

CENTRAL DELTA WATER AGENCY

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Re: BDCP/California Water Fix
RDEIR/SDEIS
DJN Sr. Part One

Our comments regarding the above are being submitted in multiple parts.

PREDETERMINATION OF ACTION TO CONSTRUCT AND OPERATE AN ISOLATED CONVEYANCE FACILITY

The Decision to Proceed with an Isolated Conveyance, i.e., Peripheral Canal/Tunnels, as Part of the Plan Has Been Made in Advance of the Analysis and Preparation of the Draft EIR/EIS and RDEIR/SDEIS Destroyed the Impartiality for a Good Faith Effort at Full Disclosure and Analysis of Impacts, Alternatives and Mitigation.

NEPA requires full disclosure of the potential effects of major actions proposed by federal agencies and accompanying alternatives, impacts and possible mitigation. NEPA also requires that environmental concerns and impacts be considered during planning and decision making so that steps may be more easily taken to correct or mitigate the impacts of an action. Compliance with NEPA should result in more informed decisions and the opportunity to avoid or mitigate for potential environmental effects before an action is implemented. The NEPA process is intended to identify and evaluate alternatives in an impartial manner. (See Reclamation's NEPA Handbook dated February 2012.)

CEQA requires adequacy, completeness and a good faith effort at full disclosure. The EIR is to inform the decision makers and the public of the environmental impact of proposed actions. (See CEQA Guidelines sections 15002 and 15003.) The purposes include identifying ways to avoid or significantly reduce environmental damage and preventing significant, avoidable damage to the environment by requiring changes in projects through the use of feasible alternatives or mitigation measures.

The environmental review for BDCP and now the California Water Fix has been orchestrated to justify the new Sacramento River Intakes and the Isolated Conveyance Facility. Such actions reflect bad faith and have resulted in inadequate disclosure and analysis of impacts, alternatives and mitigation.

1) Participation in the BDCP Steering Committee was conditioned on agreement to The Bay Delta Conservation Plan Points of Agreement for Continuing into the Planning Process dated November 16, 2007, which includes agreement to new points of diversion on the Sacramento River and an isolated conveyance facility.

The agreement provides:

“2.3 Conveyance Facilities

The Steering Committee agrees that the most promising approach for achieving the BDCP conservation and water supply goals involves a conveyance system with new points of diversion, the ultimate acceptability of which will turn on important design, operational and institutional arrangements that the Steering Committee will develop and evaluate through the planning process. The main new physical feature of this conveyance system includes the construction and operation of a new point (or points) of diversion in the north Delta on the Sacramento River and an isolated conveyance facility around the Delta. Modifications to existing south Delta facilities to reduce entrainment and otherwise improve the State Water Project’s (SWP) and Central Valley Project’s (CVP) ability to convey water through the Delta while contributing to near and long-term conservation and water supply goals will also be evaluated. This approach may provide enhanced operational flexibility and greater opportunities for habitat improvements and fishery protection. During the BDCP process, the Steering Committee will evaluate the ability of a full range of design and operational scenarios to achieve BDCP conservation and planning objectives over the near and long term, from full reliance on the new facilities to use of the new facilities in conjunction with existing facilities.” (Exhibit 2) (Emphasis added.)

Excluded from such planning process agreement is design and operation of the SWP and CVP without an isolated conveyance facility and/or new intake facilities on the Sacramento River.

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Exhibit 1 is a copy of the January 27, 2009, letter from Karen Scarborough, Undersecretary of the State of California Resources Agency and Chair of the BDCP Steering

Committee to Dante John Nomellini, Manager and Co-Counsel of the Central Delta Water Agency requiring such consent. The letter provides:

“As you are also aware, consent to the ‘Points of Agreement’ and other prior decisions of the Steering Committee is requisite for a seat on the Steering Committee.”

Exhibit 2 is a copy of The Bay Delta Conservation Plan: Points of Agreement for Continuing Into the Planning Process (November 16, 2007).

Exhibit 3 is a copy of the August 26, 2008, *letter* from Dean Ruiz, attorney for the Central Delta Water Agency, to Karen Scarborough requesting membership on the BDCP Steering Committee.

Exhibit 4 is a copy of the November 13, 2008, letter from Dante John Nomellini, Manager and Co-Counsel of the Central Delta Water Agency, to Karen Scarborough, et al. stating willingness to execute the October 6, 2006, Planning Agreement but disagreeing with the provision in the November 16, 2007 “Points of Agreement.”

2) The Department of Water Resources as lead agency for CEQA and the United States Department of Interior’s Bureau of Reclamation as a co-lead agency under NEPA are both signatories to the March 2009 Memorandum of Agreement Regarding Collaboration On the Planning, Preliminary Design and Environmental Compliance for the Delta Habitat Conservation and Conveyance Program in Connection With the Development of the Bay Delta Conservation Plan. The Memorandum includes the above referenced November 16, 2007, Points of Agreement to construct and operate an isolated conveyance facility as Exhibit 2 thereto. Said Memorandum is Exhibit 5. DWR and the USBR are both signatories to the December 15, 2011, First Amendment To The Memorandum of Agreement Regarding Collaboration On the Planning, Preliminary Design and Environmental Compliance For The Delta Habitat Conservation and Conveyance Program In Connection With the Development of the Bay Delta Conservation Plan. Said First Amendment confirms the ongoing commitment to the BDCP and DHCCP including the March 2009 MOA which is Exhibit 5 and further references in paragraph J. the November 2007 “Points of Agreement.” The First Amendment dated December 15, 2011, is Exhibit 6.

3) The Draft EIS/EIR is written in a manner advocating the Conservation Strategy of the BDCP plan which is to construct and operate an isolated conveyance as a standalone conveyance or as part of dual conveyance and is evidence that the decision is predetermined. The lack of objective and impartial presentation and analysis is apparent. The Executive

Summary for the Bay Delta Conservation Plan at page 10 sets forth the Conservation Strategy for “Water Flow and Conveyance” as follows:

“Water Flow and Conveyance

Water flow and conveyance conservation measures provide for the development and operation of new water conveyance infrastructure and the establishment of operational parameters associated with existing and new facilities. New north Delta intake facilities along the Sacramento River will divert water through state of the art positive barrier fish screens into an isolated tunnel/pipeline to the south Delta. In conjunction with the existing south Delta facilities (referred to as dual operations), this improved operational flexibility will improve conditions for covered fish species and restore water supply reliability. Water diversion rates and bypass flows in the Sacramento River at the north Delta diversions will be informed by seasonal movement patterns of covered fish species. The conservation measures summarized in the following sections are discussed in detail in Chapter 3, *Conservation Strategy.*” (Emphasis added.)

The Executive Summary for the BDCP Draft EIR/EIS (November 2013) at page ES-1, paragraph 3 provides:

“The BDCP is a comprehensive conservation strategy for the Sacramento-San Joaquin Delta (Delta) to advance the planning goal of restoring ecological functions of the Delta and improving water supply reliability in the state of California. The conservation strategy is designed to restore and protect ecosystem health, water supply, and water quality within a stable regulatory framework. The BDCP reflects the outcome of a multiyear collaboration between DWR, Reclamation, state and federal fish and wildlife agencies, state and federal water contractors, nongovernmental organizations, agricultural interests, and the general public. The BDCP sets out a comprehensive conservation strategy for the Delta designed to restore and protect ecosystem health, water supply, and water quality within a stable regulatory framework through the following.

- New and/or modified state water conveyance facilities and operation of the SWP and the CVP in the Delta.” (Emphasis added.)

At page ES-2, it is provided:

“The conservation strategy is based on the best available science and was built upon the following broad conservation goals.”
(Emphasis added.)

These statements issued in advance of the completion of the EIR/EIS process reflect the predetermination and intended lack of objectivity in the preparation of the environmental documents and analysis.

4) The pretense that the isolated conveyance facility was a Conservation Measure (CM1) has been removed however the lack of good faith effort at full disclosure remains. Two forty foot (40ft) diameter tunnels 35 miles long which have the capacity depending on intakes to convey 15,000 cfs or more of water from the Sacramento River to the export pumps with no outlets for maintaining Delta water quality certainly do not constitute a measure to protect and enhance the unique cultural, recreational and agricultural values of the Delta as an evolving place. During much of the time the capacity of the tunnels to divert water will exceed the flow available in the Sacramento River at the intake location. As clearly demonstrated the SWP and CVP have not developed sufficient supply to meet the desires of contractors or even the preconditions to their permits to operate. There is no basis to assume that regulatory restraints will not continue to be avoided through emergency actions and there is no basis to assume that water supply will be developed in sufficient quantities to meet regulatory requirements, senior obligations and contractual desires. Disregarding operation the impacts of construction and the physical facilities themselves will severely damage the Delta in violation of the statutory mandate to protect and enhance.

5) Top Public official actions have gone far beyond simple preference of a particular project and their actions have resulted in the lack of impartiality of the public agencies under their direction which is necessary to a good faith full disclosure in the environmental documents.

Jerry Brown, Governor of the State of California has been emphatic in his advocacy of the BDCP tunnels. See Exhibit 7 which is a May 28, 2014 Article wherein he is quoted as saying “I just want to get sh*t done,”. “Sh*t” appears to be the BDCP tunnels which are the alternative to his previously emphatically supported peripheral canal, but with no outlets to maintain Delta water quality. Those within the Governor’s Department of Water Resources and Department of Fish and Wildlife (agencies responsible for good faith full disclosure in the BDCP EIR/EIS) would be fools to misread the direction from the top. They have not misread the direction.

Secretary of Interior Ken Salazar, the head of the U.S. Bureau of Reclamation and U.S. Fish & Wildlife Service has also signaled his emphatic support for the BDCP Tunnels in remarks to the Commonwealth Club, San Francisco, CA, September 19, 2011, Exhibit 8. After

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referencing debate raging in Washington, D.C. relating to water supplies we depend on in the west. He explains:

“It’s a battle between pragmatism and ideology. Collaboration versus cynicism.”

“In California’s Bay Delta, a plan to modernize and secure the State’s aging and inadequate water system is always the target of pot shots. Yet the bottom line is the health of the Delta is inextricably linked to the security of safe and reliable water supplies.”

Mr. Salazar goes on to provide:

“That solution is the Bay Delta Conservation Plan.

The Bay Delta Conservation Plan is the most important - and most complex - long-term water and habitat management plan ever undertaken.

The BDCP provides a comprehensive approach that includes new habitat for endangered fish species, coordinated measures to attack toxics that are fouling delta waters, and improvements to the state’s water infrastructure.

Rather than simply pumping water from north to south through the Delta - which places immense strain on the system and is unreliable - a new conveyance system would reduce direct conflicts between water supply and fisheries, as the Delta Vision Blue Ribbon Task Force and many independent scientists have recommended.

This type of a comprehensive approach is long overdue. We simply must find a way to put California on a path to restore the delta and protect in-Delta interests - while also securing a more reliable water supply for its future. These are the ‘co-equal goals’ required by the landmark law that the California legislature passed in 2009.

That’s why, for the past two and a half years, my Department has committed a vast amount of energy to advancing the BDCP.”

The reference to “a new conveyance system” rather than “simply pumping water from north to south through the Delta” is to the BDCP common strategy for Water and Conveyance which is the “isolated tunnel/pipeline to the south Delta”. Mr. Salazar’s characterization of criticism as “pot shots” does not encourage those within his departments to make a good faith disclosure of adverse impacts of the project which he apparently favors.

It would appear that those public officials who will control the decisions have moved well beyond support to a predetermination to move forward with the isolated conveyance in advance of completion of the EIR/EIS process.

6) Further evidence of the predetermination of proceeding with the isolated Tunnel/pipeline conveyance prior to completion of the EIR/EIS is the Department of Water Resources establishment of an organization within the Department called the Delta Conveyance Facility Design and Construction Enterprise to support the design and construction of Conservation Measure 1. See Exhibit 9. In a presentation to the Metropolitan Water District of Southern California, Special Committee on the Bay Delta Mark Cowin, Director of the Department of Water Resources was quoted as saying:

““So that’s what I wanted to say about the DCE,” he said. “The memo that I put out to all staff as Randall indicated, really is just our first steps as an organization to prepare ourselves for implementation of this project so we’re taking our existing resources and starting to move them into an organization that can engage both with the DCE and ultimately with the implementation office for BDCP as well.” (Exhibit 9-1) (Emphasis added.)

The candid admission by Jerry Meral, then Deputy Secretary of Resources who was quoted to say:

“BDCP is not about, and never has been about saving the delta.
The delta cannot be saved.”

is further evidence that there has been a predetermination as to the construction of the isolated conveyance facility. See Exhibit 10.

The isolated conveyance is the only measure for which the BDCP EIR/EIS provides project level review. The lack of inclusion of Delta levee improvements as part of the project to facilitate export operation when the Sacramento River intakes cannot be safely operated lends more weight to the evidence that going forward with the isolated conveyance has been predetermined. The State administration determination is contrary to State law which requires that the unique cultural, recreational, natural resource and agricultural values of the Delta be protected and enhanced and that water shall not be diverted from the Delta for use elsewhere unless adequate supplies for the Delta are first provided.

In April of 2015, before completion of environmental review, the Design and Construction Enterprise (DCE) developed a CM1 Property Acquisition Management Plan focused only on Alternative 4 which includes the Sacramento River intakes and the isolated tunnels along the chosen route for Alternative 4A. This planning effort focus on only one alternative and one route is yet another commitment of resources to the single preferred alternative thus inhibiting objective review of other alternatives. See Exhibit 10-1.

On August 25, 2015 the DWR and USBR submitted to the SWRCB a petition for change in their specific water permits to allow the three new intakes on the Sacramento River for Alternative 4A. This commitment of resources and reflection of intent to move forward with Alternative 4A and only 4A is yet another confirmation of the predetermination for new intakes on the Sacramento River and the isolated conveyance tunnels. See Exhibit 10-2.

On August 27, 2015 California Natural Resources Secretary John Laird gave an update to a committee of the San Diego Water Authority explaining the split of the tunnel project into two projects. He explained "By doing two 30-mile tunnels and by doing habitat restoration, it lowers the amount of approval that needs to be done, and you can move ahead with the habitat...". "I should just say that the Governor is very committed to doing this," he said, "He wants to get it done. One of the interesting things in working for him is that he is fearless. He says what he really thinks; it doesn't matter how unpopular it is, if he thinks it's in the long-term interest, he is determined to spend whatever capital it takes to get it done, and this is on that list for him." The predetermination as to the tunnels is again confirmed. See Exhibit 10-3.

On September 21, 2015 the USACE gave notice that the DWR applied for a permit to place fill material in approximately 775.02 acres of waters of the United States to construct and operate a new water conveyance facility consisting of three intakes along the Sacramento River and dual tunnels conveying up to 9,000 cubic feet per second of water to the existing Clifton Court Forebay. See Exhibit 10-4. This application is specific to the 4A tunnels and three Sacramento intakes adding to the evidence of predetermination.

The actions of Federal Officials and Agencies reflect an intentional violation and circumvention of 40 CFR section 1506.1(a) which precludes actions which would "Limit the choice of reasonable alternatives" until an agency issues a record of decision as provided in section 1505.2. Such actions clearly run contrary to a good faith effort to rigorously explore and objectively evaluate all reasonable alternatives as required by 40 CFR section 1502.14.

The actions of State Officials and departments clearly show that the project with three intakes on the Sacramento Rivers and two tunnels connecting to Clifton Court has already been determined to be the selected project regardless of the fact that environmental review has not been completed.

NEPA POLICY AND PROCEDURAL REQUIREMENTS TO ASSURE OBJECTIVITY IN THE PREPARATION OF THE EIS HAVE BEEN AND ARE BEING CIRCUMVENTED.

The BDCP Draft EIR/EIS Purpose Statement and the revision in the Water Fix are a confusing mix of State Water Project (SWP), federal Central Valley Project (CVP), State Water Contractor and federal Water Contractor purposes and needs. The broader purposes as required by law are not included.

The SWP and State Water Contractors obviously want to construct the isolated conveyance facility and operate the SWP to maximize the export of water from the Delta.

The CVP (U.S. Bureau of Reclamation) although clearly in favor of construction of the isolated conveyance has not forthrightly sought authority to join in construction, but obviously plans to convey CVP water through such facility and seeks to protect the “ability of the SWP and CVP to deliver up to full contract amounts, . . .”

The SWP contractors and CVP contractors who are to receive the water exported from the Delta obviously are isolated conveyance and full delivery proponents.

The roles of regulating agencies and applicants, lead agencies and cooperating agencies has been mixed in a manner which circumvents the procedural mechanisms to assure NEPA required objectivity.

The SWP and SWP contractors seeking take permits from the U.S. Fish & Wildlife Services (USFWS) and National Marine Fisheries Service should be viewed as applicants and the Services as co-lead agencies. In such case, the EIS should have been prepared directly by the Services or by a contractor selected by them or where appropriate under 40 CFR section 1501.6(b), a cooperating agency which has a similar interest. 40 CFR section 1506.5(c) in part provides:

“It is the intent of these regulations that the contractor be chosen solely by the lead agency, or by the lead agency in cooperation with cooperating agencies, or where appropriate by a cooperating agency to avoid any conflict of interest.” (Emphasis added.)

Allowing DWR, the USBR and their respective contractors to run the show is not appropriate.

Although 40 CFR section 1506.2 directs cooperation to the fullest extent possible to reduce duplication between NEPA and state and local requirements, it does not suggest that compliance with requirements to avoid conflict of interest and assure objectivity can be avoided. Joint selection of common consultants in compliance with NEPA requirements and subsequent sole direction of the common consultants by USFWS and NMFS as to NEPA compliance would

avoid duplication and could have helped avoid the conflict of interest deterioration of objectivity. Such has not been the case. The USBR is not a regulatory or permitting agency for BDCP in the same sense as the USFWS and NMFS. It has its own responsibilities for compliance with federal ESA. Its consultations with USFWS and NMFS require that it comply with NEPA, but its role in protecting endangered species is conflicted with its role in serving its water contractors and in coordinating the CVP operations with those of the SWP. The USBR is not an adequate representative for the interests and NEPA responsibilities of the USFWS and NMFS and should not be a co-lead and particularly the sole lead.. Exhibit 11 is a copy of the First Amendment to the Memorandum of Agreement Regarding Collaboration on the Planning, Preliminary Design and Environmental Compliance for the Delta Habitat Conservation and Conveyance Program in Connection with the Development of the Bay Delta Conservation Plan dated August 31, 2011. This copy contains signatures by the DWR and USBR. Whether the State and Federal Contractors signed is not known. This First Amendment can be contrasted to another First Amendment (which may be the Second Amendment) dated December 15, 2011 and is Exhibit 6. The USFWS and NMFS are not parties to either First Amendment. Both First Amendments provide essentially the same language as to contracting, directing and communicating with the consultants regarding the BDCP related environmental documents.

II.E. of Exhibit 6 provides:

“E. DWR is taking the lead role in preparing and, after consultation with the Parties, shall direct the consultants regarding the content of the BDCP, including those elements of the BDCP intended to be incorporated in the EIS/EIR. DWR has also contracted with the consultants preparing the EIS/EIR and shall continue to administer the contract. DWR shall solicit, in a timely manner, from the Department of Fish and Game (‘DFG’), the Public Water Agencies, and the NEPA Co-lead Agencies, comments on the draft work products in support of the completion of tasks, pursuant to the schedules in Exhibit 1 and 1A. As set forth in Paragraph B above, Reclamation shall be responsible for coordinating with the NEPA Co-lead Agencies and coordinating with DWR on the NEPA Co-lead Agencies’ comments that DWR shall submit to the Consultants in accordance with the schedules in Exhibit 1 and 1A. In the event agency comments are not received consistent with the schedules in Exhibit 1 and 1A, DWR may proceed with preparation of the BDCP and DWR, and Reclamation may proceed with the preparation of the EIS/EIR. DWR shall direct the Program Manager on preparation of the BDCP and EIS/EIR as necessary to maintain the schedule or consider necessary revisions as

described in subsection II.C. The DWR Director shall concurrently advise the Parties of the direction provided to the Program Manager. Nothing in this section or elsewhere in this First Amended MOA modifies the Federal responsibilities for the content of the draft and final EIS and preparation of the ROD.” (Emphasis added.)

II.F. of Exhibit 6 and Exhibit 11 in pertinent part provides:

“F. DWR has retained a consultant with extensive project management experience to be the BDCP and DHCCP Program Manager. The Program Manager shall report to and be directed by the Director of DWR. The Director of DWR shall implement the responsibilities of DWR as set forth in Subsection II.E. above. The Director of DWR may fulfill this responsibility through the Program Manager, who is delegated to carry out the day-to-day management activities of the BDCP and to closely coordinate with Reclamation regarding preparation of the EIS/EIR. . . .” (Emphasis added.)

II.Q. of Exhibit 6 (12-15-11) provides:

“Q. The Parties may retain consulting services as necessary to complete the BDCP and DHCCP Planning Phase, including the BDCP and EIS/EIR. No consultants will be retained for BDCP work unless they are approved by DWR. Before retaining consultants for EIS/EIR work DWR shall, in accordance with NEPA, its implementing regulations and the Lead Agency Agreement, consult with the NEPA Co-Lead Agencies. Consistent with Section II.F, above, the Director of DWR shall manage the retained consultants to carry out the BDCP and EIS/EIR.” (Emphasis added.)

II.Q. of Exhibit 11 (8-31-11) provides:

“Q. The Parties may retain consulting services as necessary to complete the BDCP-DHCCP Planning Phase, including the BDCP and EIS/EIR. Consistent with Section II.F, above, the Director of DWR shall manage the retained consultants to carry out the BDCP and EIS/EIR.” (Emphasis added.)

III.I. of Exhibit 6 and Exhibit 11 provide:

- “I. In the event DWR designates SFCWA as a consultant contract administrator, DWR shall continue collecting funds from the Public Water Agencies, including but not limited to those member agencies identified in Exhibit 2, pursuant to the BDCP-DHCCP Planning Phase funding agreements, and DWR shall distribute those funds to SFCWA to fund the consultants that are contracting directly with SFCWA for the completion of the BDCP-DHCCP Planning Phase.” (Emphasis added.)

The USFWS and NMFS, the agencies with the most direct responsibility for protection of endangered species and the parties expected to grant the essential permits have been relegated to a back seat role. They don't hire or direct the consultants; their submission of comments must be through the USBR and thence through DWR to the consultants. If their comments are untimely DWR and Reclamation make the call. USFWS and NMFS cannot even hire consultants unless they are approved by DWR and DWR can even delegate administration of the consultant contracts to the water contractors.

The manipulation of the lead, co-lead and cooperating agencies and the delegation of responsibilities by the State and federal agencies has left the most conflicted parties in charge of the NEPA environmental process. Although the ultimate approval is left with the respective agencies, the thousands of pages of text and studies is virtually impossible to adequately review. The 132 page Executive Summary can be contrasted to the 15 page normal summary referenced in 40 CFR section 1502.12 and the thousands of pages in the DEIS/EIR can be contrasted to the 150 to 300 pages referenced in 40 CFR section 1502.7. The impartiality and avoidance of conflicts whether financial or otherwise, of the consultants is critical to the objective analysis required by NEPA. Those who contract with the consultants and most important those who direct the consultants will have the greatest impact on objectivity. As related to BDCP the DWR and in turn the USBR are essentially the agents of their respective contractors and should be viewed as applicants for the purpose of NEPA compliance. 40 CFR section 1506.5(c) specifies that a consulting firm involved in preparing an EIS must execute a disclosure statement setting forth any “financial or other interest in the outcome of the project.” Whether this was done and by whom is of interest however, even with such disclosure, direction of the consultants will greatly dictate the bounds of objectivity.

Objectivity to assure the need to “rigorously explore and objectively evaluate all reasonable alternatives” is made more critical by the revolving door of employees between federal and state agencies and export water contractors.

For NEPA purposes, USFWS and NMFS should now engage independent consultants which they direct to review, revise and supplement the already prepared BDCP documents and

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issue their own draft EIS for public comment and final action. The cost for such effort should be paid in advance by the contractors.

For CEQA purposes the state Department of Fish and Wildlife, although realistically not able to exercise any position independent of DWR, would have been the more appropriate State agency to direct the consultants in preparation of the EIR. At this juncture the Independent Science Board or some other independent body should be authorized and funded to review, revise and supplement the already prepared BDCP documents and issue a new CEQA draft for public comment and final action. The cost for such effort should be paid in advance by the contractors.

Exhibits 1 through 11 of our comments submitted July 25, 2014 are hereby incorporated by this reference as if included with this submittal. Exhibits 9-1 and 10-1 through 10-4 are submitted with this Part One of our comments.

Very truly yours,



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