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Community Services District

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Telephone: (916) 357-2121

November 28, 2001

Bureau of Reclamation
Attn: Alisha Sterud, MT-400
2800 Cottage Way
Sacramento, CA 95825

Via: Federal Express

RE: Comments Submitted by Clear Creek CSD on the Draft Municipal and Industrial (M&I) Water Shortage Policy, Central Valley Project (CVP), California

Dear Ms. Sterud:

Thank you for the opportunity for Clear Creek Community Services District to submit comments on the Draft Central Valley Water Project Water Shortage Policy (September 11, 2001) that was published in the Federal Register October 30, 2001. For over a year the District has participated in meetings and public workshops with Reclamation relating to development of the M&I Shortage Policy, and we have submitted many comments and statements --both orally and in writing-- during that time. The comments provided in this letter cannot possibly incorporate or replace all of the input provided over the last year; if any issue is overlooked in this letter, we would ask that you refer to the comments and remarks previously submitted to Reclamation on the M&I Shortage Policy.

For accuracy and ease of reference, I have numbered our comments and attached a highlighted copy of the Shortage Policy with numbering for each highlighted portion that corresponds to the comments. If a numbered comment in this letter has an asterisk, then the comment refers to some aspect of the policy in general and is not referenced to a highlighted portion of the text of the enclosed copy of the Shortage Policy.

1.* There has been no NEPA environmental review of this Policy as required by law. In the Workshops for development of this Policy, on more than one occasion, Reclamation was asked why it had not performed any environmental review of the proposed policy. The response from Reclamation representatives was that any environmental review which might be necessary had already been done in the Programmatic EIS that had been done for implementation of CVPIA. When asked to produce the applicable portion of the PEIS or cite us to the relevant portion of the PEIS,

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Reclamation was evasive and unresponsive. Throughout the entire public process carried on by Reclamation for review and development of the Shortage Policy, no environmental documentation or analysis was produced at any time to address the potential environmental impacts of Reclamation's adoption and implementation of this Policy.

Reclamation representatives acknowledged that the PEIS did not explicitly address the potential impacts of the M&I Shortage Policy, but instead made vague statements that the impacts of the Policy were covered by unspecified "background materials" to the PEIS, without ever identifying or producing those materials for discussion in the public process. After issuance of the September 11, 2001 M&I Shortage Policy, Reclamation responded to a Freedom of Information Act request by another contractor seeking the purported "background materials" by providing a copy of a June, 1997 report prepared for Reclamation by Bookman-Edmonston Engineering, entitled "Urban Reliability Policy Impact Analysis." (A copy of pertinent portions of that report is enclosed with these comments for your reference.) The Bookman-Edmonston report does not present itself as any sort of environmental document structured to satisfy the requirements of NEPA. However, the report does provide a comparative analysis of implementation of Reclamation's proposed M&I water shortage policy (embracing the key concept of 75% reliability for M&I water supplies), as contrasted to Reclamation's ongoing "somewhat subjective CVP pro rata water allocation policy."

One of the critical findings of this engineering analysis (see Section 3, Table 3) is that when ultimate demand is experienced about 25 years in the future, in a 55% /normal water year, the Ag contractors in the "North of Delta" operations group would experience a 30.8% reduction in water supply --resulting from the shift of water necessary to maintain the 75% reliability standard for M&I water. The same basic 75% reliability standard is carried through in the September 11, 2001 Shortage Policy, so one should expect the same analytical results. Obviously the loss of 30% of Ag water supplies in a 55%/normal (or worse) water year would have significant and devastating environmental impacts, including large scale removal of lands from agricultural production, loss of wildlife habitat (for example, water fowl habitat lost when rice fields are fallowed), and major economic dislocation of the farming communities of the Sacramento Valley. There could not be a more clear "red flag" or "alarm bell" for environmental review to occur. Nonetheless, despite express warnings from Clear Creek CSD and others that environmental review is necessary, Reclamation appears to have taken a "damn the torpedoes" stance on pushing through the M&I Shortage Policy without any NEPA environmental review at all.

Reclamation's stance is at odds with past promises and assurances that necessary analysis and environmental review would be carried out in a careful and thoughtful manner. In the summer of 1997, Reclamation made the following statement in the document titled "Final -- Administrative Proposal on Urban Water Supply Reliability, June 9, 1997," at page 4 (see Document No. 6 under the heading "Development of Water Shortage Policy," at the M&I Water Shortage Policy web site currently maintained by Reclamation):

> Once adopted, Reclamation proposes to implement such an M&I Water Shortage Policy in a way that minimizes impacts to agricultural contractors. An analysis will be done to quantify any impacts and explore possible mitigation measures before this policy is finalized. This policy, as modified, will continue to be only an interim policy until ongoing studies associated with the CVP yield and the PEIS required under Section 3409 of the CVPIA are completed. Once such studies and the PEIS are completed, the goal is to modify the M&I Water Shortage Policy again, if necessary, make it available for public review and comment, complete any additional applicable environmental requirements, and ultimately adopt a final policy.

Despite this assurance, Reclamation seems to have given no consideration to minimizing impacts to agricultural contractors in the Sacramento Valley ("North of Delta" operations group). No analysis was done to quantify any impacts or explore possible mitigation measures before finalization of the September 11, 2001 Shortage Policy. As far as we know, only the 1997 Bookman-Edmonston report was prepared, which: is not close to being a NEPA document, stops far short of quantifying all the impacts, does not explore any mitigation measures, and <u>we were not even aware of</u> until extricated from Reclamation <u>after</u> September 11, 2001 with a FOIA request. The promise that Reclamation will "complete any additional applicable environmental requirements" before adopting a final policy has been completely ignored.

In addition, looking beyond just the impacts on North of Delta agriculture, the M&I Shortage Policy will have major impacts on land use patterns and the geographic location of population growth throughout most of California (areas for which CVP water is available). This Policy attempts to establish both a <u>present</u> urban growth moratorium in existing agricultural areas served by CVP irrigation water, <u>and</u> a <u>future</u> urban growth limit moratorium on existing CVP M&I contractors. This is accomplished in the Policy by creating a new but inferior grade of "converted" M&I water that applies when existing Ag water is "converted" to M&I usage, or an M&I contractor reaches a quantity of water usage greater than an arbitrarily selected limit established at the future projection of M&I demand made in September 30, 1994. This inferior grade of "converted" M&I water would be subject to withdrawal generally in the same manner as Ag water, and therefore would lack the reliability to sustain ordinary M&I usage. The direct purpose and effect of this Policy is to further concentrate population growth in existing urban areas served by CVP water, and to preserve existing agricultural lands served by CVP water, with the collateral impact of greatly accelerating population growth in urban areas with access to non-CVP water. No analysis of impacts or environmental review has been given to this aspect of the M&I Shortage Policy.

At the local level, the environmental impacts of this Policy on Clear Creek CSD are substantial and significant. Enclosed, and incorporated by reference herein, is a copy of our previous comment letter dated November 17, 2000 describing in more detail the circumstances applicable to our District, and expressing the desire that the public workshops be used to find a solution for the deficiencies in the Policy. Regrettably, the September 11, 2001 Policy still arbitrarily deprives the District of nearly one-third of the potential M&I water the District may need to serve future customers. The resulting

growth limit moratorium improperly restrains land use and impairs the District's ability to generate revenues to pay for water treatment facilities that would allow the District to currently provide 100% potable water for its entire contract quantity. This may encourage more aggressive higher value urban development that allows higher water rates from a smaller customer base, but with more concentrated urban impacts. The disproportionate distribution of capital costs to Ag water makes agriculture less profitable and accelerates conversion of land and water use to M&I within the available limits. It is axiomatic that water allocation, availability, and price fundamentally control the path and timing of urban development --whether on a local or CVP wide level.

Given the significance of the Central Valley Project in California's overall water supply and the importance of water allocation to the future of California, it is astounding that Reclamation is adopting this Policy without broad public participation and environmental review. Unfortunately it is all too predictable that California's water infrastructure will be subjected to droughts and worsening crisis conditions in the future, especially as the state's population grows. A policy such as this, designed to control the allocations of water supplies between M&I and Ag users for at least the next 25 years, should be given the kind of thoughtful planning that California deserves and the thorough environmental review that NEPA legally requires.

2.* An odd problem with the development of the M&I Shortage Policy, that complicates commenting on the Policy, is the absence of basic data and information that one would have expected Reclamation to collect and make public as a basis for discussion. There is no basic data presented as to the number of contracts that will be affected, the types of contracts affected, the quantities of contracted water of different types that will be affected, and so on. Reclamation commonly (and mistakenly) refers to contractors as either "Ag contractors" or "M&I contractors," but Reclamation has never identified or listed which contractors fall in which category, and those categories have no real technical meaning. These terms are especially confusing for "mixed" Ag/M&I water users, like Clear Creed CSD, which fall in neither category to the exclusion of the other.

The Policy imposes a cap on regular M&I water at the aggregate quantity shown for CVP projected M&I demand as of September 30, 1994, but there is no data or computation showing by what gross amount or percentage that aggregate total falls short of the total aggregate contract quantity for M&I water. How much existing and potential Ag water is out there? How much existing and potential M&I water is out there? What is the <u>actual</u> potential for conversion of Ag to M&I water? How do these statistics impact reliability of water supplies? Though Reclamation does have data on projected M&I water needs based on recent "needs analysis" reports, there was no data compiled for their policy to compare individual or aggregate "needs" with quantities that may be made available under the cap established by the 1994 rate study. When a major policy like this is approached blindly, without basic foundational data, the resulting policy is inherently arbitrary and capricious.

3.* A bizarre aspect of this Policy, which ties in with the previous comment, is that the most important Policy decision may have been made outside of the Policy development process, possibly to accommodate a private and/or political deal.

Out of the many long-term water service contracts up for renewal, the vast majority of the expiring long-term contracts (or expired subject to continuation by Interim Renewal Contracts) are designated as providing explicitly "irrigation water" or "M&I water"; in a small number of contracts both types of water use are expressly allowed. Unfortunately, here again, there is no data made available by Reclamation as to the numbers of contracts and quantities of water falling in these different categories. In theory, contractors would have a right of renewal for "irrigation water" or "M&I water" as the case may be, and an expiring contract allowing both may expect a renewed contract of the same kind. I have seen no legal opinions, either from the Solicitor's Office or from contractor's legal counsel, as to whether a contractor with a contract for "irrigation water" could use that water for M&I purposes. At least a fair argument can be made that such a change of use would not be contractually permitted. If Reclamation and the CVP Ag contractors are genuinely concerned about potential conversion of Ag water to M&I water in the future, one would assume that Reclamation would insist upon renewal of contracts for "irrigation water" to remain solely designated for "irrigation water." It could well be that concerns over "conversion" of Ag to M&I water would be illusory if "irrigation water" contracts are renewed simply as "irrigation water" contracts.

Strangely, Reclamation's draft CVP-wide long-term renewal contract (11/1/00) would convert all single-purpose CVP water service contracts into dual-purpose contracts providing water for both irrigation and M&I purposes. In effect, Reclamation has created the need for an M&I Shortage Policy by concurrently taking a policy direction in the contract negotiation process that would open up all new long-term CVP contracts to the possibility of Ag/M&I water conversion.

The only half-plausible explanation for the policy direction in the draft CVP-wide contract that I have heard, is that it was necessary to accommodate a deal for water exchanges between the largest Ag contractors and Santa Clara --which otherwise might not be possible because the Ag contractors have expiring contracts limited to "irrigation water." It would not be possible for Reclamation to waive the "irrigation water" contract provision for the major Ag contractors on this deal, and still preserve the enforceability of the contract provision against other Ag water contractors in the CVP, if single-purpose irrigation contracts are renewed as-is. Therefore the contract provision is proposed to be changed for all contractors in the CVP (making all water usable for Ag or M&I purposes), and then the conversion limitations are brought back into place by application of a "policy" rather than strictly legal contract terms, giving Reclamation the flexibility to allow a narrow exception for Santa Clara and the major Ag contractors.

I am not a fan of "conspiracy theories." The only thing that is clear is that Reclamation's move to renew single-purpose irrigation contracts as dual-purpose contracts make no sense standing alone. At a minimum Reclamation owes the public and all CVP contractors an explanation. Regardless of the motives or details, this aspect of the M&I Shortage Policy is arbitrary and capricious in light of Reclamation's concurrent policy approach to long-term contract renewal terms allowing renewal of single-purpose contracts as dual-purpose water service contracts.

4. The Policy as published in the Federal Register is labeled "Draft," though it has otherwise been described as the "Final" version of the Policy. While I don't agree that

this Policy ought to be "Final" or adopted at all, it is misleading labeling it "Draft" unless there is some further opportunity to modify it before it actually becomes "Final."

5. It is highly misleading to label this as an "M&I" Water Shortage Policy, when the Policy clearly applies to all CVP water that is used for either Ag or M&I purposes. To be accurate, "M&I" should be deleted. This is truly a "Central Valley Project Water Shortage Policy."

6. Consideration of non-CVP water supplies has the effect of federalizing water management and penalizing development of alternate non-CVP water sources. The second bullet point in the Policy incorporates "other water supplies" with CVP water that Reclamation would consider in establishing a minimum water supply level to meet certain goals. Reclamation has no authority nor any valid policy purpose in regulating non-CVP supplies, whether it attempts to do so directly or indirectly.

7. The previous July 30, 2001 version of the Policy disclosed that "most" rather than "many" M&I contractors are not using the full M&I portion of their contract total; and an earlier version of the Policy disclosed that most M&I contractors are currently using just a little more than half of their available M&I contract water supplies. Why is Reclamation making the disclosure of information on this topic progressively more vague and less informative?

8. The selection of "CVP projected M&I demand as of September 30, 1994" as a cap on future M&I water usage is completely arbitrary and capricious. The projected M&I demand in September of 1994 was used only as a guideline for water rates, and that is the only purpose for which CVP contractors submitted information to Reclamation relating to their estimate of future demand. There was no notice to CVP contractors that these projections established for one specific purpose would be adapted to a completely different purpose in establishing an M&I Water Shortage Policy and a moratorium limit on M&I water usage. In the particular case of Clear Creek CSD, we have no documentation or records of ever submitting <u>any</u> projection of future M&I demand to Reclamation in 1994; we don't know where Reclamation got the numbers that it used for a projection for Clear Creek CSD in September of 1994; as far as we know, the "projection" for Clear Creek CSD could have been created by Reclamation staff; and because we have been unable to obtain a definitive answer to questions regarding the origin of the projection for the District, a FOIA request is currently pending to produce whatever document Reclamation has relied upon to create a projection for the District. For Clear Creek CSD, and all of the contractors, the selection of projections created in 1994 as a basis for this M&I Shortage Policy denies the contractors any due process opportunity to contest the usage or suitability of those figures.

9. There is no apparent purpose for Reclamation to mention in this Policy that it previously explored the concept of two tiers of M&I water supply reliability. It is further unclear why Reclamation takes the trouble to state that "although Reclamation determined not to adopt two tiers, it will facilitate the sale of CVP water from willing sellers to M&I contractors when necessary." What is this statement supposed to mean, and what will facilitate the sales of CVP water?

10. Under "Definitions" and "Historical Use" Reclamation may adjust the "historical use" on the basis of "unique circumstances." Though some flexibility is desirable, the allowance for "unique circumstances" raises more questions than answers, and looks more like a loophole than a guideline. Every contractor is "unique" in some way. In the absence of rule-oriented policy, Reclamation should at least provide guiding principles if it intends to allow exceptions or make individualized determinations.

11. The "Definition" relating to "adjustment to the contractor's historical use" for non-CVP water has been explained as being intended to avoid disadvantaging contractors who develop alternate non-CVP sources of supply. However, the Policy is not effective when non-CVP water is much more expensive than CVP water, as is almost always the case. There is no reason to substitute expensive water for less expensive water, and use the expensive water for the base supply.

It is also worth noting that consideration of non-CVP supplies is unique to M&I water as contrasted with Ag water. As a result, Ag water is given a significant preference for use of ground water and other alternate non-CVP supplies. No Policy grounds or justification is given for this discriminatory treatment of M&I water in contrast to Ag CVP water supplies.

12. Reclamation attempts to provide a definition for "Public Health and Safety" based on "criteria established by the State of California" or alternatively <u>by Reclamation</u> consistent with criteria applied by similarly situated California water supply entities. The State of California, with good cause, has abstained from creating a state law definition of "Public Health and Safety" for local water delivery service. Under existing state law, local water service agencies must make the determination based on their own criteria as to whether a "water shortage emergency" exists that jeopardizes "public health and safety." (Water Code §350 et seq.) Reclamation does not have the legal authority to declare a "water shortage emergency" on behalf of a local water agency or presume to substitute its own judgement for the local agencies' determinations as to whether water shortages will jeopardize "public health and safety." Perhaps Reclamation can develop its own independent policy for rationing and allocating water in drought years, but Reclamation cannot usurp the water management authority of local agencies under state law.

13. Term and Condition No. 1 of the Policy attempts to provide a "credit" to CVP contractors who use non-CVP Water to reduce the contractors use of CVP water in non-drought years. However, Reclamation has yet to explain how this "credit" benefits a contractor, as there is no calculation of the "credit" provided in the Policy, nor is there any assurance that the Policy will use the actual "credit" quantity as a basis to provide water during critical water years. For example, the Policy does not promise that a contractor regularly using "X non-CVP water plus Y CVP water" will receive a 75% (X plus Y) allocation of CVP water in addition to its non-CVP supply during a critical water year. Given Reclamation's promise to provide water at public health and safety levels and the proviso that non-CVP supplies may be considered "at times of extraordinary circumstances," then during wide-spread drought conditions that threaten health and safety levels Reclamation will be compelled to redistribute CVP water from M&I contractors with "credit" to other CVP contractors who are totally dependant on CVP supplies. The "credit" is illusory.

14. Term and Condition No. 2 declares Reclamation's intention to incorporate the Shortage Policy in all new, renewed, and amended water service contracts. This interjects the M&I Shortage Policy as a critical term in the renewal of long-term water service contracts, with the effect of improperly dictating terms and conditions of the long-term renewal contract without negotiation. This also is an illegal attempt to modify M&I contracts, that carry an absolute right of renewal subject to renegotiation only of specified terms --of which this is not one.

15. Term and Condition No. 3 specifies the cap placed on M&I water reliability that has been arbitrarily tied to the "projected M&I demand as of September 30, 1994." This term further specifies that irrigation water transferred or converted to M&I use over the September 30, 1994 projection limit "will be subject to shortage allocation as irrigation water." As commented previously, this is an arbitrary, irrational, and discriminatory basis for restricting M&I water usage otherwise allowable under M&I water service contracts.

This proposed Policy violates the District's contract rights to use of M&I water. There is no legal basis for establishing an arbitrary ceiling on the District's M&I water usage within its existing contract amount. Unlike the M&I contractors who typically have 0% agricultural usage, Clear Creek has a major proportion of Ag usage (about 60%) that may eventually be converted to M&I use, as the District currently provides 100% M&I quality water to all of its customers (including Ag customers). Also, there is no legal basis for a policy which compels the District to accept two different classes of M&I water --reliable existing M&I supplies and unreliable "converted" M&I supplies.

From a broader public policy perspective, a moratorium limit on M&I water supplies will not protect Ag water, because M&I water demand is driven by population growth, not by land use conversion. Once people are in the state they will have to be served. And the policy will hinder rather than enhance reliability of M&I supplies. M&I contractors faced with increasing demand will not be able to purchase reliable M&I supplies from willing sellers of Ag water. Contractors that convert portions of their own contract supply from Ag to M&I are given an unacceptably unreliable inferior class of M&I water that is reduced to emergency public health and safety levels on a repetitive basis. These policy provisions do not really benefit either Ag or M&I contractors. They should be deleted.

16. Term and Condition No. 4 displays a comparison table of "irrigation allocation" and "M&I allocation" as if the numbers were comparable. The table mixes "apples and oranges" by comparing irrigation water allocated on the basis of contract quantity with M&I allocation based on historical use. The comparison is nonsensical, particularly when applied to mixed Ag/M&I contractors. A "mixed" contractor that receives a portion of its contract quantity as M&I water will not receive an "irrigation allocation" based on "contract entitlement" when the M&I allocation is subtracted first.

Furthermore, there is no justification given for discriminatory allowance of "contract entitlement" to pure Ag contracts as opposed to "historical use" for pure M&I contracts. All contractors should be dealt with on a truly comparable basis --either contract quantity or historical use-- to create a Policy that is consistent and fair.

17. Term and Condition No. 6 indicates that M&I water allocations to contractors may be reduced below 75% of adjusted historical use when irrigation water has been reduced below 25% of contract entitlement, due to limited water supplies. The Policy should provide some measure of guidance as to how further reductions in supply or allocations of water will be prioritized. The M&I Shortage Policy leaves this as an open question and invites arbitrary determinations by Reclamation to fill the void.

18. Term and Condition No. 7 assures water delivery at public health and safety levels "provided CVP water is available." There is no indication of what qualifications, if any, are attached to whether or not water is "available." Is water "available" if it is also needed for environmental purposes or some other urgent need? If public health and safety for M&I usage has the top priority among competing CVP uses, there ought to be a statement to that effect in this Policy.

19. Term and Condition No. 7 also specifies that "Reclamation, in consultation with the contractor, determines that an emergency exists due to water shortage." As noted previously, Reclamation does not have the legal authority to declare a "water shortage emergency," whether Reclamation consults with the contractor or not.

20. Term and Condition No. 7 specifies that Reclamation may take into account non-CVP water at times of "extraordinary circumstance." Nobody knows what "extraordinary circumstance" means, and without guidelines Reclamation's determinations will necessarily be arbitrary and unaccountable. The consideration of non-CVP water shouldn't occur at all, because it penalizes contractors that make the effort and investment to develop non-CVP sources of supply, at the same time Reclamation is trying to encourage contractors to develop non-CVP sources through CAL FED and other programs.

Respectfully submitted,

LAW OFFICES OF WALTER P. McNEILL

Walter P. McNeill

WALTER P. McNEILL

WPM/rmc

Enclosures

cc: Clear Creek CSD