



January 25, 2017

Re: Federal Register Notice Period for the California WaterFix Final Environmental Impact Report/Environmental Impact Statement (EIR/EIS).

To Whom It May Concern:

This letter responds to various procedural requests submitted in response to the Notice of Availability (NOA) issued for the Final Environmental Impact Report/Final Environmental Impact Statement (Final EIR/EIS) for the Bay Delta Conservation Plan/California WaterFix, prepared pursuant to the California Environmental Quality Act (CEQA) and the National Environmental Policy Act (NEPA). The U.S. Bureau of Reclamation (Reclamation), in coordination with the California Department of Water Resources (DWR), issued this NOA (see 81 Federal Register 251 (30 December 2016) pp. 96485-96486), as required by the Council on Environmental Quality's (CEQ's) NEPA regulations (see 40 CFR Sections 1506.9 and 1506.10). The NOA stated that:

No Federal or State decision on the proposed action will be made until at least 30 days after the U.S. Environmental Protection Agency (EPA) publishes a notice of availability of the Final EIR/EIS. After the 30-day period, the U.S. Department of the Interior will sign a Record of Decision [ROD] and DWR will complete a Notice of Decision [*sic*].

Although issued jointly with DWR, there is no equivalent requirement under CEQA or other California law for DWR to publish a notice of the Final EIR/EIS. However, because it is required through NEPA, DWR utilized the notice as an additional method of disclosure to further the goals of public outreach. DWR included a statement in the federal register notice, and other announcements of the Final EIR/EIS, stating that:

DWR's certification of the EIR and final decision-making under the CEQA will not occur until at least 30 days after EPA publishes a notice of availability of the Final EIR/EIS. This distribution of the Final EIR/EIS, including the written proposed responses to comments submitted by public agencies, is intended to satisfy the requirement to provide these responses to commenting public agencies at least 10 days prior to certification, consistent with CEQA Guidelines Section 15088(b). In addition, the end of the Federal Register notice period is intended by DWR to close the period by which any person may submit to DWR any grounds for noncompliance with CEQA, CA Public Resources Code Section 21177(a).

Several interested parties have requested an extension of Reclamation's 30-day Federal Register notice period and DWR's statement that the end of the Federal Register notice period also closes the time for submittal of any grounds for CEQA non-compliance. In addition, requests have been submitted for DWR to create a "public hearing process" for completion of the CEQA process and decision on the project. Certain inquiries have also included requests for additional information on the how various elements of other agencies' environmental review and permitting processes will be considered as part of Reclamation and DWR's completion of the CEQA/NEPA decision-making process.

Request for extension: Consistent with the requirements of the CEQ NEPA regulations, Reclamation's NOA notice period is described as a minimum timeframe from which the ROD cannot be issued. There are several other prerequisites to Reclamation's issuance of the ROD, including the receipt of Biological Opinions from the U.S. Fish and Wildlife Service and National Marine Fisheries Service pursuant to Section 7 of the Endangered Species Act (ESA). CEQA does not require a lead agency to provide notice or a public review period associated with publication of a Final EIR other than the requirement that the lead agency make its responses to public agencies' comments on the Draft EIR available 10 days prior to certification. The timeframe for interested parties to submit grounds for CEQA non-compliance in order to take legal action against an agency decision under CEQA is specified by CEQA as "during the public comment period provided by this division or prior to the close of the public hearing on the project before issuance of the notice of determination" (Pub. Resources Code, Section 21177, subd. [a]). However, because DWR does not have a process for a public hearing prior to issuance of an NOD, DWR took the opportunity to utilize the federal NOA to announce an additional "optional comment period" for interested parties to submit additional information related to CEQA non-compliance, over and above the normal mandatory comment period provided by CEQA. (i.e., as specified in Public Resources Code Section 21091[a]). (See CEQA Guidelines section 15089, subd. [b]; *Center for Biological Diversity v. California Department of Fish and Wildlife* (2015) 62 Cal.4th 204, 239.) This optional CEQA comment period provided by DWR at the publication of the Final EIR/EIS serves the same function as a public hearing on the project: to allow parties to raise legal issues that could not have been raised during earlier comment periods. (See Pub. Resources Code, Section 21177, subd. [a].) In addition, during the draft EIR public comment periods, DWR and Reclamation conducted multiple informational sessions where the public had an opportunity to obtain clarification and discuss with DWR and Reclamation staff and consultants the analysis presented in the draft EIR/EIS.

Because Reclamation and DWR believe sufficient opportunity has already been provided in the proposed project's environmental review process, because DWR has gone beyond the CEQA noticing requirements for a Final EIR, and because it is in the public interest in having the agencies proceed in an orderly fashion to the final steps in CEQA and NEPA decision-making, Reclamation is not extending the federal register notice period under NEPA beyond January 30, 2017 and DWR is not extending the timeframe for submittal of any grounds for noncompliance with CEQA beyond January 30, 2017.

Completion of CEQA/NEPA Process: As stated previously, Reclamation will not issue the ROD and complete the NEPA process until after receipt of the Biological Opinions on the project. DWR expects to certify the EIR and make a decision on the proposed project and the alternatives discussed in the Final EIR/EIS and file a Notice of Determination (NOD), completing the CEQA lead agency process at approximately the same time as Reclamation's issuance of the ROD (thereby also considering the biological opinions issued for the project prior to its decision). As required by CEQA, a lead agency must certify the EIR and file the NOD prior to any Responsible Agencies completing their decision-making process. Therefore, DWR will not and cannot wait to complete and certify the Final EIR portion of the Final EIR/EIS and take action on the project prior to the State Water Resources Control Board or other state agencies (e.g., the Department of Fish and Wildlife) making regulatory decisions on the project. As explained above, CEQA does not require, and DWR process does not provide for, a public hearing on the completion of the CEQA process and decision on the project. Thus, DWR does not believe it is in the public interest to delay its decision-making by creating a new public hearing process prior to its certification of the Final EIR and decision on the California WaterFix. Instead, DWR and Reclamation have sought comments on the Final EIR/EIS and will consider all of the comments received by the close of the current comment period on January 30, 2017 before the two agencies proceed to finalize their respective decision-making processes.

Sincerely,

Michelle Banonis



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U.S. Bureau of Reclamation

Cindy Messer



Deputy Director
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