

and all required measures shall be capable of successful implementation; (c) the permit is consistent with any DFG regulations; (d) the applicant shall ensure adequate funding to implement mitigation and monitoring; and (e) the issuance of the permit will not jeopardize the continued existence of the species.²⁰⁷

Based upon our review of the proposed Habitat Conservation Plan/Section 2081 permit ("HCP") for the water transfer, the HCP fails to meet the statutory requirements under both the federal and state endangered species acts for the reasons described below.

Recommendation: The proposed HCP must be substantially revised to include the identification, analysis and mitigation of a number of impacts at the Sea and surrounding areas, the removal of the fish pond mitigation and replacement with non-speculative, fully analyzed and detailed mitigation measures for impacts at the Sea and surrounding areas, improved adaptive management and monitoring, further in-depth analysis of a number of species proposed to be covered, identification of specific and secured funding for the proposed plan, and the inclusion of a number of foreseeable events that should not be classified as "unforeseeable" for purposes of receiving "no surprises" assurances.

G25-77

A. THE PROPOSED HCP FAILS TO IDENTIFY ALL PROJECT IMPACTS.

G25-78

The FWS Habitat Conservation Planning Handbook ("HCP Handbook") states that the project applicant should include in an HCP all actions that (1) are likely to result in incidental take; (2) are reasonably certain to occur over the life of the permit; and (3) for which the applicant has some form of control.²⁰⁸ Here, the project applicants have failed to identify all of the impacts to the species at the Salton Sea and surrounding areas from the reduction of flow of water to the Sea due to the implementation of on farm conservation. In addition to the increase in salinity and decrease in the size of the Sea, as discussed *supra* under Biological Impacts, the Sea will also experience wide fluctuations in temperature and water quality. The Regional Water Quality Control Board ("RWQCB") from Region 7 has submitted testimony to the State Water Resources Control Board that states that on farm conservation will result not only in an increase in selenium in drains leading to the Sea, but it may have a significant impact in the Sea itself.²⁰⁹ Both the RWQCB and other experts, see discussion *supra* under Biological Impacts, explain that a decline in inflow to the Sea and subsequent reduction in fish at the Sea, may result in an imbalance in the Sea's equilibrium. Due to unknown factors, the Sea has previously been successful in keeping Selenium levels relatively low. There is no discussion in the HCP regarding impacts from possible Selenium increases at the Sea.

In addition, temperature fluctuations, including significant increases in temperature, and a decline in water quality (e.g., increased eutrophication, pesticides, etc.) are likely to lead to an

Response to Comment G25-78

There is no reason to suspect that biological processes will not continue to limit water-borne selenium concentrations in the future (as they do in saline, evaporation ponds; see the response to Comment R5-68). Increased summer temperatures in a shallower Sea are possible. However, similar to changing input nutrient concentrations, it is not possible to predict what effect changing temperatures will have on warm water fish or bird disease outbreaks (see the response to Comment R5-76). In addition, the revised Salton Sea strategy (see Master Response for *Biology—Approach to Salton Sea Habitat Conservation Strategy* in this Final EIR/EIS) will result in the avoidance of salinity and elevation impacts until the year 2030.

The HCP addresses impacts to covered species that could occur as a consequence of the covered activities, including water conservation and transfer. An evaluation of changes in the invertebrate community and the response of migratory birds in general is not necessary or appropriate in an HCP. The HCP individually addresses impacts of the Proposed Project (both water conservation and transfer and the HCP components) on covered species that exploit invertebrates at the Salton Sea (e.g., snowy plover, long-billed curlew).

²⁰⁷ Fish and G. Code § 2081.

²⁰⁸ FWS, Habitat Conservation Planning Handbook (1996) at 3-12.

²⁰⁹ See Exhibit 2: Written testimony by Phil Gruenberg, Executive Officer, California RWQCB (March 22, 2002) (attached).

increase in fish kills, bird disease, and impacts on the Sea's invertebrates. See *supra* under Biological Impacts. There is no discussion in the HCP regarding impacts from temperature increases and/or a decrease in water quality. There is also no discussion regarding impacts to birds if there is a decrease in invertebrates at the Sea due to reduced inflows. Finally, there is no discussion regarding the loss of unvegetated beaches and alkalai flats and its impacts on the tens of thousands of shorebirds found at the Sea in any given season. These impacts are critical to the future health of the bird community that relies upon the Sea for habitat and food (fish and invertebrates).

Recommendation: The proposed HCP needs to address impacts to species from increases in water temperature at the Sea, a decline in water quality, including impacts from increasing Selenium, and changes in the invertebrate community at the Sea due to the decline in flow to the Sea from on-farm conservation.

G25-78

The HCP also fails to acknowledge the impact of the water transfer, via on-farm conservation, on future restoration efforts at the Sea. The Sea is projected to become unable to sustain fish populations due to an increase in salinity within the next 30 to 50 years. According to the HCP and DEIR, on-farm conservation of water for the transfer will result in the Sea becoming too saline to support fish within the next 10 years and will significantly decrease the amount of water flowing to the Sea. There are ongoing efforts to stabilize the Sea so that it provides habitat for bird species in the future. The reduction in flow to the Sea will have a tremendous impact on both the feasibility and cost of stabilizing the Salton Sea.²¹⁰ For example, on farm conservation measures will increase the cost of the proposed restoration from \$250 million to more than \$1.7 billion.²¹¹ These impacts are reasonably certain to occur over the 75 year life of the permit, and are within the control of the project applicants. Thus, these impacts must be addressed in the HCP.

G25-79

Recommendation: The HCP must be revised to include a discussion of the impacts of on-farm conservation to future restoration efforts at the Sea and must either avoid or fully mitigate those impacts.

B. THE PROPOSED HCP FAILS TO MINIMIZE AND FULLY MITIGATE IMPACTS TO SPECIES.

For all of the impacts the HCP failed to identify, see discussion *supra* at XII.A, the HCP fails to mitigate for those impacts.

G25-80

Recommendation: The proposed HCP needs to identify measures that fully mitigate for all of the impacts discussed above in XII.A.

Response to Comment G25-79

Refer to the Master Response on *Other—Relationship Between the Proposed Project and the Salton Sea Restoration Project* in Section 3 of this Final EIR/EIS.

Response to Comment G25-80

See the response to Comment G25-78.

The HCP (Attachment A to this Final EIR/EIS) identifies impacts to covered species that are attributable to the covered activities, including water conservation and transfer, and includes measures to avoid, minimize or mitigate the impact of take of covered species that could result from the covered activities.

²¹⁰ See Exhibit 3: Testimony of Tom Kirk, Executive Director, Salton Sea Authority (April 12, 2002) (attached).

²¹¹ *Id.* at 4.

G25-81

As for impacts that the HCP did identify, there is a chronic problem through the HCP in which project applicants have failed to set forth specific mitigation strategies. “[T]he law establishes that the FWS cannot comply with the strict ESA mandate that the HCP ‘minimize and mitigate’ the effects of the projects to the ‘maximum extent practicable’ simply by relying on speculative future actions by others.”²¹² The HCP currently fails to state when and how much area would be created as island nesting and roosting habitat so it is impossible to assess whether or not there is sufficient mitigation. In addition, the HCP fails to contain any specific information on the adaptive management and monitoring plan for desert pupfish, which is a key part of the mitigation for the pupfish. Finally, as discussed at length under Sections VII and VIII, the HCP fails to provide any details on exactly how the fish pond mitigation strategy would be implemented. This thinly-described and yet-to-be-developed fish pond mitigation scheme is the epitome of “speculative” mitigation.

G25-82

In addition to speculative mitigation, the HCP also fails to provide adequate mitigation for impacts to species from on-farm conservation. CESA required that the project applicants “fully mitigate” for impacts to species. Under the federal ESA, the adequacy of mitigation is determined, in part, by analyzing the quality of the habitat sacrificed with the quality of the habitat used for mitigation.²¹³ Not only is the fish pond mitigation scheme speculative, but there has been no analysis weighing the quality of the habitat sacrificed (e.g., the Sea) with the quality of the habitat used for mitigation (e.g., the fish ponds). There is also no discussion as to how and to what degree the fish ponds will provide replacement habitat for the numerous fish-eating birds.²¹⁴ In addition, the HCP fails to include any analysis to determine whether or not the replacement habitat for the Sea and its shoreline, wetlands, mudflats and tamarisk scrub as well as the drain areas will meet the needs of the impacted species. As discussed *supra* under Biological Impacts, there is reason to suspect that the loss of drain habitat will impact black rails and the loss of gently sloped shallow water habitat around the Sea will impact snowy plover, which has the largest inland breeding population in the West at the Sea.

G25-83

There is also no discussion of how the permit applicants will keep wildlife away from the 42 acres of drains contaminated by selenium. There appears to be an assumption that the birds will naturally move from the contaminated drains to the replacement habitat. However, as discussed *supra* under Biological Impacts, there has been no analysis as to whether the replacement habitat will be successful. Finally, the HCP also fails to provide adequate mitigation for impacts to species from following. As discussed, *supra* under Biological Impacts, approximately 42% of the world population of mountain plovers utilize agricultural lands at the Sea. As lands are taken out of production – up to 75,000 acres – to provide water for the transfer, there will be impacts to mountain plover. The HCP fails to provide any discussion of how the HCP will fully mitigate

²¹² *Sierra Club v. Babbitt*, 15 Fed. Supp.2d 1274, 1282 (S.D. Ala. 1998). See also *National Wildlife Federation v. Babbitt*, 128 F.Supp. 2d 1274 (E.D. Cal. 2000) (discusses strict requirements for establishing that a project fulfills mitigation requirement under ESA).

²¹³ *NWF v. Babbitt, supra*, 128 F.Supp.2d at 1299.

²¹⁴ See *supra* at VIII.A.

Response to Comment G25-81

The comment specifically refers to a lack of detail in the HCP regarding the specifics of how nesting islands would be created, the specifics of the pupfish adaptive management program, and the details of how the forage pond mitigation strategy (Approach 1) would be implemented. Both the nesting island and forage pond mitigation were elements of Salton Sea Approach 1, which is described in the HCP. Subsequent to the release of the Draft EIR/EIS and HCP, IID has revised the HCP to eliminate Approach 1 (see the Master Response on *Biology—Approach to Salton Sea Habitat Conservation Strategy* in Section 3 of this Final EIR/EIS). In addition, IID revised the HCP, in coordination with USFWS and CDFG, to more clearly define the adaptive management approach for desert pupfish. The revised HCP is included as Attachment A to the present document.

Response to Comment G25-82

The comment refers to elements of Salton Sea Approach 1 of the Draft HCP. Because of concerns expressed by USFWS, CDFG, and others commenting on the HCP, IID has eliminated Approach 1 and revised the HCP to reflect the new approach (see Attachment A to this Final EIR/EIS). Also, please refer to the Master Response on *Biology—Approach to Salton Sea Habitat Conservation Strategy* in Section 3 of this Final EIR/EIS.

Response to Comment G25-83

The approach to the Drain Habitat Conservation Strategy is to create an equivalent amount of managed marsh habitat as the acreage of vegetation currently supported in the drainage system. The managed marsh habitat would be of much better quality than drain vegetation, as explained in Section 3.5 of the HCP. In the drainage system, water quality would decline slightly but the nature and extent of vegetation would not be expected to change substantially. An analysis of the potential effects of water quality changes and the resultant effects on species using drain habitat is provided in the Draft EIR/EIS and HCP. This analysis shows a small effect on reproductive productivity. Thus, under the Proposed Project, habitat availability in the drains would remain similar to existing conditions, but some species could experience slightly lower reproductive success.

Response to Comment G25-83 (continued)

With the creation of the managed marsh, individuals currently using the drainage system could move to exploit the new habitat, in which case these individuals would not experience any adverse effects. Alternatively, they could stay in the drains, but juveniles produced by individuals in the drains or in other marsh habitats (e.g., the refuges) could colonize the managed marsh. Although individuals remaining in the drains could experience reduced reproductive success relative to the No Project condition, the overall species population would increase because of colonization of the managed marsh. In short, the managed marsh would be expected to support an equivalent or greater number of individuals as are currently in the drains and thereby increase the overall population.

To receive an incidental take permit under Section 10 of the federal ESA, the applicant must minimize and mitigate to the maximum extent practicable the *impact* of the proposed taking (emphasis added). To receive an incidental take permit under Section 2081 of the Fish and Game Code, the applicant must fully mitigate the *impact* of the take (emphasis added). The potential for take and the impact that the potential take could have on each of the covered species associated with agricultural fields is evaluated in Section 3.8 of the Draft EIR/EIS. As described for each species, the potential for take and the level of potential take of species associated with agricultural fields as a result of the covered activities (including fallowing) is expected to be very low. Thus, the *impact* of such take on the species' populations would be minimal. In keeping with this minimal potential impact, only a low level of mitigation is required to fully mitigate. An additional mitigation measure was added to the Agricultural Field Habitat Conservation Strategy to further address effects to covered species from fallowing.

Approach 1, Hatchery and Habitat Replacement, in the Salton Sea Conservation Strategy is no longer being considered.

More detailed and species-specific analyses of the impacts to covered species from the covered activities and the effect of implementing the HCP measures have been added to the HCP (see Attachment A of this Final EIR/EIS).

impacts to these species. Without any of the above analysis, there is no basis for either FWS or DFG to determine that the proposed measures "fully mitigate" impacts to the covered species.

Recommendation: The HCP needs to provide a more detail analysis of mitigation for impacts at the Sea and its surrounding shoreline and wetlands, in the tamarisk ecotone, in the drains and in the agricultural lands. In addition, in the absence of compelling further analysis, which is unlikely to be produced, the HCP should abandon the fish pond mitigation scheme as it fails to "fully mitigate" for the impacts to covered species at the Sea.

C. THE PROPOSED HCP SUFFERS FROM INSUFFICIENT ADAPATIVE MANAGEMENT AND MONITORING.

The HCP Handbook says that the FWS should not approve an HCP using conservation strategies that have a low likelihood of success.²¹⁵ CESA also states that "[a]ll requirement measures shall be capable of successful implementation."²¹⁶ "A key element of adaptive management is the establishment of testable hypotheses linked to the conservation strategies and their biological objectives."²¹⁷ In addition, the HCP should establish "threshold levels" that are "clearly defined in the HCP and based upon *measurable criteria*, and monitoring should be linked to those measurable criteria. The establishment of measurable criteria would dictate the type of monitoring, including the number of samples, distribution of samples and use of controls.²¹⁸ Here, the HCP lacks any of this specificity for its proposed adaptive management and monitoring plans for each conservation strategy. There are no specific goals or objectives to monitor the success of the conservation strategies for the Salton Sea, tamarisk ecotone, drain habitat or agricultural lands. Furthermore, the HCP does not contain an adaptive management program for the desert pupfish. This plan is supposed to be developed at a later unspecified time. Finally, the HCP fails to contain any monitoring program for the drains contaminated with Selenium. Without monitoring, there cannot be sufficient adaptive management. Thus, without specific biological goals and measurable criteria for each covered species and the mitigation strategies, there is no basis in the record for the FWS and DFG to conclude that the HCP provides mitigation measures that are likely to be successful.

Recommendation: The adaptive management and monitoring plans for each covered species must be rewritten so that they contain specific biological goals and measurable criteria. In addition, the adaptive management and monitoring plan needs to be formulated for the desert pupfish as well as for impacts to the covered species that are likely to utilize the drains contaminated with Selenium.

D. A NUMBER OF SPECIES SHOULD NOT BE CONSIDERED "COVERED" UNDER THE HCP.

²¹⁵ HCP Handbook at 3-25.

²¹⁶ Fish and G. Code § 2081(b)(2).

²¹⁷ HCP Handbook at 3-25.

²¹⁸ *Ibid.* (emphasis added).

Response to Comment G25-84

The monitoring and adaptive management program has been revised. The analysis of the impacts of the covered activities and the effect of implementing the HCP measures on covered species has been revised to provide a more in-depth analysis. The pupfish mitigation and monitoring program described in the HCP has been modified to provide greater detail and to more clearly define the structure of the adaptive management program. The revised HCP, which includes detailed flow diagrams, describes how pupfish and pupfish habitat (e.g., selenium concentrations) would be monitored over the term of the permit. Please refer to Attachment A, Habitat Conservation Plan, in this Final EIR/EIS.

With respect to biological goals, see the response to Comment G26-24.

G25-83

G25-84

G25-85

A species may be covered in an HCP as long as the plan addressed the conservation of the species and its habitat as if the species were listed pursuant to the ESA.²¹⁹ Here, there are a number of unlisted species for which the HCP lacks even the most basic information to show that the conservation of the species is being provided for in the HCP. This is particularly acute for those bird population that rely heavily on the Sea and surrounding areas for their continued existence – e.g., the American White pelican (20-30% of the North American population utilize the Sea), mountain plover (30-50% of the world's population utilize the Sea), eared grebe (90% of North America's population utilize the Sea), Black skimmers (40% of California's breeding population utilize the Sea), gull-billed terns (the largest colony in the Western U.S. exist at the Sea) and double-crested cormorant (the largest breeding colony in California exists at the Sea). In addition, the HCP lists a number of bat species to be covered for which there is no information in the HCP other than a commitment by IID to provide \$600,000 for unspecified research and mitigation.

Recommendation: Do not list unlisted species as covered by the HCP if there is no solid information from which we can gather that the species are being adequately protected.

E. THE HCP LACKS ADEQUATE FUNDING.

In order to issue an ITP under both the federal and state ESA, the HCP must ensure that there is a reliable funding source for the plan's mitigation measures.²²⁰ Here, the HCP identifies \$22.5 million in money committed by the permittees. However, the cost of this plan, while not specified, will far exceed \$22.5 million. The HCP is vague regarding how additional monies would be secured. The HCP states that "[a]ny mitigation costs in excess of the \$22.5 million . . . could be funded through one or a combination of the following: revenue generated through conservation and transfer of water, additional funds contributed by the water agencies, and grants or funding provided by the federal and state governments."²²¹ Thus, without a specified amount to fully fund mitigation and without the identification of secured funding for all of the mitigation, the proposed HCP fails to fulfill the federal and state endangered species acts' requirement for "adequate funding."

Recommendation: The HCP must quantify the full cost of mitigation for the take of all covered species. It must also identify the sources of secured funding.

F. PERMITTEES HAVE NOT SATISFIED THE REQUIREMENTS TO RECEIVE "NO SURPRISES" ASSURANCES UNDER FEDERAL REGULATORY POLICY.

²¹⁹ HCP Handbook at 4-1, quoting H.R. Report No. 97-835, 97th Congress, Second Session, and 50 Federal Register 39681-39691.

²²⁰ See *NWF v. Babbitt*, supra, 128 F.Supp.2d at 1291 (court held that the FWS acted arbitrarily when it issued an ITP for a plan that failed to identify the specific source of secured funding); *Sierra Club v. Babbitt*, supra, 15 F.Supp.2d at 1282 (court held that the FWS could not rely on funding from an "unknown source for an unknown amount").

²²¹ HCP at 5-2 (emphasis added).

Response to Comment G25-85

Eared grebes are not a species covered by the HCP. There is considerable information available about the ecology of white pelicans, mountain plover, black skimmers, and gull-billed terns, both in general and at the Salton Sea. The HCP was developed with close coordination with the U.S. Fish and Wildlife Service and the California Department of Fish and Game and the available information on these species was not deemed inadequate for issuing permits under the federal and state Endangered Species Acts.

Based on discussions with and input from the U.S. Fish and Wildlife Service and the California Department of Fish and Game, the HCP has been revised to include a more detailed strategy and timeline for the Other Covered Species Conservation Strategy (see Attachment A, Habitat Conservation Plan, in this Final EIR/EIS). In addition, species-specific evaluations of the effects of the covered activities and implementation of the HCP on these "other covered species" have been added.

Response to Comment G25-86

Prior to issuance of the Incidental Take Permit, an implementation agreement for the HCP would be completed between IID, USFWS, and CDFG. The implementation agreement will include assurances that adequate and reliable funding is available to implement all measures included in the HCP.

G25-87

The court in *NWF v. Babbitt* found that permittees who avail themselves of assurances shift the risk of poor HCP performance to species.²²² Thus, permittees must agree to broad adaptive management provisions in which they take financial responsibility for ensuring that the HCP will achieve its stated objectives. As discussed, *supra*, the HCP lacks sufficient adaptive management and monitoring, and adequate funding to ensure that the HCP will achieve its stated goals.

Recommendation: Until the HCP has fully identified mitigation measures, detailed sufficient adaptive management and monitoring plans and secured adequate funding for all mitigation measures, the FWS should not grant the permittee any "no surprises" assurances.

G. THE UNFORESEEN CIRCUMSTANCES PROVISION IS TOO BROAD.

G25-88

As part of defining regulatory certainty in an HCP, the permit applicants must set forth all foreseeable circumstances that may effect an HCP. Any circumstances left out will be considered "unforeseeable" and thus the permittee is not responsible for providing additional funding or land to address these unforeseen circumstances. Here, the range of foreseeable circumstances detailed in the HCP fails to include the very foreseeable possibility that the ponds will fail, the newly created habitat for drains, wetlands and shoreline may not serve as effective habitat, and the possibility that Selenium will increase in the Sea. All of these circumstances are foreseeable and must be addressed in the HCP instead of shifting the responsibility and cost to FWS/DFG.

Recommendation: The HCP needs to expand the range of foreseeable circumstances to include the failure of the ponds, the failure of replacement habitat at the Sea, in the Tamarisk scrub and in the drains, and the possibility that Selenium will increase in the Sea due to reduced inflows.

XIII. ENVIRONMENTAL JUSTICE ISSUES

G25-89

Executive Order 12898, signed by President Clinton on February 11, 1994, directs "Federal agencies to take the appropriate and necessary steps to identify and address disproportionately high and adverse effects of Federal projects on the health and environment of minority and low-income populations to the greatest extent practicable and permitted by law." One of the objectives of the Executive Order is to enhance opportunities of minority and low-income people to access public information about projects that may impact them disproportionately and to participate in the decision-making process and evaluation of alternatives. Unfortunately, the DEIR/DEIS employs such a superficial and myopic analysis of the environmental justice implications of the proposed IID water transfer that it completely fails to comply with the letter or intent of EO 12898.

A. THE ENVIRONMENTAL JUSTICE ANALYSIS IN THE DRAFT EIR/EIS IS SUPERFICIAL AND EMPLOYS A FLAWED METHODOLOGY

²²² 128 F.Supp.2d at 1293-1299; *see also* 64 Fed. Reg. 11485 (March 3, 1999) (Addendum to the HCP Handbook that sets forth the criteria for granting no surprises assurances to permittees).

Response to Comment G25-87

The monitoring and adaptive management programs for each of the Conservation Strategies have been revised to more clearly identify what information will be collected in the monitoring program, and how that and other relevant information will be used to adjust the conservation measures. Adjustments that would be outside the scope of the adaptive management program have been defined. With respect to adequate funding, see response to Comment G25-86.

Response to Comment G25-88

IID has eliminated the forage pond strategy (Approach 1) for mitigating Salton Sea impacts and revised the HCP accordingly (see the Master Response on *Biology—Approach to Salton Sea Habitat Conservation Strategy* in Section 3 of this Final EIR/EIS). In addition, IID has worked with USFWS to provide additional detail on the distinction between changed and unforeseen circumstances. These changes are reflected in the revised HCP (which is included as Attachment A in this Final EIR/EIS).

Response to Comment G25-89

In response to comments, the text of Section 3.15 has been revised. The changes are indicated in subsection 3.15 in Section 4.2, Text Revisions in this Final EIR/EIS.

The DEIR/DEIS divides potentially impacted areas into geographic subregions, including the IID water service area subregion, the Salton Sea subregion, and the SDWCA service area subregion. The DEIR/DEIS confines its environmental justice analysis to the question of whether the Proposed Project would cause adverse impacts that affect communities differently within each subregion. And as the DEIR/DEIS points out repeatedly, because the Proposed Project is regional in scope, its environmental impacts are likely to affect different communities within subregions equally. This is the justification that the DEIR/DEIS uses to conclude that the Proposed Project has no environmental justice implications.

The DEIR/DEIS does not even address the far more troubling question of disparate environmental impacts of the Proposed Project between subregions, even though it predicts that some subregions (the SDWCA service area) will experience no adverse environmental impacts), while others (Salton Sea and the IID water service area) could or will experience unmitigable adverse environmental impacts. One potential impact of concern to people who live in the Salton Sea and IID water service area subregions (and in other communities near the Sea but not included in the DEIR/DEIS analysis) is the health and regional economic impact of regional air quality deterioration that could be caused by the proposed project.

B. THE DISPROPORTIONATE IMPACTS OF THE PROPOSED TRANSFER ON THE SALTON SEA SUBREGION PRESENT A QUINTESSENTIAL ENVIRONMENTAL JUSTICE PROBLEM

In the Salton Sea subregion, the DEIR/DEIS states that "the Proposed Project would accelerate the decline of the Salton Sea's elevation and water quality, and induce other environmental effects that have been described elsewhere in this DEIR/DEIS."²²³ Presumably, the almost inevitable dust storms and air quality problems that would affect communities situated at the receding shoreline of the Salton Sea are among the "other environmental effects" that would be induced by the transfer. However, the DEIR/DEIS concludes that there would be no significant environmental justice effect from significant air quality deterioration in the Salton Sea subregion because all communities within the subregion would find that their environment had been equally degraded. This conclusion defies logic. People who live in the Salton Sea subregion could face very serious health risks and quality of life impairments from the implementation of the proposed project. The proposed project primarily benefits Southern California water users on the urbanized and politically powerful coast. This is an environmental justice issue that merits honest analysis, as required by EO 12898.

C. THE PROPOSED PROJECT WOULD HAVE A SIGNIFICANT DISPROPORTIONATE EFFECT ON THE TORRES MARTINEZ TRIBE.

The DEIR/DEIS notes that the Torres Martinez Indian Reservation is within the area that would be impacted within the Salton Sea subregion. However, the DEIR/DEIS concludes that there would be no disparate impact on the Tribe because all other communities within the subregion would be equally affected. Even under the completely flawed analysis provided in the

Response to Comment G25-90

In response to comments, the text of Section 3.15 has been revised. The changes are indicated in subsection 3.15 in Section 4.2, Text Revisions in this Final EIR/EIS.

Response to Comment G25-91

The Draft EIR/EIS has been revised to include additional discussion of the Torres-Martinez Tribe's concerns, based on government-to-government consultations with the Tribe, USFWS and Reclamation. These changes are indicated in this Final EIR/EIS in subsection 3.9 under Section 4.2, Text Revisions. The Draft EIR/EIS has also been revised to include a different methodology for analyzing and disclosing potentially disproportionate high and adverse impacts (including air quality). These changes are indicated in this Final EIR/EIS in subsection 3.15 under Section 4.2, Text Revisions. USFWS sent a letter on April 8, 2002, to five Tribes in the Coachella Valley, including the Cabazon Tribe, offering technical assistance and government-to-government consultations regarding the water transfer.

G25-89

G25-90

G25-91

²²³ DEIR/DEIS, p. 3.15-14.

DEIR/DEIS, this conclusion seems strained. The Torres Martinez Tribe only has one Reservation, and it is located at (and partially under) the Salton Sea. The Reservation cannot pick up and move if, in the worst case scenario, the exposure of lake bed at the Salton Sea causes terrible dust storms. An Indian Reservation is differently situated from other communities in that the special sovereign and cultural existence of the Tribe is connected with its Reservation. The environmental justice implications of putting this risk on the Torres Martinez Tribe should have been addressed.

Additionally, the Department of Interior has not met its fiduciary responsibility to follow EO 12898 by consulting with neighboring sovereign tribes. The Cabazon Tribe is a member of a consortium of governments (Coachella Valley Association of Governments), which recently passed a resolution opposing the water transfer project if it had significant adverse impacts on the Salton Sea.

G25-91

D. A MORE APPROPRIATE ENVIRONMENTAL JUSTICE ANALYSIS WOULD COMPARE THE SUBREGION(S) BENEFITING FROM THE PROJECT WITH THE SUBREGIONS THAT WILL EXPERIENCE THE ENVIRONMENTAL IMPACTS.

While there is no standard way of structuring an environmental justice analysis, determining whether low income people and minorities are disproportionately impacted by a Federal project seems to require drawing comparisons between the population that is negatively impacted by the project and the general population or, where identifiable, the population that would benefit from the proposed project.

The DEIR/DEIS blithely notes that the Hispanic population in the project area exceeds 70 percent.²²⁴ It could also have noted, but did not, that Imperial County, which is basically covered by the IID water service area subregion, has one of the highest poverty rates in California and a population that is about 80 percent minority. Imperial County also has the highest rate of childhood asthma hospitalizations in the state – an important consideration for a project that increase dust and PM10 levels even more. It does not contribute to the debate to conclude, as the DEIR/DEIS tries to do, that the proposed project does not have significant environmental justice implications because its harmful impacts will be shared equally by all communities in Imperial County. Because both the potential harmful impacts and the potential benefits of the proposed project are regional in nature, a much more appropriate environmental justice analysis would compare the project's impacts by region. Even the most cursory comparison of low-income populations, minority populations, and existing air quality impairments between the IID water service area subregion and the SDWCA service area subregion raises environmental justice concerns with the proposed project.

G25-92

XIV. ERRATA

The DEIR QSA implementation scenario shows transfers beginning year 2002 (the current year), yet the transfer agreements have not been finalized and to date no farmer in the Imperial Valley

G25-93

²²⁴ DEIR/DEIS, p. 3.15-1.

Response to Comment G25-92

In response to comments, the text of Section 3.15 has been revised. The changes are indicated in subsection 3.15 in Section 4.2, Text Revisions in this Final EIR/EIS.

Response to Comment G25-93

The comment regarding the Project start date is noted. At the time the IIDSS was used to predict Project impacts, it was thought that the Project would begin in Year 2002. Although the Lead Agencies now understand that the Project, if approved, would not start until Year 2003, the essentially negligible change in impacts that could be seen from starting the IIDSS model runs at Year 2002 versus Year 2003 do not warrant the substantial cost that would be incurred to produce all new model runs. Therefore, the Lead Agencies have decided that the text and the time frame for the model runs will remain as reported in the Draft EIR/EIS.

has subscribed to the conservation program, making it extremely unlikely that any water will be conserved or transferred this calendar year.²²⁵

G25-93

Recommendations - Table 2-5 and all other pertinent tables should be updated to show the transfer beginning in 2003. Additionally, all projections within the text that are based on the incorrect starting date of 2002 should be corrected.

G25-94

Figure 1-11 is incorrect; the Colorado River basin extends into Mexico. The revised figure should account for the full basin.

G25-95

In the cumulative impacts discussion of the LCR MSCP, the species proposed for coverage number approximately 60, not 100 as stated at page 5-22.

XV. OTHER RECOMMENDATIONS

G25-96

The law of the river discussion must be revised to distinguish between apportionment and entitlement; the two are not the same.²²⁶ Furthermore, it contradicts the DEIS for the IA, IOP and related federal actions, which is included by reference.²²⁷

The Appendices should contain the full text of both the QSA and transfer agreement, as promised at Appendix C, page 1-4.

XVI. CONCLUSION

G25-97

For all of the forgoing reasons, the Environmental Groups find that IID and USBR's DEIR/DEIS for the proposed water transfer between IID and SDCWA fails to meet the standards of either NEPA or CEQA. Our groups oppose any water transfer unless – as an integral part of such a project – adequate, reliable and enforceable avoidance and mitigation measures are incorporated into the project to reduce or avoid the projects impacts on public health, wildlife and biological resources throughout Southern California, including the project's growth inducing impacts.

Thank you,



J. William Yeates
Attorney at Law

on behalf of:

²²⁵ DEIR/DEIS, § 2.0, Table 2-5, p. 2-3.7.

²²⁶ See DEIS/DEIR, p. 1-23.

²²⁷ See IA DEIS at 1-14.

Response to Comment G25-94

The suggested changes have been made and are reflected in Section 4.2, Text Revisions in this Final EIR/EIS.

Response to Comment G25-95

The suggested changes have been made and are reflected in Section 4.2, Text Revisions in this Final EIR/EIS.

Response to Comment G25-96

We agree that "apportionment" relates to how water is divided among various users while "entitlement" relates to legal rights to use water. The section has been revised; see subsection 1.4.2 under Section 4.2, Text Revisions in this Final EIR/EIS.

Regarding the comment that the full text of the QSA and IID/SDCWA Transfer Agreement should appear in the Final EIR/EIS, the full text of these agreements is available for review at IID Headquarters, as noted in Section 1.0 of the Draft EIR/EIS. The text of the revised HCP (Attachment A to this Final EIR/EIS) has been corrected to reflect the correct location of the full text of these agreements.

Response to Comment G25-97

Comment noted. Responses to the specific comments made in your letter regarding these issues are provided.