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Subject: BDCP Draft EIS/EIR Review; Chapter 4 and Appendix 4A

Issue: Baseline Data

I. BDCP EIR/EIS Chapter 4 Approach to Environmental Analysis

A. The BDCP EIS does not meet the requirements of 40 CFR 1502.22, *Incomplete or unavailable information*.

B. Comment:

In accordance with 40 CFR 1502.22, the federal agencies responsible for preparation of the BDCP EIS shall always make clear when data necessary to evaluate reasonably foreseeable significant adverse effects is incomplete or unavailable. The federal agency shall include information the cost of which is not exorbitant to obtain in its analysis of reasonably foreseeable significant adverse effects; or explain how the incomplete information is relevant. Appendix 4A is clear that important information is not available to assess biological, geotechnical, archaeological, floral and faunal effects along proposed tunnel alignment alternatives. Despite statements contained in Appendix 4A, which makes clear information is lacking, the co-lead federal agencies make no attempt to conform to NEPA guidance set forth in 40 CFR 1502.22 and how the lack of those data effects a credible assessment of the effects of the proposed project.

NEPA and CEQA Analysis

NEPA requires that the lead Federal agencies rely on a scientific and analytical basis for the comparison of alternatives (40 CFR 1502.16) in making their decisions. Commonly, when preparing a joint document, the lead Federal agency may adopt the CEQA significance thresholds as its scientific basis.

Lead agencies must make their best efforts to predict and evaluate the reasonable, foreseeable, direct, indirect, and cumulative environmental impacts of the proposed project (Federal Action) alternatives. NEPA and CEQA do not require the lead agencies to engage in speculation about impacts that are not reasonably foreseeable (CEQA Guidelines sections 15144 and 15145). In these instances, CEQA does not require a worst-case analysis. Similarly, NEPA does not require a worst-case analysis when confronted with incomplete or unavailable information (40 CFR 1502.22).

In analyzing a proposed project in a joint CEQA/NEPA format, the lead Federal agencies must distinguish the scientific and analytical basis for its decisions separately from the CEQA lead agency decision. Fundamental to this analysis is establishing the NEPA baseline.

For BDCP, the NEPA baseline for determining the significance of impacts is required to be the set of conditions defined by examining the full range of construction and operational activities the applicants could implement and are likely to implement absent permits from the USFWS and NMFS. Unlike the CEQA baseline, which is defined by conditions at a point in time (NOP, February 12, 2013), the NEPA baseline is not bound by statute to a "flat" or "no-growth" scenario. The significance of impacts associated with

implementation of the BDCP or its alternatives is defined by comparison to impacts that would occur under NEPA baseline conditions.

The NEPA baseline should also include other actions that would affect diversions into the intake structures. Those actions should be described under the No Action Alternative. The determination regarding the affects of other actions should be based on direct statements and empirical data from the applicants, and on the judgment and experience of the federal agencies.

BDCP EIS/EIR Appendix 4A: *Summary of Survey Data Collection Efforts by Department of Water Resources to Obtain Information Regarding Baseline Conditions in Areas That Could Be Affected by BDCP*

Appendix 4A corresponds to Chapter 4, *Approach to the Environmental Analysis*, and pleads the DWR case that private property owners denied access to land such that DWR could not gather necessary information:

DWR has taken actions to obtain access to land in the Delta for the purpose of gathering information to be used in environmental review. DWR, however, has not been able to get access [to] a substantial number of the private properties that would yield relevant information. The problem repeatedly faced by DWR in such efforts has been the unwillingness of private property owners to allow entry onto their properties. Many landowners have gone to court to prohibit access. This appendix describes the actions taken by DWR to gain access to properties within the Delta as needed to fulfill the requirements of CEQA and NEPA and federal permits (i.e., Sections 408 and 404(b)) for the BDCP.

Appendix 4A describes the history of attempts to obtain the temporary entry permits and opines that private property owners have obstructed their attempts to gather information. The appendix concludes:

As the preceding discussion shows, DWR has been unable, despite diligent efforts, to gain access to all of the private properties within the Delta on which it would like to conduct ground surveys, Environmental Site Assessments, and engineering, biological, geotechnical, archaeological, floral and faunal studies. Although DWR has been able to conduct some of the geotechnical studies it contemplated originally, it has not been able to conduct all such studies because of the court order issued April 8, 2011. DWR has challenged that court decision and is currently seeking access to land in the Delta for the purpose of conducting the geotechnical activities through the use of eminent domain. In short, DWR has done all that is reasonably feasible under the circumstances to conduct thorough investigation of the impacts of all of the BDCP alternatives.

On June 24, 2005, James Connaughton, Chairman of the Council on Environmental Quality wrote in a letter to heads of Federal agencies:

The purpose of 40 CFR 1502.22 is to disclose the fact of incomplete or unavailable information, to acquire information if it is "relevant to reasonably foreseeable significant adverse impacts" and "essential to a reasoned choice among alternatives," and to advance decision-making in the absence of all information regarding reasonably foreseeable effects. The focus of this provision is, first and foremost, on "significant adverse impacts." The agency must find that the incomplete information is relevant to a "reasonably foreseeable" and "significant" impact before the agency is required to comply with 40 CFR 1502.22. If the incomplete cumulative effects information meets that threshold, the agency must consider the "overall costs" of obtaining the information. 40 CFR 1502.22(a) The term "overall costs" encompasses financial costs and other costs such as costs in terms of time (delay), program and personnel commitments. The requirement to determine if the "overall costs" of obtaining information is exorbitant should not be interpreted as a requirement to weigh the cost of obtaining the information against the severity of the effects, or to perform a cost-benefit analysis. Rather, the agency must assess overall costs in light of agency environmental program needs.

Analysis

The Council on Environmental Quality directs Federal agencies to obtain project-specific baseline information to compare the effects of the proposed action and its alternatives on the human environment if the costs to do so are not exorbitant (40 CFR 1502.22(a)). If collecting the data is not possible, the EIS must disclose what information is not available and identify the relevance of the information (40 CFR 1502.22(b)(1)(2)(3)). The DWR explanations in Appendix 4A (and in Chapter 4) make no reference to the costs of obtaining data on private land or if those costs made it exorbitantly expensive to do so

The EIS is largely silent with regards to the significance of the incomplete information, except in Chapter 4, Table 4-1. *Overview of BDCP EIR/EIS Modeling Tools, Habitat Suitability Models (HSM)*, p. 4-16: "The models are not formulated on the basis of species occurrence data, which is incomplete for most covered species in the Plan Area. Instead, species occurrence data are used to verify the habitat models and, as necessary, revise the input data." However, this reference does not seem to be the result of the agency's inability to gain access to private property.

The DWR explanation pursuant to incomplete information does not meet the requirements set forth in 40 CFR 1502.22, *Incomplete or unavailable information*.

When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.

(a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement:

1. A statement that such information is incomplete or unavailable;
2. A statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment;
3. A summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and
4. The agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. For the purposes of this section, "reasonably foreseeable" includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

(c) The amended regulation will be applicable to all environmental impact statements for which a Notice of Intent (40 CFR 1508.22) is published in the Federal Register on or after May 27, 1986. For environmental impact statements in progress, agencies may choose to comply with the requirements of either the original or amended regulation.

Based upon Chapter 4 and Appendix 4A, and the NEPA guidance provided by the CEQ pertaining to incomplete or unavailable information the BDCP EIS fails to comply with NEPA and makes an evaluation of potential project impacts impossible to reasonably evaluate:

1. Appendix 4A does not meet directives in 40 CFR 1502.22. All three Federal agency NEPA Handbooks refers to 1502.22. The NOAA/NMFS handbook does not offer specific instructions to comply with 1502.22. The USFWS handbook (516 DM 4.1, paragraph 4.13) notes that, "The references to overall costs in this section [EIS preparation guidance] are not limited to market costs, but include other costs to society such as social costs due to delay."

However, the Bureau's handbook provides explicit guidance to comply with 1502.22 and DOI NEPA Implementing Guidance (43 CFR 46.125). This guidance is specific to the BoR and does not necessarily apply to the USFWS.

Bureau NEPA Handbook, p. 3-15, February 2012¹.

Reclamation will obtain the information necessary to fully evaluate all reasonably foreseeable, significant adverse impacts in NEPA documents, unless the information cannot be obtained because the costs are too great or the means of getting it are not available. Data and new information needs should be identified early enough in the process to enable timely completion of required studies and integration of the information.

¹ See attached table that compares BoR NEPA Handbook 1990/2000 to BoR NEPA Handbook dated February 2012.

The determination of costs being too great (i.e., exorbitant) is the responsibility of the deciding official. In addition to the monetary costs of obtaining the information, consideration of other nonmonetary costs, such as social costs, delays, opportunity costs, and non-fulfillment or non-timely fulfillment of statutory mandates, is appropriate.

Reclamation should carefully evaluate whether to move ahead on proposals for which limited relevant information may prevent meaningful analysis of alternatives, impacts, or the means to mitigate impacts. If information cannot be obtained, the NEPA document will make it clear that such information is lacking and why, discuss how that information would be relevant to the analysis, provide a summary of relevant existing data, and provide Reclamation's evaluation of potential impacts based upon generally accepted approaches, methods, or models.

Some information may not be available to Reclamation because it is proprietary information maintained by an applicant (i.e., a non-Federal entity requesting Reclamation to take some action). The CEQ regulations in 40 CFR 1502.21 state that "Material based on proprietary data which is itself not available for review and comment shall not be incorporated by reference." Reclamation should work closely with the applicant on questions that deal with proprietary issues or information.

2. Based on a word search of the BDCP EIS/EIR, we could not find any chapter or section which complies with the directives in 1502.22. That is, we could not find a discussion of the incomplete information; a summary of relevant existing data and an evaluation of potential impacts based upon generally accepted approaches, methods or models. In short, the Federal agencies did not comply with 1502.22. In Appendix 4A DWR shines a bright light on incomplete data. DWR makes neither argument that the costs to comply with NEPA are exorbitant, nor does DWR attempt to identify how the incomplete information affects an evaluation of the project impacts.

3. DWR does not make a case that costs to obtain the incomplete information are exorbitant. We could not find a discussion regarding any kind of cost associated with gaining access to private property for the purpose of collecting environmental data. CEQ guidance provides that costs can include nonmonetary costs, such as social costs, delays, opportunity costs, and non-fulfillment or non-timely fulfillment of statutory mandates. There is no discussion in the EIS that provides the reader with an understanding of nonmonetary costs.