

December 29, 2008



VIA EMAIL: chandler.j.peter@usace.army.mil

Mr. Chandler Peter, P.E.
Project Manager
Denver Regulatory Office
U.S. Army Corps of Engineers
9307 South Wadsworth Blvd.
Littleton, CO 80128-6901

Re: Windy Gap Firing Project - CWA § 404 Permit Application

Dear Mr. Peter,

Trout Unlimited, Colorado Trout Unlimited, and the Colorado Headwaters Chapter of Trout Unlimited (jointly referred to as “Trout Unlimited”) offer the attached comments on the above-referenced application for your consideration. Trout Unlimited is a non-profit conservation organization with approximately 150,000 members nationally, approximately 10,000 in Colorado. Our Colorado Headwaters Chapter, based in Grand County, counts with 100 very active members. Our mission is to conserve, protect and restore coldwater fisheries and their habitat.

In addition to these comments, Trout Unlimited is concurrently submitting comments on the Draft Environmental Impacts Statement (DEIS) for the Windy Gap Firing Project (WGFP) prepared by the U.S. Bureau of Reclamation (Reclamation).¹ According to its Public Notice, the U.S. Army Corps of Engineers (Corps) is relying on the DEIS to comply with NEPA requirements and for information to assist in the decision regarding the pending permit application. Appendix B of the DEIS constitutes the agencies’ analysis of compliance with CWA § 404(b)(1) Guidelines. Trout Unlimited believes the DEIS fails to provide information that is essential for the Corps decision and that its analysis is fatally flawed. Accordingly, we believe that a decision on the CWA § 404 permit application must be postponed pending development of the required information and an opportunity of additional public comment.

¹ Trout Unlimited’s NEPA Comments letter is incorporated into these comments by reference. Trout Unlimited also joins in the separate comments provided by Western Resource Advocates, Grand County, the National Wildlife Federation, and the Colorado River Water Conservation District, to the extent not inconsistent with these comments.

Any future consideration of this permit application should take into account specific conditions designed to avoid, minimize and mitigate the impacts of the Proposed WGFP on the aquatic and recreational resources of the Colorado River and Willow Creek. Grand County's comments suggest a number of conditions to this effect. While Trout Unlimited has not had an opportunity to fully evaluate the suggested conditions, we conceptually support many of them, as further specified in our attached comments.

Thank you for the opportunity to comment. Do not hesitate to contact me at 720.470.4758 if you have any question or would like to further discuss the project.

Sincerely,

/s Amelia S. Whiting

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cc: U.S. Bureau of Reclamation
U.S. EPA
U.S. Fish and Wildlife Services
Colorado Division of Wildlife
Colorado Water Conservation Board
Colorado Water Quality Control Division
NCWCD

I. SUMMARY OF COMMENTS

According to the Public Notice, the Subdistrict has applied for a CWA § 404 permit to allow construction of Chimney Hollow Reservoir. Chimney Hollow Reservoir is a component of the Proposed WGFP Action alternative. The Proposed WGFP would divert water from the Colorado River and its tributary, Willow Creek, and store it in Chimney Hollow Reservoir for subsequent use by participating cities in Northern Colorado and the Front Range.

The affected reaches of the Colorado River are home to some of the most valuable recreational fisheries in the State of Colorado. The upper portion of the reach (between Windy Gap reservoir and Troublesome Creek) has been designated by the State as a Gold Medal fishery. There are only 10 river segments in the State bearing this designation. The lower portion of the reach (between its confluence with Blue River and State Bridge) is a State Wild Trout fishery. In recognition of the exceptional recreational opportunities these fisheries provide, the U.S. Bureau of Land Management (BLM) has identified the affected reaches as eligible for Wild and Scenic Rivers Act designation. These recreational fisheries are the life blood of Grand County and provide an economic benefit to the State as a whole.

The Proposed WGFP could have significant and irreversible impacts on these valuable fisheries. The DEIS estimates that the project will take, on average, 24% of the existing Colorado River flows. This is in addition to the existing transmountain diversions that already divert over 50% of the river's native flows. As discussed in comments provided by Grand County, Trout Unlimited and others, this figure is likely to be significantly higher. Some of these flows will be taken at times of high, peak flows. Some will be taken later on in the year, at times when lower flow conditions and higher stream temperatures create particularly harmful bottlenecks for the fish. Unless restricted, operation of WGFP would extend these low flow periods and increase drought conditions in the river, with potentially serious effects on the river's fisheries.

When considering whether to issue or deny a CWA § 404 permit or, if to issue, the conditions for issuance, the Clean Water Act and implementing regulations require an evaluation of the impacts of the proposed discharge on the aquatic environment. This evaluation must look not only at the direct impacts of placing dredged and fill materials on a specific location, but also at the impacts that action will have on other affected aquatic environments, such as the reduction of flows in affected streams. *See Riverside Irrigation District v. Andrews*, 758 F.2d 508, 512 (10th Cir. 1985).

When the analysis reveals that impacts would result, the regulations require a determination of whether less damaging, practicable alternatives to the proposed discharge are available. *40 CFR § 230.10(a)*. If such alternatives are available the permit must be denied. *Id.* The CWA § 404 permit must also be denied if the proposed discharge would cause or contribute to violations of applicable State water quality

standards or the significant degradation of the aquatic ecosystem, or if conditions to minimize such potentially adverse impacts are not included. *40 CFR § 230.10(a) through (d)*. In evaluating whether significant degradation to the aquatic ecosystem will result, the Corps must take into account the special nature of state and federal designated areas. *40 CFR Subpart E*.

The DEIS fails to provide critical information necessary for the Corps' evaluation of the extent and magnitude of impacts the proposed WGFP will have on the Colorado River's aquatic ecosystem. The information the DEIS does provide shows that operation of WGFP will significantly change the river's hydrograph and will cause or contribute to violations of the State's water quality standards. These changes could have significant impacts on these valuable fisheries. Yet, no real, enforceable means to avoid, minimize or mitigate such impacts have been proposed.

Accordingly, Trout Unlimited requests that the Corps' postpone a decision on the Subdistrict's CWA § 404 permit application pending the development of the required information and preparation of an amended or supplemental draft environmental impact statement subject to public review. Any future consideration of this permit application should take into account specific conditions, designed to avoid, minimize and mitigate the impacts of the Proposed WGFP on the aquatic and recreational resources of the Colorado River and Willow Creek. Trout Unlimited conceptually supports many of the conditions suggested by Grand County, as further discussed at the close of our comments below.

II. NEPA COMPLIANCE

As discussed in detail in Trout Unlimited's NEPA Comments, the DEIS fails to comply with NEPA. Agencies may not commit themselves to an action before the analysis required by NEPA is completed. *Wyoming Outdoor Council Powder River Basin Resources Council v. U.S.*, 351 F.Supp.2d 1232 (D.Wyo. 2005). Therefore, a CWA § 404 permit should not be issued until the DEIS problems are remedied and an opportunity for additional public comments provided.

III. CWA § 404(b)(1) GUIDELINES

The CWA § 404(b)(1) guidelines (Guidelines) prohibit the discharge of dredge or fill materials into U.S. waters 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 "cause 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)*.
- Appropriate and practicable steps to minimize potential adverse impacts of the discharge on the aquatic ecosystem are not taken. *40 CFR § 230.10(d)*.

The Corps must deny a CWA § 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. Violations of State Water Quality Standards.

The DEIS establishes that operation of the Proposed WGFP alternative will exceed stream temperature and dissolved oxygen standards adopted by the State of Colorado for the protection of aquatic resources. Accordingly, the requested CWA § 404 permit must be denied unless effective measures to avoid such violations are adopted. The DEIS fails to propose such conditions. Moreover, the DEIS fails to provide critical information needed to assess the magnitude, frequency and extent of these violations. Therefore, a full assessment of compliance with the Guidelines is not possible at this time.

B. Significant Degradation of the Waters of the United States.

Using criteria set forth in the Guidelines, the agencies acknowledge that WGFP would impact the Colorado River’s aquatic and recreational resources. Specifically, Appendix B acknowledges that operation of WGFP would change the river’s current and normal patterns of flow and circulation and reduce stream flows. *Appendix B at B-9 and B-11*. It acknowledges that such changes will increase the river’s stream temperatures and the potential for violation of standards adopted by the State of Colorado for the protection of aquatic life. *Appendix B at B-6 to B-8*. It acknowledges that increased diversions will reduce the riffle and pools complexes that provide aquatic life habitat in the river, *Appendix B at B-18*, and affect the sediment carrying capacity of the river, *Appendix B at B-9*. Appendix B concludes that “[e]ffects to fish and other aquatic life are possible in the Colorado River.” *DEIS at B-13*. However, borrowing from the DEIS, Appendix B concludes that such effects are not likely to “measurably” impact the Colorado River’s fish populations. *DEIS at B-13*. This conclusion is not supported by and is, in some cases, contrary to the information provided in the DEIS.

1. Hydrological Changes

An assessment of the *magnitude* of impacts due to WGFP is not possible from the hydrological information provided in the DEIS. The DEIS measures the project’s

impacts to the river's aquatic and recreational resources based on projected hydrological changes that, as discussed in comments provided by Grand County, are grossly underestimated. It relies on a hydrological model that, as discussed in Trout Unlimited's NEPA Comments, uses an averaging tool that significantly overestimates remaining flows available to the river and, therefore, underestimates the impacts of flow reduction on the river's resources. Accordingly, the DEIS conclusions regarding the magnitude of WGFP impacts is unfounded.

Nor is an assessment of the *extent* of such impacts possible from the information provided. The DEIS fails to look at the extent and frequency with which operation of WGFP will prolong low flow conditions in the river. As proposed, WGFP would increase Windy Gap diversions in two ways: by allowing Windy Gap to pump more water during higher flows and by allowing it to pump for longer periods of time than it current does. Because it would allow pumping for longer periods of time, WGFP could significantly increase the periods of time when the river experiences low flow, dry year conditions.² These hydrological changes can be particularly devastating to fisheries because they create bottle neck conditions that subject the fisheries to multiple stressors (i.e., reduced habitat, low flow, high stream temperatures) at one time. Yet, the DEIS does not acknowledge, much less look at the extent and frequency with which WGFP will create these conditions or the impacts such conditions will have on the fisheries.

Moreover, while the DEIS appears to base the conclusion that no measurable impacts will result largely on the assumption that most Windy Gap diversions will occur during high runoff, the modeled data provided indicates that the most significant percentage increases in diversions due to operation of WGFP would actually occur in July and August.³ In other words, one of the most significant effects of WGFP will be to increase current Windy Gap project pumping and river flow reduction later into the season. These effects can be particularly damaging, as they come at a time when lower flows and higher temperatures begin to place stress on the fisheries and immediately before river flows plummet and stream temperatures reach their highest due primarily to operation of other water diversions projects. Thus, even if most Windy Gap project diversions are anticipated to occur during higher flows, the most damaging impacts could

² For example, 2002 was the driest year in Colorado's recorded history. Windy Gap did not pump then because its water rights were not in priority. However, in 2003 Windy Gap recorded the highest diversions in the history of the project. Had WGFP been on line, it would have increased Windy Gap diversions by an order of magnitude, potentially extending the 2002 drought conditions into 2003 and even 2004. Yet, the DEIS does not even include 2002 and subsequent years in its modeled study period.

³ The DEIS indicates that the Proposed WGFP Action alternative will increase Colorado River diversions by an average of 109% in July and 144% in August of average years. These percentage increases are significantly underestimated because they are compared with modeled conditions which, as discussed by Grand County in its comments, assume Windy Gap current diversions that are over three times higher than actual diversions. Still these figures show that one of the effects of WGFP is to increase the period of pumping later into the season.

occur in only a few days of lower flows. The DEIS fails to evaluate either the frequency with which these conditions will occur or to assess their impacts on the river's resources.

2. Water Quality Changes.

The DEIS acknowledges that operation of WGFP would cause exceedences of the State's stream temperature standards for protection of aquatic life. However, it concludes that such exceedences are unlikely to result in "measurably impacts" to fish populations, a conclusion that is adopted in Appendix B. As summarized below and discussed in detail in Trout Unlimited's NEPA Comments, the DEIS stream temperature impacts analysis is fatally flawed and its conclusion unsupported.

First, the DEIS analysis relies on a model that is incapable of predicting stream temperature increases due to operation of WGFP either on a single day or over time. The steady state, single day model does not look at the extent to which WGFP will cause or contribute to temperature increases on the days prior to the single modeled day and, therefore, cannot accurately predict stream temperatures on the single modeled day. Nor does it look at temperature changes that occur thereafter. As a result, the model cannot and does not predict the extent and frequency of either acute (daily) or chronic (weekly) stream temperature conditions and their impacts on the fisheries.

Second, the DEIS fails to look at how WGFP will add to the stream temperature problems caused by operation of multiple water diversion projects. While WGFP would be required to cease pumping when stream flows below Windy Gap reservoir are at or below 90 cfs, other projects, including Colorado-Big Thompson, Denver's Moffat Tunnel and the anticipated Denver Moffat Tunnel expansion, can continue to divert as flows continue to drop and stream temperature increases. The DEIS fails to evaluate the impacts late WGFP pumping, combined with continued diversions by other projects, will have on stream temperatures and its effect on aquatic and recreational resources.

Third, in assessing compliance with State stream temperature standards the DEIS compares modeled stream temperature increases against the wrong State standards. As a result, the DEIS only looks at chronic standard violations, disregarding acute conditions. When compared with the correct State standards, it is clear that WGFP diversions will cause or contribute to the violation of both the State's acute and chronic stream temperature standards for protection of aquatic life.

Fourth, while acknowledging that WGFP will cause or contribute to the violation of the State's chronic temperature standards, the DEIS concludes that such violations would not harm the fisheries, primarily because some exceedences already occur and the fish are still there. This conclusion is not only scientifically untenable, it entirely disregards the scientifically rigorous and formal process the State went through to adopt the stream temperature standards currently in place. The DEIS also cites three studies for the proposition that the fisheries can tolerate higher stream temperature standards.

There are dozens of studies purporting to evaluate the thermal tolerance of fish – some of them less scientifically valid than others. The State of Colorado went through a three year process, relying on experts with a wide range of perspectives to weed through and select only studies deemed to be credible and reliable to assist in the development of the ultimately adopted State standards. As a result of this effort, the State adopted, through a formal rulemaking proceeding, the stream temperature standards currently in place. The DEIS arbitrarily replaces this three year State effort with arbitrarily picked information and unscientific conclusions.

3. Impacts to Special Aquatic Resources

Neither the DEIS nor the CWA § 404(b)(1) Guidelines compliance review reported in Appendix B take into account the special recreational value of the impacted fisheries. The State's Gold Medal fishery designations are based on population and size of fish. BLM's designation of the affected reach of the Colorado River as eligible for designation under the Wild and Scenic Rivers Act is based on similar considerations. Risks and impacts to fish that may be otherwise deemed acceptable, including impacts to fish size, could jeopardize such designations. Yet, the DEIS entirely fails to evaluate impacts of WGFP in light of the river's special designations or to evaluate the extent to which operation of the project would jeopardize such designations.⁴

4. Other Changes.

Trout Unlimited's NEPA Comments discuss, in detail, additional fatal flaws that render the DEIS incapable of informing the Corps' determination of the extent to which the proposed action will cause or contribute to the significant degradation of the Colorado River's aquatic ecosystem. Accordingly, to the extent Appendix B relies on the DEIS information and analysis to reach conclusions in this regard, such conclusions are unfounded.

C. Least Damaging Practicable Alternatives.

As discussed in detail in comments provided by Grand County, Western Resource Advocates and others, the DEIS defines the purpose and need for the Proposed WGFP in such narrow terms, that less damaging alternatives to supply water to Project participants were eliminated from consideration. The definition is so narrowly drawn that any alternative that would not "firm" the existing Windy Gap project by providing "at least 30 percent of the total requested firm annual yield of 40,000 AF" was screened out. *DEIS at 2-5.* Such narrow definition forecloses the Corps' evaluation of other practicable

⁴ As discussed in Trout Unlimited's NEPA Comments, while the DEIS acknowledges the existence of the State's and BLM's designations, it entirely fails to take such designations into account in its analysis. Moreover, the DEIS entirely fails to evaluate the impacts of WGFP on fishing recreation, simply concluding that no such impacts will result without either discussion or supporting information.

alternatives that could be significantly less damaging, including better conservation and efficiency, reuse and transfer of irrigation rights to municipal purposes.⁵

While the applicant's purpose and goals should not be ignored, the Corps is not restricted by the applicant's definition.⁶ Rather, the Corps has a duty to independently review and define a proposed project's overall purpose. *Alameda Water & Sanitation Dist. v. Reilly*, 930 F.Supp. 486, 492 (D.Colo. 1996). The DEIS's overly narrow statement of purpose and need precludes the Corps required evaluation and selection of the least damaging alternative.

In addition, the DEIS's narrow definition of the project participants' need and of the "no action" alternative precludes the Corps proper consideration of no action as the least damaging practicable alternative. The defined no action alternative assumes that, absent approval of WGFP, Longmont will enlarge Ralph Price Reservoir and other participants will find ways to maximize their Windy Gap diversions. As discussed at length in Trout Unlimited's NEPA Comments, the no action alternative, as defined, is highly speculative and makes assumptions that, while not fully disclosed, appear to artificially inflate the expected diversions and, therefore, impacts associated with the no action alternative.⁷ Moreover, in selecting the no action alternative, the DEIS fails to consider the relative cost (to Windy Gap project participants) of maximizing Windy Gap shares versus meeting their needs through less costly alternatives, including reducing demand through conservation and/or supplying such needs through other, less costly existing water supply sources. Particularly relevant here is the high cost of pumping Windy Gap water over the Continental Divide. The DEIS assumes that Windy Gap participants will opt to maximize their Windy Gap shares regardless of cost, even if conservation and/or use of cheaper, in-basin supplies would allow participants to meet their needs. This assumption is groundless. It is particularly so during wet years, when demands are lower and the yield of cheaper water supplies more available.

Because it very narrowly focuses on meeting participant demands through Windy Gap, the DEIS defines a no action alternative that is both speculative and likely

⁵ According to figures provided by Western Resource Advocates, adoption of the conservation measures consistent with the State's conservation objectives would enable project participants to meet their demand through 2030. When other projects currently proposed and involving several of the WGFP participants is considered, firm supplies will exceed participant demands through 2050.

⁶ It should be noted that the project's purpose and need is driven by the needs of WGFP participants and of Middle Park Water Conservancy District. The Subdistrict has claimed no need for the project, independent from facilitating service to the project's participants.

⁷ Such assumption lead to the questionable conclusion that construction of the 93,000 acre-foot Chimney Hollow reservoir, at a cost of over \$300 million, would yield a fairly small gain in supply (i.e., 7 % more on average years and 26% in wet years), when compared to the 13,000 acre-foot enlargement of Ralph Price Reservoir, at a cost of \$33 million.

financially unfeasible. Indeed, the original Windy Gap project, approved over 20 years ago, anticipated the need for 90,000 acre-feet of storage but assumed that such storage would be supplied by the project participants. Such assumption did not come to fruition, hence the proposed WGFP. The DEIS's assumption that, absent WGFP, project participants will choose the high cost of pumping Windy Gap water over conservation and other solutions is both unsupported and highly speculative. As a result, the DEIS fails to consider whether a true no action alternative would be, indeed, the least damaging practicable alternative available.

D. Measures to Minimize Potential Adverse Impacts on Aquatic Ecosystems.

Appendix B of the DEIS proposes specific measures offered by the Subdistrict and purportedly designed to “avoid, minimize, and compensate” the effects associated with implementation of the Proposed Action. Specific to the aquatic resources of the Colorado River, Appendix B proposes:

- The Subdistrict will work with Grand County, CDOW, and others to determine if increasing bypass flows in the Colorado River from the existing minimum flow of 90 cfs to 135 cfs while Windy Gap is pumping during July and August would result in temperature reductions downstream of Windy Gap that would measurably benefit the trout fishery. If studies indicate that increased bypass flows would be effective, Subdistrict would consider increasing required flows under certain water supply conditions.
- Opportunities for improvements to aquatic lie habitat in the Colorado River and mitigation of impacts of fish will be coordinated with the CDOW, Grand County and other responsible agencies.

Appendix B at B-23. These are the same measures offered in the DEIS and discussed in Trout Unlimited's NEPA Comments. As discussed in those comments, the measures proposed by the Subdistrict are insufficient to meet NEPA requirements. They are even less adequate to meet the requirements of the Clean Water Act and the CWA § 404(b)(1) Guidelines.

As proposed, these measures offer, at most, voluntary restrictions on operation of WGFP and a vague promise to look for ways to mitigate its impacts. As such, the proposed measures cannot be relied upon to minimize impacts on the outstanding resources of the Colorado River, as required under the Guidelines. The benefits of limiting WGFP diversions to times when Colorado River flows below Windy Gap are 135 cfs or more are not described and are, indeed, inconsistent with information provided in the DEIS and recommendations set forth in Grand County's Stream Flow Management Plan, which indicate that higher flows are needed to protect these valuable fisheries. Moreover, as further discussed in Trout Unlimited's NEPA Comments, the conditions upon which the Subdistrict might even consider restricting WGFP diversions are

practically impossible to meet and scientifically unjustified. As such, the proposed measures fail to meet the requirement of 40 CFR § 230.10(d) to “minimize” impacts to those resources, particularly in light of the special value of the resources involved.⁸

IV. OTHER REGULATORY REQUIREMENTS

A. Public Interest Review.

The Corps 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.

For the reasons highlighted in these comments and discussed in detail in comments provided by Trout Unlimited, Grand County, Western Resource Advocates, and others, the Corps lacks adequate information at this time to determine whether the Proposed WGFP is in the public interest. It lacks essential information to evaluate the magnitude and extent of the project’s impacts on the outstanding aquatic resources of the Colorado River, and it lacks information from which it can determine whether practicable, less damaging alternatives are available to meet the project’s overall purpose.

B. Water Quality Impacts

Corps 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.*

⁸ See also 1990 Memorandum of Agreement between EPA and the USACE regarding the Determination of Mitigation under the Clean Water Act § 404(b)(1) Guidelines (1990 MOA). The 1990 MOA indicates that 40 CFR § 230.10(d) requires adoption of measures to “minimize” rather than “mitigate” the impacts of a proposed discharge. It also emphasizes that the determination of what level of mitigation is appropriate should be “based solely on the values and functions of the aquatic resource that will be impacted.” *Id.* The mitigation measures proposed by the district fall far short from what is needed to protect the outstanding resources of the affected reach of the Colorado River, as recognized by both State and Federal designations.

As previously discussed, the DEIS indicates that operation of WGFP will cause or contribute to violations of State stream temperature and dissolved oxygen standards established by the State for the protection of aquatic resources. However, the DEIS does not provide sufficient information to fully evaluate the magnitude, extent and frequency of such 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.

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 WGFP 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.

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

The Corps must give "due consideration" to the effect of 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 summarized in this comments, above, and discussed in detail in Trout Unlimited's NEPA Comments, the DEIS fails to provide needed information for the Corps' evaluation of impacts on the State and Federally recognized outstanding recreational fisheries of the Colorado River affected by the proposed CWA § 404 permit. Moreover, neither the DEIS nor Appendix B give due consideration to the special character of these areas.

E. Other Federal, State and Local Requirements.

Corps regulations require inclusion in CWA § 404 permits of conditions that are "necessary to satisfy legal requirements or otherwise satisfy the public interest requirement." *33 CFR § 325.4(a)(1)*. If the Corps 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). As further discussed in Trout Unlimited’s NEPA Comments and in comments provided by others, there are serious questions regarding the legality of the Proposed WGFP, including consistency with Federal, State and local laws. Any permit considered by the Corps in this case must impose conditions designed to ensure compliance with such laws. Trout Unlimited endorses Grand County’s proposed permit conditions in this regard.

F. Mitigation.

In addition to the requirements of the CWA § 404(b)(1) Guidelines, Corps 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 to avoid, minimize and mitigate the impacts of the Proposed WGFP on the aquatic and recreational resources of the Colorado River and Willow Creek have been proposed.

V. NEXT STEPS

Given the deficiencies in the information provided by the DEIS, the design of measures that will ensure protection of the outstanding aquatic and recreational values of the Colorado River and Willow Creek is difficult if not impossible. In its comments on the Subdistrict’s CWA § 404 permit application, Grand County suggests a number of measures to be included in any future consideration of such an application and prior to construction of any project feature. Trout Unlimited has not had an opportunity to fully evaluate such suggestions but we conceptually endorse a number of them, including:

- Development and implementation of an adaptive management plan, provided that adequate opportunity for input by interested parties including, but not limited to, Trout Unlimited is provided.
- Development and implementation of a temperature monitoring and mitigation plan, provided that adequate opportunity for input by interested parties including, but not limited to, Trout Unlimited is provided.
- Development and implementation of a monitoring plan to identify impacts to fisheries and modification of project operations to avoid such impacts, provided that adequate opportunity for input by interested parties including, but not limited to, Trout Unlimited is provided.
- Development and implementation of an algae study and mitigation plan for the reach of the river downstream of Windy Gap, provided that adequate

opportunity for input by interested parties including, but not limited to, Trout Unlimited is provided.

- WGFP diversion limitations. Such limitations should carry through the agencies's assumption, as expressed in the DEIS, that no diversions would occur in dry years and that most diversions would occur during the months of May and June of average and wet years.
- Adoption of conservation, efficiency and reuse measures, as outlined by Grand County. Additional measures may be necessary.
- Adoption of storage limits and accounting measures to prevent the illegal expansion of the C-BT Project, together with any structural changes needed to ensure that Granby Reservoir can physically release flows in excess of its allowed storage limits.
- Demonstration of compliance with local, state and federal laws, including specific laws outlined by Grand County.
- Limitation on further diversions by Windy Gap participants and non-WGFP users.
- Mitigation storage in Granby Reservoir.
- Development and implementation of a bypass flow around Windy Gap reservoir to prevent further whirling disease problems.

Thank you for the opportunity to comment.