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

May 14, 2009

Lori Rinek
U.S. Fish and Wildlife Service
Sacramento Office
2800 Cottage Way, W-2605
Sacramento, CA 95825

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

Dear Ms. Rinek:

The U.S. Environmental Protection Agency (EPA) has reviewed the Federal Register Notice published February 13, 2009 requesting comments on the U.S. Fish and Wildlife Service (USFWS), U.S. Bureau of Reclamation (USBR), and National Marine Fisheries Service (NMFS) decision to prepare an Environmental Impact Statement/Environmental Impact Report (EIS/EIR) 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.

As you know, the U.S. Environmental Protection Agency (EPA) agreed to be a cooperating agency in the preparation of this EIS/EIR in its letter dated November 12, 2008.[1] We had previously been following the development of the Bay Delta Conservation Plan (BDCP) over the past two years as an "interested observer," and submitted a short scoping letter in response to the initial Notice of Intent (NOI) issued jointly by the NMFS and the USFWS on January 24, 2008. We also reviewed, but did not comment on, the subsequent NOI issued by those agencies and the USBR on April 15, 2008. In that many of our previous comments are still relevant, we are enclosing copies of the earlier correspondence.

All parties involved in Bay Delta issues recognize that California is at a critical juncture in water resources management. The current multi-year drought has highlighted the fragility of the system's ability to meet both environmental and water supply goals. EPA believes that a

[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. We reiterate that caveat here, and note that recent litigation brought by some parties against state and federal agencies and others participating in the development of the BDCP does not affect our Section 309 responsibilities. See 54 FR 12735 (March 28, 1989)(CEQ accepts EPA's Section 309 "referral" of the CVP contract renewals even though the NEPA issues had been raised in federal defensive litigation.).

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successful BDCP could be a useful component of a broader governmental response to water management for all uses.

We understand that the team tasked with preparing the EIS/EIR is developing criteria for evaluating alternatives that will be carried into the EIS/EIR analysis. Given that the alternatives analysis is the "heart" of an EIS/EIR,[2] we urge the action agencies to choose alternatives carefully and strategically. With that in mind, we offer the following observations and suggestions:

I. Clarify the Purposes of this NEPA Document

EPA believes that the action agencies need to decide and clearly articulate what state and federal actions they want to cover in this NEPA document. As a regulatory agency, we are especially concerned about the need to identify probable regulatory permits, licenses, etc., that will need to be secured in order to move forward with the BDCP process, and to make early decisions about whether those permits, licenses, etc., are intended to be covered by this NEPA document. Those decisions need to be made in conjunction with selecting a range of alternatives, so that any particular requirements of the anticipated permits can be addressed in the NEPA document.

The BDCP program, as it stands now, includes two major components: a large scale habitat restoration program and a major construction project to reconfigure export water conveyance in or around the Delta. The NOI anticipates the potential adoption of a Habitat Conservation Plan (HCP) under the federal Endangered Species Act (ESA), as well as possibly an ESA Section 10 permit. These federal actions will be the primary subject of the EIS/EIR. At the same time, however, implementing this program will most likely require several other permits that are subject to NEPA and the California Environmental Quality Act (CEQA), 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.[3]

(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.

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[2]CEQ Regulations Section 1502.14.

[3]Generally, the Corps issues the 404 permits, subject to oversight and potential veto by the EPA. See CWA Section 404(c). See also 73 Fed. Reg. 54398 (09/19/08)(EPA vetoes proposed Corps 404 permit for Yazoo Straits drain project).

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(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.[4]

(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.

This list is not intended to be exhaustive. Our point here is that the BDCP process needs to clarify which permits are intended to be covered in this EIS/EIR, so that the relevant agencies can make sure that their program requirements for NEPA/CEQA coverage are met.[5] We urge the action agencies to consider entering into memoranda of agreement with any relevant permitting agency, which could allow the agencies to clarify roles and responsibilities in developing an adequate EIS/EIR.

II. Clarify the Level of Analysis for this EIS/EIR

In a related issue, EPA urges the BDCP process to clarify the level of analysis intended for this EIS/EIR. Is this a programmatic document, or is it intended to serve as both the programmatic document and the site-specific document for some or all of the major projects emanating out of the BDCP? Although we note that a single site-specific level document for a project of this scale is rare, EPA is deferring to the action agencies in deciding the level of analysis. We do believe, however, that this decision must be made explicit now so that the alternatives analysis can reflect the chosen level of analysis.

III. Address the Following Broad Scoping Comments

There are a number of major issues that need to be addressed in this EIS/EIR. We are highlighting three of them below:

Water Quality Impacts

Many of the ecosystem enhancement and conveyance changes proposed in the BDCP will likely have significant water quality impacts within the Bay Delta watershed. Proposed conveyance reconfiguration, for example, could significantly alter the relative proportions of tributary waters entering the Delta and the transport routes and times. As a consequence, export and in-Delta water quality would be affected. We understand that the EIS/EIR analysis will evaluate the effects of alternatives on the salinity regime in the system ("X2"). Salinity is a valid parameter for water quality analysis, but it is insufficient to assess all potentially significant

[4] 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.

[5] EPA is not suggesting that the BDCP EIS/EIR is *required* to provide NEPA/CEQA coverage for all ensuing permits. Action agencies can chose to deal sequentially, rather than simultaneously, with their permit obligations, and may have legitimate programmatic or legal reasons for doing so.

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water quality issues. For example, the CALFED Programmatic Record of Decision identified several water quality constituents for evaluation, including--in addition to salinity--boron, total organic carbon, dissolved oxygen, pesticides, mercury, selenium, and toxicity of unknown origin.[6] Moreover, substantial additional work on Delta water quality has been done by the State Water Resources Control Board, Central Valley Regional Water Quality Control Board (Regional Board), California Department of Public Health, and CALFED Science Program since the Record of Decision in 2000.

For additional parameters, EPA suggests that the EIS/EIR team build upon the approach to water quality indicators begun in the CALFED Program, adding contaminant topics where appropriate (e.g., ammonia). The CALFED Water Quality Program, in 2008, suggested using organic carbon, bromide, and methylmercury as primary indicators. These parameters were chosen because they reflect conditions of different beneficial uses of Delta waters and are expected to show responses to management actions[7] The Water Boards' Strategic Workplan for Activities in the Bay-Delta recognizes the importance of continued work on these parameters. In the case of methylmercury, a Delta methylmercury TMDL is well underway. With respect to sources of drinking water, the Regional Board is developing a Drinking Water Policy.[8] Both the Drinking Water Policy process and the Delta Regional Ecosystem Restoration Implementation Program (DRERIP), a multi-agency effort, have developed conceptual models for water quality constituents that should serve as useful tools in the BDCP EIS/EIR analyses. We understand that some DRERIP models are being used to evaluate ecosystem restoration proposals for BDCP. DRERIP models could also help evaluate effects of actions under consideration in the BDCP and determine the indicators of greatest relevance for impact assessment and monitoring.[9]

We note that these broad indicators may still be insufficient to capture particular, localized water quality issues of interest. Ammonia and dissolved oxygen, for example, are site-specific water quality problems that should also be evaluated in the EIS/EIR.

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[6] CALFED Bay-Delta Program, Programmatic Record of Decision, Volume 1, at p.36 and p. 65.

[7] More information about these indicators and the process used to identify them can be found in A Guide For Understanding Implementation of the Phase 2 Performance Measures Process, CALFED Bay-Delta Program Water Quality Subgroup, Draft, March 18, 2008 (available from the California Bay Delta Authority). The CALFED Program's decision to start with methylmercury levels as an indicator of ecosystem and public health was based on availability of information that supported this topic as a priority for monitoring and reporting.

[8] In August 2008, the Central Valley Regional Water Quality Control Board initiated scoping for a Basin Plan Amendment and CEQA compliance on its Drinking Water Policy. See: Central Valley Regional Water Quality Control Board, "Development of a Drinking Water Policy for Surface Waters of the Central Valley," Staff Report, July 2008. The categories of pollutants addressed are organic carbon, salinity (with bromide), nutrients, and pathogens.

[9] The conceptual models for the four categories of constituents of concern for drinking water are available online: http://www.swrcb.ca.gov/rwqcb5/water_issues/drinking_water_policy/. For DRERIP, the conceptual models are documented at: http://www.science.calwater.ca.gov/drerip/drerip_index.html. Chemical stressors, pyrethroids, and mercury directly address water pollutants. The sediment model is also directly relevant to sediment-bound pollutants.

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Where a proposed alternative (or operations associated with that alternative) may affect water quality, the alternative should incorporate appropriate plans for monitoring, assessment, and reporting those effects. Monitoring should be coordinated with the Regional Board's efforts to establish a Delta Regional Monitoring Program. In some cases, an adaptive approach to implementation may be included in the alternative - for example, in design and management of wetland habitats (associated with conservation measures) that have potential for methylmercury production. EPA recommends that the EIS/EIR analysis rely on the protocols, metrics, and targets already included in programs and policies of the state and regional boards, so that the interested public has a consistent frame of reference for understanding the water quality discussion.

Sea Level Rise and the Design of New Facilities

The Governor's Delta Vision Blue Ribbon Task Force recommended to the Governor that planning assumptions for state investments should assume a sea level rise of 16 inches by year 2050 and of 55 inches by year 2100.[10] This recommendation is in accord with recent California Department of Water Resources evaluations of the impacts of climate change on California water planning, released recently in a draft report from the California Climate Change Center.[11]

As you know, 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, the sea level rise itself would increase the hydrostatic pressures on Delta facilities.

With these problems on the horizon, EPA believes it would be important for the EIS/EIR to evaluate the design of the proposed Delta conveyance improvements to assure that they are appropriate. The current design appears to rely on unlined canals, many parts of which are substantially below current sea levels. This issue was discussed in depth at the June 27, 2008 Delta Vision Blue Ribbon Task Force meeting. A number of issues were raised by the Task Force about this design, including seismic safety, excess evaporation from a wide, shallow canal, export water quality problems caused by infiltration, environmental impacts of a large structure in the sensitive areas of the Delta, and the overall issue of construction of a major critical facility below sea level.[12]

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[10] See Letters from Phillip L. Isenberg, Chair, to Gov. Schwarzenegger dated September 4, 2008 and March 24, 2008, and accompanying material (available on Delta Vision website at http://www.deltavision.ca.gov/BlueRibbonTaskForce/Communications/SLR_Followup_Letter_To_Governor_9-4-08.pdf).

[11] See Using Future Climate Change Projections to Support Water Resource Decision Making in California, California Climate Change Center, Draft, April 2009 (Available on DWR Website at http://www.water.ca.gov/pubs/climate/using_future_climate_projections_to_support_water_resources_decision_making_in_california/usingfutureclimateprojtosuppwater_apr09_dwr_web.pdf).

[12] The Webcast of this and other Blue Ribbon Task Force meetings are available on the Delta Vision web site.

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EPA believes that these issues need to be explored and addressed in the EIS/EIR. 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.

Reductions in Inflows and Exports

EPA fully appreciates that there is a substantial debate over the likely future scenario of water export regulation in the Bay Delta. In fact, the BDCP process may be one forum for resolving that debate. Generally, NEPA documents analyzing issues with uncertain outcomes will make sure that the range of alternatives at least brackets the range of potential outcomes, and EPA recommends that approach in this EIS/EIR.

Even disregarding different predictions about future regulatory scenarios, however, EPA believes that the EIS/EIR will need to include a significant analysis of alternatives reflecting reduced Delta inflow and reduced exports. Recent Department of Water Resources (DWR) studies of the potential impact of climate change on the Bay and Delta watershed predict significantly reduced inflow and reduced diversions over the next century. Holding regulatory, structural, and operating rules constant, the DWR study estimated climate-change induced reductions in Delta exports and reservoir carryover storage ranging from 7% to 19% at mid-century, and of 21% to 38% by year 2100.[13] Delta inflows will also be restricted in future years (compared to the historical record) due to changes in Trinity River diversions into the Sacramento River system and due to upstream water resource development by senior water rights holders.[14]

Given these predicted developments outside of the regulatory debate, EPA believes that reduced inflow and reduced export scenarios are not just reasonable alternatives to evaluate, but represent a likely future for the Bay Delta basin that needs to be reflected in the EIS/EIR.[15]

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[13] See Possible Impacts of Climate Change to California's Water Supply, California Climate Center, Summary Sheet, April 2009 (Available on DWR web site at http://www.water.ca.gov/pubs/climate/climate_change_impacts_summary_sheet__april_2009/climate_change_impacts_summary_sheet_4-16-09_lowres.pdf).

[14] See, for example, discussion of CVPIA Programmatic Environmental Impact Statement analyses on USBR's web site. (Summary of Impact Assessment, p. 12; http://www.usbr.gov/mp/cvpia/docs_reports/fpeis/index.html).

[15] EPA understands that there is an ongoing discussion, at least in the legal community, about the California Supreme Court's decision in In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings, 43 Cal. 4th 1143 (June 5, 2008). One extreme interpretation of that case is that action agencies have unlimited discretion to define multiple project purposes, and that they need not look at alternatives that do not meet all of the stated purposes. Regardless of whether that is a proper reading of the state case, it is not determinative of the federal NEPA obligations in this upcoming EIS/EIR. Federal courts examining NEPA documents do grant significant discretion to action agencies to define the project purposes, but that discretion is not unfettered. See, for example, Simmons v. USCOE, 120 F.3d 664, 666 (7th Cir. 1997)(Rejecting "single-source" definition of project purpose for water supply, noting that "[i]f

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IV. Establish the Baseline

Over the past several years, EPA has worked closely with the USFWS, USBR, and NMFS on a number of large-scale NEPA reviews. One lesson learned in these efforts is that defining the "baseline" for evaluating project impacts is often a complex and contentious issue. EPA suggests that the action agencies establish a workgroup to draft and secure agency agreement on a "baseline report" so that baseline issues can be identified and, if necessary, elevated for resolution. This approach was successfully employed in developing a common baseline for NEPA and ESA evaluation purposes when the Department of the Interior prepared the Central Valley Project Improvement Act Programmatic Environmental Impact Statement.

Conclusion

We look forward to our continued constructive involvement in developing the BDCP EIS/EIR. Please send subsequent notices and three copies of the Draft EIS to the address above (mail code: CED-2). If you have any questions about our comments, please call Laura Fujii, the lead NEPA reviewer, or Carolyn Yale, the Water Division lead, for this project. Laura can be reached at (415) 972-3852 or fujii.laura@epa.gov. Carolyn can be reached at (415)972-3482 or yale.carolyn@epa.gov.

Sincerely,

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

Karen Schwinn, Associate Director
Water Division

Attachments: EPA March 17, 2008 BDCP Scoping Letter
EPA November 12, 2008 Cooperating Agency Letter

cc: Ted Meyers, National Marine Fisheries Service
Rosalie del Rosario, National Marine Fisheries Service
Patti Idlof, U.S. Bureau of Reclamation

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the agency constricts the definition of the project's purpose and thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role."). See also Border Power Plant Working Group v. DOE, 260 F. Supp. 3d 997 (S.D. Cal., 2003)(Rejecting and broadening agency's definition of project purpose.); Similarly, Davis v. Mineta, 302 F.3 1104 (10th Cir. 2002). For the reasons outlined above, EPA believes that analyzing alternatives with reduced exports is both factually and legally appropriate and pragmatically necessary to move the BDCP process forward.

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Mike Jewell, U.S. Army Corps of Engineers
Dorlores Brown, California Department of Water Resources
Scott Cantrell, California Department of Fish and Game
Karen Scarborough, California Natural Resources Agency
Thomas Howard, State Water Resources Control Board

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Proj file

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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75 Hawthorne Street
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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.

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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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project file

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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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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