

## Attachment A

### **Trout Unlimited Comments Compliance with CWA 404(b)(1) and other USACE Regulations Moffat Collection System Project**

The Clean Water Act (CWA) prohibits the discharge of dredge or fill materials into waters of the United States without a permit, *33 U.S.C. § 1344(a)*. To issue a permit, the USACE must comply with binding CWA § 404(b)(1) Guidelines adopted jointly with the U.S. Environmental Protection Agency, and codified at 40 CFR Part 230. *See 33 U.S.C. §1344(b)*. The USACE must also conduct a public interest review, in which “[t]he benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments.” *33 CFR §320.4(a)(1)*. For the proposed Moffat Project, the USACE’s evaluation of compliance with CWA § 404(b)(1) Guidelines is included as an Appendix to the DEIS. No public interest review analysis has been made available to the public by the USACE.

Based on our review of available information, the USACE’s evaluation of compliance with CWA 404(b)(1) Guidelines is incomplete. Issuance of a 404 permit, as proposed, is inconsistent with the Guidelines and contrary to the public interest. Accordingly, issuance of a 404 permit, as proposed, would violate the CWA.

#### **I. COMPLIANCE WITH CWA 404(b)(1) GUIDELINES**

The Guidelines prohibit the issuance of a 404 permit if:

- There is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences. *40 CFR § 230.10(a)*;
- The discharge “causes or contributes . . . to violations of any applicable State water quality standard.” *40 CFR § 230.10(b)(1)*;
- The discharge “will cause or contribute to significant degradation of the waters of the United States.” *40 CFR § 230.10(c)*; or
- Appropriate and practicable steps to minimize potential adverse impacts of the discharge on the aquatic ecosystem are not taken. *40 CFR § 230.10(d)*.

To comply with these CWA § 303(d)(1) Guidelines, the USACE is required to look not only at the direct impacts of placing dredged and fill materials on a specific location, but also at the indirect impacts of that action on other affected aquatic environments – such

as reduction of stream flows due to a proposed water storage project. *Riverside Irrigation District v. Andrews*, 758 F.2d 508, 512 (10<sup>th</sup> Cir. 1985).

The USACE must deny a 404 permit application if the proposed discharge fails to meet these criteria, *see e.g.*, 40 CFR § 320.4; 40 CFR § 323.6, or if there is insufficient information to make a reasonable judgment as to whether the proposed discharge complies with the Guidelines, 40 CFR § 230.12(a)(3)(iv)(*emphasis added*).

**A. The Moffat Project will cause or contribute to the violation of water quality standards**

**1. Stream Temperature Standards Violations**

The DEIS identifies three instances where operation of the Moffat Project will cause or contribute to violation of water quality standards:

- Violation of the acute (lethal) standard for stream temperature in Ranch Creek
- Violation of the acute (lethal) standard for stream temperature in the Fraser River
- Violation of the chronic (MWAT) standard for stream temperature in the Colorado River, downstream of Windy Gap Reservoir

No measures to avoid these violations have been proposed by the USACE. *See DEIS, Section 4.1.7 at 4-197-8*. Denver Water proposes to “mitigate” for these violations (*DEIS, Appendix M??*) by:

- Participating in ongoing monitoring activities
- Assisting in the installation of two real-time stream temperature monitoring stations in the Colorado River; and
- Bypassing up to 250 acre-feet from its Fraser River Collection System after August 1 if the Moffat Project is diverting and certain temperature “thresholds” to be defined by Denver Water, the Northern Colorado Water Conservancy District and “other stakeholders,” is exceeded.

These measures are insufficient to ensure that the violations will not occur.

Monitoring is a good first step, but insufficient to prevent violations. Moreover, participation in a general monitoring plan is insufficient. Monitoring requirements must be specifically designed to ensure no violation of water quality standards. Second, conditions triggering the proposed “bypass” are insufficient to ensure that violations will not occur because: (1) the “bypass” is triggered by unknown temperature “thresholds,” rather than by the State’s stream temperature standards formally adopted by the State of Colorado pursuant to its delegated authority under the Clean Water Act; (2) identified violations may occur before the artificially defined August 1 period; and (3) the

assumption that the Moffat Project's contribution to such violations is limited to 250 acre-feet is unexplained and unjustified.

The CWA 404(b)(1) Guidelines prohibit issuance of a 404 permit for projects that will cause or contribute to a violation of water quality standards. Accordingly, the only acceptable permit terms and conditions to prevent identified violations are (1) a specific monitoring plan for all streams that includes all streams from which the Moffat Project diverts, and (2) a prohibition against diversions that cause or contribute to stream temperature standards violations.

## **2. Insufficient information to assess additional water quality violations**

The USACE lacks sufficient information to assess whether the Moffat Project will cause or contribute to additional water quality violations. As detailed in the Joint Rebuttal Statement and Appendix B to these comments, the DEIS does not provide information or analysis critical to the USACE's assessment of compliance with the Guidelines, including:

- An accurate estimation of the magnitude and timing of flow depletions caused by the Project
- Analysis of the Project's potential to cause or contribute to violation of the State's chronic (MWAT) stream temperature standard in streams other than the Colorado River
- An evaluation of the magnitude, frequency and timing of anticipated stream temperature violations - although models are available to make this assessment, the DEIS's evaluation is only qualitative
- Analysis of the Project's potential to cause or contribute to water quality violations where violations are not already occurring
- Analysis of water quality impacts, including cumulative impacts, of Moffat Project depletions when added to increased depletions that will occur between now and 2016, the water quality impacts of which are not currently quantified.
- Analysis of water quality impacts of operation of the Project on Grand Lake – such impacts are likely as reduced Fraser River dilution flows would be pumped into Grand Lake by the Windy Gap project, thus contributing to the ongoing degradation of water quality in the Lake.

Because the USACE lacks sufficient information to make a reasonable judgment whether issuance of the permit complies with the Guidelines, the permit cannot be issued until such information is developed. *See 40 CFR § 230.12(a)(3)(iv)*. In the alternative, adequate terms and conditions – including an adequate monitoring plan and prohibition against Project diversions where diversions will cause or contribute to water quality standards violations – must be imposed.

**B. The Moffat Project will cause or contribute to the significant degradation of waters of the United States**

According to the CWA 404(b)(1) Guidelines, a discharge causes or contributes to significant degradation if it has significantly adverse effects on human health or welfare, on aquatic life and other wildlife dependent on aquatic ecosystems, on aquatic ecosystem diversity, productivity, and stability, or on recreational, aesthetic, and economic values. *40 CFR § 230.10(c)*.

As detailed in the Joint Rebuttal Statement, transmountain diversion projects, including Denver Water's existing Moffat Tunnel diversions, have significantly altered the natural hydrograph of streams within the Fraser and Williams Fork river basins and of the Colorado River downstream of its confluence with the Fraser River. Denver Water's current Moffat Tunnel diversions take, on average, over 50% of the native streams flows of the Fraser River and completely dry up portions of several of its tributaries. In conjunction with other transmountain diversions, Denver Water's current Moffat Tunnel diversions deplete the Colorado River downstream of its confluence with the Fraser River by more than 60%, on average.

Signs of degradation of these stream systems and their aquatic habitat are evident.

- Stream temperature standards exceed State acute (lethal) standards in the Fraser River and some of its tributaries and in the Colorado River downstream of Windy Gap reservoir.
- Violation of State dissolved oxygen standards are reported in the Williams Fork.
- Excess sediment, which smothers macroinvertebrates and fish eggs, is evident in the Fraser River and some of its tributaries as well as in the Colorado River downstream of Windy Gap reservoir.
- Invasive species, such as algae (*dydmo*) and *tubifex worms*, cause of whirling disease, are identified in several affected streams.
- Stonefly populations, which are an indicator of aquatic ecosystem health and a major food supply for trout have been decimated and, in some cases, eliminated in the Colorado River downstream of Windy Gap reservoir.
- Native sculpin fish populations, also a major food supply for recreational trout fisheries, have been significantly reduced and in some cases eliminated at that location.
- Trout biomass has dramatically decreased.

Yet, the Fraser and Williams Fork river basins and the upper Colorado River continue to support viable trout populations and remain popular destinations for fishing and other recreational activities.

The proposed Moffat Project alone and in conjunction other diversions, including the proposed Windy Gap Firming Project, has the potential to significantly exacerbate these degraded conditions.

The proposed Moffat Project's incremental diversions have the potential to significantly degrade these conditions, including:

- Increased stream temperature standards violations
- Increased periods of low flows that are stressful to fish
- Reduced peak flows critical to flush sediments from stream beds
- More human-created drought conditions
- can reduce the streamare expected to reduce peak flows, which are critical to flush sediments and prolong periods of low flows. Project diversions are expected to increase periods of low flows and stream temperatures in the upper Colorado River and in the Fraser River and some of its tributaries, and prolong dry up of portions of the Fraser River's tributaries.

In spite of existing degradation and clear indication that the proposed Moffat Project may cause or contribute to further degradation of affected west slope streams, their aquatic ecosystem, and recreation, the DEIS fails to adequately identify or evaluate the impacts the Project's incremental diversions will have on these resources. Where serious impacts are identified, they are unexplainably dismissed as insignificant.

### **1. The DEIS recognizes degradation and arbitrarily dismisses it**

The DEIS acknowledges that the proposed Moffat Tunnel diversions will cause or contribute to the degradation of streams within the Fraser River basin and of the upper Colorado River, including:

- Increasing violations of State acute (lethal) stream temperature standards in Ranch Creek, the Fraser River
- Increasing violations of State chronic stream temperature standards in the Colorado River; and
- Prolonging the period of time streams that are dried up by current Denver Water diversions will remain dry

The DEIS dismisses such degradation as "negligible." No rationale is given for such assessment.

Acute stream temperature standards reflect the maximum temperature levels considered to be tolerable to trout. Stream temperatures that exceed those standards are presumed to be lethal. Accordingly, the adverse effects of Moffat Project diversions are not "negligible" they are significant.

Likewise, depriving fish and macroinvertebrates of water for longer periods of time is a significant adverse impact, not a “negligible” one.

**2. The DEIS provides insufficient information to assess the Moffat Project’s potential to cause or contribute to additional significant degradation**

- a. No evaluation of potential for catastrophic threshold, non-linear responses

The DEIS recognizes that transmountain diversions have had a profound impact on the hydrologic regime of the affected west slope streams. It recognizes that dramatic changes in hydrology can trigger non-linear, threshold responses, transforming stream systems to the point that they are no longer capable of supporting aquatic life. Yet, the DEIS indicates that an analysis of the potential for these threshold changes was not undertaken because such thresholds are “difficult to identify and would require abundant data collection and analyses . . . that is beyond the scope of the EIS.” (DEIS at 4-311). No terms and conditions are proposed that would require monitoring for and taking steps to prevent such catastrophic response.

Given the dramatic alterations of the natural hydrograph of affected streams and documented signs of ongoing deterioration of their aquatic resources, a decision to issue a 404 permit that will allow such significant incremental depletions, in the absence of this information would violate the Clean Water Act.

- b. No evaluation of potential for increased artificial draught conditions

The DEIS looks at potential Moffat Project diversions on a modeled dry, average or wet year, and draws conclusions regarding the impacts of those diversions on water quality, sediment transport, and aquatic resources, based on these modeled predictions. What the DEIS does not evaluate, is the extent to which proposed Moffat Project diversions will increase the incidence of dry year conditions in the affected streams. Dry year conditions are particularly stressful to aquatic life, particularly when they occur on a prolonged basis (i.e., drought conditions).

By increasing its storage capacity in Gross Reservoir, Denver Water will be able to significantly increase its diversions during wet and average years following dry years, when reservoir levels will likely be significantly down. The effect would be to artificially create dry year conditions in the stream, particularly when filling Gross Reservoir in an average year following a dry year. The potential for and impacts of these conditions are not evaluated in the DEIS.

However, an independent evaluation of that potential indicates that the proposed Moffat Project will increase the incidence of dry year conditions in west slope streams. Such

increase in dry year conditions could have significant adverse effected on the aquatic environment. Yet, the DEIS does not evaluate it.

c. No evaluation of impacts of climate change or beetle kill

As further discussed in the Joint Rebuttal Statement, the DEIS does not include a meaningful evaluation of cumulative impacts of operation of the Moffat Project, climate change and the spread of pine beetle infestation. Accordingly, the USACE cannot evaluate the extent to which the Moffat Project will cause or contribute to the significant degradation of waters of the United States.

Because the USACE lacks sufficient information to make a reasonable judgment whether issuance of the permit complies with the Guidelines, the permit cannot be issued until such information is developed. *See 40 CFR § 230.12(a)(3)(iv)*. In the alternative, adequate terms and conditions, including an adequate monitoring and adaptive management plan –must be imposed.

**3. The DEIS provides inadequate information to assess the Moffat Project’s potential to cause or contribute to additional significant degradation**

a. Inadequate sediment impacts analysis

Peak flows are critical to flush sediments from stream beds. Excess sediment can be harmful to fisheries and macroinvertebrates. Excess sediment can also create favorable conditions for the spread of the *Tubifex* worm, responsible for whirling disease.

The DEIS recognizes that the proposed Moffat Project will reduce peak flows that are necessary to flush sediments. It recognizes that decreases in peak flows due to the Moffat Project will result in decreases in sediment transport capacity. However, the DEIS concludes that sediment transport capacity is now and will be greater than the available supply and, therefore, “only minor amounts of localized sediment deposition is anticipated.” (DEIS at 4-9). Relying on this analysis and conclusion, the DEIS goes on to conclude that loss of peak flows will not significantly adversely affect the west slope streams’ aquatic environment or contribute to the spread of whirling disease.

The DEIS’s conclusion is contradicted by empirical evidence. Evidence of excess sedimentation is already present along the Fraser River and some of its tributaries as well as the Colorado River, as photographic evidence indicates.

The DEIS’ own information shows that “potential signs of aggradation” were observed in four out of seven reported west slope sampling sites. (DEIS, Table 3.1-19). Aggradation occurs in areas where the supply of sediment is greater than the amount of material the system is able to transport.

Contrary to the DEIS's conclusion, this evidence suggests that the current flow regime is insufficient to the existing sediment load. Further reduction in peak flows can only aggravate that condition.

b. Inadequate water quality analysis

As discussed in above, the DEIS fails to provide needed information to assess the impacts, including cumulative impacts, of the Project on water quality. As a result, the USACE cannot properly assess the extent to which the proposed Moffat Project will cause or contribute to the degradation of waters of the United States.

c. Inadequate analysis of anticipated flow reductions

As discussed in the Joint Rebuttal Statement and in Attachment B, the DEIS impacts analysis relies on inaccurate and fundamentally flawed predictions of changes in flow associated with the proposed Moffat Project. Because the DEIS evaluation of impacts to the aquatic ecosystem is dependant on those predictions, the DEIS fails to adequate information needed for the USACE's assessment of whether operation of the project will result in significant degradation of waters of the United States.

Because the USACE lacks sufficient information to make a reasonable judgment whether issuance of the permit complies with the Guidelines, the permit cannot be issued until such information is developed. *See 40 CFR § 230.12(a)(3)(iv)*. In the alternative, adequate terms and conditions – including an adequate monitoring and adaptive management plan – must be imposed.

**4. The USACE analysis does not consider or take into account Special Aquatic Resources that may be impacted by the proposed Moffat Project diversions**

In evaluating whether significant degradation to the aquatic ecosystem will result, the USACE must take into account the special nature of state and federal designated areas. *40 CFR Subpart E*. The Colorado River, downstream of Windy Gap reservoir, and the Blue River between Dillon Reservoir and its confluence with the Colorado River are State designated Gold Medal fisheries and candidates for Congressional Wild and Scenic Rivers Act designation due to their outstanding fishing and boating recreation values. The Colorado River, between its confluence with the Blue River and the Eagle River is a State designated Wild Trout fishery. The Colorado River, between its confluence with the Blue River and the Roaring Fork, is a candidate for Congressional Wild and Scenic Rivers Act designation due to its outstanding fishing and boating recreation values.

These Special Aquatics Resources designations reflect the extraordinary value of these recreational fisheries, based on fish reproduction, population and size. Accordingly, risks and impacts to fish and their food supply that may be otherwise deemed acceptable, could

jeopardize the extraordinary value of these fisheries and the federal and state designations. Yet, neither the DEIS nor the USACE CWA 404(b)(1) analysis recognize Special Aquatic Resources status of these fisheries or assess impacts, including cumulative impacts, of the proposed Moffat Project in light of these special designations or the extent to which these impacts may jeopardize state and federal designations. Indeed, the DEIS entirely fails to evaluate the impacts of the proposed Project on fishing recreation, concluding without analysis, rationale or explanation, that the Project will not affect fishing recreation.

Because the USACE lacks sufficient information to make a reasonable judgment whether issuance of the permit complies with the Guidelines, the permit cannot be issued until such information is developed. *See 40 CFR § 230.12(a)(3)(iv)*. In the alternative, adequate terms and conditions – including an adequate monitoring and adaptive management plan – must be imposed.

**C. Appropriate and practicable steps to minimize potential adverse impacts on aquatic ecosystems of west slope streams are not proposed**

The USACE has proposed no specific measures to minimize the potential adverse impacts of the proposed Moffat Project on the aquatic environment of west slope streams. No measures are offered to avoid, minimize or mitigate water quality impacts, including acknowledged violation of State stream temperature standards. *See DEIS at 4-197 to 4-198*. No measures to avoid, minimize or mitigate loss of peak flows and increased sedimentation. *See DEIS at 4-199*. No measures to avoid, minimize or mitigate fishing recreation.

With respect to impacts to aquatic resources, the DEIS states:

“Minimization and avoidance techniques may include adjustments to operations that may benefit aquatic organisms. This would include changes to runoff flows or low winter flows to make these two critical time periods less stressful for fish and invertebrates . . .”

*DEIS at 4-335*. However, the proposed measure is so vague so as to render it virtually meaningless.

Appendix M to the DEIS includes Denver Water’s proposed mitigation. Accordingly, the DEIS states:

“All practicable steps have been taken to minimize potential adverse effects associated with construction and operation of the Proposed Action. This Mitigation Plan addresses the following unavoidable effects identified in the DEIS for the Proposed Action . . . Effects to flow and aquatic habitat in tributaries to the Fraser River.”

*DEIS at M-3.* Denver Water’s proposed mitigation for west slope streams consists of:

- Participation in ongoing monitoring activities and conditional bypass discussed in Section I.A.1., above;
- Participation in the Colorado River Recovery Program for the benefit of endangered fish; and
- Development and implementation of a plan to establish a viable Colorado River cutthroat fishery in a suitable location in Grand County.

*DEIS at M-4 to M-6.*

No explanation is offered why adverse effects to west slope streams are deemed to be “unavoidable.” The assumption that Moffat Project impacts to west slope streams, including violation of stream temperature standards, are unavoidable is not only arbitrary, it is inconsistent with the CWA 404(b)(1) Guidelines which specifically prohibit the issuance of a 404 permit that will cause and contribute to a violation of water quality standards.

With respect to the proposed mitigation measures, they are wholly insufficient to address the magnitude of potential impacts, including potential loss of valuable fisheries, which the Moffat Project, alone and in combination with other diversions will have on west slope streams.

No appropriate and practicable steps to minimize the impacts of the Moffat Project are being proposed, in violation of CWA 404(b)(1) Guidelines. Accordingly, a 404 permit may not be issued until such time as such steps are proposed and made available to the public for review.

#### **D. Least Damaging Practicable Alternatives.**

Please refer to Joint Rebuttal Statement and comments by Western Resource Advocates.

## **II. OTHER REGULATORY REQUIREMENTS**

### **A. Public Interest Review.**

The USACE must deny a CWA § 404 permit if the proposed project is contrary to the “public interest.” *33 CFR § 320.4(a)*. This evaluation requires the weighing of the benefits of the proposed project requiring a CWA § 404 permit against its impacts including, but not limited to, impacts on fish and wildlife values and recreation. The public interest review requirement is in addition to the requirement of compliance with the requirements of the CWA § 404(b)(1) Guidelines discussed above. This analysis requires the Corps to consider the “relative extent of the public and private need” for the

project and “reasonable alternative location and methods to accomplish the objective of the project. *Holy Cross Wilderness Defense Fund v. Madigan*, 960 Fed. 1515, 1524-1525, fn. 12 and 13.

Please refer to Joint Rebuttal Statement and comments by Western Resource Advocates.

## **B. Water Quality Impacts**

USACE regulations require evaluation of CWA § 404 applications for compliance with “applicable effluent limitations and water quality standards, during the construction and subsequent operation of the proposed activity.” 33 *CFR* § 320.4(d). Certifications by the State regarding compliance with water quality standards is deemed conclusive by the Corps unless EPA advises of other water quality aspects need to be taken in consideration. *Id.*

As previously discussed, the DEIS indicates that operation of the Moffat Project will cause or contribute to violations of State water quality standards. However, the DEIS does not provide sufficient information to fully evaluate the magnitude, extent and frequency of such violations or of such violations or the extent to which the Project will result in additional, unidentified violations. A decision with respect to the Subdistrict’s CWA § 404 permit application must be postponed until such time as sufficient information to enable the State’s required CWA § 401 determination and the State acts upon the requested certification in accordance with Clean Water Act and State procedures.

## **C. Fish and Wildlife Impacts.**

The Federal Wildlife and Coordination Act (FWCA) requires federal agencies to consult with the USFWS and the State’s fish and wildlife agencies when evaluating approval of projects that will impound, divert, or otherwise modify a stream or other water body. 16 *U.S.C* § 662(a). The purpose of this requirement is to ensure that “wildlife conservation shall receive equal consideration with other features in the planning of Federal water resource development programs . . . putting fish and wildlife on the basis of equality with flood control, irrigation, navigation, and hydroelectric power in our water resource programs. . .” *S.Rep. No. 1981, 85th Cong.2d Sess. (July 28, 1958). 1958 U.S.Code Cong. & Admin.News, pp. 3446, 3448, 3450.1958 U.S.Code Cong. & Admin.News, at 3450.*

Consultation with the fish and wildlife agencies must occur before the agencies make decisions. *See, e.g. Zabel v. Tabb*, 430 F.2d 199 (5<sup>th</sup> Cir. 1970), and their recommendations must be given proper consideration and weight. *See e.g., Sierra Club v. Alexander*, 484 F. Supp. 455, 470 (N.D.N.Y. 1980). To enable consultation, federal agencies must give the fish and wildlife agencies a meaningful opportunity to comment. *Sierra Club v. U.S. Army Corps of Engineers*, 935 F. Supp. 1556, 1580 (S.D. Ala. 1996).

As required by the Fish and Wildlife Coordination Act (FWCA), before making a decision with respect to CWA § 404 permits, the Corps must consult with the U.S. Fish and Wildlife Service (USFWS) and the State’s fish and wildlife agencies “with a view to the conservation of wildlife resources by prevention of their direct and indirect loss and damage due to the activity proposed in a permit application.” *33 CFR § 320.4(c)*. The Corps are required to “give full consideration to the views of those agencies on fish and wildlife matters in deciding on the issuance, denial, or conditioning of individual or general permits.” *Id.*

The DEIS provides sufficient information to warrant a determination by the USFWS and the Colorado Division of Wildlife that the proposed Moffat Project will have unacceptable impacts to aquatic resources. However, it fails to provide adequate information to understand the full magnitude and extent of the project’s impacts to the resources. Accordingly, the USACE has failed to provide a meaningful opportunity for the WSFWS and the Colorado Division of Wildlife’s comments, in violation of the FWCA.

**D. Impacts to Historical, Cultural, Scenic, and Recreational Values**

The USACE must give “due consideration” to the effect the proposed project may have on the values of special areas such as “wild and scenic rivers . . . and such other areas as may be established under federal or state law for similar and related purposes.” *33 CFR § 320.4(e)*. “Action on permit applications should, insofar as possible, be consistent with, and avoid significant adverse effects on the values or purposes for which those classifications, controls, or policies were established.” *Id.* As discussed above, and in detail in the Join Rebuttal Statement, the DEIS fails to provide required information or analysis needed for the USACE’s assessment of the impacts of the proposed Project diversions on special state and federally designated aquatic resources, or on fishing recreation in general.

**E. Other Federal, State and Local Requirements.**

The USACE regulations require inclusion in 404 permits conditions that are “necessary to satisfy legal requirements or otherwise satisfy the public interest requirement.” *33 CFR § 325.4(a)(1)*. If the USACE finds that special conditions are necessary to insure such compliance but those conditions would not be “reasonably implementable or enforceable, the permit application must be denied. *33 CFR § 325.4(c)*. There are serious questions regarding the legality of Denver Water’s storage of Fraser and Williams Fork River basin water under its most senior water rights decrees.

**F. Mitigation.**

In addition to the requirements of the CWA § 404(b)(1) Guidelines, the USACE regulations require consideration of mitigation measures “throughout the permit

application review process.” 33 *CFR* 320.4(*r*). Such mitigation includes “avoiding, minimizing, rectifying, reducing, or compensating for resource losses.” 33 *CFR* 320.4(*r*)(1). Losses are to be avoided to the extent practicable. *Id.* As previously discussed in these comments, no meaningful mitigation measures have been offered to avoid, minimize and mitigate the impacts of the proposed Moffat Project on the aquatic and recreational resources of west slope streams (with the exception of mitigation for the benefit of the Colorado River’s endangered species)

**V. PROPOSED MEASURES TO AVOID, MINIMIZE AND MITIGATE IMPACTS TO WEST SLOPE STREAMS**

Please refer to Joint Rebuttal Statement.