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UNITED STATES CONGRESS

September 19, 2018

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Andrew Wheeler
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20004

Re: WIFIA Letter of Interest Submitted by Delta Conveyance Finance Authority

Dear Administrator Wheeler,

On July 27, 2018, the Delta Conveyance Finance Authority (“DCFA”) submitted a Letter of Interest to the Environmental Protection Agency’s (“EPA”) Water Infrastructure, Finance, and Innovation Act (“WIFIA”) loan program. This Letter of Interest (“LOI”) seeks funding for the Delta Tunnels, also known as the “California WaterFix” project. The DCFA seeks \$9.5 billion committed toward a total estimated project cost of \$19.8 billion, due to annual interest and inflation calculations.

The Letter of Interest includes several misrepresentations, of which EPA should be aware, including:

Incorrect claim that the Tunnels Project would Generate 100,000 Jobs During Construction

The Letter of Interest claims that 100,000 jobs would be created by the Delta Tunnels project. (LOI, p. 13.) No support is provided for this claim. According to the Final Environmental Impact Report/Statement (“FEIR/S”) prepared for the project, there would be a peak of 2,427 direct construction jobs in the third year of construction. (FEIR/S, p. 16-277.) The FEIR/S also discloses that employment effects would peak in the twelfth year with an additional 6,425 jobs (mainly in the service sector, not including 5,250 construction and manufacturing jobs). (FEIR/S, p. 16A-17.) Collectively, these job figures come to less than 10 percent of the job creation claimed in the WIFIA Letter of Interest. The Letter of Interest also fails to discuss the Project’s heavy reliance on materials, equipment and personnel imported from outside the U.S.

Significant Barriers to the Bureau of Reclamation’s Participation in the Project Are Ignored

The Letter of Intent described the organizational structure as consisting of DWR and certain SWP contractors. (LOI, pp. 4-6.) Yet the project is also proposed to divert Central Valley Project (“CVP”) water permitted for diversion by the Bureau of Reclamation (“Reclamation”) in the Delta. Operation of the SWP and CVP is currently subject to the 1986 Coordinated Operations Agreement, which the Letter of Intent states “is expected to continue in force for the life of the WaterFix.” (LOI, p. 23.) Yet just last month, Reclamation provided a Notice of Negotiations to DWR, to renegotiate the terms of the Coordinated Operations Agreement. (See Reclamation Letter, October 17, 2018, attached as Exhibit A.) In addition to the uncertainty surrounding the COA, no information forthcoming about the agreement referenced between DWR and Reclamation concerning how possible impacts to CVP operations will be avoided. (LOI, p. 23.) While the Letter of Intent glosses over possible effects on operational viability (LOI, p. 23), given the complexity of CVP and SWP interoperation, as well as the differing service areas and water demands, one would be hard pressed to imagine a world in which there are no such effects.

The Environmental Review and Permitting for the Project are Nowhere Near Complete

The Letter of Intent provides an overly rosy view of the chances of this very controversial water infrastructure megaproject completing the permitting process and surviving a gauntlet of litigation. (LOI, pp. 19-20.) No detail is provided regarding the implications of the incomplete water rights permitting process at the State Water Resources Control Board, or the fact that the face of the water rights permits required to operate the diversions have expired and is the subject of a separate proceeding, the substance of which has not yet begun.¹

Already the subject of 23 lawsuits in state and federal lawsuits, more lawsuits are sure to be filed if more permits are issued. While the Letter of Intent admits that the lawsuits could lead to delays, increase costs, change the Project and its mitigation, and potentially cancel the Project (LOI, p. 19), it also claims settlement agreements would magically not have any “impact to construction, operations or operational viability” (LOI, p. 23). Given the scale of both the

¹ See SWRCB Notice of Petition for CWF (October 30, 2015), p. 9, fn. 11 [“DWR’s time to complete construction and beneficial use of water for its subject permits elapsed on December 31, 2000, and December 31, 2009, respectively. On December 31, 2009, DWR filed petitions to extend the development schedule until December 31, 2015, for the subject four permits and two additional DWR permits. The State Water Board noticed all six DWR petitions on August 19, 2010, and received eight protests. The protests have not been resolved and the petitions for time extensions are still pending.”]; p. 10, fn. 13 [“Reclamation’s time to complete construction for the subject permits elapsed on a range of dates from December 1, 1964 through December 1, 1985. Reclamation’s time to complete beneficial use of water for its subject permits elapsed on December 1, 1990. On September 19, 1985, Reclamation filed a petition for an extension of time to the year 2030. On June 26, 2009, Reclamation filed a petition to extend the development schedule until December 1, 2030, for the subject 11 permits and 21 other Reclamation permits. The June 26, 2009 petition superseded the September 19, 1985 petition. The State Water Board noticed all 32 Reclamation petitions on September 3, 2009, and received 17 protests, of which 11 were accepted, in whole or in part, as valid protests. The protests have not been resolved and the petitions requesting time extensions are still pending.”].

Project and the litigation that is already ensuing, it is premature and simplistic to opine on the likely outcomes and effect on Project viability.

The Letter of Intent mischaracterizes the completeness of the Project’s environmental review process, stating that documentation for NEPA compliance “has been completed and the Record of Decision is drafted and awaiting signature at the Department of Interior.” (LOI, p. 19.) In fact, due to changes to the project, DWR circulated a Supplemental Environmental Impact Report/Statement (DSEIR/S) in August 2018. Notably, Reclamation has not yet circulated the document pursuant to NEPA.² No notice has been circulated in the Federal Register, and is unknown when the DSEIR/S will be circulated pursuant to NEPA.

The Letter of Interest also fails to disclose the EPA’s ongoing concerns with the adequacy of the environmental review prepared for the Project. In October 2015, EPA rated the Supplemental EIR/S circulated in 2015 as “Inadequate”. (See EPA Letter, October 30, 2015, p. 4, attached as Exhibit B.) At that time, EPA anticipated that “future regulatory processes are expected to provide the needed supplemental information to allow a full review of the environmental impacts without requiring another draft supplemental EIS.” (Exhibit B, p. 4.) Those processes, however, still have not been completed. In January 2017, EPA explained:

To date, none of the regulatory processes mentioned in our [October 30, 2015] SDEIS letter have been completed. . . ., the FEIS continues to predict that water quality for municipal, agricultural, and aquatic life beneficial uses will be degraded and exceed standards as the western Delta becomes more saline. Significantly, the FEIS' conclusions regarding impacts to aquatic life remain unchanged from those in the SDEIS, predicting substantial declines in quantity and quality of aquatic habitat for 15 of 18 fishes evaluated under WaterFix preferred operations.

(EPA Letter, January 18, 2017, p. 1, attached as Exhibit C.) Due to myriad unresolved concerns and inadequacies of the environmental review and permitting process for the Project, the December 2018 projected end date for review and permitting is not realistic. In short, the environmental review, permitting and litigation processes are nowhere near complete, and statements to the contrary in the Letter of Intent are unsupported. Moreover, the project design and environmental documents cited in the Letter of Intent from 2016-2017 (LOI, p. 17) are outdated and pertain to a Project (BDCP Alternative 4A) that has now been abandoned in pursuit of the Byron Tract Forebay Option that is now under review by DWR in a DSEIR/S that has been circulated for public review by DWR but not Reclamation.

The Delta Tunnels Project has Already Bilked the Public

1 California WaterFix Draft Supplemental EIR/EIS
2 Executive Summary
3
4 Note to Readers: Due to timing constraints, publication and release for public review of this Draft
5 Supplemental EIR/EIS is being done by DWR as lead agency in compliance with the requirements of
6 EIQIA only. Separate publication and release for public review of this document by the US Bureau of
Reclamation (Reclamation) as the lead agency in compliance with NEPA will be done at a later date.

Available at:

<https://www.californiawaterfix.com/resources/draft-supplemental-environmental-impact-report-environmental-impact-statement-eir-eis/>.

The Letter of Interest falsely characterizes the \$271 million used thus far for funding Delta Tunnels planning as paid by state and federal water contractors. (LOI, p. 24.) In fact, a federal audit by the Office of the Inspector General found that over \$84 million in federal funding was spent on the planning process, despite requirements under the law specifying all costs to be paid by the water beneficiaries of the project. Specifically, the OIG found:

USBR did not fully disclose to Congress and other stakeholders that it contributed \$84.8 million to the BDCP or that it subsidized 64 percent of the CVP water contractors' share of the cost. In addition, USBR Mid-Pacific Region officials determined that \$50 million in payments to DWR under three financial assistance agreements for BDCP activities was nonreimbursable, meaning the cost would not be repaid to the Federal Government by CVP water contractors. Finally, USBR did not expend funds under the third financial assistance agreement in accordance with the authority delegated to the Commissioner under the Fish and Wildlife Coordination Act (Coordination Act).

(OIG Audit, September 7, 2017, p. 6, available at: file:///D:/Documents/Delta%20Work/BDCP/Finance/2017.9%20OIG%20FinalAudit_BayDeltaPlan_Public.pdf.)³ The Letter of Interest obscures past public fund expenditures and fails to mention the very real risk that this megaproject will require additional taxpayer funds to make up the likely large difference between projected and actual costs.

Conclusion

The problems mentioned above are just some of the many fatal flaws of the Delta Tunnels Project megaproject, which is not deserving of limited WIFIA loans. In addition to being misleading, the Letter of Intent overstates the benefits and lowballs the risks associated with the Project. The DCFA has presented misleading and false information in its Letter of Intent the omits key information relating to the WIFIA criteria. Better and more deserving infrastructure projects exist and should be funded prior to this Project. Thus, an invitation to submit a WIFIA loan application for the Delta Tunnels Project should not be forthcoming.

Sincerely,



JOHN GARAMENDI
Member of Congress

³ See also <https://losangeles.cbslocal.com/2017/09/08/audit-us-misused-84m-for-states-delta-tunnels-water-project/>; <https://www.sfgate.com/news/article/States-s-Delta-tunnels-project-got-improper-12184453.php>. A state audit in 2016 also found significant concerns with the financing of the Project: <https://www.bsa.ca.gov/reports/2016-132/summary.html>.



United States Department of the Interior

BUREAU OF RECLAMATION
Mid-Pacific Regional Office
2800 Cottage Way
Sacramento, California 95825-1898

AUG 17 2018

IN REPLY REFER TO:

MP-100
WTR 4.00

Ms. Karla Nemeth
Director
Department of Water Resources
1416 Ninth Street, Room 1115-1
Sacramento, CA 95814

Subject: Notice of Negotiation – Coordinated Operation Agreement (COA)

Dear Director Nemeth:

Since June 1, 2016, the Mid-Pacific Region of the Bureau of Reclamation (Reclamation) and the Department of Water Resources (DWR) for the State of California have been conducting a mutual review of the 1986 COA as prescribed in Article 14(a) of that Agreement, for the purpose of determining if revisions to COA are warranted. This process was initiated following a series of preliminary meetings dating back to August 2015.

There have been numerous meetings over the past two years, which have included Central Valley Project (CVP) and State Water Project (SWP) contractors. This has included considerable productive discussion and sharing of information and data through which we have learned a great deal about our respective operations as they have evolved over the years. At this point, we have concluded the Article 14(a) review process. Unfortunately, we have been unable to mutually agree on revisions to COA for maintaining conformity with the objectives and principles embodied in the 1986 COA and underlying technical studies.

Absent mutual agreement on revisions needed to COA, Reclamation respectfully makes this Notice of Negotiations in accordance with Article 14(b)(2). I am designating Mr. Federico Barajas as the Lead Negotiator for Reclamation and request DWR identify their Lead Negotiator. It is suggested the respective leads immediately form their negotiating teams and proceed with negotiations within the next 30 calendar days in order to allow for satisfactory conclusion of an agreement within twelve months of the date of this letter, per COA. We are hopeful an agreement can be achieved within the twelve-month period; however, in the event that does not occur, Reclamation will work with DWR to follow the procedure outlined in Article 14(b)(2) to assemble an Advisory Board which shall "report its unanimous recommendations to both parties at a date not later than 24 months from the date of" this Notice of Negotiation.

Sincerely,

David G. Murillo
Regional Director



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

January 18, 2017

David Murillo, Regional Director
Bureau of Reclamation, Mid-Pacific Region
2800 Cottage Way, MP-700
Sacramento, CA 95825

Subject: Final Environmental Impact Statement for the Bay Delta Conservation Plan/California WaterFix CEQ# 20160318

Dear Mr. Murillo:

The U.S. Environmental Protection Agency has reviewed the Bay Delta Conservation Plan/California WaterFix Final Environmental Impact Statement (FEIS) pursuant to the National Environmental Policy Act (NEPA), Council on Environmental Quality regulations (40 CFR Parts 1500-1508), and our NEPA review authority under Section 309 of the Clean Air Act.

The WaterFix project evolved from the Bay Delta Conservation Plan (BDCP), which was proposed as a Habitat Conservation Plan (HCP) to support the issuance of a 50-year incidental take permit under Section 10 of the Endangered Species Act (ESA). EPA's August 26, 2014 comments on the Draft EIS for the BDCP detailed our significant concerns with that proposal and its potential adverse impacts on water quality and aquatic life in the Bay Delta. We withheld our rating due to the lead agencies' commitment to produce a Supplemental Draft EIS. In April 2015, the Bureau of Reclamation (Reclamation) and California Department of Water Resources (DWR) announced fundamental changes to the proposed project and changed its name from BDCP to the California WaterFix. The WaterFix project focuses on the construction and operation of proposed new water export intakes on the Sacramento River to divert water into a 35-mile twin tunnel conveyance facility.

In our October 30, 2015 review of the SDEIS, we noted that the proposed WaterFix project continued to predict significant adverse impacts to the Delta and its resources. As we reiterated in that letter, the most essential decision for achieving the desired balance of water reliability and restoration of the Bay Delta ecosystem is how freshwater flows through the Delta will be managed. We noted that decisions regarding appropriate flow management are being deferred, pending future regulatory actions by multiple state and federal agencies that will determine operational parameters important to the evaluation of the project's impacts. Because information was not available for a complete evaluation of environmental impacts, we found the SDEIS to be inadequate.

The FEIS provides a modified statement of the purpose of the federal action, no longer mentioning construction. It clarifies that the purpose of the Reclamation's proposed action is "to improve movement of water entering the Delta from the Sacramento Valley watershed to existing Central Valley Project (CVP) and State Water Project (SWP) pumps in the south of the Delta in a manner that minimizes or avoids adverse effects to listed species, supports coordinated operation with the SWP, and is consistent with the Project Objectives", which include ecosystem restoration and "delivery of up to full contract

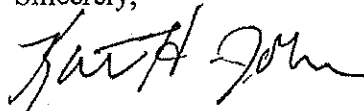
amounts of CVP Project water” when conditions are such that sufficient water is available. This purpose would be accomplished by adjusting the operations of the CVP, specific to the Delta, to accommodate new conveyance facility operations and flow requirements. As explained in the joint document, DWR intends to pursue construction of dual, 40-foot diameter, 35-mile long tunnels under the Sacramento-San Joaquin Delta to provide such conveyance.

To date, none of the regulatory processes mentioned in our SDEIS letter have been completed. The impact analysis in the FEIS is based on updated modeling that more accurately reflects the proposed project operations to the limited extent that they can be predicted at this time, and an appendix to the document includes information from the Biological Assessment. Nevertheless, the FEIS continues to predict that water quality for municipal, agricultural, and aquatic life beneficial uses will be degraded and exceed standards as the western Delta becomes more saline. Significantly, the FEIS’ conclusions regarding impacts to aquatic life remain unchanged from those in the SDEIS, predicting substantial declines in quantity and quality of aquatic habitat for 15 of 18 fishes evaluated under WaterFix preferred operations.

Because the operations proposed in the FEIS do not reflect the real world operational scenarios likely to be generated by the aforementioned regulatory processes, the amount of water that will actually be available for diversion through the proposed conveyance facilities may differ significantly from what was assumed for purposes of the EIS/EIR. We continue to recommend that the federal and state lead agencies for WaterFix carefully consider such reasonably foreseeable operational constraints to ensure that the project is appropriately designed and operated to achieve the aforementioned balance and avoid unnecessary costs and environmental impacts.

EPA remains committed to working with our federal and state partners on actions to restore and protect the Bay Delta ecosystem and the communities that depend upon it. If you have any questions, please contact me at 415-972-3873. Alternatively, your staff may contact Stephanie Gordon, lead reviewer of the FEIS, at 415-972-3098.

Sincerely,



Kathleen H. Johnson
Director, Enforcement Division



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

OCT 30 2015

OFFICE OF THE
REGIONAL ADMINISTRATOR

David Murillo, Regional Director
Bureau of Reclamation, Mid-Pacific Region
2800 Cottage Way, MP-700
Sacramento, CA 95825

Subject: Supplemental Draft Environmental Impact Statement
Bay Delta Conservation Plan/California WaterFix CEQ# 20150196

Dear Mr. Murillo:

The U.S. Environmental Protection Agency has reviewed the Bay Delta Conservation Plan (BDCP)/California WaterFix Supplemental Draft EIS pursuant to the National Environmental Policy Act, Council on Environmental Quality regulations (40 CFR Parts 1500-1508), and our NEPA review responsibilities under Section 309 of the Clean Air Act. The San Francisco Bay/Sacramento-San Joaquin Delta is an important estuarine system, supporting over 750 species and supplying drinking water to 25 million people and irrigation water to 4 million acres of farmland.

Background

The WaterFix project evolved from the BDCP, which was proposed as a Habitat Conservation Plan (HCP) to support the issuance of a 50-year incidental take permit under Section 10 of the Endangered Species Act (ESA). A joint federal and state Draft Environmental Impact Statement/Draft Environmental Impact Report (DEIS/DEIR) for the BDCP was released on December 13, 2013, with the U.S. Fish and Wildlife Service (FWS), National Marine Fisheries Service (NMFS), and Bureau of Reclamation (Reclamation) as joint federal lead agencies for the DEIS, and the California Department of Water Resources (DWR) as the State lead agency for the DEIR. The BDCP included a major habitat restoration program, targeting over 150,000 acres, as well as a proposed new conveyance facility (tunnels) to transport water from the Sacramento River to existing pumps in the South Delta.

In August 2014, the federal and State lead agencies committed to supplement/recirculate the DEIS/DEIR in response to public comments received on that document, including those submitted by EPA on August 26, 2014. In a collaborative effort to resolve the issues that we had raised, EPA met frequently with DWR and the original federal lead agencies for several months after submitting our comments on the DEIS, and we appreciate the attention given to the analysis of the proposed project's impacts on specific water quality parameters.

In April 2015, Reclamation and DWR announced fundamental changes to the proposed project and changed its name from BDCP to the California WaterFix. The WaterFix project focuses on the construction and operation of proposed new water export intakes on the Sacramento River to divert water into a proposed 40 mile twin tunnel conveyance facility. Reclamation is now the sole lead federal agency. The proposed federal action has changed from implementing a Habitat Conservation Plan under

Section 10 of the ESA to modifying operations of the federal Central Valley Project (CVP) in order to accommodate new water conveyance infrastructure.

Project Benefits

The proposed project and alternatives would provide greater water supply reliability for the users of exported Delta water and would reduce certain adverse impacts of the CVP and State Water Project (SWP) on fish. The SDEIS shows that transporting water in tunnels would reduce the risks to CVP/SWP exports in several ways. The proposed tunnel project would provide greater protection against sudden degradation of exported freshwater caused by the catastrophic failure of the earthen levees in the Delta and the consequent intrusion of saltwater that could foul supplies of water for municipal, agricultural and industrial consumption. Given the potential for earthquakes and floods in the region and the numerous earthen levees encircling the Delta islands, water supply security is a significant concern. Transporting water via tunnels would substantially address longer term threats to export water quality caused by sea level rise, with its concomitant salt water intrusion. The proposed project would also enhance CVP/SWP project flexibility by adding a northern diversion point. The current system, which relies solely on the southerly intakes, provides limited operational flexibility and at times results in reverse flows in Old and Middle Rivers which are associated with decreased survival of endangered fishes. Added flexibility would enable better real-time management of the export operations in response to observed movement of special status fish populations. Furthermore, the SDEIS predicts that flexible use of the proposed new intake facilities, combined with the establishment of biological criteria for operation, the installation of state-of-the-art fish screens, and the reduction of reverse flows in Old and Middle Rivers, would reduce the entrapment of certain fish species into poor habitats and the entrainment of fish into the CVP/SWP system. By making these physical and operational changes in the Delta, the proposed project would address some of the many identified stressors to aquatic resources in the Delta. In addition, although not part of the WaterFix project, the State of California has launched a separate EcoRestore initiative to pursue the restoration and stewardship of 30,000 acres of floodplains, riparian forests, and wetlands within the Delta over the next four years. As this significant conservation effort was not part of the SDEIS, it was not reviewed or rated as part of our NEPA review.

Project Purpose and Need

As stated in the SDEIS, the purpose and need for the WaterFix project, as was the case for the BDCP, is to advance the co-equal goals set forth in the Delta Reform Act of 2009. Those are (1) to provide a more reliable water supply for California, and (2) to protect, restore, and enhance the Delta ecosystem. EPA recognizes the crucial public health, economic, and ecological importance of both goals. The proposed project and the alternatives evaluated in the SDEIS support the water reliability component, but largely defer actions necessary to protect water quality and aquatic life to the future.

As has been discussed throughout the development of this project, the most essential decision for achieving the desired balance between water reliability and restoration of the Bay Delta ecosystem is how freshwater flows through the Delta will be managed. This key decision is not described in the SDEIS and is, instead, deferred to future regulatory processes administered by the State of California in consultation with federal resource and regulatory agencies. The decision by the State of California and Reclamation to defer these decisions means that the impacts of the WaterFix project on the Delta ecosystem cannot be fully evaluated at this time, and that any attempt to describe the environmental impacts of the project is necessarily incomplete. Once those decisions, described below, are concluded, the evaluation of possible impacts and consideration of alternatives can be completed.

Aquatic Habitat and Water Quality

As noted above, the project has been significantly revised since the initial DEIS, yet the SDEIS relies on modeling results that are based on the BDCP alternatives. Information in the SDEIS indicates that the modeling completed for the BDCP alternatives is not necessarily representative of the environmental effects resulting from the WaterFix alternatives. NMFS and FWS concluded in 2008 and 2009, respectively, that continued operation of the CVP/SWP would jeopardize the existence of delta smelt, winter-run Chinook salmon, green sturgeon and several other fish species. Even with the predictive limitations of the modeling, the SDEIS predicts a loss of valuable aquatic habitat for many fish species in the Delta and upstream tributaries due to the combined effects of the WaterFix project, CVP/SWP exports, climate change, and increased water diversions upstream of the Delta in the Sacramento River Basin. These species have experienced sharp population declines in the last decade and showed record low abundance over the last five years. Information presented in the SDEIS shows that the WaterFix project could reduce habitat conditions for delta smelt, winter-run Chinook salmon, green and white sturgeon, striped bass, and American shad, and result in a decline of longfin smelt abundance. For example, according to the SDEIS, winter-run Chinook salmon and sturgeon may be negatively impacted when migrating past new intakes, because significant volumes of freshwater flows are diverted at the intakes resulting in less water that is also of lower quality downstream of the intakes. The SDEIS also predicts that selenium concentrations in sturgeon would increase by 12-19% as a result of the proposed project, and would exceed the FWS and NMFS benchmark for adverse impacts to sensitive species.

The modeling results presented in the SDEIS show predicted exceedances of a salinity standard at both Prisoner's Point and Emmaton. The water quality modeling predicts that the Western Delta and Suisun Marsh will become saltier over time, which is likely to cause increased exceedances of chloride criteria near municipal water supply intakes. Mitigation actions are identified in the SDEIS to prevent exceedances, and the compliance history shows that salinity standards have rarely been exceeded in non-drought years. Nevertheless, if the proposed project operations contribute to a general increase in salinity in the Delta, the flexibility that Reclamation and DWR have to operate the system to ensure that water quality criteria are met will be seriously diminished, and the two agencies will have little room for error in operating the system to protect beneficial uses and achieve the co-equal goals.

While the impacts stated above may be mitigated by appropriately timed increased flows and habitat restoration, the WaterFix project does not propose additional flows in the Delta, nor does it propose significant habitat restoration (See EcoRestore above). CVP/SWP operation scenarios that propose additional outflow, such as BDCP Alternatives 7 and 8 from the DEIS, could provide substantially more water for resident and migratory fish and provide benefits to aquatic life; however, these were not evaluated as alternatives in the SDEIS.

Pending Regulatory Actions

Several pending regulatory actions are important to understanding the full impacts of the project. First, the State Water Resources Control Board (State Water Board) will be acting on Reclamation's and DWR's recent request to add points of freshwater diversion from the South Delta to the Sacramento River in the North Delta (at the northern end of the new conveyance facility). This State regulatory action is likely to include terms and conditions, including flow requirements, that could modify proposed WaterFix operations sufficiently to produce environmental and water supply effects that have not been analyzed in the SDEIS. Additionally, the State Water Board is in the midst of comprehensively updating water quality standards through the Bay Delta Water Quality Control Plan (Bay Delta WQCP). The updated standards could result in freshwater flow management provisions and corresponding changes to water supply diversions throughout the watershed that have not been analyzed

in the SDEIS. The Delta is listed as impaired for several water quality parameters under Section 303(d) of the CWA. EPA is working closely with the State Water Board to ensure that the revised standards are sufficient to address impaired water quality conditions in the Delta and reverse the declines in the fish species. The updated standards could result in altered environmental and water supply impacts that have not been analyzed in the SDEIS.

Second, ESA Section 7 consultation with FWS and NMFS regarding the construction and operation of new conveyance facilities is underway. We understand that the FWS and NMFS are not relying solely on the SDEIS for the Section 7 consultation process and that additional information is being generated to identify criteria for operating the new WaterFix facilities, to be included in the Biological Opinions and Incidental Take Permits. This information and such operating criteria could result in environmental impacts that have not been analyzed in the SDEIS.

Third, construction of WaterFix's new water intake and conveyance infrastructure would require authorization under Clean Water Act Section 404, as well as a Rivers and Harbors Act Section 14 modification of levees permit, from the U.S. Army Corps of Engineers. Water quality and aquatic life analyses in the SDEIS show that the proposed project may cause or contribute to violations of state water quality standards and significant degradation of waters of the U.S.; therefore, additional avoidance and minimization of environmental impacts and/or compensatory mitigation may be necessary in order to comply with CWA Section 404. It is also likely that additional information and analysis not included in the SDEIS will be required to support those permit decisions and that information and analysis will better inform the overall evaluation.

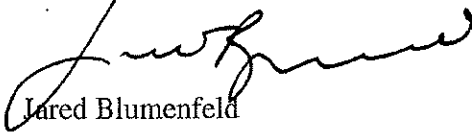
All of the above listed regulatory processes will develop new data and likely new compliance requirements beyond those provided in the SDEIS. EPA understands that these as yet incomplete regulatory requirements will be addressed through the pending actions by the State Water Resources Control Board, FWS, NMFS, and Corps of Engineers. These key decisions, and the analysis that will support them, are not yet done. Our statutory responsibility is to review the NEPA document that is in front of us at this time, however, the reality is that these future regulatory processes will have an important bearing on the project. Because these subsequent regulatory processes are likely to generate real world operational scenarios that are significantly different from the operations proposed in the SDEIS, the information is not yet available to reach definitive conclusions concerning the environmental impacts of the proposed project.

The tunnels that are discussed in detail in this draft NEPA document are an important improvement for water reliability, but the choices that will affect the operation of the tunnels, and thus the overall impacts of the project, will not be made until future regulatory actions are completed. These future decisions will supply the missing pieces necessary to determine the environmental impact of the entire project. The unusual circumstances of this project mean that the information is not yet available for a complete evaluation of environmental impacts – and for that reason a rating of “3” (*Inadequate*) for the SDEIS is required – but EPA expects that the project will continue to move forward, with those necessary additional pieces to be supplied as the later regulatory processes proceed. Under the unique circumstances of this case, the additional data, analysis and public input associated with these future regulatory processes are expected to provide the needed supplemental information to allow a full review of the environmental impacts without requiring another draft supplemental EIS. EPA will have the opportunity to support Reclamation, other federal agencies, and the State of California as they collectively continue to define an environmentally sound and effective project that would operate in a manner that simultaneously supports water supply reliability and enhances the Delta's ecosystem. EPA

believes that the upcoming actions by USFWS, NMFS, the State Water Board, and the Corps of Engineers will be critical next steps in the design and review of the project, and EPA looks forward to continuing to work with these agencies as the project moves forward.

If you have any questions, please contact me at 415-947-8702. Alternatively, your office may contact Kathleen Johnson, Enforcement Division Director. Ms. Johnson can be reached at 415-972-3873.

Sincerely,



Jared Blumenfeld