APPENDIX H: COPIES OF COMMENTS, LETTERS, EMAILS, AND COMMENT CARDS FROM 2009 SCOPING PROCESS
APPENDIX H1: 2009 FEDERAL AGENCIES SCOPING COMMENTS
May 14, 2009

Regional Business Directorate

Ms. Lori Rinek
Army Federal Register Liaison Officer
Sacramento Fish and Wildlife Office
2800 Cottage Way, W-2605
Sacramento, CA  95825

Dear Ms. Rinek:

Thank you for the opportunity to provide comments and perspective on behalf of the U.S. Army Corps of Engineers (Corps) regarding the Bay Delta Conservation Plan (BDCP) for the Sacramento-San Joaquin Delta, Environmental Impact Statement/Environmental Impact Report (EIS/EIR). This letter incorporates comment from the South Pacific Division Headquarters, our San Francisco District and our Sacramento District.

The Corps recognizes and embraces our role as a cooperating agency in the preparation of the proposed EIS/EIR (IAW 33 CFR Part 325). The mission of the Corps includes Flood Risk Management; Environmental Protection and Restoration; Navigation; and Emergency Preparedness and Response. We anticipate that the BDCP actions may impact these mission areas. As a result, multiple Corps permissions may be required.

The Corps’ regulatory jurisdiction in the BDCP project area primarily falls under three authorities:

1. Section 404 of the Clean Water Act for the discharge of dredged or fill material in waters of the U.S.; (33 USC 1201 et seq.) (Section 404)
2. Section 14 of the Rivers and Harbors Act of 1899 (33 USC 408) for the alteration of a Federal project (to include sea wall, jetty, dike, levee, wharf, pier, or other work);
3. Section 10 of the Rivers and Harbors Act for work in navigable waters. (33 USC 403) (Section 10)

We envision using the BDCP EIS/EIR as a programmatic document; tiering additional NEPA documents for Corps permit actions from it. In addition, it is important that you are aware of ongoing initiatives in the Delta with which the Corps is currently involved.

The Corps’ responsibilities include the Federal flood risk reduction system, which involves, in part, the operation of a system of reservoirs. The BDCP actions may have a significant impact on the flood risk reduction system in the Central Valley and the Delta. Any changes or modification to the flood risk reduction system and its operation must be analyzed and may require reauthorization by Congress. Actions and impacts on the levee system will also need to be consistent with the CA Levee Roundtable Framework (Flood System Improvement Framework).
We anticipate that some or all of the proposed projects would result in discharges into waters of the U.S. Accordingly, authorization under Section 404 of the Clean Water Act would be required. In developing alternatives, we encourage you to consider an appropriate range. With a range of alternatives, we are able to use them in subsequent NEPA document(s) that evaluate compliance with the Clean Water Act Section 404(b)(1) Guidelines. Please note that the Corps may only authorize the least environmentally damaging alternative (LEDPA).

Under both Section 10 and Section 404, the Corps performs a public interest review. We expect that the NEPA process will provide adequate information for us to undertake our review in subsequent document(s), but encourage you to continue to keep us informed of the development of alternatives and impact analyses.

In addition to the Regulatory Permits requirements, the Corps has a robust Civil Works project program, with many projects directly or indirectly impacting the Delta. These projects are managed by the two following South Pacific Division Corps Districts, the San Francisco and Sacramento Districts. The Corps recognizes that the scope of the project EIS/EIR must take into account potential project impacts while appropriately balancing environmental issues in its analysis. Three Corps projects the BDCP should coordinate with the San Francisco District staff include: (1) the San Francisco Bay to Stockton navigation improvement study, (2) the Sacramento River Deep Water Ship Channel (DWSC) navigation improvement study, and the (3) the Delta Dredged Sediment Long Term Management Strategy (Delta LTMS).

San Francisco Bay to Stockton navigation improvement study:

The San Francisco Bay to Stockton navigation improvement study is composed of two ship channels with a combined length of more than 85 miles. The John F. Baldwin (JFB) ship channel extends from outside the Golden Gate to the eastern end of Suisun Bay. The JFB channel includes the West Richmond Channel, Pinole Shoal Channel, and the Suisun Bay Channel portion of the JFB Ship Channel. The West Richmond Channel is located within the North Ship Channel just south of the Richmond – San Rafael Bridge and west of the City of Richmond. The area of interest for deepening the Stockton DWSC extends to the Port of Stockton. All channel segments are currently maintained to the water depth of at least 35 feet mean lower low water (MLLW). The proposed project is evaluating deepening the West Richmond and Pinole Shoal Channels to a possible maximum depth of 45 feet MLLW and the remaining segments to a maximum depth of 40 feet MLLW. The total volume of material generated from this project is expected to be up to 31 million cubic yards of material.

The project website, http://www.sfbaytostockton.org, provides a project description and map. For coordination the lead environmental manager for the project is Ms. Nancy Ferris (nancy.m.ferris@usace.army.mil); the project manager is Mr. David Patterson (David.R.Patterson@usace.army.mil).

Sacramento River Deep Water Ship Channel:

The Sacramento Deep Water Ship Channel extends 46.5-miles along a route starting at the confluence of the Sacramento and the San Joaquin Rivers and ending at the Port of West Sacramento. The channel
runs along the Sacramento River, into Cache Slough and along a man-made channel to the Port. Construction of a 35-foot deep channel was initiated in 1989, but work was suspended in 1990. Two of the six construction contracts had been completed at that time, from River Mile 43 to 35. The remaining channel is 30 feet deep. The current project is evaluating the resumption of the 35 feet deepening work. The total volume of material generated from this project is expected to be between 6 to 7 million cubic yards of sediment.

The project website, http://www.sacamentoshipchannel.org, contains a project description and map of the study area. For coordination, lead environmental manager for the project is Dr. Bill Brostoff (William.N.Brostoff@usace.army.mil); the project manager is Mr. Craig Conner (Craig.S.Conner@usace.army.mil).

The BDCP should coordinate with the Corps on SF Bay to Stockton and Sacramento deep water ship channel projects regarding several modeling efforts. Hydrodynamic and salinity modeling is currently under way for both the SF Bay to Stockton and Sacramento studies. Dissolved oxygen and water quality modeling is being conducted for the Stockton DWSC. These modeling efforts include assumptions about future conditions with and without implementing the BDCP based on the best information available at the time when modeling was initiated. The technical lead for these modeling efforts is Dr. Frank Wu, available via email at Frank.Wu@usace.army.mil.

**Delta Dredged Sediment Long Term Management Strategy:**

The Delta Long-Term Management Strategy (LTMS) is a cooperative effort to coordinate, plan, and implement beneficial reuse of sediments in the Sacramento and San Joaquin River Delta (Delta). Five agencies (Corps, US Environmental Protection Agency, California Department of Water Resources, California Bay Delta Authority, and Central Valley Regional Water Quality Control Board) are examining dredging, reuse, and disposal needs in the Delta. The goals of the LTMS are to collectively manage dredging activities to support and maintain Delta channel functions for navigation, flood control, water conveyance, and recreation, maintain and stabilize Delta levees that protect land-based activities, water conveyance, and terrestrial ecosystems, and protect and enhance water quality for Delta water supply and ecosystem function. The project website is [http://www.deltaltms.com/](http://www.deltaltms.com/). The Delta LTMS program manager is Mr. Al Paniccia (Al.Paniccia@usace.army.mil), the study manager is Dr. Bill Brostoff (William.N.Brostoff@usace.army.mil).

For coordination on the Delta LTMS regarding current research on threatened and endangered fish species and the permitting process, please contact Dr. Bill Brostoff (415) 503-6867 or Ms. Nancy Ferris at (415) 503-6865.

The Corps projects that the BDCP should consider and coordinate with Sacramento District include: (1) Delta Islands and Levees Feasibility Study, (2) CALFED Levee Stability Program, (3) the Lower San Joaquin River feasibility Study, (4) the Central Valley Integrated Flood Management Study, (5) the Sacramento River Bank Protection Project, and (6) the Sacramento River Flood Control Project.
Delta Islands and Levees Feasibility Study:

The Delta Islands and Levees Feasibility Study (DILFS) will incorporate elements of the State's Delta Risk Management Strategy (DRMS), while reevaluating some of the results, to develop a combined ecosystem restoration and flood risk management plan for Corps involvement in the Delta vision. The Corps and the California Department of Water Resources (DWR) signed a Feasibility Cost Sharing Agreement (FCSA) in May 2006.

For coordination, appropriate points of contact are the project manager, Mr. Russ Rote at (916) 557-6672 or the lead planner, Ms. Brooke Schlenker, at (916) 557-5299.

Calfed Levee Stability Program:

The Levee Stability Program (LSP) allows the Sacramento District to construct high priority levee rehabilitation projects identified in the Sacramento District’s “2006 Report to Congress”. The small projects are considered interim emergency type repairs to the most fragile reaches of levee. The authorized project purposes include flood risk management, ecosystem restoration, water supply, conveyance, and quality. The DWR has indicated a willingness to partner by providing construction grants to the Reclamation Districts (RDs) for cost sharing on the Federal projects. Projects that will be implemented will first be proven to be consistent with the latest version of the Delta Vision (DV) and other state visioning efforts.

For coordination, appropriate points of contact are the project manager, Mr. Russ Rote at (916) 557-6672 or the lead planner, Ms. Brooke Schlenker, at (916) 557-5299.

Lower San Joaquin River Feasibility Study:

The Lower San Joaquin River study is being conducted by the Corps of Engineers in partnership with the San Joaquin Area Flood Control Agency. The study will evaluate the feasibility of implementing flood risk management and ecosystem restoration improvements along the lower San Joaquin River and its tributaries and distributaries. The study is being coordinated with the State of California, San Joaquin County, and various Reclamation Districts.

The study area is located along the lower (northern) portion of the San Joaquin River system in the Central Valley of California. The river flows west to the Central Valley, where it is joined by the Merced, Tuolumne, Stanislaus and Calaveras Rivers, and other smaller tributaries, as it flows north to the Sacramento-San Joaquin Delta. The Lower San Joaquin River study area includes the main stem of the San Joaquin River from the Mariposa Bypass downstream to and including the city of Stockton. The study area also includes the distributary channels of the San Joaquin River in the southern most reaches of the Delta.

For coordination, the project managers are Mike Morgan (Michael.R.Morgan@usace.army.mil) and Claire Marie Turner (Claire.Marie.Turner@usace.army.mil). The lead planner is Miki Fujisubo (Miki.Fujisubo@usace.army.mil).
Central Valley Integrated Flood Management Study

The Central Valley Integrated Flood Management Study is being conducted in partnership with the State of California (Central Valley Flood Protection Board and the Department of Water Resources). It is a multi-objective study that will balance flood damage reduction, ecosystem restoration, and other water resource purposes and provide a long-range management program to improve the flood carrying capacity, while restoring and protecting environmental features. It will provide a framework for a management plan that can be effectively implemented and supported by local, state, and Federal agencies.

The study area includes the entire Sacramento River Basin, San Joaquin River and the Delta Basin in Central California. It encompasses about 43,000 square miles, 1,613 miles of federal levees, 1,200 miles of floodways, 56 flood control features, and 1/3 of the state water supply. Numerous projects are within the study area including the Sacramento River Flood Control Project, Sacramento River Bank Protection Project, Folsom Dam, West Sacramento, and the Lower San Joaquin River and Tributaries Project.

For coordination, the project manager for this study is Mr. David VanRijn (David.P.VanRijn@usace.army.mil).

Sacramento River Bank Protection Project:

The Sacramento River Bank Protection Project is a long term project that protects the integrity of the Sacramento River Flood Control Project (SRFCP) through construction of bank protection and set back levees. The State of California’s Central Valley Flood Protection Board is the non-Federal project partner. The existing Sacramento levees are seriously threatened by erosion and unless continued corrective measures are taken, levee failures may occur with resultant catastrophic damage and possible loss of many lives.

The project extends from River Mile (RM) 0.0 on the Sacramento River at Collinsville to RM 194.0 above Red Bluff. Existing levees are seriously threatened by erosion that could result in levee failures. Areas protected by levees comprise over 1 million acres, 50 communities, $38 billion of improvements, and 2.3 million people.

Sac Bank received authorization in Water Resources Development Act of 2007 for an additional 80,000 linear feet. The 2007 authorization adds to the previously authorized project. There are 154 identified erosion sites on the system, totaling approximately 150,000 linear feet. The Corps is designing and will award for construction approximately 9,000 linear feet of bank protection this year at 13 sites. Planning and environmental compliance is underway for Sacramento River Bank Protection Project, Phase II, which is the additional 80,000 linear feet authorized in WRDA 2007. Planning efforts have also begun on Phase III. This phase will look more comprehensively at protecting the integrity of the SRFCP.

For coordination, the project manager for Sac Bank is Mr. Mike Dietl (Michael.L.Dietl@usace.army.mil). The lead planner is Mr. Miki Fujitsubo (Miki.Fujitsubo@usace.army.mil).
Sacramento River Flood Control Project System Reevaluation

The Sacramento River Flood Control Project general reevaluation study will evaluate the condition and performance of this flood risk management system, with particular attention to levees in rural areas. The Sacramento River Flood Control Project is located on the Sacramento River and lower reaches of its principal tributaries in north-central California. It includes a comprehensive system of levees, overflow weirs (including the Sacramento and Fremont Weirs), drainage pump plants and flood bypass channels (including the Yolo Bypass). Most of the project facilities are over 50 years old and were originally locally constructed. They were later upgraded and incorporated into the project after Federal authorization in 1917. Following the floods of 1986, a five-phase program was developed by the Corps of Engineers which divided the flood control system into five study areas the purpose of which was to examine the levees and determine how the system was performing. This study focused particularly on urban areas.

For coordination, the project manager is Mr. Mark Ellis (Mark.A.Ellis@usace.army.mil). The lead planner is Mr. Miki Fujitsubo (Miki.Fujitsubo@usace.army.mil).

These projects geographically overlap the BDCP proposed project footprint and may share both baseline conditions and impacts analysis needs for water quality, hydrodynamics, as well as other environmental and biological effects. BDCP’s alternative formulation should consider these projects when creating and evaluating conveyance, infrastructure, restoration, and mitigation options.

We anticipate that the BDCP will appropriately consider and address any hazardous, toxic, and radioactive waste (HTRW) impacts from the proposed project.

We look forward to coordination with the BDCP team to discuss elements of the Draft EIS/EIR. Ms. Cindy Tejeda (Cindy.L.Tejeda@usace.army.mil), lead watershed planner, USACE South Pacific Division Headquarters, is coordinating a technical meeting to be scheduled in the near future. Please note that our detailed comments provided are focused on areas of particular interest to the Corps given the information available in the NOI and at the scoping meeting held March 19, 2009.

Sincerely,

Andrew Constantaras, P.E.
Director, Regional Business Directorate
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.).
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, 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.\(^2\)

(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.

\(^2\)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).
(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

4See 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.

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

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 I, 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.
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. 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.

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.

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12 The Webcast of this and other Blue Ribbon Task Force meetings are available on the Delta Vision website.
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.\(^{15}\)


\(^{14}\) 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/cvpiadocs_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
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

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.
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
March 17, 2008

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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.
(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,

[Signature]

Nova Blazej, Manager
Environmental Review Office
Communities and Ecosystems Division

Cc: Lori Rinek, US Fish and Wildlife Service
Agency Coordination Team
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 (BCDP) 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 BCDP 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.
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.
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
May 13, 2009

Ms. Delores Brown
Chief, Office of Environmental Compliance
Department of Water Resources
P.O. Box 942836
Sacramento, California 94236


Ms. Brown,

I am writing regarding the scope of the Environmental Impact Report and Environmental Impact Statement of the Bay Delta Conservation Plan. The eastern alignment of the proposed conveyance channel runs adjacent to the Stone Lakes National Wildlife Refuge (Refuge) and then crosses the lower third of the Stone Lakes National Wildlife Refuge Project Boundary. The Refuge Project Boundary encompasses the Bufferlands area around the Sacramento Regional Wastewater Treatment Plant and extends south from Freeport between the former Southern Pacific Railroad and along I-5 south to Twin Cities Road (see attached map).

I believe there are a number of issues that have not been adequately addressed in the scoping process including impacts to terrestrial biological resources, potential changes in local hydrology and water quality, and impacts to local agricultural operations. Our primary concern regarding the potential environmental impacts is the loss of habitats for a variety of species that would result from this project, particularly the eastern alignment, including some state and federal special status species and the loss of agricultural lands in the region.

The Refuge, administered by the U.S. Fish & Wildlife Service (Service), was established to protect 18,000 acres of Central Valley agricultural lands and natural habitats to support a wide variety of migratory birds and special status species. The Service completed an EIS in 1994 that established Stone Lakes as the 505th National Wildlife Refuge and approved the legal Project Boundary within Sacramento County. Over 8 million dollars of private and public funds have now been invested in protecting about 6,000 acres of wetlands, grasslands, riparian habitats and
agricultural lands within the Project Boundary with an eventual goal of linking with the Cosumnes River Preserve to the south. In 2007 the Service completed a Comprehensive Conservation Plan (CCP) for the Refuge that included public review on management activities for the next fifteen years. This Refuge is part of a national network of lands and waters in the National Wildlife Refuge System for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of the present and future generations of Americans.

The scoping process needs to address the potential impacts the eastern alignment of the project could have on over 75 bird species that are currently found on the Refuge, including the following state and federal listed or species of concern: greater sandhill crane, Swainson’s hawk, white-faced ibis, long-billed curlew and western meadowlark. The project could also potentially affect vernal pool species located in the proposed alignments including the federally listed vernal pool fairy shrimp and vernal pool tadpole shrimp, the giant garter snake and the valley elderberry long horned beetle. Furthermore, over one million birds winter in the Central Valley, and the loss of agricultural lands and open space and associated activities with the construction and operation of the canal would likely impact populations and migratory patterns of waterfowl and waterbirds in southern Sacramento County.

The Service has been actively managing wetland and grassland habitats since 1997 and have monitored local movements of migratory waterfowl and waterbirds, particularly white-fronted geese, black-bellied plovers, greater sandhill cranes, long-billed curlews, and white-faced ibis; the last three species being candidates for federal listing. Our observations indicate these species regularly feed and roost both on the Refuge and in winter wheat, corn, clover, and pasture on private lands outside currently managed lands and the Project Boundary. In the case of waterfowl, the birds that roost at the Refuge may be found feeding at the Yolo Wildlife Area in the morning and at Cosumnes River Preserve or private land in the afternoon. We have documented daily movements of greater sandhill cranes between the refuge and privately-owned agricultural fields to the west within Reclamation District 744 (Scribner’s Bend). We have also observed movement by white-fronted geese and black-bellied plovers between the refuge and wheat and clover fields within RD 813 to the southwest.

Specifically in the case of the sandhill crane, the refuge and surrounding agricultural fields are critically important. Greater sandhill cranes have a wintering range of as little as one to three square miles, do not tolerate disturbance and require shallow wetlands for night roosting and loafing sites and a mix of agricultural fields such as alfalfa, corn and irrigated and dry pastures and wetlands for foraging. Already, sandhill cranes have been displaced from traditional feeding grounds because of urbanization. The agricultural lands surrounding the Refuge are vital to maintaining a healthy population of these magnificent birds, because the Refuge cannot provide all the habitat requirements needed by these birds. I am concerned the construction and maintenance activities of the canal could cause major changes in the migratory patterns of these birds pushing them into less suitable habitat, and believe the scoping process has not adequately addressed potential impacts the eastern alignment would have on this species.

The scoping process does not adequately address potential increases in flooding caused by the construction of a large canal and levee system. An increase in flooding could affect the
Refuge’s infrastructure and its’ ability to meet goals and objectives, including the restoration and management of wildlife habitat, public uses including hunting, fishing, environmental education, interpretation, photography and wildlife observation, and maintaining agricultural activities. Increases in stormwater run-off are already projected to double in the Beach-Stone Lakes area with the continued development south of Elk Grove between Interstate 5 and Highway 99. The construction of a 30’ high levee would likely alter the flooding pattern, frequency and duration in the Stone Lakes Basin.

The scoping process also did not adequately cover potential mitigation areas and impacts. Mitigation efforts should remain in the general area of impact. For example, mitigation and conservation efforts to protect greater sandhill crane habitat should remain within the current footprint of sandhill crane habitat and not be placed elsewhere in the Delta. This area would include the Stone Lakes Project Boundary as well as Cosumnes River Preserve, Woodbridge Crane Reserve and the privately owned properties between the two conservation areas.

I am also concerned that the impacts of enhancing and developing tidal marsh habitats on species that currently depend on the Delta have not adequately been addressed. Establishing a canal and tidal marsh conservation measures could displace several migratory bird species that rely on conservation and agricultural lands in the Central Valley. Several of the sites being considered as Restoration Opportunity Areas include conservation areas in addition to the Refuge such as the Yolo Bypass Wildlife Area, Cosumnes River Preserve and Woodbridge/Isemberg Sandhill Crane Preserve which provide habitat for waterfowl, shorebirds, raptors and other grassland and shallow wetland dependent birds. The BDCP must incorporate existing plans and goals and obligations these various conservation areas have already developed in the planning process. Lastly, the impact of upstream diversions coupled with continued salt water intrusion and less run-off as a result of climate change will change the current Delta hydrology and salinity thereby affecting farming and the available waste crop in Delta used by cranes and other migratory birds.

In closing, I believe the Bay Delta Conservation Plan needs to address a variety of issues before choosing any alignment and moving forward with this project. Thank you for the opportunity to comment on this document. We look forward to continued communication with you and other concerned interests on this and other projects related to biological resources in the Stone Lakes Basin.

Respectfully,

[Signature]
Bart McDermott
Project Leader

Attachments:
Stone Lakes NWR Project Map (CCP figure 2)
Figure 2. Land Status

Stone Lakes
National Wildlife Refuge

- Cooperative Agreement
- Conservation Easement
- County or State Land
- Private Ownership
- Owned in Fee Title
- Approved Refuge Boundary

Refuge Headquarters

Sacramento River
North Stone Lake
Twin Cities Rd
Snodgrass Slough
Lambert Rd
Elk Grove Blvd
Hood Franklin Rd
South Stone Lake
Southern Pacific Railroad (abandoned)

0 0.5 1 2 Miles
0 0.5 1 2 Kilometers

Twin Cities Rd
Godfrey Slough
Southern Pacific Railroad (abandoned)