UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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OCT 2 2010

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RE: Purpose Statement for Bay Delta Conservation Plan (BDCP)

Dear Messrs. Glaser, McInnis, and Lohoefener:

Since 2006, a large group of water export interests, nongovernmental organizations (NGOs), and state and federal agencies have been developing the Bay Delta Conservation Plan (BDCP), which will serve as a Habitat Conservation Plan (HCP) under the federal Endangered Species Act (ESA) and a Natural Communities Conservation Plan (NCCP) under California law. Broadly stated, the intention of the BDCP is to contribute to the recovery of listed species in the Delta system and to provide for ESA compliance for ongoing export operations and new Delta water conveyance facilities. In connection with the BDCP, the U.S. Fish and Wildlife Service (FWS), National Marine Fisheries Service (NMFS) and Bureau of Reclamation (USBR) have agreed to serve as joint leads in the preparation of the Environmental Impact Statement (EIS) analyzing the BDCP as required by the National Environmental Policy Act (NEPA).

The Environmental Protection Agency (EPA) has several roles in this process, but this letter will focus primarily on two.[1] Under NEPA and Section 309 of the Clean Air Act, EPA is

[1]EPA has also agreed to serve as a cooperating agency in the preparation of the federal Environmental Impact Statement for the BDCP. In addition, there is a possibility that Clean Water Act water quality standards may need to be revised by the California State Water Resources Control Board to facilitate construction and operation of new export water conveyance facilities in the Delta. The Board's actions on water quality standards are subject to EPA review and approval pursuant to Clean Water Act Section 303.

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charged with reviewing major federal actions significantly affecting the environment and the associated NEPA compliance by the action agencies. Under Clean Water Act Section (CWA) 404, EPA and the U.S. Army Corps of Engineers (Corps) have shared responsibility for reviewing projects that will need a Corps-issued 404 permit.

Over the past several months, EPA has been discussing the "purpose" statement for the BDCP with the action agencies, without final resolution. Given the time line for developing both the BDCP and the accompanying environmental review, and in light of the request from the Federal Bay-Delta Leadership Committee to identify and elevate issues expeditiously, we are taking this opportunity to summarize our concerns.

Background

A purpose statement is important under both NEPA and the 404 permitting process.

Under NEPA, the action agency must include a "purpose and need" statement that must "specify the underlying purpose and need to which the agency is responding...." 40 CFR Section 1502.13. The purpose and need statement drives the alternatives that must be analyzed in the Environmental Impact Statement, and the alternatives are "the heart of the environmental impact statements." 40 CFR Section 1502.14.

Under CWA Section 404, the permit applicant must demonstrate that the chosen alternative is the "least environmentally damaging practicable alternative" (LEDPA) for meeting the overall project purpose pursuant to the CWA Section 404(b)(1) Guidelines. "The overall project purpose is used for evaluating practicable alternatives under the Section 404(b)(1) Guidelines. The overall project purpose must be specific enough to define the applicant's needs, but not so restrictive as to preclude all discussion of alternatives." Army Corps of Engineers Standard Operating Procedures for the Regulatory Program, p. 7.

Under both acts, there is broad discretion for the action agency to define its project purpose, but that discretion is not unlimited. When disputes over project purpose arise, it is usually a dispute over whether the purpose statement is written so narrowly that it eliminates otherwise viable alternatives.[2]

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[2] The very recent 9th Circuit case Butte Environmental Council v. U.S. Army Corps of Engineers, et al., No. 09-15363 (9th Cir., June 1, 2010), is a good example of how the CWA 404 process works. It shows a strong deference to both the action agency and the Corps in making decisions under the 404 program. The history of that controversy also provides a good example of the iterative process between the applicant and the many regulatory agencies for defining a project purpose. As noted, the deference to action agencies is not unlimited. See, for example, Simmons v. U.S. Army Corps of Engineers, 120 F.3d 664, 666 (7th Cir. 1997) (Rejecting "single-source" definition of project purpose for water supply, noting that "[i]f the agency constricts the definition of the project's purpose and thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role."). See also Border Power Plant Working Group v. DOE, 260 F. Supp. 3d 997 (S.D. Cal., 2003)(Rejecting and broadening agency's definition of project purpose.); Similarly, Davis v. Mineta, 302 F.3d 1104 (10th Cir. 2002).

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Purpose Statement in the BDCP

The purpose statement for the BDCP has been evolving over the past two years.

The first amended[3] Notice of Intent (73 Fed. Reg. 20326 (April 15, 2008)) included the following discussion of the project purpose:

> "Specifically, Reclamation seeks to ***improve water supply reliability*** for its Federal water contractors, while meeting its [federal ESA] obligations."
>
> "The BDCP will have several core purposes:...conveyance facilities to ***enhance operational flexibility and water supply reliability***, while providing greater opportunities for habitat improvements.....water operations and management actions to achieve conservation and water supply goals.....Additional core purposes of the BDCP are....to ***provide for and restore water quality, water supplies***, and ecosystem health within a stable regulatory framework...."

The most recent Notice of Intent (74 Fed. Reg. 7257 (02/13/10)) added the reference to "full contract amounts."

> "...***Restore and protect the ability of the [State Water Project and Central Valley Project] to deliver up to full contract amounts***, when hydrologic conditions result in the availability of sufficient water, consistent with the requirements of state and federal law and the terms and conditions of water delivery contracts...."

As you know, it is this addition of the metric of "full contract amounts" that has inspired the many conversations between our agencies.

"Full Contract Amounts" as a Project Purpose Metric

Although it is not entirely clear what this reference to "full contract amounts" means (see discussion below), EPA first notes that "full contract amounts" has a special meaning in the Delta context, given the history of contracts and exports over the past 50 years. The attached chart (from the California Department of Water Resources) displays Central Valley Project (CVP) and State Water Project (SWP) exports out of the Delta over roughly the past 50 years. For our purpose, the relevant data in the chart are that the SWP and CVP have never exported more than approximately 6.3 million acre feet (MAF) annually.

Full contract amounts, however, are significantly higher. The State Water Project contract amount is 4,171,996 acre feet (AF) (DWR December 1, 2009 press release). South of

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[3]The first NOI (73 Fed. Reg. 4178 (January 24, 2008)) was issued by NMFS and FWS, and stated a general purpose as follows: "....allow for projects that restore and protect water supply, water quality, ecosystem, and ecosystem health to proceed within a stable regulatory framework....." The subsequent addition of the USBR as an additional lead agency on the NEPA evaluation generated the first amended Notice of Intent, quoted above.

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Delta CVP Water Rights Contractors (Exchange Contractors plus Contra Costa Water Rights Contracts) have full contract amounts totaling 893,277 AF and South of Delta CVP water service contractors (Contra Costa, DMC and SLC, San Felipe, San Luis and Cross Valley) have full contract amounts totaling 2,367610 AF.[4]

Combined, the SWP and CVP full contract amounts for Delta exports are around 7,432,883 AF. As noted above, historical exports by the CVP and SWP almost never exceed 6 MAF, so it appears that the "full contract amount" of exports is at least 1 million acre feet more *than has ever been exported historically.*

EPA Concerns

EPA has four broad concerns with using full contract amounts as a performance metric in the forthcoming EIS.

1. *There is significant disagreement as to what it means.* In our own discussions within the federal family, as well as in the broader debate, there seems to be little agreement on exactly what this term means. The most straightforward reading of the full contract language is that it is a performance metric.[5] Given the criticism leveled at the BDCP and, before that, at the CALFED Bay Delta Program for failing to identify performance goals, developing some form of performance metric for water supply reliability might make sense. Nevertheless, some participants insist that the focus should be on the "*up to*" full contract amounts, so that the phrase does not state a performance goal at all but merely a broad range. If this were true, then the project purpose would be met if the system were to deliver any amount of water between zero and full contract amounts. We doubt that such a loose project purpose was intended by either the action agencies or the water export interests. The inability of the action agencies to agree on what this language means is troubling. At a minimum, the purpose statement needs to be revised to provide clarity, or we risk creating even more controversy in the future.

2. *A significant increase in exports out of the Delta is inconsistent with recent state legislation.* California Water Code Section 85021, which was added last fall in the special session, states, in relevant part: "The policy of the State of California is to reduce reliance on the Delta in meeting California's future water supply needs through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency." Although complying with this statutory mandate is primarily an issue between the project proponents and the State Legislature,

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[4]These numbers are from a CVP-produced briefing binder from the 1990's. The current numbers may be a little different, but they suffice for illustrative purposes.

[5]Some participants at DWR apparently read it this way, and edited it to reflect more clearly the intention of regularly diverting full contract amounts. In discussions with EPA and the Corps under the 404 permit program, DWR provided a draft purpose statement that revised the language as follows: "restore and protect the ability of the SWP and CVP to ***reliably divert and deliver water up to full contract amounts.....***" Even this language is unclear, as discussed above.

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the federal action agencies need to address the apparent conflict between this state statute and the proposed purpose of increasing diversions out of the Delta by more than 1 million acre feet annually. The CEQ regulations, at 40 C.F.R. Section 1506.2(d), require that "[EISs] shall discuss any inconsistency of a proposed action with any approved State or local plan and laws (whether or not federally sanctioned.)"

3. *The scope of the alternatives and the effects analysis must match the scope of the project purpose.* Although this seems to be obvious, the participants seem to be having difficulty applying this to the proposed project. If the project purpose is to deliver full contract amounts, then the environmental documentation needs to analyze the effects of delivering full contract amounts. Similarly, the range of alternatives evaluated must mirror the project purpose. If, as some say, the project purpose is primarily to change the method of conveying the same amount (that is, the historical amount) of export water out of the Delta, that would be one set of alternatives. If, on the other hand, the project purpose is to increase diversions out of the Delta by 1 million acre feet, that would be a different, and probably much larger, set of alternatives. This concern implicates both the NEPA analysis and the LEDPA analysis under the CWA 404 permitting program.

4. *Significantly increasing exports out of a stressed Delta is the wrong policy.* Finally, as a straightforward policy matter, EPA questions the goal of increasing exports out of a severely distressed estuary.

The California Supreme Court, when it evaluated appeals of the CALFED Bay Delta Program, noted that the Program was an experiment.

> "The CALFED Program is premised on the theory, *as yet unproven*, that it is possible to restore the Bay-Delta's ecological health while maintaining and perhaps increasing Bay-Delta water exports through the CVP and SWP. If practical experience demonstrates that the theory is unsound, Bay-Delta water exports may need to be capped or reduced." *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings,* 43 Cal.4th. 1143 (2008)(emphasis added).

The Court was looking at a program that was developed during the 1990's, and adopted in 2000. The intervening ten years have not proved the theory accurate, and, in fact, seem to point the other way. EPA does not believe that we can attain the goal of a sustainable estuary if we are simultaneously trying to export an additional 1 million acre feet from that estuary.[6]

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[6]EPA is not alone in questioning a policy of increasing exports out of the Delta. As noted above, the Legislature has weighed in on this subject. The Governor's Delta Vision Blue Ribbon Task Force also addressed this issue: "[T]he Task Force recommends...a two-channel approach....Increased storage capacity, surface and ground, plus changed operations are also required to improve water supply reliability. Concurrently, Californians need to become less dependent on water supply from the Delta, both to reduce risk from a failed Delta conveyance system and to reduce risks to the ecosystem." Strategic Plan, at vi (October 2008). Leading academic think-tanks have reached similar conclusions. The Public Policy Institute of California recently noted that "...a peripheral canal alone will fix neither the Delta nor California's water supply issues, and it is unlikely to improve native fish populations enough to allow immediate

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We emphasize that we are not raising this issue of an oversubscribed Delta as an indirect attack on potential changes in Delta conveyance. *The real lesson of the past ten years of science is that the current conveyance for Delta exports is neither reliable nor sustainable, for either environmental or water supply purposes.* We believe that piggybacking on the conveyance problem to demand significantly increased exports out of the Delta risks delaying an expeditious response to this immediate and difficult conveyance problem.

Conclusion

EPA recognizes that defining a project purpose in a contentious arena is difficult. We note that the process for defining a project purpose in the CALFED Bay Delta Program lasted for more than two years, and generated a committee product that pleased no one. Nevertheless, for the reasons outlined above, we are concerned about the most recent change in the BDCP project purpose statement, and recommend it be revised.

We understand the federal action agencies have been discussing this issue. We suggest two options: first, the action agencies could return to the project purpose in the first amended Notice of Intent (quoted above); alternatively, the action agencies could start with the general "coequal goals" language articulated by the State Legislature in creating the new Delta Stewardship Council.[7] We would also be happy to discuss other approaches with you.

If you have questions about our comments, please refer your staff to Karen Schwinn, Associate Director in our Water Division, at (415)972-3472. We look forward to resolving this issue quickly, so that all agencies can turn their attention to completing the BDCP and the associated EIS/EIR on the proposed accelerated schedule.

Sincerely yours,

for Enrique Manzanilla
Director, Communities and Ecosystems Division

Alexis Strauss
Director, Water Division

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increases in exports above currently restricted levels." California Water Myths, PPIC (December 2009), at p. 11.

[7]"Coequal goals means the two goals of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem. The coequal goals shall be achieved in a manner that protects and enhances the unique cultural, recreational, natural resource and agricultural values of the Delta as an evolving place." Cal. Water Code Section 8054.

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Enclosure

cc: David Nawi, U.S. Department of the Interior
Karen Scarborough, California Natural Resources Agency
Mark Cowin, California Department of Water Resources
Col. Thomas C. Chapman, U.S. Army Corps of Engineers
Dorothy Rice, California State Water Resources Control Board

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