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Via E-Mail

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Re: Request For Supplemental NEPA Review By The Corps For The Northern Integrated Supply Project In Light Of Significant New Information Bearing On The Proposed Action

On behalf of the nonprofit organization Save The Poudre, I hereby request that the U.S. Army Copy of Engineers (“Corps”) conduct supplemental environmental analysis pursuant to the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321-4370m, by preparing a supplemental environmental impact statement (“SEIS”) or, at bare minimum, a supplemental environmental assessment (“EA”) to address and evaluate new circumstances and significant information relevant to this project and its environmental impacts. As explained below, **we request a response from the Corps by no later than March 29, 2019** informing Save The Poudre whether the Corps intends to conduct any supplemental NEPA review, and, if not, explaining the reasons why the Corps has declined to take this action.

BACKGROUND

I. STATUTORY AND REGULATORY FRAMEWORK

Congress created NEPA more than four decades ago “[t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment” 42 U.S.C. § 4321. In light of this mandate, the Supreme Court has reasoned that NEPA is “intended to reduce or eliminate environmental damage and to promote ‘the understanding of the ecological systems and natural resources important to’ the United States.” *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 756 (2004) (quoting 42 U.S.C. § 4321).

In achieving NEPA’s substantive goals, Congress created two specific mechanisms through which federal agencies must evaluate the environmental and related impacts of a



particular federal action—an EIS and an EA. *See* 42 U.S.C. § 4332(c). These procedural mechanisms are designed to inject environmental considerations “in the agency decisionmaking process itself,” and to “help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.” *Pub. Citizen*, 541 U.S. at 768-69 (emphasis added) (quoting 40 C.F.R. § 1500.1(c)). Therefore, “NEPA’s core focus [is] on improving agency decisionmaking,” *Pub. Citizen*, 541 U.S. at 769 n.2, and specifically on ensuring that agencies take a “hard look” at potential environmental impacts and environmentally enhancing alternatives “as part of the agency’s process of deciding whether to pursue a particular federal action.” *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 100 (1983). The alternatives analysis “is the heart” of an EIS or EA. 40 C.F.R. § 1502.14. NEPA’s implementing regulations require that the agency “present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public.” *Id.*

An EIS must be prepared by an agency for every “major Federal action significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(c). Under the Council on Environmental Quality’s (“CEQ”) regulations that implement NEPA, “significance” requires consideration of both context and intensity. Where a significant environmental impact is not expected, the agency must still prepare an EA and a Finding of No Significant Impact (“FONSI”). *Id.* §§ 1508.9, 1501.3. Where an EA or EIS has been previously prepared, NEPA’s regulations require an agency to supplement its prior NEPA review when “[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns,” or “[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1502.9(c).

II. FACTUAL BACKGROUND

The Corps commenced its decisionmaking and NEPA review process for the Northern Integrated Supply Project (“NISP”) in August 2004. *See* Corps, *Environmental Impact Statement – Northern Integrated Supply Project*, <https://www.nwo.usace.army.mil/Missions/Regulatory-Program/Colorado/EIS-NISP/>. The Corps issued its Draft EIS in April 2008, its Supplemental Draft EIS in June 2015, and its Final EIS in July 2018. *Id.* According to the Corps’ project website, the agency intends to issue a Record of Decision (“ROD”) authorizing this project later this year (i.e., in 2019). *Id.*

It would be a major understatement to say that this project has engendered substantial controversy. Save the Poudre, affected municipalities such as the City of Fort Collins, and many other interested parties have submitted extensive comments criticizing myriad aspects of the Corps’ decisionmaking process including the agency’s impermissibly narrow purpose and need statement, the artificially constrained analysis of practicable alternatives, the use of inappropriate screening criteria in examining project alternatives, and major project impacts that have not been adequately analyzed. Those comments are all part of the public decisionmaking record.

DISCUSSION

Although the Corps evidently intends to issue its ROD later this year, the Northern Colorado Water Conservancy District (“Northern Water”)—i.e., the project proponent—recently made a major change in project operations that alters many of the basic assumptions underlying the NISP project and the ability of Northern Water to fill the proposed Glade Reservoir. On February 28, 2019, Northern Water revealed—for the first time ever—that, in order for NISP to be viable, Northern Water may have to purchase at least “25,000 acre-feet of water” from northern Colorado farmers, which Northern Water representatives estimate “would take about a decade and 100 or more farms, depending on their size.” Loveland Reporter, *Northern Water Buys First Farm for NISP Water* (Feb. 28, 2019), available at http://www.reporterherald.com/news/larimer-county/ci_32483944/northern-water-buys-first-farm-nisp-supply. Indeed, in purchasing its first water from a northern Colorado farm in furtherance of NISP, Northern Water spent \$330,000 to purchase a mere 30 acre-feet of water—i.e., \$11,000 per acre-foot. Even assuming other farms will sell to Northern Water at no more than this rate (a proposition that is far from certain), purchasing all of the required water would add an additional \$275 million in total project costs. *See id.* On the same day that local newspapers revealed this approach, Northern Water separately unveiled its new regime—called the WaterSecure program—and launched a website providing information about it. *See* Northern Water, *WaterSecure*, available at <https://www.northernwater.org/sf/nisp/watersecure>. For several reasons, these purchases would represent a wholesale change to the approach Northern Water will take to acquire the water for NISP, and is a fundamentally different and highly significant modification to the project that bears directly on the proposed action, its impacts, and its alternatives.

First, Northern Water’s new approach of purchasing some or all of the required 25,000 acre-feet of water from northern Colorado farms—i.e., more than 60% of the 40,000 annual acre-feet of water that Northern Water alleges is a necessary project component of NISP—has *never* been analyzed as part of the Corps’ Draft EIS, Supplemental Draft EIS, or Final EIS. To the contrary, the Final EIS makes clear that under Northern Water’s preferred alternative—as well all other action alternatives—“\$0” would be spent on “water rights acquisition.” Final EIS at 2-103. In contrast, the Corps estimated that under the *no-action* alternative, Northern Water would have to spend \$700 million on water rights acquisition by buying water rights from farms at approximately \$15,500 per acre-foot. *See* Final EIS at 2-102. Accordingly, because Northern Water’s new approach fundamentally transforms the preferred action and its underlying assumptions and operational mechanics, at minimum the Corps must prepare supplemental NEPA review disclosing to the public this new approach and soliciting public input on this substantial change.¹

¹ The Final EIS states that Northern Water already owns the water rights necessary to implement the preferred alternative. *See* Final EIS at 2-77 (“With the exception of Upper Galeton Reservoir as a point of storage for the SPWCP water right, *Northern Water owns the water rights with the necessary points of diversion and storage for Alternative 2M.*” (emphasis added)). Thus, the fact that Northern Water actually does *not* own some of these water rights—to the tune of 25,000 of annual acre-feet of water (more than half the water Northern Water claims to need from this project)—is a colossal change in the preferred alternative that alters the entire landscape of this project is a significant way.

Second, supplemental NEPA review is necessary because Northern Water’s new approach completely alters the baseline against which practicable alternatives are measured, especially in light of the significantly increased project costs. Even if Northern Water is able to buy 25,000 acre-feet at approximately \$11,000 per acre-foot—which is not certain given the fair market price for such water rights, *see* Final EIS at 2-102—this would add at least \$275 million to overall project costs, which means that certain alternatives previously dismissed due to higher costs might now be “practicable” when compared to the much higher costs of the preferred alternative in light of Northern Water’s new farm purchasing scheme. Given the new cost baseline for the project, the Corps must re-examine all practicable alternatives as judged against the new projected costs of Northern Water’s preferred alternative.²

Third, the Corps and Northern Water previously rejected alternatives that included as a component alternative agricultural transfer methods (including agricultural leasing), and did so by implementing faulty screening criteria for proven technology—i.e., rejecting the leasing of agricultural water on the purported grounds that such methods are technologically unproven. *See* Final EIS at A-115 (EPA comments advocating the consideration of alternative agricultural transfer methods). Now that Northern Water has dramatically changed course and *is* purchasing and/or leasing water from northern Colorado farms, the Corps must revisit the concept of alternative agricultural transfers and analyze other alternatives involving this concept that is, in fact, feasible as demonstrated by Northern Water’s selection of this new approach to acquire more than half of the water needed for this project to be viable.

Fourth, Northern Water’s significant change in operations for the preferred alternative necessarily modifies many of the key factors under NEPA related to this project, such as the purpose and need and whether the preferred alternative can even achieve the purported need for this project. In particular, since there is much uncertainty as to whether and when Northern Water would be able to achieve its goal of purchasing 25,000 acre-feet of water from northern Colorado farms, it is highly speculative as to whether the preferred alternative can provide 40,000 acre-feet of water (which is a requirement to satisfy the project’s stated need).³ The Corps

² The costs associated with NISP have grown exponentially since the beginning of this project. In 2008, the Corps estimated that the project would cost \$350 million. By the 2018 Final EIS, the Corps estimated that the project would cost \$1.1 billion—i.e., three times what the Corps estimated only ten years earlier. With Northern Water’s new approach, the estimated costs will increase at least another \$275 million and likely much more than that as farms sell their water rights at higher per-unit rates.

³ Northern Water has indicated that it intends to resell the purchased land, conditioned to allow the exchange to operate in perpetuity, and may claim that such transactions will allow them to make these purchases at zero cost. *See* Loveland Reporter, *supra* (“Eventually, the district plans to sell the farms to private owners, he said, with the stipulation that the water would stay with the property.”). Until such a time as Northern Water can provide signed contracts for resale of all of the purchased land, this approach remains speculative at best. Even if Northern Water was able to eventually resell all of the properties at favorable prices—which is far from certain—the project would incur substantial carrying costs associated with land ownership in the interim.

must analyze the likelihood that Northern Water will be able to acquire the rights to 25,000 acre-feet of water, the estimated costs of doing so, the anticipated time frame before such acquisition is completed, and what happens in the event that Northern Water is not able to acquire 25,000 acre-feet of water through this new approach.⁴

Fifth, the modeling conducted to date by the Corps and/or Northern Water is no longer accurate since the modeling assumptions previously used in assessing mass-balance water quality and return flow obligations fail to include any analysis of this new approach and how those projections change if Northern Water is (or is not) able to purchase 25,000 acre-feet of water from farms.

Sixth, there will be highly significant environmental impacts under Northern Water's new approach, in which the project proponent will separate Poudre river water from the land and replace it with South Platte water (then reselling and/or leasing the land to an irrigated agricultural user). Because of the multi-river issues inherent in this approach, there are myriad adverse effects to water quality, wildlife, and other aspects of the ecosystem that the Corps has not yet examined. The need for a "hard look" at these new impacts counsels in favor of supplemental NEPA review.⁵

Seventh, now that Northern Water's preferred alternative and the no-action alternative *both* involve as a key component the purchase of many acre-feet of water from farms, there is not an alternative that is genuinely distinct from the action alternatives. Because the Corps must include an analysis of a true no-action alternative—which must be conceptually distinct in terms of its components from the action alternatives—supplemental NEPA review is necessary to ensure that the agency explores a genuine no-action alternative as a proper baseline for assessing the action alternatives against that no-action standard.

None of these costs have been disclosed in any of the NEPA documents to date, nor compared to alternatives in determining the practicability of other approaches.

⁴ Not only will Northern Water's new approach dramatically increase overall project costs and the amount of time before the project is viable due to water rights acquisition, but there will be additional costs and time expended addressing water rights issues associated with this new approach in water court. These costs and delays must also be examined as part of a supplemental NEPA analysis.

⁵ Under this new approach, every purchase/exchange allows Northern Water to displace clean Poudre River water with more contaminated and more polluted water from the South Platte River. The mixing of water from these two sources will very likely adversely impact water quality for all ditch customers, including landowners who have *not* sold or leased their water rights to Northern Water. The Corps must analyze these water quality impacts, which require landowners who refuse to sell to Northern Water to nevertheless accept more polluted and lesser-quality water from the South Platte that otherwise would flow from the much cleaner Poudre River, and would require this outcome presumably without any compensation for those landowners from Northern Water or the Corps.

Eighth, in conjunction with this new approach, Northern Water expects to exchange 25,000 acre-feet of water between several ditch companies and the NISP participants. However, there is nothing in the Final EIS or elsewhere quantifying the costs of any contracts or other agreements with these ditch companies, nor any evaluation of what happens if the ditch companies are unwilling to partner with Northern Water on this project. This, too, must be addressed through supplemental NEPA analysis.

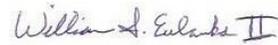
Ninth, supplemental NEPA review is necessary because Northern Water's new approach to the preferred alternative changes the assessment of impacts to the irrigated agriculture-related economy of northern Colorado. Whereas the Final EIS stated that the no-action alternative "would likely result in a moderate to major effect on irrigated agricultural economy in the study" due to widescale purchase of water rights under the no action alternative, Final EIS at 4-541, the Corps stated that "[u]nlike the No Action Alternative, Alternative 2M would not rely on transfers of agricultural water rights as a source of supply"; "[c]onsequently, there would not be effects on the irrigated agriculture-related economy due to water transfers." *Id.* at 4-545. Clearly, the Corps' earlier assumption that the preferred alternative would not involve transfers of agricultural water rights is no longer accurate, nor is the conclusion accurate that the local agricultural economy will not be impacted by implementation of the preferred alternative. This aspect of the Final EIS needs to be revised to account for current information on the preferred alternative and to accurately identify economic and other effects that will reasonably flow from Northern Water's new approach.

Given the many areas of the Final EIS that are now outdated, inaccurate, or flawed, it is imperative that the Corps update its analysis of project impacts, alternatives, and purpose and need. This critically important information requires supplemental NEPA review addressing these concerns both because Northern Water has made "substantial changes in the proposed action that are relevant to environmental concerns," and the new approach constitutes "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts," 40 C.F.R. § 1502.9(c)(1). Thus, because agencies "shall prepare supplements" to final EISs where either criterion is satisfied, *id.*, the Corps must conduct supplemental NEPA review and issue an SEIS (or at least a supplemental EA) addressing this vitally important issue that is central to the Corps' purpose and need analysis, evaluation of reasonable alternatives that could satisfy the need for this project, and the ultimate decision as to whether the Corps should authorize this project under Section 404 of the Clean Water Act. In conducting supplemental NEPA review, Save The Poudre strongly urges the Corps to subject that document to public comment and input, in light of the controversial nature of this project and the immense public interest in this project shown to date by Colorado residents. In our view, absent a supplemental NEPA analysis incorporating the new elements of the preferred alternative and public comment on that evaluation, the Corps' action would not satisfy NEPA's "hard look" standard and would, instead, be sweeping vital aspects of this project and its effects under the rug,

CONCLUSION

For the reasons explained above, Save The Poudre believes that the Corps must conduct supplemental NEPA review as directed by the CEQ's NEPA regulations to analyze various aspects of Northern Water's new WaterSecure program and how it impacts this project, its purpose and need, its impacts, and feasible alternatives. Please let me know by **no later than March 29, 2019** if the Corps intends to prepare a Supplemental EIS or EA in response to this letter and the significant new information identified herein. If the Corps decides not to conduct any further NEPA review despite the new information set forth in this letter, please provide a written response by March 29 explaining the reasons why the Corps has declined this request. I look forward to hearing from the Corps about this matter. Please let me know if you would like to schedule a conference call to discuss this matter in person.

Respectfully submitted,



William S. Eubanks II