

February 16, 2023 via email

The Honorable Michael Regan, Administrator,  
U.S. Environmental Protection Agency  
[Regan.Michael@epa.gov](mailto:Regan.Michael@epa.gov)

Re: USACE DEIS Legal Deficiencies--Supplemental DEIS Required

Dear The Honorable Michael Regan, Administrator, U.S. Environmental Protection Agency

The U.S. Army Corps of Engineers Draft EIS on the Delta Conveyance Project *does not cover Project operations*. Our purpose is to alert the U.S. Environmental Protection Agency, the other cooperating agencies, the National Marine Fisheries Service, U.S. Fish and Wildlife Service, and Bureau of Reclamation, and the Council on Environmental Quality to this significant violation of NEPA in advance of the March 16, 2023, close of the comment period on the Draft EIS. The Draft EIS is EPA No. 20220183 (87 Fed.Reg. 77106.)

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The Corps must prepare and publish a supplemental Draft EIS covering Project operations.

The Delta Conveyance Project facilities proposed by the California Department of Water Resources (DWR) include massive intakes and a 45-mile-long Tunnel to divert substantial quantities of freshwater flows from navigable waters of the United States--the Sacramento River --upstream from the already impaired San Francisco Bay-Delta Estuary. Instead of continuing to flow through the Delta--which according to expert state and federal agencies needs increased, not reduced, freshwater flows-- the diverted water would be diverted to the Tunnel prior to export from the south Delta. The Corps' Draft EIS admits, "The modeling results showed consistent decreases in long-term average flows for all months on the Sacramento River north of Courtland (i.e. downstream of the proposed north Delta intakes)." (**Draft EIS**, Ch. 3, 3.18.2.2, p. 3-18-2.)

This is yet another attempt by DWR to inflict the most controversial water project in California history on the San Francisco Bay-Delta Estuary. The then-named Peripheral Canal was rejected by California's voters by a 2 to 1 margin in a statewide referendum in June 1982.

The Corps' Draft EIS on the Project *does not cover Project operations*. The Draft EIS states it was prepared "for construction of the proposed action." (**Draft EIS**, ES.1, p. ES-1.) The effects of Project operations "are not covered by this EIS." (**Draft EIS**, Table ES-2, p. ES-32.) (The Draft EIS is EPA No. 20220183, 87 Fed. Reg. 77106.) Moreover, the impacts of the Project on surface water and water supply were not evaluated by DWR as impacts under the California Environmental Quality Act (CEQA.) (**Draft EIR**, Ch. 5, p. 5-1, Ch. 6, p. 6-1.)

The National Environmental Policy Act (NEPA) requires that federal agencies take a "hard look" at the environmental consequences of their actions. (*E.g.*, *Robertson v. Methow Valley Citizens Council*, 400 U.S. 332, 350 (1990); *350 Montana v. Haaland*, 50 F.4<sup>th</sup> 1254, 1265 (9<sup>th</sup> Cir. 2022.)) But instead of doing what NEPA requires, the Corps took no look at the environmental consequences of *operating* the Delta Conveyance Tunnel Project.

According to the Draft EIS, "The project is dependent on federal action and would require federal permits," (**Draft EIS**, Ch. 1, 1.7, p. 1.7.) Permits are required to alter a federal levee or channel under Clean Water Act (CWA) section 408, to discharges of dredged or fill material into waters of the United States under CWA section 404, for work or construction of a structure in or over any navigable water of the United States under

section 10 of the Rivers and Harbors Act, and “activities affecting plant or animal species protected by the federal Endangered Species Act (ESA)...” (*Id.*)

The Corps of Engineers is the federal lead agency for the Project. (**Draft EIS**, ES.1, p. ES-1.) Four other federal agencies are cooperating agencies in the EIS process. The cooperating federal agencies are the EPA, NMFS, USFWS, and Bureau of Reclamation. (**Draft EIS**, Ch. 1, 1.6.2, p. 1-6.) The Central Valley Project (CVP) is operated by Reclamation. According to DWR, its fundamental purpose in developing the “new diversion and conveyance facilities in the Delta is to restore and protect the reliability of SWP [State Water Project] water deliveries *and, potentially, CVP water deliveries* south of the Delta,..” (**Draft EIR**, Ch. 2, p.2-2; **Draft EIS**, ES.1.1.2, p. ES-1)(Emphasis added.) *Moreover, SWP and CVP water are co-mingled in the San Luis reservoir and the Delta Mendota and San Luis canals.*

Reclamation has explained, “Both the CVP and SWP use the San Luis Reservoir, O’Neill Forebay, and more than 100 miles of the California Aqueduct and its related pumping and generating facilities.” (Reclamation website, <https://www.usbr.gov/cvp/about-cvp/About-the-CVP/California-Great-Basin-Bureau-of-Reclamation-August-24-2022>.)

In other words, if the Project is constructed and operates, some of the water ultimately delivered to Reclamation’s CVP contractors will have been taken out of the Sacramento River by the proposed new intakes and transported through the proposed Water Tunnel.

The federal government through its agencies including the EPA, NMFS, USFWS, and Reclamation and its CVP will be involved in Project operations and pre-approval review of same. The *only* EIS the cooperating agencies will have is the EIS prepared by the Corps. It must cover, not exclude, the impacts of Project operations. Because it does not cover Project operations, the prepared Draft EIS is virtually useless for the cooperating agencies attempting to carry out their responsibilities ranging from determining the impacts of Project operations on water quality to determining the impacts of operations on endangered and threatened fish species and their designated critical habitat.

The previous Bay Delta Conservation Plan/California Water Fix Final EIS/EIR was prepared *jointly* by Reclamation and DWR. (**Letter** from Kathleen H. Johnson, Director, Enforcement Division, EPA Region IX to David Murillo, Regional Director, Bureau of Reclamation, Mid-Pacific Region, January 18, 2017.) EPA’s letter said the

purpose of Reclamation's proposed action included, " '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'" 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." (*Id.* at pp. 1-2.) EPA's letter also stated "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." (*Id.* at p. 2.)

It is reasonable to conclude that the switch from a joint Reclamation/DWR EIS/EIR to an EIS by the Corps is an attempt to evade the NEPA requirement to evaluate the impacts of Project operations. An honest evaluation of Project operations would require disclosure that reducing freshwater flows through the Delta will have adverse impacts on water quality and on endangered and threatened fish species and their designated critical habitat. As the EPA said in a Technical Report, "Alteration of the natural flow regime can have cascading effects on the physical, chemical, and biological properties of riverine ecosystems." (**Final EPA-USGS Technical Report: Protecting Aquatic Life from Effects of Hydrologic Alteration**, EPA Report 822-R-16-007 USGS Scientific Investigations Report 2016-5164.)

The Corps published a notice on December 19, 2022, explaining under the heading "Environmental Setting" "The proposed project is within the Sacramento-San Joaquin Delta, a state-wide resource for recreation, water supply, cultural and historic resources, agriculture, and fish and wildlife habitat." (**Corps Public Notice** SPK-2019-00899.) The Corps' notice also said under the heading "ENDANGERED SPECIES" "The proposed activity may affect Federally listed endangered or threatened species and their critical habitat." (*Id.*)

The NEPA Regulations require the scope of an EIS to cover connected actions--meaning they are closely related. (40 C.F.R. § 1501.9(e)(1.)) It would not be possible for actions to be more closely related than constructing the Project facilities followed by operating them to divert the water away from the Sacramento River and Delta Estuary. *The Project facilities are not a statue or a monument. The only reason to construct the*

facilities is to *operate* the facilities. What the Corps has provided is unlawful segmentation of environmental review of construction impacts from operations impacts.

The scope of an EIS must include the combined environmental impacts of a construction project and the activities the project is designed to facilitate. Here, like the situation in *Thomas v. Peterson*, 753 F.2d 754, 759 (9th Cir. 1985), “it would be irrational” to construct the Delta Conveyance Project facilities but then fail to analyze the operations of the facilities to divert and export the water as if the tunnel project was built not to divert and export. In *Baykeeper v. U.S. Army Corps of Engineers*, 2006 WL 2711547 \*8 (E.D. Cal., No. CIV. S-06-1908, September 20, 2006), the court explained, “while it is the development's impact on jurisdictional waters that determines the scope of the Corps' permitting authority, it is the impact of the permit on the environment at large that determines the Corps' NEPA responsibility.”

The NEPA statute requires a detailed EIS by the lead agency on several subjects including “the environmental *impact* of the proposed action,” the adverse environmental *effects* which cannot be avoided should the proposed action be implemented,” and “*any irreversible and irretrievable commitments of resources* which would be involved in the proposed action should it be implemented.” (42 U.S.C. § 4332(2)(C) (i), (ii), and (v)(Emphasis added.)

The NEPA Regulations confirm the requirements of the statute in more detail. The definition of “*Effects or impacts* means changes to the human environment from the proposed action or alternatives that are *reasonably foreseeable* and include the following:.. (2) *Indirect effects*, which are caused by the action and are later in time or farther removed in distance but are still *reasonably foreseeable*. Indirect effects may include... related effects on air and water and other natural systems, including ecosystems. (3) *Cumulative effects*, which are effects on the environment that result from the *reasonably foreseeable* actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. (4) Effects include ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems)... whether direct, indirect, or cumulative.” (40 C.F.R. §1508.1(g)(Emphasis added.) Here, Project *operations* are “reasonably foreseeable.” The project operation and implementation impacts must be analyzed and disclosed for public review. The courts enforce these requirements. (See *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 870 (9<sup>th</sup> Cir. 2005) (“Because a ‘reasonably close causal relationship’ exists between the Corps' issuance of the permit [for a dock extension], the environmental effect of increased vessel traffic, and the attendant increased risk of oil spills, the Corps had a duty to explore this relationship further in an EIS.”)

Finally, the Corps' own regulations also make clear it must review the environmental impacts of the freshwater diversions during Project operations. *First*, the Tunnel is an "artificial waterway" that will be "connected to navigable waters of the United States"--the Sacramento River. It will "at some point in its construction or operation" result "in an effect" on the "condition, or capacity of navigable waters of the United States." The exercise of the Corps' regulatory authority includes "those activities which affect" the "condition, or capacity of the navigable waters of the United States." (33 C.F.R. § 322.5(g.) *Second*, according to the Corps, the Tunnel corridor includes "13 crossings of navigable waterways,.. " (85 Fed.Reg. 514211, August 20, 2020.) The Corps' own regulations state, "For purposes of a section 10 permit, a tunnel or other structure or work under or over a navigable water of the United States is considered to have an impact on the navigable capacity of the waterbody." (33 C.F.R. § 322.3(a.)

In conclusion, the NEPA Regulations require, "If a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and publish a supplemental draft of the appropriate portion." (40 C.F.R. § 1502.9(b.) Because the Draft EIS does not cover the environmental effects of Project operations it is so inadequate as to preclude meaningful analysis. That is true for decision-makers in the Corps and the cooperating agencies as well as for the public. The Corps of Engineers must prepare and publish a supplemental Draft EIS that analyzes the effects of Project operations on the environment.

The contact for this preliminary comment letter is E. Robert Wright, Counsel, Sierra Club California (916) 557-1104 or [bwrightatty@gmail.com](mailto:bwrightatty@gmail.com) . We would do our best to answer any questions you may have.

Sincerely,



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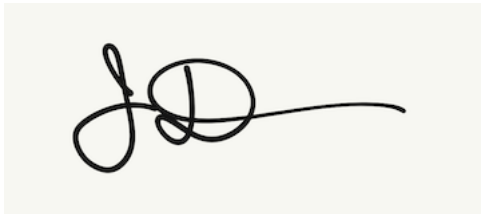
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