

CENTRAL VALLES

ENV 600

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April 22, 2005

VIA FACSIMILE

Mr. David Lewis
United States Bureau of Reclamation
2800 Cottage Way, MP-730
Sacramento, California 95825

Re: Comments on the Draft Environmental Documents for the CVP Municipal and Industrial Water Shortage Policy

Dear Mr. Lewis:

These comments are made on behalf of The West Side Irrigation District, Patterson Irrigation District, and Banta-Carbona Irrigation District on the above referenced Draft Environmental Assessment (EA) and Draft Finding of No Significant Impact (FONSI).

Reclamation is using the National Environmental Policy Act process to justify a decision it has already made, which NEPA does not allow. In determining whether an Environmental Impact Statement (EIS) is required, Reclamation is required to analyze both the context and intensity of the impacts of the proposed action. 50 CFR § 1508.27. As to "context," the agency must consider such factors as whether the action has impacts on "society as a whole, the affected region, the affected interests, and the locality." Id. at § 1508.27(a). As to "intensity," the agency must consider whether the action involves "prime farmlands," Id. at § 1508.27(b)(3); the degree to which the action is related to other actions with . . . cumulatively significant impacts," Id. at § 1508.27(b)(7); and whether "the action threatens a violation of Federal . . . law or requirements imposed for the protection of the environment." Id. at § 1508.27(b)(10). The presence of one or more of these factors should result in an agency decision to prepare an EIS. (Public Service Co. of Colorado v. Andrus, 825 F.Supp. 1483, 1495 (D. Idaho 1993)). If, after fully evaluating these factors, an agency decides not to prepare an EIS, "it must supply a convincing statement of reasons to explain why a project's impacts are insignificant." This "statement of reasons is crucial to determining whether the agency took a 'hard look' at the potential environmental impact of a project." *Blue Mountains Biodiversity Project v. Blackwood* 161 F.3d 1208, 1212.

Reclamation has undertaken NEPA analysis as to only a portion of the policy it is proposing; has failed to explain how it can implement the proposed policy without violating requirements of federal law; and has minimized the impact of the proposed alternative on the farmland involved. Each of these concerns is explained below.

1. No Action Alternative. The Bureau of Reclamation has made the EA largely irrelevant because of its carefully selected "No-Action Alternative." Reclamation cleverly defines the no-action alternative as including Reclamation's current policy of illegally

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providing M&I contractors with a priority unauthorized by Congress, statute or contract. As a result, Reclamation has eliminated the majority of impacts resulting from its proposed implementation of the Proposed M&I Shortage Policy.

2. Legality of Alternatives. NEPA requires Reclamation to evaluate all reasonable alternatives. The Council of Environmental Quality has stated, "Reasonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant." 46 Fed. Reg. 18026 (March 23, 1981), as amended, 51 Fed. Reg. 15618 (April 25, 1986). Any potential conflict with federal law must be considered. 50 CFR §1506.2(d).

The EA describes the no-action alternative as the operational criteria presented in the June 30, 2004 Long-Term Central Valley Project and State Water Project Operations Criteria and Plan (OCAP 2004). OCAP 2004 does not explain Reclamation's water allocation priorities and categories – particularly its description of the allocation of CVP water supplies as a "two-tiered hierarchy". The top hierarchy, Group I, includes M&I water supplies. Group II includes all agricultural water service contracts. OCAP 2004 states: "Group II water allocations are made only after Group I obligations have been met." The text further notes, "Because of increases in certain Group I requirements over time (M&I and refuge water) . . . the potential for deficiencies to Group II exists every year."

In OCAP 2004 Reclamation based its CVP allocation priorities on a policy that has not yet been promulgated, and for which no NEPA analysis has been completed. Yet Reclamation now bootstraps that action into the current EA. OCAP 2004 states that: "... water service contracts are readily documented consisting of . . . contracts with specific terms and conditions" but the document ignores those conditions, however, and proceeds to group water service contractors into priority classes in direct contravention of the specific terms and conditions of those water service contracts. The majority of M&I water service contracts do not have a limit on reductions in supply, and none of the M&I water service contracts in the Delta Division have such a limit. Such a limit has been provided only by Reclamation's practice, not by contractual authority. At least in the Delta Division of the CVP, the contractual provisions specify that the same shortage allocations should be given to both ag and M&I water service contracts.

Most importantly, NEPA requires that Reclamation consider how the hierarchy of water allocation priorities and categories described in each of the alternatives considered in the EA are reconcilable with the requirements of the Reclamation Project Act of 1939, which provides:

"No contract relating to municipal water supply or miscellaneous purposes or to electric power or power privileges shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes."

3. Impacts are significant. The Findings of No Significant Impact conclude that the water supply shortages imposed upon agricultural water users as a result of implementing Alternative 1B are not significant. Reclamation does not discuss the fact that these impacts

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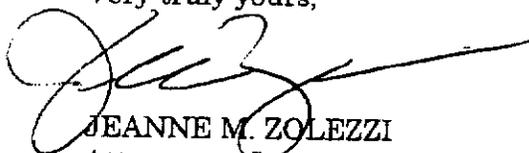
may affect prime farmland. Rather, it determines that as a percentage, the impact is insignificant. While the EA evaluates each M&I contractor individually, it does not evaluate impacts to individual ag contractors to evaluate district specific environmental affects.

Finally, there has been no public scoping process or comment period on newly developed "Preferred Alternative 1B". One of the major faults with the Draft M&I Policy is its selection of an arbitrary point in time to quantify the quantity of water to which the policy applies, that is the "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." CVP contractors were unaware that this schedule would be used for this purpose until 1997, so contractors did not have the opportunity to review the Schedule for accuracy, nor to make corrections. Reclamation was subject to substantial criticism for this portion of the policy, and has apparently attempted to change that provision of the proposed policy through the NEPA process rather than the rulemaking process.

The proposed change, however, suffers from the same flaw as the "cut-off" date - it is arbitrary, retroactive and selected without notification. Similar to the original cut-off proposal, CVP contractors have had no notice that the water needs assessment documentation, prepared for long-term CVP contract renewal, would be used to define their historic and future potential use of M&I water. Using the Water Needs Assessment for this purpose is inappropriate for numerous reasons. Most importantly, Reclamation identified the water needs assessment as a tool to confirm a contractor's demand for water, without emphasizing the importance of accurately forecasting whether that demand was ag or M&I. In fact, the USBR provided different instructions for preparation of the water needs assessments to ag and municipal contractors, and directed the agricultural contractors to prepare assessments on a regional basis. As a result of this regional approach identified in the February 22, 1999 letter from Reclamation, many contractors identified their future M&I needs in the "Transfers/ Exchanges Out" column rather than as a separate demand in the M&I column. Had these contractors known that their water needs assessments were to be used to determine the future availability of M&I to their districts on a reliable basis they would have taken a different approach to completion of the assessments.

Finally, Alternative 1B must be made subject to public review and comment.

Very truly yours,



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cc: Ms. Barbara Kleinert
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