



Public Employees for Environmental Responsibility

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Mr. Michael Colombo
Regional Director
Western Regional Office
Office of the Inspector General
U.S. Department of Interior
Federal Building, 2800 Cottage Way
Suite E-2712
Sacramento, CA 95825

By postal mail and email:

February 19, 2016

Re: Expansion of Audit of Reclamation contracts

Dear Mr. Colombo:

Your office is currently conducting an audit of contracts between the Klamath Water and Power Agency (KWAPA) and the Klamath Basin Area Office of the Department of Interior's Bureau of Reclamation (Reclamation). This audit is being performed in response to a finding from the U.S. Office of Special Counsel concerning a formal disclosure from a current and a former Reclamation employee (OSC File No. DI-15-2383).

I am writing you on behalf of Public Employees for Environmental Responsibility (PEER). PEER represents the Reclamation employees who made this disclosure to OSC. The current Reclamation employee who made the disclosure now has a related disclosure, and we are asking your office to expand its review to include this new disclosure.

Subject:

The Financial Assistance Agreement on which we seek your office's review is agreement #R15AC00052 Delta Habitat Conservation & Conveyance Program – Prepare Final Draft Environmental Impact Report/ Environmental Impact Statement (EIR/EIS). This agreement is between Reclamation and the California Department of Water Resources (DWR). It funds nearly \$36 million on a 50/50 cost share arrangement, and like the KWAPA contract, was issued by Reclamation's Regional Office in Sacramento. The Financial Assistance Agreement is attached hereto.

The funding authority for this agreement is also the Fish and Wildlife Coordination Act (FWCA) – one of the principal authorities used to fund the KWAPA contract which your office is now reviewing.



Basis for Request:

The stated purpose of the grant contained within Financial Assistance Agreement (FAA) is to fund the preparation of a final draft EIR/EIS that according to the agreement will be used to “benefit” to the public because it “contributes to the development and implementation of measures to conserve endangered and special-status species and habitat that has been degraded due to changes in the natural Delta”.... The “EIR/EIS will lead to the conservation and rehabilitation of habitat to improve fish and wildlife populations and ultimately to a healthier Delta ecosystem.” But what the grant is really for is stated in Section I.3 page 4. What it actually does is fund the planning and promoting of the Water Fix program commonly referred to the Delta Tunnel water export project.

Both the HCP/NCCP and the non-HCP/NCCP alternatives include the development of a new water conveyance facility that will include new intakes on the Sacramento River that convey water through tunnels southward approximately 30 miles to Clifton Court Forebay. These new intakes are anticipated to reduce the risks of water pumping restrictions at existing South of Delta (SOD) facilities (the Jones and Banks pumping plants).

Just as with the KWAPA WUMP program which you are investigating, the Delta Tunnels benefit the special interest of the agricultural community in avoiding water pumping restrictions, not the general public. Therefore this grant also does not qualify as a public purpose grant. Also, as is the case with the KWAPA contract, the contract for the FAA is not authorized by any of the claimed authorities.

The FAA claims as its authority Public Law 85-624, 16 U.S.C. 661 et seq., as amended, the Fish and Wildlife Coordination Act (FWCA), and in particular Section 7(a) of the FWCA, (70 Stat 1122; 16 U.S.C. 742f(a)), and the Department of Interior Manual, 255 DM 1 and the Reclamation Manual, RM 526. None of these claimed authorities actually authorizes Reclamation to enter into grants to fund an EIS/EIR.

1. Impermissible Use of FWCA Funds

The contract is not funding actions that directly benefit fish and wildlife, and instead funds an EIR/EIS that would permit the construction of the Delta Water Tunnels which would result in serious harm to, if not the extirpation of several endangered or threatened species – exactly counter to the purposes of the FWCA.

The reaches of the Sacramento River, sloughs and the Delta would lose significant quantities of freshwater flows through operation of the proposed Water Tunnels. These areas are designated as critical habitat for at least five endangered and threatened fish species: the Sacramento River Winter Chinook Salmon, the Central Valley Spring-Run Chinook Salmon, Central Valley Steelhead, Southern Distinct Population Segment of North American Green Sturgeon and Delta River Smelt. The only way that the project could meet the purported public purpose of reducing “the risks of water pumping restrictions” is to remove the federally listed species from the area altogether so that Endangered Species Act restrictions would no longer apply. Sadly, this is what the Delta Water Tunnels are likely to do.

FWCA Part 742f(a), cited as authority in the grant, authorizes the Secretary of Interior to “consider and determine the policies and procedures that are necessary and desirable in carrying out efficiently and in the public interest the laws relating to fish and wildlife.” That subsection does not contain any authorization to enter into agreements that fund projects or appropriate funds as claimed in this grant. The two subsections of Part 742f of the FWCA that could possibly apply here are subsections (a) and (d), but neither applies.

Subsection (a)’s purpose is to create policies, procedures or recommendations as provided for in the statute. There is no funding authorized for this subsection. (Subsection (g) authorizes appropriations for all sections except section (a)). Moreover, the areas of policies and procedures which the Secretary is directed to consider in 742f(a) do not apply here. The following is the list of the areas in which the policies shall be considered:

- (a)(1): to maintain a sustainable fish production.
- (a)(2): study the economic condition of the domestic fishery industry and make recommendations to aid in stabilizing the industry.
- (a)(3): promote activities to stimulate the consumption of fishery products during a possible or actual surplus of fishery products.
- (a)(4): take the required steps that are necessary to develop, advance, manage, conserve, and protect fish and wildlife resources, including but not limited to research, development of existing facilities, and acquisition of land and water or the interests therein.

Subsection (d), the only subsection which authorizes cooperative agreements, is restricted to National Wildlife Refuges. The purpose of subsection (d) is to further the policies of that section through community partnership enhancement, which includes partnerships with State governments ((d)(1)), at National Wildlife Refuges. Under Section (d)(2)(A) *Cooperative Agreements*, the Secretary of the Interior may enter into cooperative agreements with State governments to “implement one or more projects or programs for a refuge or complex of geographically related refuges...” This FAA is not funding a refuge project or program.

Thus, neither of these sections could possibly authorize this grant.

In addition, even if this grant were otherwise authorized by 742f, there could be no appropriations for it. Section (g) of FWCA, “Authorization of appropriations,” only authorizes appropriations of \$2,000,000.00 for each of the fiscal years 2011 through 2014, for all subsections except section (a). Those appropriations could not be employed to fund this contract in 2015 for nearly \$18 million in federal cost, even assuming the contract were authorized by one of the other sections of 742f, which it is not.

2. The contract is not authorized by the Department of Interior or Reclamation Manuals

The Department of Interior and Reclamation Manuals were also used as an authority incorrectly. The Department of Interior Manual (255 DM 1) and the Reclamation Manual (RM 526) delegate to Reclamation the authority to award financial assistance agreements for projects associated with off-site locations based on the following:

Conduct activities for the improvement of fish and wildlife habitat associated with water systems or water supplies affected by Reclamation projects, including but not limited to fish passage and screening facilities at any non-Federal water diversion or storage project within the region.

Plan, design, construct, and monitor, including acquire lands or interest therein as needed, instream habitat improvements, including but not limited to fish passage screening facilities at off-site locations.

This project will not plan, design, construct and monitor instream habitat improvements; it funds the completion of an EIR/EIS. In addition, as the FAA recognizes (p. 3), this delegation is limited to actions authorized by the FWCA or other authorities, which do not apply here. The Department of Interior may only delegate authority which it has in the first place, and here there is no authority for the FAA. The, Department of Interior and Bureau of Reclamation policies are not congressional authorizations and as such their use for a funding authority is not valid.

There was also a prior \$50 million Reclamation payment to California Department of Water Resources for the same object of work (see below). Thus altogether, Reclamation has expended \$61,000,000.00 under FWCA (with an additional \$7 million federal cost share still available under the FAA) and has not received – and will not receive – a dime in habitat improvements.

3. Violation of Cost Share Requirement

DWR collected all of the federal funds at the time the agreement was executed, disregarding the 50/50 cost share match. As stated in Section 7.2 of the FAA, “Cost Sharing Requirement”:

“... at least 50% non-Federal cost-share is required for costs incurred under this Agreement. If pre-award costs are authorized, reimbursement of these costs is limited to federal cost share percentage identified in this agreement.

The Federal share of allowable costs shall not be expended in advance of the Recipient's non-Federal share. It is expected that expenditure of Federal and non-Federal funds based upon the cost share percentage above shall occur concurrently. If a bona fide need arises which requires the expenditure of Federal funds in advance of the Recipient share, then the Recipient must request written approval from the Grants Officer prior to the expenditure. Recipients may expend their agreed upon share of costs in advance of the expenditure of Federal funds without prior written approval.”

Out of the current \$11 million spent, Reclamation authorized prior expenditures of \$5.9 million ahead of the cost share requirement, meaning that Reclamation authorized funds without the state providing its required cost share requirement.

Moreover, DWR has not identified a bona fide need for an advance of all the federal funding. To date, DWR has not supplied any of the required non-federal share of funds. Nor has DWR indicated when and from what source it will supply its non-federal share.

Thus, it appears that the State has no intention of providing their cost share requirement and is instead relying totally on federal dollars for this EIR/EIS tunnel project.

4. Double Payment for Non-Delivery: Waste of Funds

The executed agreement Reclamation made with DWR in the amount of \$11,067,000.00 was to complete the final EIR/EIS. However, a previous contract for \$50 million had been awarded to DWR to complete the very same EIR/EIS, also using the FWCA as authority.

Significantly, Reclamation already received and accepted a draft of the EIR/EIS for its earlier \$50 million payment. In other words, the current agreement was to complete what DWR should have completed already. By accepting an incomplete report and contracting for an additional \$11 million to complete the EIR/EIS, Reclamation has mismanaged and wasted significant federal funds.

Since the subject matter of this letter parallels work your office is already performing, we would request that you expand the scope of that work to encompass this request. We have supporting documents for each of the stated bases which we are happy to provide on request.

If you choose to not expand your current review or are unable to communicate a decision as to whether you will add this matter to your investigation by March 4, 2016, we will submit the matter as a separate disclosure to the Office of Special Counsel.

Thank you for your consideration.

Sincerely,



Paula Dinerstein
Senior Counsel