

1997. There was no notice to CVP contractors that Schedule A-12 would be used for this purpose, so contractors did not have the opportunity to review the Schedule for accuracy, nor to make corrections.

The Draft Policy can be distilled down to a single sentence:

Therefore, the provision for "75 percent M&I reliability" will be applied to a contractor's *historical use*, with certain adjustments, up to the CVP projected M&I demand as of September 30, 1994. [emphasis in original, Draft Policy page 1]

Term and Condition 3 of the Draft Policy (at page 3) states that:

This M&I water shortage policy applies only to that portion of the CVP water identified as projected 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 transferred or converted to M&I use after September 30, 1994, will be subject to shortage allocation as irrigation water.

As mentioned, it was not until June 9, 1997 that CVP contractors were notified that a September 30, 1994 cut off date would be used to determine their entitlement to M&I priority. In 1997 it was too late to correct or confirm the 1994 numbers. Even more reprehensible is the fact that the policy was changed after the fact to include the cut-off date. All former drafts of the policy that were circulated to CVP contractors contained no cut-off date, but relied upon historical use of M&I water as that use may change over time. Even the policy circulated in February of 1994 contained no cut-off, and provided no notice that the September 1994 numbers should be evaluated or reviewed for accuracy.

Use of this arbitrary cut-off date runs counter to the stated policy of the Bureau of Reclamation to treat all contractors equally regardless of date of contract. Further, there are contractors who had the express contractual right to use water for M&I purposes prior to September 1994 and who also had M&I use within the original boundaries of their district prior to that time. Both the Bureau and the CVP contractors acknowledge the need for reliability; this need is no less for M&I contractors who had not established historic use or projected future M&I use prior to 1994. There is no rational basis for denying these contractors the reliability that will be provided to others, and that the Bureau acknowledges is needed.

Complaints regarding the selection of an arbitrary cut-off date were expressed in numerous public meetings with Reclamation staff during development of the Draft Policy. Reclamation staff continually asserted that development of the policy began in 1992, and that all parties were notified and agreed upon the use of the 1994 cut-off date. Reclamation's own documents establish the falsity of this assertion, and reveal that:

- Meetings were held from December, 1991 through January 1994 regarding the M&I Shortage policy; however: (1) only *selected* CVP contractors were invited, and WSID was not included on the list despite the fact that it has

had a contract allowing for M&I use since 1977 and (2) all documents discussed and/or circulated during that time period define "historical use" as "calculated as the average CVP water deliveries during the last three years of normal water deliveries, adjusted for growth", with no mention of a cut-off time period.

- February 17, 1994 was the first time that all CVP contractors were notified of the development of an M&I Shortage Policy and asked to comment. However, the draft policy circulated for comment expressly defined "historical use" as "calculated as the average CVP water deliveries during the last three years of normal water deliveries, adjusted for growth", with no mention of a cut-off time period.
- **The first public document mentioning use of the September 1994, cut-off date was released on June 9, 1997. That document, the Final Administrative Proposal on Urban Water Supply Reliability, states that: September 1994 was selected because it was the end of the fiscal year in which the draft M&I Water Shortage Policy was released for comment."**

Reclamation's own documents evidence that CVP contractors had no notice that a September 1994 cut-off date would be used to define their historic and future potential use of M&I water until June of 1997 (*see enclosed summary of disclosed documents*). Imposition of the September, 1994 time period as a cut-off date is retroactive, not within the authority of the Bureau of Reclamation, and violates the provisions of WSID's CVP contract.

In a February 17, 2001 letter, WSID requested a formal response from the Department of the Interior providing the authority, under either Reclamation Law or the terms of Central Valley Project contracts, for (1) the differential treatment of similarly situated contractors; and (2) the retroactive imposition of a cut-off date for contract benefits. While we requested that this information be provided before a final policy is released, we have received no formal response.

In 1997 the consulting firm of Bookman-Edmonston Engineering prepared a study entitled "Urban Reliability Policy Impact Analysis" for Reclamation. Page 2-1 of this document states:

The Ultimate demands reflect the declarations of the future water demand made by each CVP contractor in 1994, when every CVP contractor was required to declare its ultimate demand for both irrigation and M&I water supplies.

I am unaware of any CVP contractor that was required by Reclamation in 1994 to declare its ultimate demand for both irrigation and M&I water supplies. WSID requested that Reclamation provide it with copies of each and every declaration filed by CVP contractors, as well as the request from the Bureau to "every CVP contractor"

requiring that they do so. Again, we have not received any such documentation, and believe the statement in the study was in error.

THE DRAFT POLICY IS LEGALLY DEFECTIVE BECAUSE IT IS DISCRIMINATORY

The proposed policy discriminates against similarly situated contractors. The original contracts entered into by many CVP contractors allowed both irrigation and M&I use. The policy, however, favors those who develop their M&I use earlier in time than others. Nothing in WSID's contract provides that M&I water must be used by a certain time. Nothing in WSID's contract provides that it will be of lower priority than other CVP contractors under any circumstances. Yet the proposed policy would do just that; this result is discriminatory.

Despite the fact that implementation of the policy in its present form would deny WSID an M&I priority under its contract, WSID would be required to pay M&I prices for any water ordered under its contract for M&I purposes. WSID would be required to pay the same amount for M&I water delivered on an ag priority as other CVP contractors pay for water granted an M&I priority.

In addition, Term and Condition 3 of the policy provides that a CVP contractor may request that M&I water not entitled to priority under the policy be granted such a priority. Reclamation may approve such a request if the contractor "fully mitigates any adverse impacts to agricultural water supplies". CVP contractors falling within the policy (i.e., having an M&I usage identified as of September 1994) are not required to fully mitigate any adverse impact to agricultural water supplies. In fact, such impacts have not been fully identified. Again, Reclamation cannot impose different requirements upon similarly situated contractors.

THE POLICY DOES NOT SUFFICIENTLY DEFINE HISTORICAL USE

The March 9, 2001 draft policy defined *historical use* simply as "CVP water deliveries to the contractor during the last year in which 100 percent of the contractor's contract entitlement to CVP M&I water was made available to the contractor." This definition was objective. In its current form, the policy objective definition of *historical use* as "the average quantity of CVP water put to beneficial use within the service area during the last 3 years of water deliveries, unconstrained by the availability of CVP water" is only the beginning. Additional explanation of the remainder of the definition in the September 11, 2001 policy reveals that the term *historical use* has now been made subjective. Reclamation and the contractor are to "negotiate" historical use. This negotiated amount will be included as a contract exhibit, but it will not be a formal contract amendment. Most disturbing is the complete exception for "unique circumstances", which are also negotiated one on one between the contractor and Reclamation without public input. What this amounts to is a case-by-case definition of *historical use* with no opportunity for input by the public or by other CVP contractors who will be affected by the calculation.

In its present form then, there is no opportunity to comment on the policy's definition of *historical use* because it is not sufficiently defined.

THE POLICY ILLEGALLY IMPOSES CONTRACTUAL REQUIREMENTS

The September 11, 2001 policy adds a new requirement that heretofore was not contained in any policy reviewed by CVP contractors. The policy now requires, in Term 2, that a contractor must amend its contract in order to be "eligible" for the benefits of the policy. Reclamation is attempting to bootstrap this policy into CVP water service contracts without the benefit of negotiation. Such a contract provision cannot be imposed upon a contract that entitled the contractor to M&I water; it is nothing more than an illegal attempt to modify M&I contracts, which carry an absolute right of renewal.

THE POLICY DOES NOT COMPLY WITH NEPA

Reclamation has not complied with the requirements of the National Environmental Policy Act (NEPA) with regard to the policy. In meetings on the policy, Reclamation asserted that the Programmatic Environmental Impact Statement (PEIS) completed for implementation of the Central Valley Project Improvement Act constituted sufficient NEPA analysis for the policy. This is in error. The PEIS does not discuss the policy, does not discuss any alternatives to the policy, and does not discuss impacts of the policy on other CVP water users.

The Council on Environmental Quality (CEQ) regulations provide that a draft Environmental Impact Statement (EIS) should normally accompany the issuance of a proposal notice and comment rule. 40 C.F.R. §1502(d). Even if an EIS was determined not to be needed for the policy, Reclamation would still be required to undertake an evaluation of alternatives in an Environmental Assessment, and particularly here because the M&I shortage policy "involves unresolved conflicts concerning alternative uses of available resources". 42 U.S.C. §4332(2)(E); Hanly v. Kleindienst 471 F.2d 823, 834-35 (2d Cir. 1972), *cert. denied*, Hanly v. Attorney Gen. Of the United States, 412 U.S. 908 (1973); 40 C.F.R. §1508.9(b).

SUGGESTED CHANGES

There are, of course, ways in which the Draft Policy could be amended so that it would be legally defensible. Any revised policy must ensure that due process is granted to all contractors, and that all contractors are to be treated equally. This necessarily requires that all contractors are provided with notice of, and have an equal opportunity to participate in and benefit from the policy. In addition, this necessarily requires that Reclamation comply with NEPA, evaluate alternative policies, and evaluate potential impacts from imposition of the various policies.

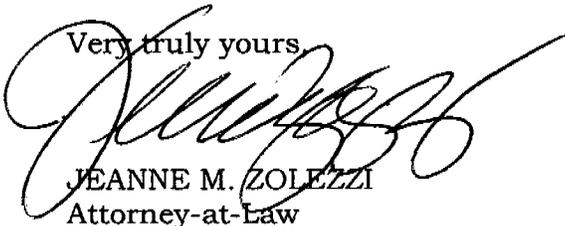
1. One alternative would be to provide no priority for M&I water, but to provide only for public health and safety levels as needed.

2. Another alternative is to apply the water shortage policy to all M&I water declared by a contractor after prior notice, provided the contractor expresses a commitment to pay for future M&I priority in a manner similar to other M&I contractors.

AGRICULTURAL IMPACTS

Please note that WSID makes no comments in this letter regarding the potential impacts of the Draft Policy to agricultural contractors. This issue must be evaluated by Reclamation and any impacts acknowledged and/or mitigated.

Very truly yours,



JEANNE M. ZOLEZZI
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JMZ:rl

Enclosures

cc: The West Side Irrigation District
Mr. Kirk Rogers, Acting Regional Director
Honorable Dianne Fienstein
Honorable Barbara Boxer
Honorable Richard Pombo

FOIA DOCUMENTS FROM BUREAU OF RECLAMATION
M&I WATER SHORTAGE POLICY

Documents Requested:

1. Any and all correspondence from the United States Bureau of Reclamation ("Reclamation") to its Central Valley Project Contractors notifying them of the meeting(s) to be held in January of 1993 to "discuss the impacts of the four previous years of drought on urban communities".
2. Any and all correspondence from Reclamation to its Central Valley Project Contractors notifying them of Reclamation's intention to undertake development of a CVP M&I Water Shortage Policy.
3. A copy of the notice provided by Reclamation to all contractors on February 17, 1994 releasing the Draft M&I Shortage Policy.
4. Any and all correspondence from Reclamation to its Central Valley Project Contractors notifying them of Reclamation's intention to use the amount of CVP Project M&I demand as of September 30, 1994 as shown for the year 2030 on Schedule A-12 of the 1996 Municipal and Industrial Water Rates book as a determining factor in M&I priority entitlement.

Pertinent Documents Provided:

- December 23, 1991 Letter to "Principal M&I users" inviting them to meeting to "solicit input on an M&I water shortage policy". (*Distributed to: Contra Costa, San Juan Suburban, City of Roseville, City of Tracy, Santa Clara, City of Coalinga, Shasta County, Clear Creek CSD, Bella Vista, Keswick CSD.*)
- June 1, 1992 letter from Commissioner to Congressman Mineta stating:
 - "Reclamation solicited and received comments on our proposed M&I water shortage policy. Meetings were held with several M&I contractors in December 1991, and all water users were briefed at the Water Users' Conference in Sacramento, California, in January 1992. The proposed policy, in concept, is that the M&I contractor will never take more than a 25 percent shortage based on current year needs."
- January 15, 1993 letter from Reclamation to "Interested Parties" inviting them to a meeting during the Water Users' Conference in January 1993.
- Series of letters from September 1, 1993 through November 5, 1993 from Santa Clara Valley Water District inviting contractors to five meetings with the Bureau on the M&I water shortage policy. (*Distributed to: City of Avenal, Contra Costa, East Bay MUD, El Dorado ID, City of Roseville, San Juan Suburban, City of Tracy.*)

July 16, 1993 letter included a one page "Water Shortage Policy". While it mentioned "historic usage", it was defined as "average quantity of water during the last three years of normal deliveries", and no mention of a date certain was made.

October 14, 1993 letter included a USBR staff report on the previous meeting of September 10, 1993 (for which there was no invitation). Summary states:

"...it would be advisable to consider this policy as interim/provisional until the full requirements of P.L. 102-575 are known." [John Davis]

"They also asked for Reclamation to define historical use. Historical use was defined as the average quantity of water used during the last three years of normal water deliveries."

- January 11, 1994 letter from Santa Clara Valley Water District to Roger Patterson acknowledging that at December 3, 1993 meeting the intention was that the draft policy would be "sent out for CVP-wide review before the end of 1993":
 - "At our last meeting on December 3, 1993, we understood that the draft policy would be sent out for CVP-wide review before the end of 1993. Unfortunately, before this could be done, Interim Contract negotiations began for eight Delta Division contractors. Since the proposed interim Contracts contained elements of the draft M&I shortage policy, the negotiating sessions have become, to some extent, the forum for broader CVP review of the policy. We urge you to send out officially the draft M&I shortage policy as soon as possible, so that all agricultural contractor and other affected parties can provide their input." [*emphasis added*]
- February 17, 1994 Memo from Bureau to "All Interested Persons, Organizations, and Agencies" circulating "Reclamation's Mid-Pacific Region draft Municipal and Industrial (M&I) water shortage policy. Requesting comments by March 18, 1994. Policy states:

"Historic usage is calculated as the average CVP water deliveries during the last three years of normal water deliveries, adjusted for growth".
- September 22, 1995 News Release announcing Garamendi process; listed five specific areas of initial focus, not including M&I Water Shortage policy. Subsequent news releases (5) discuss implementation of the CVPIA and do not mention M&I shortages.
- January 11, 1996 Meeting Report of the Urban Reliability Workgroup Meeting clearly showed that policy had not yet been developed; that "historical use" was one of two concepts considered, and that historical use had not yet been defined.

- June 14, 1996 Interior circulated the draft Administrative proposal on Urban Water Supply reliability. This document did not define historic use, and noted in Attachment A that the basis of shortage allocations was still an issue.
- August 1996 Bulletin Title 34 Update (Vol. 3, No. 1) was the first document to mention that there are 12 specific areas of concern, and to note that 11 administrative proposals “have been made available for comments to both the working teams and the public”, and included “Urban Water supply Reliability”.
- June 9, 1997 Interior issued Final Administrative Proposal on Urban Water Supply Reliability. **This is the first instance in which the date restriction was set forth.**
 - **“Interior believes that the draft M&I Water Shortage Policy, once finalized, should apply only to that portion of CVP water used historically for M&I purposes and identified as projected M&I demand as of September 30, 1994. September 1994 was selected because it was the end of the fiscal year in which the draft M&I Water Shortage Policy was released for comment.”**
- April 11, 2000 News Release announcing public meeting to discuss the policy. States that “A draft Municipal and Industrial Water Shortage Policy was issued on February 17, 1994. This policy was further addressed in the June 9, 1997, Administrative Proposal on Urban Water Supply Reliability. Reclamation is holding the public meeting with the CPV contractors and the interested public prior to finalizing the Urban Water Supply Reliability Policy.”