Communications Strategy: Supplement – Outreach to State Leaders

Historical Summary of EPA's Contacts with DWR and the Corps (and others)

Bay Delta Conservation Plan

(TJV 06.04.14)

Person	Agency	Position	Contact Information
Governor Brown			(916) 445-2841 (general number)
John Laird	California Natural Resources Agency	Secretary	(916) 653-5656 (Kimberly)
Mark Cowin	California Department of Water Resources	Director	(916) 653-7007 (Janiene)
Charlton "Chuck" Bonham	California Department of Fish and Wildlife	Director	(916) 445-0411
Felicia Marcus	State Water Resources Control Board	Chair	(916) 341-5609 felicia.marcus@waterboards.ca.gov

- 17 MAR 2008: EPA sent scoping comments to NFMS (Rosalie Del Rosario) and expressed the need to clarify the "level of review" of the forthcoming NEPA document (i.e., programmatic (tiered) vs. site-specific).

- OCT 2008: FWS announced that the federal *actions agencies* intended to "re-scope" the NEPA document in 2009.

- 12 NOV 2008: EPA accepted the invitation to participate in the process as a *cooperating agency* in a letter sent to FWS (John Engbring), and highlighted the opportunity to identify and evaluate the LEDPA per CWA §404 with an *alternatives analysis* that could be aligned with the preparation of the EIS/EIR (NEPA/CEQA).

- 14 MAY 2009: EPA sends a second set of scoping comments to FWS (Lori Rinek) that urged the action agencies to clearly decide and articulate what State and federal actions will be covered in the NEPA document, and to link these decisions with the formulation of a *range of alternatives* for the proposed project. Topping our list of concerns was the proposed project's potential adverse effects on water quality. We suggested that the EIS/EIR go beyond the evaluation of impacts on the salinity regime (X2) that we understood was a focal point of the NEPA document, and bring forth the analysis on contaminants and parameters initiated during the major agency/stakeholder effort in the early 2000's (CALFED) to identify the "right" parameters for water quality analysis, e.g., boron, bromide, dissolved oxygen, methylmercury, pesticides, selenium, total organic carbon, and toxicity of unknown origin.

- 13 FEB 2009: DOI and DOC publish a FR Notice that adds a reference about "full contract amounts" as a *performance metric* to the NEPA purpose statement for the proposed project, "...Restore and protect the ability of the /State Water Project and Central Valley Project] to deliver up to *full contract amounts*, when hydrologic conditions result in the availability of sufficient water...".

ED_000733_PSTs_00001915-00001

- 10 JUN 2010: EPA sent a stern letter to FWS (Lohoefener), NMFS (McInnis), and USBR (Glaser) expressing concern that the agencies had not reached resolution about a *purpose statement* despite months of interagency talks, and comparing and contrasting NEPA *purpose and need* statements with CWA *overall project purpose* statements.[1] Further, EPA expressed concern that the "full contract amounts" language would imbed within the project design a provision for exporting from the Delta ~1 million acre feet of freshwater above and beyond historical levels.[2] EPA detailed four key concerns with the new performance metric including inconsistency with NEPA and CWA guidelines and procedures, and non-compliance with "recent state legislation" (i.e., the Delta Reform Act of 2009).

- 29 JUN 2010: Region 9 (Schwinn) sent an email to HQ (Porterfield, aide to Perciasepe) explaining that "[a]lthough our federal partners do not disagree with us on this issue [EPA's concerns about using 'delivering full contract amounts' as a performance metric], they are unwilling/unable to change the Purpose Statement without the agreement of the State DWR, their partner on the EIS/R."

- 28 JUL 2010: USBR (Idlof) sent an email to representatives from EPA, FWS, NMFS, and USBR memorializing agreed upon language for a "Preferred NEPA Purpose Statement" and this reflected an ongoing interest by the federal agencies to reach consensus on this important aspect of the project.

- 01 SEPT 2010: EPA (Schwinn) sent an email to DOI and CEQ (Nawi, Belin, and Feller)

---

[1] Under NEPA, the action agency must include a "purpose and need" statement that must "specify the underlying purpose and need to which the agency is responding...." 40 CFR Section 1502.13. The purpose and need statement drives the alternatives that must be analyzed in the Environmental Impact Statement, and the alternatives are "the heart of the environmental impact statements." 40 CFR Section 1502.14.

Under CWA §404, the permit applicant must demonstrate that the chosen alternative is the "least environmentally damaging practicable alternative" (LEDPA) for meeting the overall project purpose pursuant to the CWA Section 404(b)(I) Guidelines. "The overall project purpose is used for evaluating practicable alternatives under the Section 404(b)(1) Guidelines. The overall project purpose must be specific enough to define the applicant's needs, but not so restrictive as to preclude all discussion of alternatives." *Army Corps of Engineers Standard Operating Procedures for the Regulatory Program*, p. 7.

Under both Acts, there is broad discretion for the action agency to define its project purpose, but that discretion is not unlimited. When disputes over project purpose arise, it is usually a dispute over whether the purpose statement is written so narrowly that it eliminates otherwise viable alternatives.

[2] EPA reviewed the meaning of a chart prepared by DWR that portrayed 50 years of exports from the Delta and found that the SWP and CVP never exported more than ~6.3 million acre feet (MAF) annually. Full contract amounts, however, are significantly higher. The SWP contract amount is 4,171,996 acre feet (AF). South of Delta CVP Water Rights Contractors (Exchange Contractors plus Contra Costa Water Rights Contracts) have full contract amounts totaling 893,277 AF; and South of Delta CVP water service contractors (Contra Costa, DMC and SLC, San Felipe, San Luis and Cross Valley) have full contract amounts totaling 2,367610 AF. Combined, the SWP and CVP full contract amounts for Delta exports are around 7,432,883 AF (~7.4 MAF). As noted above, historical exports by the CVP and SWP almost never exceed 6 MAF, so it appears that the "full contract amount" of exports is at least 1 million acre feet more *than has ever been exported historically.*

ED_000733_PSTs_00001915-00002

underscoring that the Delta and its tributaries are listed as *impaired* under CWA §303(d)[3], meaning that water quality standards are already being violated, and that many of the actions contemplated for the BDCP have the potential of exacerbating these water quality violations. The message expressed concerns that the pending *effects analysis* for the BDCP "will not provide much, if any, of the water quality information we believe is relevant to water quality impacts" (even though water quality was a key concern raised by EPA about 16 months prior in our scoping letter dated 14 May 2009).

- 26 OCT 2010: FWS (Lohoefener), NMFS (McInnis), and USBR (Glaser) sent a reply to EPA (Blumenfeld) for our letter dated 10 JUN 2010. The trio took issue with EPA's interpretation of the NOI issued 13 FEB 2009 and our concerns about the addition of "full contract amounts" to the NEPA purpose statement, and wrote that they added this language to delineate "an upper bound for the [range of] alternatives, not a target."

- 17 MAY 2011: EPA (Schwinn) wrote an email to DOI (Nawi) and USBR (Idlof) in response to a request from the "Executive Committee" to finalize the range of alternatives to be analyzed in the NEPA/CEQA document. EPA expressed "difficulty commenting on alternatives" in the absence of "an agreed-upon project purpose and…sufficient information for evaluating project alternatives." Also, we pointed out "a disconnect between the proposed alternatives, all of which focus on conveyance, and the stated ecosystem restoration purpose of the BDCP." At the same time, EPA embraced the idea suggested by the Corps to pursue development of a NEPA/404 MOU to integrate regulatory planning and permitting for the BDCP.[4]

- 08 SEPT 2011: EPA (Schwinn) sent an email to USBR (Barajas) explaining that, due to the lack of information available, we could not comment on the outline for the Alternatives Chapter to be contained in the NEPA document. Our email also makes reference to "a package of material" that DWR had committed to send to EPA that would allow us both to comment on the range of alternatives and to reach concurrence on "the soon-to-be-final NEPA/404 MOU".

- 27 JAN 2012: DWR informed the Corps that it had terminated its involvement in the NEPA/404 MOU process.

- 26 OCT 2012: The Corps (Col. Leady) sent a letter to DWR (Cowin) wherein they agreed to language for the *overall project purpose* for Conservation Measure #1 (CM 1) of the BDCP, but said the agreement would need to be " revisited" if DWR changed its approach for evaluating alternatives under NEPA and the CWR §404(b)(1) Guidelines. CM 1 focuses specifically on developing new diversion and conveyance facilities, and modifying existing SWP export facilities.

[3] All waterways within the Delta are on the CWA Section 303(d) List of Impaired Water Bodies for salinity, toxicity, pesticides, metals, pathogens, nutrients, low dissolved oxygen, and invasive species.

[4] The idea was to model a NEPA/404 MOU for the BDCP after the NEPA/404 MOU for transportation projects in California that was successfully negotiated by the federal and State transportation agencies (FHWA and Caltrans) and the four key federal regulatory agencies (EPA, the Corps, FWS, and NMFS). For the BDCP, the model for the MOU extended to integrating the provisions of NEPA, CWA, and the Rivers and Harbors Act (RHA).

ED_000733_PSTs_00001915-00003

- 02 November 2012: EPA (Schwinn) sent a letter to the Corps (Mike Jewell) expressing "serious reservations" with the Corps' "conditional concurrence" of the overall project purpose for CM 1 because it "results in an overall project purpose that **equates the overall project purpose with the applicant's preferred alternative**." Further, EPA raised questions about what project purpose statement would guide the evaluation of alternatives at the programmatic level (given the Corps' agreement pertained only to CM 1), and warned that the "conditional concurrence" may unnecessarily complicate future 404 decisions.

- Various dates during 2013-2014: EPA met with representatives from DWR and/or their consultants on the BDCP and representatives from the federal co-lead agencies.[5]

Date	Who	What	Outcome
June 18, 2013	ICF, DWR, EPA, USFWS, NMFS, BOR	ICF gave Erin Foresman and Stephanie Skophammer a powerpoint presentation on Ch 8 WQ	Helped to inform our comments on the ADEIS
August 13, 2013	Jerry Meral, Cassandra Enos, Russ Stein, Marc Ebbin, Tom Hagler, S. Skophammer, Valentina Cabrera, Tim Vendlinski, E. Foresman	BDCP	We informed DWR they would get an adverse EIS rating if our comments were not fully addressed, they said they just needed to keep moving forward
November 7, 2013	ICF, DWR, EPA, USFWS, NMFS, BOR	Proposed topic was to go over Responses to EPA's comments on the ADEIS	EPA urged the proponents to portray the ADEIS as a *programmatic* document so it could be judged more leniently. DWR said they needed to proceed with a DEIS as is (a mixed programmatic and project-level document) to be published by December 7th.
ICF failed to respond to EPA's request for Feb 2014 meeting until May 2014.			
February 24, 2014	Jared met with Mark Cowin (DWR) in Sacramento		Mark acknowledged unresolved issues.
May 13, 2014	ICF, EPA	Review EPA's misc. Questions (Chapter 3)	Productive – ICF answered our questions.
May 19, 2014	ICF, DWR, EPA	Review EPA's WQ Questions (Chapter 8)	Productive – DWR/ICF answered our questions.
May 30, 2014	ICF, DWR, EPA, USFWS, NMFS	Review EPA's Fish Questions (Chapter 11)	Productive – the parties gave EPA written response to our questions.

[5] Meetings of the BECT (BDCP Environmental Coordination Team) are not represented in this table because those meetings were open to other stakeholders and not necessarily focused on CWA issues.

ED_000733_PSTs_00001915-00004