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Via Email

Cody Wheeler, Halligan Project EIS Project Manager

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Re: Comments of Save the Poudre on the Army Corps' Final EIS for the Halligan Water Supply Project in Colorado

Dear Mr. Wheeler,

On behalf of the non-profit conservation organization Save the Poudre, we hereby submit the following comments on the U.S. Army Corps of Engineers' ("Corps") Final Environmental Impact Statement ("FEIS") for the Halligan Water Supply Project ("the Halligan Project" or "the Project"). These comments incorporate by reference all previous comments and emails submitted to the Corps by Save the Poudre and its officers, including the organization's February 21, 2020 comments in response to the Corps' Draft EIS. In general, this comment letter provides an overview of the organization's primary concerns regarding numerous legal and factual deficiencies in the Corps' FEIS for the Halligan Project; this letter does not rehash the myriad concerns raised in previous comments that the Corps has failed to adequately address or respond to in the FEIS.

1. NEPA and its implementing regulations impose on the Corps a duty to disclose relevant information about alternatives (including the no-action alternative) so that the decisionmaker and the public "may evaluate their comparative merits." 40 C.F.R. § 1502.14(b). Despite this, the Corps has failed here to disclose the comparative costs of each alternative considered in the FEIS. This is an important, foundational error that vitiates the core purposes of NEPA.

While this glaring omission would be legally problematic in any NEPA document, it is especially troubling (and unlawful) given that *this* Project requires a Section 404 permit under the Clean Water Act ("CWA"), 33 U.S.C. § 1344. The CWA and its implementing regulations mandate that the Corps *must* select the least environmentally damaging practicable alternative ("LEDPA"). *See* 40 C.F.R. § 230.10(a). An alternative is only practicable under this standard if its costs are reasonable for the type of project under consideration. *See id.* However, where the Corps has failed to publicly disclose the costs of each alternative (let alone examine the reasonable range of costs for comparable water supply projects), neither the Corps nor the public can adequately evaluate the comparative merits of the alternatives under NEPA, their ability to

satisfy the purpose and need under NEPA, or their practicability under the CWA—thus undermining the validity and integrity of both the NEPA and CWA processes for the Project.

2. The No-Action Alternative is a set of actions that the project proponent would likely take in the absence of a CWA permit. By definition, the No-Action Alternative would *not* affect wetlands or other waters of the United States that fall under the CWA’s jurisdiction. However, the Corps’ consideration and ultimate rejection of the No-Action Alternative appears designed to ensure that this option is *not* selected as the LEDPA, even though it would be substantially more cost-effective than the proposed action and it would entirely avoid impacts to waters of the United States. Here, the Corps rejected the No-Action Alternative because it ostensibly fails to satisfy the purpose and need; “even with water restrictions, storage is 600 acre-feet short of the storage reserve factor in the 1-in-50-year drought.” FEIS at 2-42. Stated otherwise, the Corps (and the project proponent) rejected this less damaging alternative because of a shortfall of water supply that is extremely nominal in the scale of water supply projects. In fact, the FEIS acknowledges that the No-Action Alternative can, as already contemplated, *nearly* achieve the purpose and need by supplying 93% of needed storage capacity during a 1-in-50-year drought. *Compare* FEIS at 2-8 (stating that “Halligan Reservoir would need to be enlarged by 8,125 acre-feet to satisfy the purpose and need” (emphasis added)), *with id.* at 2-42 (concluding that under the No-Action Alternative, “storage is 600 acre-feet short of the storage reserve factor in the 1-in-50-year drought” (emphasis added)).

There is no serious attempt, however, by the Corps or the project proponent to determine whether the No-Action Alternative (plus the three actions specified therein) can cost-effectively implement measures to satisfy the purported 600 acre-feet shortfall. If so, the No-Action Alternative *can* satisfy the purpose and need—without authorizing any impacts on waters of the United States. In other words, the Corps and the project proponent almost certainly can address this modest gap in storage as part of the No-Action Alternative, and thereby satisfy the purpose and need under NEPA and the LEDPA under the CWA and its implementing regulations. *See* 40 C.F.R. § 230.10(a)(1)(i) (defining “practicable alternatives” to include “[a]ctivities which do not involve a discharge of dredged or fill material into water of the United States”); *id.* § 230.10(a)(3) (directing that “practicable alternatives that do not involve special aquatic sites are presumed to be available, *unless clearly demonstrated otherwise*” (emphasis added)).

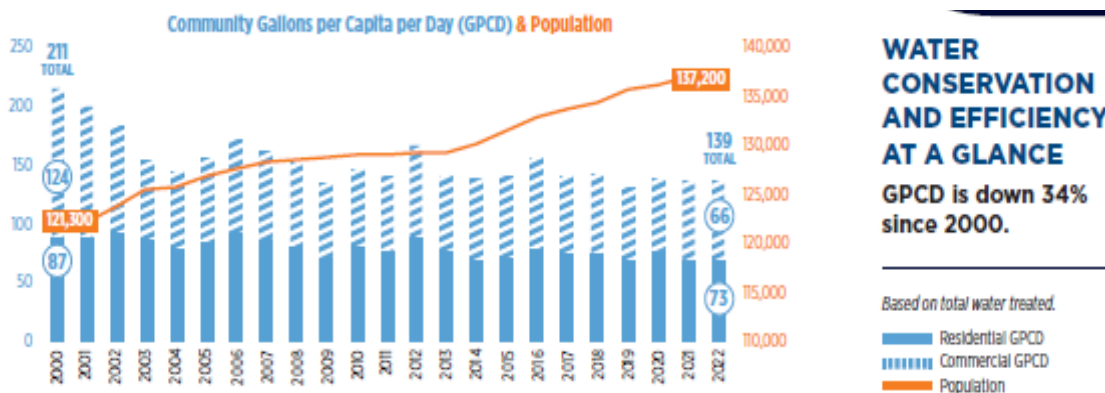
In short, because the more affordable, less environmentally damaging No-Action Alternative has not been *clearly demonstrated* to be unavailable—especially where the storage shortfall is de minimis in the context of the project proponent’s overall water storage capacity—the Corps and the project proponent have not satisfied their burden under the CWA to select the LEDPA by clearly demonstrating that the No-Action Alternative is genuinely impracticable (or, by the same token, that the No-Action Alternative cannot satisfy the purpose and need under NEPA).

3. Relatedly, the Corps (and the project proponent) assumes, as part of the No-Action Alternative, that the project proponent would impose mandatory drought restrictions when specified criteria are triggered. *See* FEIS at 2-43 – 2-44. It is the modeling of these conditions—i.e., imposing the full suite of drought restrictions, including Level 3 restrictions that would prohibit lawn watering and vehicle washing until specified drought conditions abate—that

led the Corps and the project proponent to conclude that there will be a relatively modest shortfall in water storage and water deliveries, despite these measures. *See id.*

But the FEIS does not explain or evaluate *why* stricter drought restrictions would not (or could not) be imposed under the No-Action Alternative, which likely would have the effect of ensuring sufficient water delivery and water storage in a 1-in-50-year drought without the need for a CWA permit. Indeed, if Level 3 restrictions were imposed when the current Level 1 (or even Level 2) criteria are triggered (or if other discretionary water uses could be curtailed under Levels 1, 2, and/or 3), this would conserve substantial amounts of water *before* a 1-in-50-year drought occurs, thereby creating additional reserves for storage and future water deliveries in the event that the episode ultimately turns into a 1-in-50-year drought. Understood this way, it becomes clear that the project proponent and the Corps have refused to consider common-sense options as part of the No-Action Alternative (which would obviate the need for a Section 404 permit) to make the No-Action Alternative appear impracticable so that the project proponent could avoid having to select this less damaging, more affordable option as the LEDPA.

4. A fundamental flaw of the FEIS is that the Corps and the project proponent disregard the foreseeable extent of current and future water conservation efforts that will occur in Fort Collins. Indeed, the FEIS pays lip service to the notion that the project proponent’s water demand model “account[s] for the effects of existing and future conservation measures and reflect associated water savings,” FEIS 1-13; however, in reality, that model is based on *already* outdated water demand data from “2004 to 2014,” averaging “132 total gallons per capita per day.” *Id.* As the project proponent’s most recent annual report shows, the per capita water demand has *decreased* over the last two decades:



City of Fort Collins, *Water Conservation Annual Report (2022)*, <https://www.fcgov.com/utilities/residential/conserves/water-efficiency/water-efficiency-plan>.

In addition, while the project proponent has implemented *some* water conservation measures that are modestly reducing per capita water demand, there are many obvious conservation measures that the project proponent has yet to implement. For example, the project proponent could (and should) dramatically ramp up a “cash for grass” program that provides customers with a rebate for replacing grass with drought-tolerant landscaping. Such approaches have been effective in reducing water demand throughout the Southwest, but the project

proponent has only barely explored such an incentive as a meagerly funded pilot program. Not only do such measures significantly reduce per capita water demand in Fort Collins much more cost-effectively than major water supply projects of the kind contemplated in the EIS, they will soon become necessary as the climate in this region becomes hotter and drier. Rather than waiting for a 1-in-50-year drought to begin designing and implementing these types of essential water conservation measures on a large scale, it is prudent—and practicable—for the project proponent to do so *now* (as many other western municipalities have done) in order to make Fort Collins and its population more resilient to drought events in the future.¹

In sum, the FEIS arbitrarily relies on water demand data that expired in 2014 but then projects the erroneous assumptions underlying that data more than four decades into the future (i.e., through 2065). Because it is nearly impossible that Fort Collins will be relying decades into the future on the same simplistic water conservation measures in place today, especially as the project proponent is forced to adapt to a drier and warmer conditions, the FEIS glosses over important aspects of the problem by omitting any genuine consideration of real-world water demand projections over the next 40 years.²

5. The FEIS likewise skews the No-Action Alternative (and attempts to arbitrarily enhance the benefits of the proposed action) by proposing several new timing and/or management regimes for releasing water from Halligan Reservoir, as part of the proposed action. *See* FEIS at 2-14 – 2-18 (describing, as part of the proposed action, a Winter Release Plan, as well as a Summer Plan and Peak Flow Bypass Program, which will “provid[e] a concurrent benefit to the aquatic environment,” “improve streamflow,” and “positively affect stream health in the North Fork between the replacement Halligan Dam and Seaman Reservoir” as informed by “principles of river ecology”).

The problem—legally and practically—is that the project proponent can retime and/or remanage its flows in this manner *right now* without a CWA permit, and obtain the same environmental benefits that it now attributes to the proposed action that requires a CWA permit. These measures, therefore, should be included in the No-Action Alternative (rather than the proposed action), which only further highlights the reasonableness and the less damaging nature of the No-Action Alternative, when compared to the proposed action in the LEDPA framework.

¹ Save the Poudre has sent numerous emails, letters, and comments over the years expressing serious concerns over Fort Collins’ minimally funded water conservation efforts, including gray water use and xeriscape retrofitting. Indeed, as experts on water conservation issues, Save the Poudre has repeatedly urged Fort Collins to set a goal of 100 gallons per capita per day and implement the measures necessary to attain that figure; other municipalities have done so with much more aggressive water conservation efforts than those in place in Fort Collins. Thus, the only impediment to achieving significantly reduced water demand is the Fort Collins city government and its refusal to adopt common-sense water conservation measures.

² Although we assume this is self-evident, we clarify that even minor tweaks in the project proponent’s water demand projections (including to address additional, future conservation efforts) would render the No-Action Alternative practicable under the CWA and able to satisfy the purpose and need under NEPA.

In this way, the Corps (and the project proponent) are placing a thumb on the scale in favor of the proposed action by artificially enhancing the environmental benefits of the proposed action that can be (and should be) achieved irrespective of the outcome of the Corps' permitting process. Before reaching a final permitting decision, the Corps must provide a more objective, transparent accounting of the costs and benefits of the proposed action, the No-Action Alternative, and other alternatives—which necessarily must be subject to a further round of comment once all relevant factors are disclosed and evaluated.

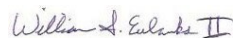
6. The FEIS explains that under the No-Action Alternative, there could be “a reduction of irrigated acreage throughout northern Colorado” because farmers might “sell their water rights or their land.” FEIS at 5-98. Likewise, farmers submitted comments in response to the Draft EIS explaining their view that the proposed action will help farmers in northern Colorado, because Fort Collins would “lease water back to farmers” with “more consistency and more reliability in the future.” FEIS at A-34; *see also id.* at A-45 (noting that the proposed action would “provide additional irrigation water for northeast Colorado farmers and ranchers”).

But Save the Poudre reminds the Corps (and the project proponent) that Fort Collins does not owe *any* legal or other duty to lease water to farmers and ranchers in northern Colorado. These entities are neither Fort Collins taxpayers, nor are they Fort Collins utility customers. Thus, because Fort Collins (as the project proponent) has no responsibility to these farmers and ranchers, the ability (or lack thereof) to lease water to these entities cannot inform the Corps' ultimate permitting decision or in any way limit the consideration of practicable alternatives under the CWA and NEPA.

CONCLUSION

Thank you for your consideration of these comments on the Halligan FEIS. We urge the Corps to take these considerations seriously and to issue a revised FEIS for public comment that contains a more accurate and complete examination of alternatives and impacts. Otherwise, the FEIS (and any Section 404 permit based on the analysis contained in the FEIS) suffers from fatal flaws that make these decisions and assessments vulnerable to legal challenge. Please let us know if you would like to set up a meeting to discuss our concerns.

Respectfully,



William S. Eubanks II
Matthew R. Arnold

EUBANKS & ASSOCIATES, PLLC