To: CN=Tom Hagler/OU=R9/O=USEPA/C=US@EPA;CN=Karen Schwinn/OU=R9/O=USEPA/C=US@EPA;CN=Bruce Herbold/OU=R9/O=USEPA/C=US@EPA;CN=Carolyn Yale/OU=R9/O=USEPA/C=US@EPA;CN=Laura Fujii/OU=R9/O=USEPA/C=US@EPA[]; N=Karen Schwinn/OU=R9/O=USEPA/C=US@EPA;CN=Bruce Herbold/OU=R9/O=USEPA/C=US@EPA;CN=Carolyn Yale/OU=R9/O=USEPA/C=US@EPA;CN=Laura Fujii/OU=R9/O=USEPA/C=US@EPA[]; N=Bruce Herbold/OU=R9/O=USEPA/C=US@EPA;CN=Carolyn Yale/OU=R9/O=USEPA/C=US@EPA;CN=Laura Fujii/OU=R9/O=USEPA/C=US@EPA[]; N=Carolyn Yale/OU=R9/O=USEPA/C=US@EPA;CN=Laura Fujii/OU=R9/O=USEPA/C=US@EPA[]; N=Laura Fujii/OU=R9/O=USEPA/C=US@EPA[]
Cc: CN=Jason Brush/OU=R9/O=USEPA/C=US@EPA;CN=Melissa Scianni/OU=R9/O=USEPA/C=US@EPA[]; N=Melissa Scianni/OU=R9/O=USEPA/C=US@EPA[]
Bcc: []
From: CN=Erin Foresman/OU=R9/O=USEPA/C=US
Sent: Thur 4/29/2010 3:50:15 PM
Subject: Delta and CWA 404 items

I was thinking forward into the NEPA and CWA process for Delta projects. There a number of potential 404(b)(1) issues. Please think about the items below. We should discuss these further at some point.

1. Consider the case of the Yazoo Pumps Project -- read the final federal register 404(c) veto action here http://www.epa.gov/owow/wetlands/pdf/YazooFinalFedReg9-19-08.pdf Yazoo includes one 14,000 CFS pump station (Delta Conveyance proposes 5 pump stations 3,000 CFS each = 15,000 CFS, ~ 100-acre intake sites), de-watering of 28,000 to 67,000 acres of wetlands, some direct fill amount that I did not find with my quick read of the FR and no mention of ESA. We need to discuss the potential range of direct, indirect, and cumulative impacts impacts for proposed Delta projects. If there is a possibility that one or more of the Delta Conveyance alternatives has a fatal 404C type of flaw, we need to identify it quickly. This is relevant for operations strategies, sizing of intakes and canals, and whether or not capacity beyond sustainable exports (e.g., dual conveyance) is permitable.

2. Here are the restrictions to discharge listed in the 404(b)(1) Guidelines -- EPA's regs that the Corps has to comply with before issuing a permit. I'll also add, because it isn't stated in plain language below that if an applicant cannot adequately mitigate for project impacts, the Corps must deny the permit. I've highlighted important pieces in colored text. I deleted parts that didn't seem relevant to me.

230.10 Restrictions on discharge.

(a) LEDPA (added). "Except as provided under section 404(b)(2), no discharge of dredged or fill material shall be
permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences."
(1) For the purpose of this requirement, practicable alternatives include, but are not limited to:
(i) Activities which do not involve a discharge of dredged or fill material into the waters of the United States or ocean waters;
(ii) Discharges of dredged or fill material at other locations in waters of the United States or ocean waters;
(2) An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose -of the proposed activity may be con-sidered.

(3) Where the activity associated with a discharge which is proposed for a special aquatic site (as defined in subpart E) does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose (i.e., is not ``water dependent''), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise. In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise.

(b) No discharge of dredged or fill material shall be permitted if it:
(1) Causes or contributes, after consideration of disposal site dilution and dispersion, to violations of any applicable State water quality standard;
(2) Violates any applicable toxic effluent standard or prohibition under section 307 of the Act;
(3) Jeopardizes the continued existence of species listed as endangered or threatened under the Endangered Species Act of 1973, as amended, or results in likelihood of the destruction or adverse modification of a habitat which is determined by the Secretary of Interior or Commerce, as appropriate, to be a critical habitat under the Endangered Species Act of 1973, as amended. If an exemption has been granted by the Endangered Species Committee, the terms of such exemption shall apply in lieu of this subparagraph;
(4) Violates any requirement imposed by the Secretary of Commerce to protect any marine sanctuary designated under title III of the Marine Protection, Research, and Sanctuaries Act -of 1972.

(c) Except as provided under section 404(b)(2), no discharge of dredged or fill material shall be permitted which will cause or contribute to significant degradation of the waters of the United States. Findings of significant degradation related to the proposed discharge shall be based upon appropriate factual determinations, evaluations, and tests required by subparts B and G, after consideration of subparts C through F, with special emphasis on the persistence and permanence of the effects outlined in those subparts. Under these Guidelines, effects contributing to significant degradation considered individually or collectively, include:
(1) Significantly adverse effects of the discharge of pollutants on human health or welfare, including but not limited to effects on municipal water supplies, plankton, fish, shellfish, wildlife, and special aquatic sites.
(2) Significantly adverse effects of the discharge of pollutants on life stages of aquatic life and other wildlife dependent on aquatic ecosystems, including the transfer, concentration, and spread of pollutants or their byproducts outside of the disposal site through biological, physical, and chemical processes;
(3) Significantly adverse effects of the discharge of pollutants on aquatic ecosystem diversity, productivity, and stability. Such effects may include, but are not limited to, loss of fish and wildlife habitat or loss of the capacity of a wetland to assimilate nutrients, purify water, or reduce wave energy; or
(4) Significantly adverse effects of discharge of pollutants on recreational, aesthetic, and economic values.

(d) Mitigation (added). Except as provided under section 404(b)(2), no discharge of dredged or fill material shall be permitted unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem. Subpart H identifies such possible steps.

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Erin Foresman
US EPA Region 9
1325 J Street, 14th floor
C/O Army Corps of Engineers
Sacramento, CA 95814-2922
Phone: (916) 557 5253
Fax: (916) 557 6877

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