Email to Federal Lead Agencies

From: Mike Jewell, Corps

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Subject: Recent Discussions on 404 and the BDCP Alternatives

Thank you for taking the time on Friday to have our telephone discussion of the status of the BDCP NEPA/CEQA review and, in particular, the desire to pin down some alternatives that will be analyzed if and when the NEPA/CEQA contractor begins work again.

Given the complexity of this process, we thought it would be useful to restate where things stand regarding the environmental analysis for the BDCP as it relates to probable 404 permitting.

1. Pre-application Consultations

At the outset, we think it is useful to remember that we are in "pre-application consultations." That is, at this point, we have no applicant, no application, and no agreed-upon project definition. The Corps and EPA will occasionally engage in extensive pre-application consultations with probable permit applicants for complex projects so that permitting requirements are considered early in the process. But the Corps does not make determinations about the adequacy of any particular aspect of a potential project application during pre-application consultations. There is literally no record upon which to make any such determinations.

As part of our pre-application discussions, we have been considering whether a NEPA/404 Memorandum of Understanding (MOU) would be appropriate and useful in advancing permit decisions for the BDCP. At this time, the Corps has been asked to develop an initial draft of an MOU, based on some of the similar MOUs that have been executed for complex projects in California. These MOUs share a similar construction: the major decision points for the permitting agencies (including, for example, finalizing a project purpose, developing a range of alternatives, and agreeing on a preliminary " least environmentally damaging practicable alternative" (LEDPA)) are identified as checkpoints to either reach agency agreement or elevate the particular issues.

2. NEPA Requirements for Corps Permits

The Corps (but not EPA) is required to carry out its own NEPA compliance for permits it issues under 404 (as well as for CWA 408 authorizations and Rivers and Harbors Act Section 10 permits; for shorthand, we will refer to all of these as "404 permits.") To save time and resources, project applicants frequently, but not always, attempt to use a single environmental document to meet the project applicants' NEPA/CEQA requirements as well as the Corps NEPA

requirements. As you know, DOI and DWR have indicated a desire to use a single EIS/EIR for the BDCP (that is, for both the lead agencies' NEPA/CEQA coverage and for the Corps NEPA obligations.)

The Corps is willing to continue its discussions of using a single NEPA document for both project planning and 404 permitting purposes. Nevertheless, there are two non-trivial concerns we have about such an approach for the BDCP.

- First, the November Draft BDCP, which is the only existent draft project description, has already received a significant and largely negative review by the nation's premier scientific body, the National Academy of Sciences. Before the Corps adopts the BDCP EIS/EIR as its own NEPA document, the Corps must be comfortable that the many points raised in the NAS review have been addressed.
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- Second, it appears from your email of May 5 that the BDCP decisionmaking process is intent on making final determinations of the BDCP EIS/EIR alternatives on May 19th, before any MOU is completed, before we have agency agreement on a 404 purpose and need statement, and before the Corp and EPA have any serious opportunity to engage in this issue.

As noted above, there is no requirement that permit applicants sign an MOU or engage in pre-application consultations. The default permit process is that the Corps evaluates project information whenever it is presented in an actual application, and at that time will make the independent determination about what other or additional environmental review is necessary to meet the Corps' NEPA obligations. Nevertheless, we clearly need to get on the same page as to which approach the project proponents intend to pursue.

3. Comments on Possible Alternatives

You have asked for our comments on the possible alternatives under consideration. We note first the conceptual difficulty of commenting on alternatives when we don't have an agreed-upon project purpose. In addition, we note the inherent confusion about the BDCP purpose described in the NAS report (see page 3). Finally, as discussed above, given that we are in pre-application consultations, these are comments only, not determinations of any sort.

Given those caveats, EPA and the Corps believe that the following list of conveyance sizing alternatives covers the likely range of reasonable conveyance alternatives: no action alternative, canals or tunnels at 3000, 6000, 9000, 12,000 and 15,000 cfs sizes, and most likely another alternative that specifically addresses the increased outflow proposed by the State Water Resources Control Board (as a recent suggestion, the contours of that alternative are in discussion in several venues). EPA and the Corps appreciate that a major element of conveyance

components are the operational scenarios associated with the conveyance operations. We have not seen any of the modeling associated with these operational scenarios, and express no opinion on their adequacy for 404 NEPA compliance purposes. Finally, these comments pertain only to the range of sizing for the conveyance alternatives, not to any possible alternatives necessary to review in order to meet the ecosystem goals (the second prong of the co-equal goals).

Thank you for your continued Herculean efforts to coordinate these complicated issues within the federal family. If you have any questions about our comments, please call _____.