UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

November 12, 2008

John Engbring
Assistant Regional Manager
Water and Fisheries Resources
California and Nevada Region
U.S. Fish and Wildlife Service
2800 Cottage Way, Room W-2606
Sacramento, CA 95825-1846

Subject: EPA Cooperating Agency Status on Bay Delta Habitat Conservation Plan

Dear Mr. Engbring:

Thank you for your recent letter inviting the U.S. Environmental Protection Agency (EPA) to be a cooperating agency for preparation of the Environmental Impact Statement/Environmental Impact Report (EIS/EIR) for the Bay Delta Habitat Conservation Plan (BDCP) for the Sacramento-San Joaquin Delta. As you know, EPA has for many years worked with the Department of the Interior and other federal agencies to address the environmental and water management challenges in the Bay and Delta. We believe that a Habitat Conservation Plan (HCP) developed under the federal Endangered Species Act (ESA) could be a useful complement to the other ongoing programs aimed at restoring this important resource. In this spirit, we accept the invitation to participate in the development of the environmental analysis and documentation, consistent with our expertise and jurisdictional interests.

At this point in time, we anticipate involvement of staff from two EPA offices: the Environmental Review Office (ERO, within the Communities and Ecosystems Division) and the Water Division. The corresponding areas of expertise would be (1) compliance with the National Environmental Policy Act (NEPA), (2) protection of the entire range of designated uses as articulated in the Clean Water Act (CWA), (3) protection of drinking water quality under the federal Safe Drinking Water Act (SDWA), and (4) implementation of the CWA Section 404 program, which we cooperatively implement with the U.S. Army Corps of Engineers (Corps).

We have been informally following the development of the BDCP over the past two years. We have also reviewed the initial notice of intent (NOI) issued jointly by the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (USFWS) on January 24, 2008, and the subsequent NOI issued by those agencies and the U.S. Bureau of Reclamation (USBR) on April 15, 2008. In response to the first NOI, EPA submitted a short scoping letter to NMFS and USFWS, a copy of which is attached. We believe that many of our previous scoping comments are still applicable.

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EPA continues to be concerned about the broadly stated purpose of the proposed program. Under NEPA, action agencies must examine a reasonable set of alternatives to the proposed action. The range of alternatives will generally mirror the range of the proposed actions. At present, the proposed set of actions is extremely ambitious, and we are concerned that the NEPA evaluation of alternatives could overwhelm the proposed schedule.

We understand from your representative at the October CALFED Agency Coordination Team meeting that the federal action agencies intend to "re-scope" this NEPA document in 2009, after release of the draft Conservation Strategy in late 2008. This release would also roughly coincide with the release of a federal agency BDCP purpose and need statement. Additional scoping would afford an opportunity to consider more specifically the proposed actions, alternatives, and potential impacts. EPA proposes that we meet with the federal action agencies after the above documents are released to discuss specifically where EPA could most usefully apply its expertise and limited resources in this NEPA analysis.

In accepting your invitation to become a cooperating agency, we also offer the following considerations:

First, as you know, EPA's resources are extremely limited. In the event that we identify a significant technical role for EPA in developing parts of the proposed analyses, we will need to work with you to identify the resources for that activity.

Second, you suggest in your letter that this EIS/EIR should serve as the NEPA compliance document for any federal permit actions envisioned in the proposal. Identifying and evaluating the "least environmentally damaging practicable alternative" (LEDPA) under the CWA 404 program requires an alternatives analysis as described in the CWA Section 404(b)(1) Guidelines. This CWA 404 alternatives analysis process could potentially be coordinated with the EIS/EIR effort. EPA will discuss this suggestion with the Corps (co-regulators in the CWA 404 program).

Third, EPA has ongoing review and approval obligations for changes to water quality standards under CWA Section 303. Historically, this review and approval function has involved consultation under the ESA. In some cases, it may be useful to coordinate ESA consultations with the NEPA review process, if doing so can expedite both processes.

Finally, we would like to emphasize that our role as a cooperating agency during document preparation will be technical in nature, and that this assistance does not abridge or otherwise affect our responsibilities for independent review of the Draft and Final EIS under Section 309 of the Clean Air Act and the related Council on Environmental Quality regulations.

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The lead contact for our work will be Carolyn Yale, in the Water Division (415-972-3482; yale.carolyn@epa.gov). She will be coordinating with Laura Fujii in the ERO, which implements our independent NEPA/309 review obligations. At this time, we do not anticipate the need for a memorandum of agreement formalizing our participation.

We look forward to working with USFWS, NMFS, USBR and the other participating agencies in this important effort.

Sincerely,

Kathleen M. Goforth, Manager
Environmental Review Office
Communities and Ecosystems Division

Karen Schwinn, Associate Director
Water Division

Attachment: EPA March 17, 2008 BDCP Scoping Letter

cc: Ted Meyers, National Marine Fisheries Service
Susan Fry, U.S. Bureau of Reclamation
Mike Jewell, U.S. Army Corps of Engineers
Dorlores Brown, California Department of Water Resources
Scott Cantrell, California Department of Fish and Game

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

March 17, 2008

Rosalie Del Rosario
National Marine Fisheries Service
650 Capitol Mall
Suite 8-300
Sacramento, CA 95819

Subject: Scoping Comments for the Bay Delta Conservation Plan for the Sacramento-San Joaquin Delta, CA.

The U.S. Environmental Protection Agency (EPA) has reviewed the Federal Register Notice published January 24, 2008 requesting comments on the National Marine Fisheries Service (NMFS) and Fish and Wildlife Service (FWS) (Services) decision to prepare an Environmental Impact Statement (EIS) for the above action. Our comments are provided pursuant to the National Environmental Policy Act (NEPA), Council on Environmental Quality (CEQ) regulations (40 CFR Parts 1500-1508), and our NEPA review authority under Section 309 of the Clean Air Act.

The Bay Delta Conservation Plan (BDCP) is being prepared through a collaboration between a number of State and Federal agencies, nongovernmental entities, and "Potentially Regulated Entities" (primarily Delta water diverters) to meet the requirements of the Federal Endangered Species Act (Federal ESA) and California Natural Community Conservation Planning Act. The BDCP may or may not include a Habitat Conservation Plan (HCP) under the Federal ESA. The California Department of Water Resources intends to apply for Incidental Take Permits from the Services based upon the BDCP. These incidental take authorizations would allow the incidental take of threatened and endangered species resulting from covered activities, including those associated with water conveyance and the operations of the California State Water Project and Federal Central Valley Project.

The Points of Agreement (November 16, 2007) of the participants in the BDCP process appear to organize the BDCP process around the question of conveyance in the Delta (existing conveyance, isolated facility, or dual conveyance). To meet the requirements of the Federal ESA, the BDCP EIS would presumably address construction, operations, and species protection measures for each of the possible conveyance alternatives, and would also make provisions for species protection during the multi-year "interim period" prior to the implementation of an alternative conveyance, if any.

Our staff has discussed the Notice of Intent (NOI) with several staff at the Department of the Interior and at NMFS. We understand that there is some discussion of issuing a revised NOI as the planning for environmental compliance for the BDCP advances. EPA believes that a revised NOI is desirable. The project purpose and need statement, proposed federal action, and intended covered activities need significantly greater definition before the interested public can meaningfully comment on the scope of the environmental analysis. We believe the federal action agencies should, at a minimum, discuss the following issues within the context of a revised NOI:

(1) What are the proposed federal actions?

The revised scoping notice should clarify the description of the proposed federal action(s) and the broader project purpose. Although the FWS and NMFS action is, literally, signing a permit, the environmental analysis and review will be of the permitted activities. The revised scoping notice should provide more specificity as to what activities (construction and operation of the existing or new facilities) are intended to be covered by the federal permit.

(2) Who are the appropriate lead agencies?

Given the substantial emphasis on new conveyance alternatives in the Points of Agreement, we believe the BDCP participants should consider whether additional or alternative federal lead agencies are necessary. Most observers of Delta conveyance alternatives believe that the US Bureau of Reclamation (or, potentially, the US Army Corps of Engineers (Corps)) will need to be involved in the construction and operation of at least some part of any new conveyance alternative. To streamline the environmental review process, these agencies should be included as lead agencies in this and any subsequent environmental reviews.

(3) What is the purpose of the document?

Construction of any new conveyance alternatives, as well as significant modification of operations of existing facilities, may trigger the need for a number of federal permits. In particular, Corps permits under Clean Water Act (CWA) Section 404 and Section 10 of the Rivers and Harbors Act will likely be required for implementation of either conveyance changes or many projects under the BDCP. In addition, depending on the configuration of new conveyance alternatives, a CWA Section 401 certification may be necessary. Similar permitting issues under state law may confront state agencies proposing to take action under the BDCP. To avoid unnecessary duplication and delay, EPA recommends that the lead agencies coordinate with the potential regulatory agencies to assure that the proposed EIS meets the needs of regulatory agency NEPA/California Environmental Quality Act (CEQA) compliance.

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(4) What is the intended level of review of the proposed EIS?

The revised NOI should clarify the proposed level of review of this document. Typically, large projects include some kind of programmatic review with subsequent documents tiering from the programmatic review to deal with site-specific issues or particular problems. The lead agencies should clarify whether this EIS is intended to serve as a single environmental review covering both programmatic decisions (such as, what form of conveyance will be used, at what size) and site specific issues (actual alignment, rights of way, site specific mitigation). If a tiered or supporting document approach is intended, the lead agencies should discuss their proposed division of issues between the programmatic and the site-specific documents.

EPA appreciates the leadership and significant resources being invested in this effort by the BDCP participants. It is clear that the current condition and uses of the Sacramento-San Joaquin River Delta are unsustainable. We recognize that developing a response to the multiple environmental and water supply problems facing the Delta is a massive undertaking, and that the environmental review process will be similarly complex. EPA believes that "re-scoping" the project to clarify the issues raised above will enable the process to move forward more defensibly and expeditiously.

We appreciate the opportunity to provide comments on the preparation of the EIS. We look forward to continued participation in this process as more information becomes available. Please send subsequent scoping notices and three copies of the Draft EIS to the address above (mail code: CED-2). If you have any questions, please contact me at (415) 972-3846 or Laura Fujii, the lead reviewer for this project. Laura can be reached at (415) 972-3852 or fujii.laura@epa.gov.

Sincerely,

Nova Blazej, Manager
Environmental Review Office
Communities and Ecosystems Division

Cc: Lori Rinek, US Fish and Wildlife Service
Agency Coordination Team

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