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November 29, 2001

Ms. Alisha Sterud, MP-400
U.S. Bureau of Reclamation
2800 Cottage Way
Sacramento, CA 95825

Re: Plain View Water District's Comments on Draft Municipal and Industrial ("M&I") Water Shortage Policy, Central Valley Project ("CVP"), California

Dear Ms. Sterud:

The following comments are submitted on behalf of Plain View Water District ("PVWD") regarding the September 11, 2001 Draft Central Valley Project M&I Water Shortage Policy. PVWD previously submitted comments to the Bureau of Reclamation concerning earlier drafts of the policy. Those comments dated November 30, 2000 and January 10, 2001 are incorporated herein.

PVWD has been a contractor of Reclamation since 1952. The water PVWD receives pursuant to its water service contract is PVWD's sole source of water. PVWD does not have other sources of water readily available to it. Furthermore, PVWD is located near the City of Tracy, an area faced with tremendous growth. Much of the growth is a direct result of the need to provide additional affordable housing for the East Bay Area. As a result of its unique circumstances, PVWD will be significantly impacted by the adoption of the proposed policy.

A. The Process for Establishing the Cap on M&I Reliability Was Flawed and Denied Contractors Due Process

The draft Water Shortage Policy should not be adopted by Reclamation. The policy arbitrarily sets a cap on the amount of water that qualifies for M&I reliability. By adopting the draft policy, Reclamation is federalizing land use decisions that are solely within the province of city and county governments. The policy limits the reliability of water, depriving contractors of the full benefit of their contractual entitlement to use water for M&I purposes. Moreover, adoption of the policy directly impacts the economic growth and land values within certain areas of the Central Valley.

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The draft M&I policy applies only to projected CVP M&I demand as of September 30, 1994, as shown for year 2030 on Schedule A-12 of the 1996 Municipal and Industrial Water Rates book. Irrigation water converted to M&I water after September 30, 1994 is subject to the shortage allocations applied to irrigation water.

Reclamation's reliance on September 30, 1994 as the cut-off date for converted M&I water is not justified. In 1994, Reclamation required contractors to estimate their projected M&I needs over the next 25 years. At the same time, Reclamation imposed a higher fee on future projected M&I deliveries. Consequently, Reclamation created a financial disincentive for smaller federal contractors to fully estimate their future M&I needs.[1]

More importantly, at *no* time during the process did Reclamation *ever* state that future M&I reliability would be tied to the 1994 projection. As a result, contractors were not on notice of the full implications of the 1994-projected M&I needs analysis. Two years later, Reclamation announced that M&I reliability would be capped at the 1994 projected M&I demand. Had contractors been fully aware of the consequences associated with the 1994 projections, they would have properly assessed the resulting long-term financial and water supply effects of their projections. By subsequently establishing a cap on water qualifying for the higher M&I reliability, Reclamation arbitrarily and capriciously penalizes contractors, such as PVWD.

B. <u>The Policy is Discriminatory</u>

The policy also impermissibly discriminates against water districts that were predominately agricultural but which are now facing dramatic increases in M&I demands. Reclamation provides no rational distinction for allowing certain M&I contractors to adjust their historic use on the basis of future growth while refusing to give the same consideration to contractors that convert to M&I after 1994.

While the policy does not expressly provide the reasons for capping the M&I reliability of districts converting Ag water to M&I, it is ostensibly to minimize the impacts to other agricultural contractors. However, the impact to agricultural supplies resulting from adjustments in historic use far exceeds the impacts associated with Ag water converted to M&I. Consequently, Reclamation's rationale for the cap cannot withstand scrutiny.

PVWD's demand for M&I water during the term of a renewed long-term contract is expected to increase dramatically. PVWD projects that approximately 30% of its current contract amount will be dedicated to M&I purposes within the

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[1] During the early 1990's, California was still in a recession. While it may have been predictable that M&I development would occur, contractors could not accurately estimate the timing for such development. As a result, districts like PVWD were reluctant to financially burden themselves without greater assurance that development plans would be implemented.

next 20 years, i.e., approximately 6,000 acre-feet. Even though the increase in M&I use is significant for PVWD, the increase is relatively small as compared to other contractors' projected adjustments in historic use resulting from new growth.

The CVP Analysis of Need for M&I Water prepared by Reclamation dated December 11, 2000 provides data demonstrating that Reclamation's policy is arbitrary and discriminatory toward contractors facing conversions of Ag water to M&I. As an example, Reclamation's table shows Santa Clara's M&I water demands in 1994 to be 81,313 acre-feet of water. However, its projected M&I demand for 2025 as listed in the 1994 rate book is 130,000 acre-feet. Thus, under Reclamation's Water Shortage Policy, Santa Clara may adjust its historic use on the basis of growth, thereby increasing the amount of water receiving M&I reliability by an additional 49,000 acre-feet.[2] PVWD, on the other hand, is arbitrarily prohibited as a result of the proposed policy from increasing its M&I reliability beyond 800 acre-feet.[3]

Another example of the discriminatory effect of the policy relates to the rates. Just like other M&I contractors with M&I reliability, PVWD is required to pay M&I rates for water delivered for M&I use. Unlike the other M&I contractors, PVWD is denied the reliability associated with paying those higher rates.

Like all M&I contractors, industries and housing dependent on a secure and reliable supply of water have been, and are being, established within PVWD. In the case of PVWD, the land use decisions are made by other local land use agencies, yet PVWD is left with the dilemma of providing water services. Denying PVWD the same reliability as other M&I contractors will burden development; will force land values to decline; and will be detrimental to the financial integrity of the district. There is no rational justification for the inequitable treatment of PVWD, and other similarly situated districts.

C. <u>The Policy Requires Contractors to Contractually Commit to Future Changes in the Policy without Due Process</u>

To be eligible for the "minimum shortage allocation of 75 percent of adjusted historical use," contractors are required to include provisions in their long-term contracts committing to the M&I water shortage policy. The policy, however, can be changed or modified at any time by Reclamation. This calls into question whether the contracts being negotiated and presumably executed in the near future will be

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[2] PVWD is not suggesting elimination from the policy of the concept of adjusting historic use as a result of growth. PVWD is only seeking that it be given equal treatment with other M&I contractors to increase the amount of M&I water with 75% reliability.

[3] Although the policy does allow a contractor to request permanent conversions to the M&I shortage criteria, the standard for allowing such a change is impossible for any contractor to meet. The policy allows for conversion provided there are no adverse impacts to agriculture or other M&I water supply contracts. Shortages inherently result in someone receiving less than their maximum entitlement. The policy provides no criteria for determining how much of shortage may occur without having an adverse impact.

legally enforceable. To have an enforceable contract there must be mutual agreement among the parties to the contract. It is difficult to comprehend how there can be a "meeting of the minds" between the contractors and Reclamation when Reclamation can unilaterally make changes in a policy that is incorporated by reference into the contract. The availability of a reliable supply of water is a crucial element of the contract. There must be mutual agreement among the parties in order for the contract to be enforceable.

The fact that contractors are given the opportunity to comment on proposed changes to the M&I Water Shortage Policy does not remedy the defect in the proposed contracts. Policies have no legal significance and are not binding on Reclamation. For the contractors to have any degree of certainty, the M&I Water Shortage Policy should only be adopted as a rule or regulation pursuant to the Administrative Procedure Act ("APA"). At least the APA provides the contractors with certain due process protections that are otherwise not present.

D. Contractors Are Entitled to Equal Treatment and Due Process

Any water shortage policy adopted by Reclamation must ensure that contractors are treated equally and due process is granted. All contractors must be given notice, fully disclosing all the implications of the proposed policy. Contractors must be given the opportunity to participate and, because the policy is included as a term of the contract, to agree to the express provisions of the policy. The policy proposed by Reclamation fails on all accounts.

Very truly yours,

Sandra K. Dunn
Attorney

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