, the Corps and EPA have been engaged in the BDCP process with a goal of integrating CWA Section 404 permitting needs into BDCP proposals. The Corps and EPA have complementary but different responsibilities in Section 404 permitting.[2] In 2011, our two agencies worked with DWR – the likely project applicant – to craft a Memorandum of Understanding to coordinate the requirements of NEPA, CWA Section 404, and Sections 408 and 410 of the Rivers and Harbors Act. This MOU approach to integrating CWA requirements into the NEPA process is being successfully used in other large scale projects such as California High Speed Rail and CalTrans transportation projects. DWR ultimately decided not to pursue an MOU with EPA but has continued these discussions with the Corps. We acknowledge and appreciate that the Corps has maintained the flow of information about its DWR discussions with EPA.

Corps Conditional Concurrence with Overall Project Purpose

The Corps' letter to DWR provides what we have been calling a "conditional concurrence" with DWR's proposed overall project purpose statement for the new diversion and conveyance facilities ("CM1") Section 404 permit application.

> *"The overall purpose of the project is to construct and operate modifications and improvements to the State Water Project (SWP) facilities in the Delta, as set forth in the Water Operations and Conveyance Conservation Measure 1 component of the approved Bay Delta Conservation Plan. The project includes the construction of new diversion facilities in the north Delta, the construction of new facilities to convey water from the new diversion facilities to the existing SWP water export facilities, and modifications to the operations of SWP. The project would align SWP water project operations in the Delta to better reflect seasonal flow patterns, reduce the usage of the existing SWP diversion facilities in the south Delta, and protect fish with state of the art fish screens."*

[2] The Corps issues the permits. EPA can "elevate" a permit pursuant to the national Corps/EPA MOA when the permit will result in "unacceptable adverse effects to aquatic resources of national importance." (EPA/Corps MOA 08/11/92, at Part IV.)

The Corps' letter also explains the relationship of the BDCP EIS/EIR with CWA 404 permitting. The operative language appears to be the following:

> *"The EIS/EIR will not attempt to merge the requirements of the National Environmental Policy Act (NEPA) with CWA 404; as such, the EIS/EIR will not include an overall project purpose statement or an 404(b)(1) alternative analysis for CM1. When the Final EIS/EIR is completed, an alternative will be selected. If we agree the selected alternative would have the fewest impacts on the aquatic environment, considering all environmental factors, the Corps plans to adopt the EIS/EIR and use it to make future permit decisions on BDCP actions……*
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> *….If DWR changes its approach for evaluating alternatives under NEPA and the 404(b)(1) Guidelines, the language of the overall project purpose statement will need to be revisited…."*

EPA Comments

EPA continues to have serious reservations about the use of this language as an overall project purpose. We also have questions about how the Corps intends to select the LEDPA and comply with NEPA for the CWA 404 permit for CM1.

As we have noted before, we believe that the addition of the phrase "…as set forth in the Water Operations and Conveyance Conservation Measure 1 component of the approved Bay Delta Conservation Plan…." results in an overall project purpose that equates the overall project purpose with the applicants' preferred programmatic alternative. That would, in effect, eliminate alternatives that are not the applicants' preferred programmatic alternative. This is contrary to 2009 Standard Operating Procedures for the U.S. Army Corps of Engineers Regulatory Program which states: " The overall project purpose should be specific enough to define the applicant's needs, but not so restrictive as to constrain the range of alternatives that must be considered under the 404(b)(1) Guidelines."[3]

In addition, multiple Department of Army Elevation Guidance Memos discourage Corps Districts from adopting applicant overall project purpose statements that are too specific, constrain the range of alternatives, and may prematurely eliminate less damaging alternatives from consideration.[4]

We would like to better understand the Corps' intended process for Delta Conveyance Project CWA 404 and NEPA compliance. Your most recent letter explains that the Corps will begin the CWA Section 404 analysis by evaluating alternatives for the Delta Conveyance Project at the programmatic level and identify the Delta Conveyance Alternative that is most likely to

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[3] Available at http://www.saw.usace.army.mil/wetlands/Policies/SOPI.pdf

[4] Chief Engineers Elevation Guidance Memos resulting from CWA 404(q) elevations, such as the Plantation Landing memo (April 21, 1989), Hartz Mountain memo (August 17, 1989) and Old Cutler Bay memo (September 13, 1990).

yield the least environmentally damaging practicable alternative (LEDPA) consistent with CWA Section 404. The Corps would consider the information included in the BDCP FEIS/EIR, although as noted the FEIS/EIR is not including a 404(b)(1) analysis. We would like to understand what information the Corps will use in this programmatic alternatives analysis, and how and when it will be disclosed in compliance with NEPA. In addition, we are unclear as to what project purpose will guide the evaluation of alternatives at the programmatic level, given that the draft overall project purpose by its terms applies only to the site specific CM1 evaluation.

We would also like to work with the Corps to ensure that the method for identifying the Delta Conveyance Project alternative most likely to yield the LEDPA at the programmatic level and the LEDPA at the project level is consistent with CWA 404 regulations and guidance. Identification of the LEDPA is achieved by performing an alternatives analysis that estimates the direct, secondary, and cumulative impacts to jurisdictional waters resulting from each alternative considered. The LEDPA is the alternative with the fewest impacts to jurisdictional aquatic resources that meets the project purpose and does not have other significant adverse environmental consequences. Secondary effects from operating a new Delta Conveyance Project, including impacts to water quality in the Delta, are critical and must be evaluated when identifying the LEDPA.[5]

We recognize that the Corps is making its current conclusions conditional on future analyses and decisions by the Corps. At the same time, however, we believe that this "conditional concurrence" with the proposed overall project purpose may unnecessarily complicate future 404 decisions. Please let us know if we have misunderstood your recent letter. We continue to be interested in a more efficient CWA 404 permitting process for BDCP projects, including CM1, and in supporting the Corps' CWA 404 permitting effort.

Sincerely,

Karen Schwinn
Associate Director
Water Division

[5] See Memorandum: Appropriate Level of Analysis Required for Assessing Compliance with the Section 404(b)(1) Guidelines Alternatives Requirements (August 1993). We find the analysis conducted for Corps permitting of Yazoo Pumps to be informative for our analysis of CM1. See Final Determination Concerning Yazoo Backwater Area Pumps Project (August 31, 2008).