ISSUE PAPER
BDCP EIR/EIS Purpose Statement

ISSUE: Are the co-equal goals of ecosystem restoration and water supply reliability accurately and adequately described in the current version of the purpose statement in the Notice of Intent?

RECOMMENDED FEDERAL POSITION: We recommend that federal agencies confirm in writing their intent that projects need not be capable of delivering full contract amounts of water in order to be consistent with the purposes of BDCP.

BACKGROUND: On February 13, 2009, the NEPA Lead Agencies published a Notice of Intent (NOI) in the Federal Register to prepare an EIS for the Bay Delta Conservation Plan (BDCP). The NOI stated that the intent of the BDCP is "to secure authorizations that would allow projects that restore and protect water supplies, water quality, and ecosystem health to proceed within a stable regulatory framework." In addition, the NOI included the following language describing the water supply aspects of the purpose of BDCP:

> Restore and protect the ability of the SWP and CVP (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..... .

This language was developed in discussions among the Fish and Wildlife Service, Bureau of Reclamation, and the National Marine Fisheries Service, California Department of Fish and Game, California Department of Water Resources, and state and federal water contractors.

ANALYSIS: The addition of the reference to "full contract amounts" in the most recent NOI has raised the questions of 1) whether it is a purpose of the BDCP to provide for delivery of full contract amounts of water, and consequently, 2) whether project alternatives must have the capability of delivering full contract amounts in order to be considered and/or adopted as a preferred alternative under NEPA, an RPA under the ESA, or a LEDPA under Section 404 of the Clean Water Act. "Full contract amounts" would be considerably more than the average historic CVP/SWP water deliveries, and even significantly higher than the maximum water deliveries ever made under the two projects combined.

The EIS purpose statement is the key component of the document that drives the development of alternatives to the proposed action. All alternatives considered must be consistent with the purposes of the action. In addition, any "reasonable and prudent alternatives" proposed under the ESA must be consistent with the purposes of the project as stated in the BDCP and the EIR/EIS. During the development of alternatives, the meaning of "up to full contract amounts" has been a frequent issue of debate, particularly as it relates to the concept of water supply reliability. The debate is whether the wording means that an alternative must allow for the delivery of full contract amounts, or that no alternative should allow for deliveries in excess of full contract amounts --i.e., does the language establish a water supply cap, or a target? The current suite of alternatives was developed based on the belief that the language sets a cap, not a target.

The federal lead agencies should clarify in the EIR/EIS that the NOI's statement of purpose and need does not require that project alternatives be capable of delivering full contract amounts in order to be consistent with the project purposes. The agencies did not intend that all action alternatives be required to be capable of delivering full contract amounts of water – that is, amounts of water substantially greater than the amounts of water that have historically been delivered through the Delta. Nor did the agencies intend the NOI to impose such a requirement. To the contrary, the agencies believe that a reasonable

range of alternatives for the BDCP is one that meets the co-equal goals of 1) providing a more **reliable** water supply for California – in whatever amount is consistent with hydrologic conditions, laws and regulations, and the terms of water delivery contracts -- and 2) protecting, restoring, and enhancing the Delta ecosystem., The goal of providing a more reliable water supply can be met by decreasing the risk of major water supply disruption from widespread levy failure, sea level rise, and other current serious risks, whether or not the amount of water supplied from the Delta increases. Any proposal that increases water supply must also meet the other requirements articulated in the statement of purpose and need.

As stated in the NOI, it is imperative that alternatives must be consistent with federal and state law. They must comply, inter alia, with the federal ESA, NEPA, and Clean Water Act, and the California ESA, Natural Community Conservation Act, and the recently-enacted Delta Reform Act. The Delta Reform Act, Cal. Water Code Div. 35 (commencing with Section 85000) states that the policy of the State is to **reduce** reliance on the Delta in meeting California's future water supply needs. See Cal. Water Code sec. 85021. Since delivering full contract amounts would **increase reliance on the Delta** in meeting California's water needs, it is difficult to discern how an alternative that is capable of delivering full contract amounts would be consistent with this State policy embodied in the State's Water Code.

Furthermore, the agencies chose language for the NOI that explicitly does not require than an alternative be capable of delivering full contract amounts. The phrase "up to full contract amounts" indicates that both alternatives that could deliver full contract amounts and those that are not capable of delivering full contract amounts are consistent with this stated purpose.

The federal NEPA lead agencies, and all federal agencies that comprise the Federal Bay-Delta Leadership Committee, should confirm that the purpose and intent of BDCP does not require that it be capable of delivering full contract amounts of water. Alternatives to be considered should further the co-equal goals, should comply with federal and state laws, and should otherwise carry out the purposes set forth in the February 13, 2009, NOI, whether or not they are capable of delivering full contract amounts of water. The alternatives contemplated to date do not result in delivery of full contract amounts. In fact, several preliminary alternatives are anticipated to result in less south of Delta (SOD) exports than the currently defined BDCP proposed project. One or more alternatives will likely result in less SOD exports than under existing conditions and future no action modeling scenarios.