Date: April 26, 2012

Subject: EPA Preliminary Administrative Draft Comments for the Bay Delta Conservation Plan DEIR/S

From: Karen Schwinn, Water Division
Kathleen Martyn Goforth, Environmental Review Office

To: Federico Barajas

As you know, the EPA agreed to be a cooperating agency in the preparation of this EIS/EIR in its letter dated November 12, 2008.[1] Over the past several months, chapters of the BDCP DEIS/DEIR as well as the Habitat Conservation Plan (HCP) have been intermittently released to the action agencies, cooperating agencies, and to the public simultaneously. EPA has provided comments on a number of these documents, as part of the Interagency Management Team (IMT) and pursuant to our review authority under Section 309 of the Clean Air Act.[2]

Given the importance and complexity of this project, we appreciate this unique opportunity for early input. EPA does not typically review NEPA documents concurrent with the lead agency review. We recognize that this is a work in progress and we anticipate significant changes in the documents as the lead agencies make revisions to the proposed project and analyses. Accordingly, we have not attempted a detailed or comprehensive review at this time. Instead, we are raising a few broad comments and suggesting corrections where we notice obvious errors or unfinished discussions. We may have additional substantive comments as additional revisions of the environmental documents and required documentation for CWA Section 404 permitting are available for early and formal review by our agency.

All parties involved in Bay Delta issues recognize that California is at a critical juncture in water resources management. EPA believes that a successful BDCP could be a useful component of a broader governmental response to water management for all uses. With that in mind, we offer the following observations and suggestions on the administrative draft.

Clean Water Act Section 404

Specific Comments

The current draft, at section 8.2.1 in the water quality chapter, includes a discussion of the federal regulatory regime applicable to the Delta region. We have not attempted an exhaustive edit of these general descriptions of the various federal regulatory programs. However, we offer the following necessary revisions of the 404 discussion, at page 8-108:

(1) The sixth sentence of the 404 discussion, line 23 ("If a federal agency is a partner...") is incorrect and should be deleted. Federal agencies must comply with 404 like any other prospective permittees. Congress can, on a project by project basis, exempt projects from the permit requirements of 404. See CWA Section 404[r]. Otherwise, federal agencies need to rely

on a 404(b)(1) analysis and demonstrate that the chosen project is the LEDPA.

(2) The fifth sentence of the same paragraph, line 20 ("Under Section 404(b)(1) of the CWA, the Least Environmentally Damaging Practicable Alternative (LEDPA) must be identified from among those alternatives considered in detail in the Environmental Impact Statement (EIS)/Environmental Impact Report (EIR)") is misleading. It implies that the LEDPA is limited to the list of alternatives that were analyzed by the EIS. This inverts the analysis. The requirement is that the project proponent must demonstrate that the project is the LEDPA. If done correctly, the EIS will include an analysis of the LEDPA, but this is not inherently true. That is, the Corps may determine that the EIS does not properly evaluate the LEDPA, in which case additional review may be necessary. This sentence would be more accurate if it simply states that a project proponent must demonstrate that the Proposed Project represents the LEDPA that achieves the basic project purpose while meeting the costs, technical, and logistical feasibility factors associated with that basic purpose.

General comments on regulatory compliance

The document correctly points out that project implementation will require a significant number of permits under federal programs.[3] Most of these permits require some form of NEPA compliance.

EPA, the Corps, and DWR have been discussing permit compliance for the BDCP for more than a year. EPA and the Corps recommended streamlining the federal natural resource permitting process by including CWA Section 404 information for the BDCP Delta Conveyance Project in the EIS/EIR. The goal of this approach is to allow the Corps to rely on the BDCP EIS/EIR to support a CWA Section 404 permit decision without significant supplemental NEPA environmental review. EPA and the Corps proposed a process for including information relevant to CWA Section 404 by the lead federal agencies and DWR. We have been working together during this time to integrate the CWA Section 404 information needs with the BDCP ESA NEPA process. Although an MOU among the lead agencies, the Corps, and EPA was drafted, DWR ultimately chose not to pursue this MOU. At this time, however, it is not clear whether this goal of integration will be attained.

EPA recommends that DWR and the lead federal agencies continue the efforts to incorporate CWA Section 404 information in the EIS/EIR by working with EPA and the Corps. The preliminary administrative Draft EIS states that CWA Section 404 information, including an alternatives analysis and identification of the LEDPA, will be included in the Final EIS. We are encouraged by this statement but note that limited progress in this effort has been made and that the majority of CWA Section 404 work remains incomplete. We suggest DWR and the federal lead and cooperating agencies begin by formally agreeing on a BDCP NEPA purpose statement followed by agreeing on a CWA Section 404 basic and overall purpose statements for the Delta Conveyance Project. These steps should be followed by agreeing on methods for estimating the extent of CWA jurisdictional waters, screening criteria, LEDPA identification methods, alternatives, LEDPA, and mitigation.

Incomplete Chapters or Analyses

The most current Administrative Draft includes some incomplete chapters and analyses. We list the following as examples of unfinished or fragmented information:

1) Alternatives screening criteria (Alternative Development Report, Appendix 3A),
2) Fish entrainment analysis for the new operational water conveyance intakes,
3) Appendix 29C Effects of Sea-Level rise on Delta Tidal Flows and Salinity,
4) Effects of the proposed project on water quality indicators for mercury and selenium,
5) Environmental effects on fish and aquatic resources in a No action scenario(s) (p. 11-127) and environmental effects of operations on fish and aquatic resources (for all action alternatives),
6) General conformity analysis including mitigation (p. 22-48)
7) Appendix 3D- Defining Existing Conditions, the No Action/No Project Alternative and Cumulative Impact Conditions

As these documents are noted to be under preparation, we take some comfort that they will be released with subsequent administrative drafts(s) but note that it is difficult to make meaningful comparisons amongst alternatives, evaluate significance thresholds, and understand impacts when many of the issues EPA believes to be most important are not yet evaluated. We also strongly encourage the development of robust cumulative impacts sections, particularly for the cumulative impacts to water quality, fish, etc. (these sections are not available for our review at this time).

Inconsistency Among Multiple Baselines and No Action Alternatives

The Draft EIS evaluates multiple baseline and No Action alternatives in the various impact chapters. Although we acknowledge the complexity of fulfilling various requirements under CEQA and NEPA regarding determination and selection of the No Action Alternatives, EPA believes there is inconsistency among the chapters that will be confusing for the public and the decision-makers. For instance, there are references to *the* No Action Alternative when comparing a constituent and/or future scenario (i.e. climate change effects on water supply under *the* No Action Alternative p. 29-23), and references to the suite of No Action Alternatives when referring to other constituents (i.e. impacts to ammonia concentrations for No Action Alternative Near-Term, No Action Alternative Early Long-Term, and No Action Alternative Late Long-Term). We note this is problematic for determination of a threshold of significance (see p. 8-130) because one impact deemed to be significant on one baseline may not be significant when compared against another. It is unclear how these discrepancies will be reconciled in the document. In some cases, these multiple baseline/existing condition scenarios may lead to questionable conclusions. For example, Chapter 8 Water Quality repeatedly states that impacts to dissolved oxygen will be identical to existing conditions for all alternatives, including Conservation Measure 14- Stockton Deepwater Ship Channel aeration facility (p. 8-187). This seems counter intuitive and we recommend that the Draft EIS provide further information regarding the analysis that supports this conclusion.

Sea Level Rise and the Design of New Facilities

Sea level rise and climate change projections suggest a number of long term challenges in the

Delta, especially in terms of increased salinity intrusion, decreased Delta outflow, and potentially greater flood events. Furthermore, sea level rise itself would increase pressures on Delta facilities. It is stated that the proposed facilities under the Action Alternatives will -*not* increase resiliency to climate change stressors that are predicted to occur such as those described above. This appears multiple times throughout Chapter 23- Climate Change for a variety of stressors (shift from snowfall to rainfall, increased water temperatures) as well as impacts (surface water, groundwater, and so forth).

With these problems on the horizon, EPA believes it will be important for the EIS/EIR to evaluate the design of the proposed Delta conveyance improvements to assure that they are appropriate and provide flexibility in a changing climate. Although some of these issues may not be direct environmental concerns, we believe that the integrity of the structural design for the below-sea-level Delta conveyance component is an important consideration in the Section 404 public interest determination.

Additionally, the format of the climate change chapter makes it difficult to compare alternatives and consider significant impacts as a result of climate change. For instance, although Table 29-4 details the linkages between climate change effects and resource topics, it gives no information regarding the potential impacts, nor any discussion of these impacts in relation to the alternatives. Due to the lack of analysis and organization in this chapter, it is difficult to accurately evaluate the impacts of the proposed project.

Lastly, the document's assumptions with regard to climate change are unclear. The document includes aggressive negative impacts from climate change when it evaluates future fisheries scenarios, but does not appear to make similar evaluations for the anticipated climate change effects on Northern California hydrological conditions (even though these projections are readily available in DWR documents- see generally http://www.water.ca.gov/climatechange/articles.cfm). For analytical purposes, the document and appendices need to make similar climate change assumptions for each resource area. That is, if there are "worst case" climate change assumptions being made for future fisheries scenarios, then there should be parallel "worst case" climate change assumptions in analyzing future hydrological (water supply) scenarios.

Readability of the document

To facilitate the development of informative environmental documents, NEPA encourages straightforward and concise reviews[4] and an EIS should present the environmental impacts of the proposal and alternatives in comparative form (40 CFR 1502.14). We recommend a table and summary of environmental consequences for each aspect of the affected environment. Additionally, we cite CEQ's guidance on readability and note that EIS's "shall be analytic rather than encyclopedic" (40 CFR 1502(a). For example, Chapter 8 Water Quality offers no comparison amongst impacts for various water quality constituents, and presents information in a list, rather than narrative form. Although we acknowledge the complicated nature of the project, we suggest that the document's readability be improved for the public and for the decision-makers.

EPA appreciates this early coordination opportunity and we look forward to our continued constructive involvement in developing the BDCP EIS/EIR. If you have any questions about our comments, please call Stephanie Skophammer, the lead NEPA reviewer, or Erin Foresman, the Water Division lead, for this project. Stephanie can be reached at (415) 972-3098 and Erin can be reached at (916) 930- 3722 and foresman.erin@epa.gov.

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[1] In our letter agreeing to be a cooperating agency, EPA emphasized that our role as a cooperator was technical, and that it did not abridge or otherwise affect our independent NEPA review responsibilities under Section 309 of the Clean Air Act and the related CEQ Regulations.

[2] See our Scoping comments at http://www.epa.gov/sfbay-delta/cwa-nepa.html

[3] Several potential permits have been identified under the Clean Water Act, including:
(1) Clean Water Act Section 404 (33 U.S.C. 1344) permits for discharges of dredge or fill material into waters of the United States ("404 Permits."). This permitting program is administered jointly by the U.S. Army Corps of Engineers (Corps) and EPA pursuant to a series of interagency agreements and regulations. Generally, the Corps issues the 404 permits, subject to oversight and potential veto by the EPA. See CWA Section 404(c). See, for example , 73 Fed. Reg. 54398 (09/19/08)(EPA veto of proposed Corps 404 permit for Yazoo Pumps project).
(2) Rivers and Harbors Act Section 10 permits (33 U.S.C. Section 403) authorizing modifications to the "course, condition or capacity" of any navigable water. This program is administered by the Corps.
(3) Permits for Modifying Corps Projects under Rivers and Harbors Act Section 14 (33 U.S.C. Section 408). This program is administered by the Corps. See generally Policy and Procedural Guidance for the Approval of Modification and Alteration of Corps of Engineers Projects, October 23, 2006. Under this guidance, Section 408 approval will generally require a public interest determination as well as appropriate NEPA documentation.
(4) Clean Water Act Section 401 water quality certifications, issued in California by the State Water Resources Control Board, which would ordinarily be required for the issuance of a 404 permit, a 408 modification, and/or a Rivers and Harbors Act permit.

[4] See CEQ's Improving NEPA Efficiencies Guidance released March 6, 2012:
http://www.whitehouse.gov/sites/default/files/microsites/ceq/improving_nepa_efficiencies_06mar2012.pdf. This recent guidance reiterated the NEPA regulations' preference for brevity: "The CEQ Regulations indicate that the text of a Final EIS that addresses the purpose and need, alternatives, affected environment, and environmental consequences should normally be less than 150 pages and a final EIS for proposals of unusual scope or complexity should normally be less than 300 pages."