

Chapter 4.0

Comments from Organizations


This chapter contains copies of comment letters (and any attachments) from the organizations listed in Table 4-1. Each comment in the comment letters was assigned a number, in sequential order (note that some letters may have more than one comment). The numbers were then combined with an abbreviation for the individual (example: MLT-1).

Responses to the comments follow the comment letters, and are also numbered, corresponding to the numbers assigned in the letter. The letters and associated responses are sorted alphabetically by abbreviation and appear in the chapter in that order.

Table 4-1.
Comments Received from Organizations on Environmental Assessment/Initial Study
Water Year 2010 Interim Flows Project

Abbreviation	Agency
CCM	California Citrus Mutual
MLT	1986 Mitigation Lands Trust
RMC	San Joaquin River Resource Management Coalition

4.1 California Citrus Mutual



July 2, 2009

Mr. Jason Phillips
SJRRP Program manager
U.S. Bureau of Reclamation
2800 Cottage Way, MP-170
Sacramento, CA 95825-1898

Dear Mr. Phillips:

On behalf of the grower membership supporting California Citrus Mutual I would like to offer comments on the Draft Environmental Assessment and Finding of No Significant Impact... Negative Declaration published June 3, 2009.

California Citrus Mutual is a citrus producers' trade association. The industry produces a variety of citrus products valued at \$1.8 billion. Concomitantly it also creates another \$1.2b in economic activity. The industry employs an estimated 12,000 people and indirectly another 10,000 are dependant upon our production for their employment. The vast majority of this activity and therefore acreage is in the San Joaquin Valley.

CCM-1 More to the point the overwhelming majority of that acreage is "watered" by the Friant Authority. We find the "negative declaration" confusing at best and simply wrong in several instances. Historically our industry of family farmers relies upon the Friant Authority for approximately one-third of their water needs. The balance is achieved via rainfall and/or groundwater pumping. We submit that 99% of that water is applied via low volume irrigation techniques.

As an industry with a year-round crop harvesting over 10 months a year our water needs and conservation techniques are widely known. There is no margin to change and our innovations, many of which come via UC, are envied and copied by other permanent crops. The efficient movement of water is our mandate to insure that avoidance of adverse water supply impacts is real and not just words on paper.

CCM-2 Your comment that flows would be recaptured by existing water diversion facilities **to the extent possible** is insufficient. How will that be defined? Is the *extent possible* a loss of one acre foot? Less? More? How will that loss be quantified given the diversity of the water uses within the Authority? Rural communities, small businesses, urban areas and agriculture must have a clear understanding as to the water loss impact. *To the extent possible* creates vast uncertainty, thus clouding a tremendous amount of decision making. The question therefore is just what are we looking at specific to recapturing?

CCM-3 Your negative declaration determines that there is no significant impact on agricultural resources. You no doubt reached that conclusion by simply dividing the probable water loss against the acreage and use demands. A simple mathematical calculation led to the no significant impact

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Jason Phillips
July 2, 2009
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declaration. BUT that calculation was void of other water losses occurring simultaneously. The dots must be connected as the impacted parties do not operate in a vacuum. Each decision or government body attempts to define their project/policy within the narrow confines of their own definition. It's nice and easy and no significant impact always results.

However, the combined effects of policies affecting water supplies or uses has changed the amount of margin for producers and others to adapt. Drought conditions, varied policies, greater demand and cost are all dynamics that have changed dramatically in the past decade. This "little bit of water" is now significant. The Agencies must calculate the impact on the cumulative effects and not just a narrowly focused policy change.

The declaration that no significant impact or loss of prime agricultural land would occur is subsequently flawed *if* the cumulative impacts are taken into consideration. Agricultural consolidation is taking place. In some cases the economic environment caused the consolidation. For many, however, input costs have risen to the point that generating the revenues necessary to offset the costs is impossible. Insufficient or inconsistent inputs are another reason for the consolidation. The uncertainty of necessary inputs, such as water, creates financial considerations by banks and land owners. Again, the policy maker looks through the impact lens at only one factor whereas the landowner, the citrus producer has many factors determining his future.

Will the water supply reduction create a loss of citrus? Narrowly defined no; but honestly defined as to the rippling effect that answer must be reconsidered. Connecting the dots must occur. Arguing to the contrary is simply playing the con game of "hide the pea." This is no game and an honest assessment must be developed.

CCM-4 The negative declaration concludes that no impact of any significance will occur relative to soil although *temporary* impacts may occur. I challenge you to define *temporary*. Because of the cumulative water loss from a variety of dynamics, a greater amount of ground water pumping is occurring. To assume no more would occur is dishonest. To assume this would not affect ground water recharge is dishonest. To assume soil subsidence is nothing more than just a word is dishonest. Your modeling and engineering skills focus on this flow this October and ignores other water reductions that will have a cumulative effect on ground water recharge. It ignores the effect on the cost of irrigation. It ignores the negative effect on subsidence or soil compaction.

While certainly not a germane issue to our grower members we note the irony in two subsequent categories. River Restoration will help increase recreation opportunities, will not increase noise factors and will allow for boats on the River. So how many power boats does it take to create a detrimental noise factor? How many people over and above the existing population figure, which now is almost none, does it take to create a noise factor?

Finally, the Agencies do not recognize any negative impact on minority population members. The relatively minor water loss associated with endangered species created tens of thousands job losses. But it also created pressures on other members of the water community. The proposed reduction of water movement or availability directed by the National Marine Fisheries Service will create pressures on other members of the water community. Were these pressures taken into consideration during the drafting stage? Were possible demands from Exchange Contractors on the Friant Authority supply taken into consideration? Was a continuing drought condition evaluated within the context of available supplies? This water loss will result in lost acreage.

Jason Phillips
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According to Arizona State in a study published January 2009 the loss of 10,000 acres of citrus equates to a \$44 million loss in citrus value; an aggregate economic value loss of \$74.3m; which includes \$21.8m in lost wages, \$17.3m in returns to business owners and \$3.8m in indirect business tax payments. Actual job losses would total 1,100 within the industry and nearly 2,200 in the broader economy. These job losses equates to \$8.9m in lost income tax revenue to the state.

Policy makers, including the Agency, must take into consideration, when evaluating impacts, lost production on society. Clearly citrus is a major pillar of the California economy. Citrus is a major commodity within the Friant Authority. Determining impact must include an accurate assessment of lost acreage and resulting impacts on society both from an economic perspective and dietary effects. As the Arizona State study stipulates: *"Policy uncertainty that adversely affects the returns to growing citrus in any one year is likely to have outsize effects in future years, compounding over time to magnify the end result of many times over."*

California Citrus Mutual, therefore, argues that the draft assessment is incomplete and urges that a more comprehensive evaluation takes place that clearly evaluates the cumulative impacts of several decisions affecting the supply of water to user groups.

Cordially,



Joel Nelsen
President

Response to Comments from California Citrus Mutual

CCM-1: No significant impacts to the Friant Division long-term contractors are expected under the Proposed Action. See response to comment FWUA-76 in Chapter 3.

CCM-2: See response to comments RMC-74 and RMC-91 in this chapter.

CCM-3: The scope of the environmental impacts evaluation in the Draft Environmental Assessment/Initial Study (EA/IS) is to assess the significance of effects on the environment resulting from the release and recapture of Interim Flows for one year based on conditions existing at the time of its drafting. Therefore, possible demands from Exchange Contractors on the Friant Authority supply were taken into consideration as was a continuing drought condition within the context of available supplies. No loss of acreage of fruit and nut crops is expected because it is expected that any reduction in surface water deliveries from the Friant Division during Water Year 2010 would be replaced by other water sources (e.g., water transfers and additional groundwater pumping). No revisions to the Draft EA/IS text were necessary in response to this comment; therefore, the EA/IS text was not modified.

CCM-4: See response to comments RMC-93, RMC-10, and RMC-8 in this chapter. The loss of agricultural land other than temporary inundation of grazing land in the bypass system would not occur as a result of the Proposed Action (see the Finding of No Significant Impact).

4.2 1986 Mitigation Lands Trust

**1986 Mitigation Lands Trust
4888 E Jensen Ave
Fresno, CA 93725
559-266-0767**

Mr. Jason Phillips
SJRRP Program Manager
U.S. Bureau of Reclamation
2800 Cottage Way, MP-170
Sacramento, CA 95825-1898
InterimFlos@restoresjr.net

Mr. Kevin Faulkenberry
DWR SJRRP Program Manager
Department of Water Resources
3374 E Shields Ave
Fresno, CA 93726
Faulkenb@water.ca.gov

**RE: Environmental Assessment and Finding of No Significant Impact/Initial Study and Mitigated
Negative Declaration for the San Joaquin River Restoration Program for Water Year 2010 Interim
Flows Project.**

Upon reviewing the Assessment and Finding of No Significant Impact/Initial Study and Mitigated Negative Declaration for the San Joaquin River Restoration Program for Water Year 2010 Interim Flows Project (EA/FONSI/IS/MND) and attending the June 25, 2009 Land Owner meeting in Firebaugh, the 1986 Mitigation Lands Trust has the following comments for inclusion in the record.

The Trust owns two parcels affected by the proposed Restoration Program. They are Madera County APNs 042-252-006-000 and 042-260-002-000. Our comments relate to the likely impacts of the proposed restoration activities in reach 2B on the Trust's property.

It is not the Trust's intent to stand in the way of these studies or the longer term implementation of the Restoration Program. However, we are concerned about the impacts to our investments and properties.

MLT-1

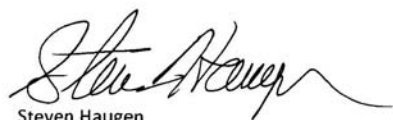
The two parcels owned by the Trust are possibly the two lowest lying properties in the area that are currently in production agriculture. Based on past experience these parcels have high likelihood of being rendered unfarmable when the river is flowing at 1300 cfs. There is a strong chance that

inundation of at least a portion of the parcels will occur annually as a result of restoration flows, resulting in substantial economic injury to the Trust. Mitigation or compensation should be required.

It appears inevitable that certain parcels will ultimately require acquisition by the Restoration Program as a result of program activities. If that is the case, it would be desirable that those obvious acquisitions be initiated as soon as possible to relieve those property owners of the unnecessary burden of requiring them to engage in this extended process in order to protect their properties.

If you require additional information or have questions please contact Steve Haugen at 559-266-0767.

Sincerely,

A handwritten signature in black ink, appearing to read "Steve Haugen", with a stylized flourish at the end.

Steven Haugen
Trustee, 1986 Mitigation Land Trust

Response to Comments from 1986 Mitigation Lands Trust

MLT-1: The release of Interim Flows will remain below channel capacity to avoid seepage or other damage to surrounding agriculture. The Restoration Flows are being assessed in the Program Environmental Impact Statement/Report ; permits, permissions, agreements, and mitigation measures are being identified as part of that process.

4.3 San Joaquin River Resource Management Coalition



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July 20, 2009

Stakeholders:

Landowners
Water Users
Environmentalists
Local Governments
Building/Commerce
Farm Bureaus
Labor
Federal Agencies
State Agencies

President:

Marl Martin

Directors:

Chester Andrew
Julia Berry
Frank Bigelow
Jeff Bryant
Chris Cardella
Roy Catania
Steve Chedester
Connley Clayton
Jeff Coulthard
Tim DaSilva
Bob Edminster
Steve Emmert
Lloyd Erlandson
Richard Harman
Randy Houk
Chase Hurley
Ron Jacobsma
Carl Janzen
Bob Kelley
Jim Merrill
Jim Nickel
Dan Pearce
Diana Westmoreland Pedrozo
Mike Prandini
Jose Ramirez
Lynn Skinner
Scott Skinner
Randy Spain
Chris White
Dave Widell

Organizations:

Local Governments
Madera County Farm Bureau
Merced County Farm Bureau
Fresno County Farm Bureau
Stanislaus County Farm Bureau
Environmental Member
General Public Member
Aliso Water District
Central Calif. Irrigation District
Chowchilla Water District
Clayton Water District
Columbia Canal Company
East Side Canal Company
Farmers Water District
Firebaugh Canal Water District
Fresno Irrigation District
Friant Water District
Friant Water Users Authority
Gravelly Ford Water District
Lone Tree Mutual Water Co.
Madera Irrigation District
Root Creek Water District
San Luis Canal Company
SJR Exchange Contractors W.A.
Sierra Water District
Stevenson Water District
Turner Island Water District
Grasslands Water District
Building and Commerce
Land Owner Representatives

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RE: ***Comments on the Draft Environmental Assessment/Proposed Finding of No Significant Impact Under NEPA and Notice of Availability and Intent to Adopt an Initial Study/Draft Mitigated Negative Declaration Under CEQA for the Water Year 2010 Interim Flows Project, Dated June 3, 2009, Submitted By the San Joaquin River Resource Management Coalition, San Joaquin River Exchange Contractors Water Authority, and Respective Members***

Dear Mr. Phillips and Mr. Faulkenberry:

The following comments are submitted by and on behalf of the San Joaquin River Resource Management Coalition (RMC), San Joaquin River

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Exchange Contractors Water Authority (Exchange Contractors), and their respective members identified in the footnote no. 1.^{1, 2} All of these persons/entities have hereby participated in this process and have exhausted their administrative remedies. For convenience only, and not to prejudice the rights or standing of any individual commenter, the commenting parties are referred to herein as the RMC. Questions regarding these comments should be directed to Mr. Steve Chedester, Executive Director, Exchange Contractors or Ms. Mari Martin, RMC.³

The RMC appreciates the efforts and cooperation of the Bureau of Reclamation (Reclamation) and the Department of Water Resources (DWR) regarding the development of measures to mitigate the impacts of the proposed project on the agencies and landowners along the San Joaquin River downstream of Friant Dam. The RMC also looks forward to working cooperatively

¹ RMC members include: Aliso Water District, Andrew Farms, Inc. (Chester Andrew), Basila Farms, LLC (Jon Basila), Bob Brandt, J&M Britton (John Britton), Building Ind. Assoc. SJV (Mike Prandini), Robert Brewer, Daniel Burns, Elizabeth Burns, Butts Ranches (Carolyn Butts), Chris & Michelle Cardella, Manuel & Cecilia Cardoza, Central California Irrigation District, Clayton Bonnley, Brad Coburn, John & Marie Coelho, Albert Coderniz, Columbia Canal Company, David Cory, MK Crow & Sons (Richard Crow), DT Lock Ranch, Inc., Robert Edminister, Rick Elrod, Steven Emmert, Farmers Water District, Firebaugh Canal Water District, John & Kathy Foppe, John Gamboni, Ray & Maria Giampaoli, Giffen Ranch (Steve & Price Giffen), Gravelly Ford Water District, Clay Groefsema, Gunner Ranch, Gustine Drainage District, Hammonds Ranch, Inc. (Mike Stearns), Harman & Sons, Laurance & Peggy Harman, Merry Alice Harman, Richard Harman, Houk, Inc., E.W. & M.B. Hostetler, D.R. Houk & Co., Gilbert Housley, Paul Hunger, Jr., Jensen Ranches, Bert Johnson, Ray Knight, Janice Labar, Robert R. Labar, Laura LaSalvia, Maurice Ledford, Phillip & Judy Lehman, Jim Linneman, Frank Lima, Laurance & Margaret Locke, Frank Long, Dan McNamara, Madera County Farm Bureau, Madera Irrigation District, Eyvonne Malm, Jeff Mancebo, Gary & Mari Martin, Merced County Farm Bureau, Mumby Farms, Inc. (Stanley Mumby), Nickel Family, LLC (James Nickel), Jerry O'Banion, O'Banion Ranches, Kevin Olsen, Main Stone Corp. (Pierre Perret), Pikalok Farming (Kelley Jo Locke), Gary Pirtle, Keith & Lori Porter, Peter Raffo, William Rice, Gravelly Ford Ranch (Ann Robinson), Root Creek Water District, San Joaquin River Association, Inc., San Joaquin River Exchange Contractors Water Authority, SanLuis Canal Company, Frank & Alice Saviez, Joe & Sharon Sequeira, Donald & Lynn Skinner, Sol Development Association (Al Solis), Spain Air, Inc. (Randy Spain), Stevinson Water District, Teixeira & Sons, The Water Agency, Inc., Preston & Ellen Thompson, Jack Threlkeld, Turner Island Water District, Wolfson Land & Cattle Co., Joe Vajretti, Dorcas Van Atta, Bill Ward (BB Limited), Anne Willis (4-W Ranch), Nancy & Gary Wride, Don Wright, and Yosemite Farm Credit

Exchange Contractor members include: Central California Irrigation District, Columbia Canal Company, Firebaugh Canal Water District, and San Luis Canal Company

² You will have received letters from various individuals and interests that support these comments. Each of those individuals/entities have also participated in this process and have exhausted their administrative remedy.

³ Mr. Chedester may be reached at 209-827-8616 or 'schedester@sjrecwa.net'. Ms. Martin may be reached at 559-659-2536 or cotnlady@inreach.com.

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with Reclamation, DWR and the Settling Parties, to ensure that the San Joaquin River Restoration Project (SJRRP) is implemented in a manner that meets the needs of all stakeholders.

The comments set forth in this letter are submitted in furtherance of the cooperative relationship that has been developed and is expected to continue. The RMC believes that comprehensive environmental documentation and implementation of the required mitigation measures are essential to the success of the SJRRP and that the environmental process adhere to the standards established under NEPA, CEQA and the San Joaquin River Restoration Settlement Act (Act).

The comments are organized with general overarching comments set forth in the first section, and section-specific comments set forth in the second section.

I. General Comments

These general comments are limited to what the RMC believes are the issues of most importance to its membership, particularly with regard to the impacts on the landowners and the environment of the San Joaquin River that will be used to transport the “interim flows.” The RMC does not propose to comment on issues such as the impacts of the loss of the “interim flow” water to the Friant-Kern service areas and those environments. Similarly, we do not offer any comments on areas receiving water downstream of the confluence with the Merced River.

In the instant case the “project” is described as the temporary “change [to] Friant Dam operations in Water Year 2010 (WY 2010) (October 1, 2009, to September 30, 2010) to release Interim Flows from Friant Dam into the San Joaquin River and potentially downstream as far as the Sacramento-San Joaquin Delta (Delta). The Interim Flows would be recaptured by existing water diversion facilities along the San Joaquin River and/or in the Delta for agricultural, municipal and industrial, or fish and wildlife uses.” (See Finding of No Significant Impact (FONSI), p. 2) The purpose of the Proposed Action is identified in this EA/IS as being the Proposed Action identified in the Stipulation of Settlement (Settlement) in *NRDC, et al. v. Rodgers, et al.* and “to implement the provisions of the Settlement pertaining to WY 2010 and to collect relevant data to guide future releases of Interim Flows and Restoration Flows under the SJRRP.” (FONSI, p.2)

RMC-1 Comment 1: The Settlement was entered into in September 2006. By its terms it envisions one continuous program of flows, commencing with Interim Flows and once construction is complete, Restoration Flows. (See Settlement, Sections 9, 13 and 15) The Water Management

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Program is an integral part of the Interim and Restoration Flow Program as it applies in every year that flows are released. (See Settlement, Section 16) To date, no environmental review has been conducted of the Settlement. In June, 2008, Reclamation issued the Initial Program Alternatives Report (IPAR), which, at page 3 sets forth a timeline for environmental review actions to analyze the impacts of the SJRRP. The IPAR timeline properly identified a programmatic environmental impact statement to be completed on a timely basis prior to release of Interim Flows. As of June 2008, Reclamation was already well aware of the fact that the legislation they were seeking related to the Settlement had not yet been enacted by Congress and that as a result, certain timelines under the Settlement could not be met. In fact, the Settlement recognized that just such an eventuality could occur and provided a remedy for such a delay. (See Settlement, Sections 23-27) Nowhere was it stated that Reclamation or DWR would seek to start the restoration related flows prior to completing appropriate environmental review; nor could it as such a statement would have been a clear violation of NEPA and CEQA. In fact, the Settlement and the Act state specifically that the Secretary of the interior (Secretary) must comply with NEPA and other laws and the Settlement provides that the Secretary is to "expeditiously complete applicable environmental documentation and consultations as may be necessary to effectuate the purposes of this Settlement." (See Settlement, Section 28) Given that the Settlement was entered into some three years ago, there has been ample time to complete the PEIS/PEIR. In actuality, for several reasons it would have been more appropriate to conduct programmatic analysis prior to the introduction of legislation in Congress seeking to authorize actions and appropriate funds to implement the Settlement. At this point, Reclamation should formally acknowledge the delay in SJRRP implementation caused by the delay to get legislation enacted, seek concurrence from the other Settling Parties, and return to the timeline set forth in the IPAR that provides for issuance of a programmatic environmental impact analyses addressing the Settlement prior to issuing project specific analyses that address discrete actions under the Settlement, including the first year of Interim Flows.

RMC-2

Comment 2: The project description is inconsistent with the Settlement and the Act. The Settlement requires the development of a flow program that commences with years of Interim Flows, followed by full Restoration Flows. (See Settlement, Sections 9, 13, 15 and 16) The first year Interim Flows are required to ascertain the impacts that will result from the subsequent years' Interim Flows and Restoration Flows. These Interim Flows are an integral and necessary part of the overall Interim Flow, Restoration Flow and Water Management Program. Each year's flows are part of an entire program, are subject to recapture as part of the Water Management Program and are not separable or of utility in and of themselves. Contrary to the

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assertion in the EA/IS, there is no provision for a single year of Interim Flows unrelated to the following years' flows or the Water Management Program, or that the Settlement would terminate due to impacts discovered during the Interim Flow period. Therefore, the segmenting of the first year's Interim Flows from the other flows is inappropriate.

Comment 3:

- RMC-3
- a. The Proposed Action includes the release of "Interim Flows" (water) down the San Joaquin River as a necessary first step to the longer-term project to attempt to restore the River for anadromous (salmon) fisheries. The proposed flows are in amounts above what has historically been released for the last fifty or so years in order to evaluate the impacts of the flows moving through portions of a natural system that has been shielded from flow by a constructed "by-pass" system. On occasion during wet years, flows have reached lower portions of the San Joaquin River between Friant Dam and the Merced River (Reaches 1-5) and impacts have occurred to land near the proposed Interim Flow route (in addition to impacts in Reach 4B). However, the Proposed Action is substantially different from the intermittent flood flows that have occurred historically. Therefore, a major focus of the Settlement and the Act was to ascertain what impacts would occur downstream to lands adjacent to the River and what actions would be necessary to mitigate those impacts. The EA/IS characterizes the Interim Flows as being substantially similar to historical flow conditions. This is incorrect and results in understating the significant impacts that will result from the initiation of Interim Flows. There are impacts in the first year of flow releases and those impacts will be compounded by continuous releases of water as the riparian areas will not have the opportunity to "recover" as they would have during historical flood conditions during which flows would occur and then the river would recede to permit recovery of the adjacent lands.
- RMC-4
- b. Another analysis that will be necessary will be to study those actions that will be necessary to protect the salmon that will be planted in the river in the hopes that a viable population of salmon may be restored. The restoration of flows to the River is for the benefit of the fishery resources and actions related to existing water operations will have to be isolated from the reintroduced fisheries to the extent possible. To the extent other fisheries will be impacted by the restoration program, whether protected species or not, impacts on those fisheries must be examined as well. The EA/IS is silent as to any impacts to existing fisheries that may occur.

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RMC-5

- c. It appears that the Project, as designed, does not have sufficient and necessary prior empirical and field-test data to present a rational assessment of the impacts of the project to either the resources or natural environment in much of the proposed project area. Field testing has not been implemented, and the EA/IS has not used previously collected data from wet years, soil surveys and other geotechnical investigations in a fashion that could be used to assess impacts or mitigate those impacts as part of the Proposed Action.

Comment 4:

RMC-6

- a. Unlike other typical pilot programs where environmental impacts are truly *de minimis*, in this instance there are likely to be significant and long lasting environmental impacts due to flooding and seepage that would destroy property and cause the loss of crops. Even a one year flood event or high groundwater situation will cause significant impacts. While the EA/IS has characterized the impacts as either not significant or capable of being mitigated to the point where there will be no negative impacts, insufficient mitigation measures have been proposed to eliminate the impacts that are likely to occur.

RMC-7

- b. We note that while the mitigated negative declaration (MND), calls for mitigation, no such mitigation is required by the FONSI. Under the Act, the Secretary must not only abide by the NEPA requirements, but must also mitigate the impacts that the NEPA process identifies. We do note that Appendix D to the EA/IS sets forth the monitoring and management plan for seepage. The FONSI should make implementation of the Seepage Monitoring and Management Plan a mandatory condition consistent with Section 10004(d) of the Act.

Comment 5: There are several issues that need to be addressed in the environmental process that have not been included in this EA/IS.

RMC-8

- a. Reclamation will have to design the flow release program to meet the needs of the Project as well as to be able to potentially release significant flows to meet its contractual commitments to downstream senior water rights holders, including the "Exchange Contractors," due to the possible inability of the Central Valley Project to

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deliver water from the Delta during the spring time-period. During WY 2009, Reclamation was within a few thousand acre feet of storage in San Luis Reservoir from being required to release water from Friant Dam to meet downstream needs. But for a very unusual rainfall late in the spring, releases would have been necessary. Based on current Delta conditions, primarily due to regulatory constraints, there is a likelihood that senior rights-holders will have to rely on Friant for a portion of their water.

RMC-9

- b. Related to Comment 5(a) above, the EA/IS does not address the impacts of the most recent NOAA Fisheries "biological opinions." These BOs will further decrease the amount of water that can be pumped at the Delta, thereby further straining available storage in San Luis Reservoir. Since the SJRRP will reconnect the San Joaquin River to the Delta system, under the scope of the new BOs, anadromous species protection will require a broader suite of environmental mitigation measures, including retrofit of unscreened diversions, especially if there is a listing followed by an unexpected breakthrough of fall run salmon into the main-stem San Joaquin River above the Merced River confluence.

RMC-10

- c. The potential inverse condemnation of numerous agricultural properties by seepage is not adequately addressed. For example, the crops involved (especially permanent crops that have not been adequately documented), based on various increasing flow regimes, could be irreversibly damaged at a substantial cost. Seepage could also create new ecological services that require additional protection, especially if habitat for endangered species is re-created and found to harbor said species. Also, the project environmental document incorrectly finds that important farmland will not be impacted. Based on RMC landowner information that we compiled, any flows above the amount historically and currently released by the Mendota Pool will lead to inundation and inverse condemnation of numerous properties adjacent to the River in Reaches 2a to 5. (See compilation attached as Attachment 1.) The EA/IS should consider the location and map the potential loss of these important farmlands (by inundation or construction, if any) as required by the Division of Land Protection of the CA Department of Conservation. This potential loss also carries an impact to the local economy. The project document needs to identify a salient method of quantifying the farmland loss in regional dollars.

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RMC-11

- d. The Project description does not include adequate discussion as to how the Project proposes to integrate the proposed new flows with existing water operations and activities. For instance, Mendota Dam is operated by the Central California Irrigation District (CCID) in cooperation with the San Luis & Delta-Mendota Water Authority (Authority) and the various users around the Mendota Pool. The addition to Mendota Pool operations of Friant Dam water will further complicate an already complex coordination process. The EA/IS needs to address the potential impacts of such a process and the potential impacts on the environment. For example, failure to operate Mendota Dam and/or adjust Delta-Mendota Canal flows into the Mendota Pool properly could contribute to a failure to provide adequate water service to over 300,000 acres of agricultural lands, or levee breaching or failure, and/or flooding of land adjacent to the pool, or jeopardize the structural integrity of the Mendota Dam. In the waterfowl season, such a failure could adversely impact the Mendota Wildlife Refuge, and the approximately 100,000 acres of State and Federal wildlife areas, and private grassland wildlife areas which receive service from the Mendota Pool.

An agreement must be entered into with each of CCID, as operator of the Mendota Dam; the Authority, as operator of the Delta Mendota Canal; and San Luis Canal Company (SLCC), as operator of Sack Dam, regarding operations, maintenance, repair, replacement, and liability issues. If these agreements would change River operations of facility operations such that there would be a significant environmental effect, those agreements must be reviewed pursuant to applicable environmental laws. Such an analysis is likely properly set forth in the PEIS/PEIR, which again highlights the timing issue previously discussed as operation of those facilities, in a manner that could well be different than historic operations, will commence with the onset of Interim Flows.

- e. Other omissions from the EA/IS that could benefit from clarification include the following:

RMC-12

- 1) The EA/IS does not describe how relevant data concerning flows, temperatures, fish needs, and seepage losses, recirculation, and recapture and reuse will be collected, quality controlled, documented, or available to the public for review.

RMC-13

- 2) The proposed action should clearly define the specific flow actions, facility operations, agreements, and permits required for routing and recapture of "interim flow" releases.

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- RMC-14 3) The groundwater seepage monitoring and management plan should include additional actions to quickly identify potential seepage areas of concern. To some extent the use of aerial reconnaissance flights and photography may help identify seepage areas, but even that technique may only identify damage that has already occurred.
- RMC-15 4) It appears no shallow groundwater modeling or quantitative analysis was conducted to evaluate the potential for seepage impacts along the river.
- RMC-16 5) We suggest overlaying timing of river releases with cropping patterns on land adjacent to the river to assess potential high risk areas and develop pro-active mitigation strategies and procedures.
- RMC-17 6) There has been no effort to identify existing monitoring wells or even production wells that might be used to assess the incidence of rising groundwater tables as a result of the Proposed Action. These wells have long been used successfully to assess groundwater conditions and could be used by Reclamation as part of this program.
- RMC-18 7) The Mendota Pool is dewatered every other year in order to perform an inspection and maintenance required by CCID and the State of California, Division of Dam Safety. The EA/IS does not analyze the additional maintenance needed on Mendota Dam in order to convey the restoration flows or explain how flows will be curtailed sufficiently in the future to permit necessary maintenance.

II. Specific Comments on the FONSI and MND

A. Legal Deficiencies with the FONSI.

- RMC-19 The primary deficiency with the EA is that it reaches a result that defies logic. A FONSI is not warranted. The SJRRP is expected to last at least until 2026 and possibly in perpetuity. Yet, the FONSI would have the public and decisionmakers believe that all that is happening is that Reclamation is engaging in a one year flow release program to study the affects on the San Joaquin River of an increase in flows from Friant Dam. This contention ignores the point of 18 years of litigation, a Settlement and related legislation that makes hundreds of millions of dollars available to address fishery problems and water replacement actions on the San Joaquin River. The FONSI would have one believe that the effects of this program, at least in its first

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year are insignificant. Reclamation has misinterpreted what constitutes a significant effect on the environment.

The CEQ regulations specify that which constitutes a “significant” effect on the environment, 40 C.F.R. § 1508.27. The regulations explain the factors an agency must consider in determining if a project’s potential effects are “significant,” an analysis that requires “considerations of both context and intensity.” *Id.* “Context” refers to the location and interests that would be affected by the proposed action. *Id.* at § 1508.27(a). “Intensity” refers to “the severity of the impact.” *Id.* at § 1508.27(b). In considering intensity, an agency should consider up to ten factors that shed light on the “significance” of a project, including: the effect on public health and safety; the **unique characteristics of the geographic area; the degree to which the effects on the quality of the human environment are likely to be highly controversial**; the degree to which the possible effects are **highly uncertain or involve unknown risks**; the degree to which the action may establish precedent; whether the action will have cumulative effects; the degree to which the action may adversely affect scientific, cultural, or historical resources, and the **possible impacts on an endangered or threatened species**. *Id.* at §§ 1508.27(b)(2)-(10) (emphasis added).

The agency itself is to ensure that the scope of an EIS is proper. 40 C.F.R. §§ 1502.4; 1508.25. CEQ regulations note that agencies are to prepare EISs on “broad actions” so that they are “timed to coincide with meaningful points in agency planning and decisionmaking,” that when preparing statements on such broad actions, agencies may find it useful to evaluate the proposal(s) geographically, generically, or by stage of technical development, and that, as appropriate, agencies shall employ “scoping,” “tiering,” and other methods “to relate broad and narrow actions and to avoid duplication and delay.” 40 C.F.R. §§ 1502.4 (b)-(d). CEQ regulations provide that a “programmatic EIS” should be prepared when federal actions are connected, cumulative, or similar, such that their environmental effects are best considered in a single impact statement. 40 C.F.R. § 1508.25. Finally, the decision whether to prepare a programmatic EIS – as opposed to a project-specific EIS – is committed to the agency’s discretion.⁴

⁴ See *Izaak Walton League of Am. v. Marsh*, 655 F.2d 346, 374 n.73 (D.C. Cir. 1981) (“Even when the proposal is one of a series of closely related proposals, the decision whether to prepare a programmatic impact statement is committed to the agency’s discretion.”).

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Even though an EA need not “conform to all the requirements of an EIS,” it must be “sufficient to establish the reasonableness of [the] decision” not to prepare an EIS.⁵ An EA “[s]hall include brief discussions of the need for the proposal . . . [and] the environmental impacts of the proposed action and alternatives.” 40 C.F.R. § 1508.9(b). An EA “must in some circumstances include an analysis of the cumulative impacts of a project. . . . An EA may be deficient if it fails to include a cumulative impact analysis”⁶

Regardless of the preparation of an EA, an EIS “must be prepared if ‘substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factor.’”⁷ If an agency finds an EIS is not required and issues a FONSI, it must provide a “convincing statement of reasons” to explain its decision.⁸ An agency cannot rely on mere “conclusory assertions that an activity will have only an insignificant impact on the environment”⁹ but rather, the agency must demonstrate that it took the requisite “hard look” at the potential environmental impacts of a project.¹⁰ Thus, in *Alaska Wilderness League v. Kempthorne*,¹¹ the U.S. Court of Appeals for the 9th Circuit found that the Minerals Management Service (MMS) violated NEPA by failing to take the required “hard look” at the impacts of an oil company’s sea exploration proposal on bowhead whales and Inupiat subsistence activities, because MMS did not provide a “convincing statement of reasons” to justify its decision not to complete an EIS.

⁵ See *Center for Biological Diversity v. National Highway Traffic Safety Admin.*, 538 F.3d 1172, 1215 (9th Cir. 2008) (citing *Foundation for North American Wild Sheep*, 681 F.2d 1172, 1178 n.29 (9th Cir. 1982); 40 C.F.R. § 1508.9(a)(1)).

⁶ *Id.* (citing *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 895 (9th Cir. 2002)). See also *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 993-94 (9th Cir. 2004); *Kern v. United States BLM*, 284 F.3d 1062, 1076-78 (9th Cir. 2002).

⁷ *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998) (quoting *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1332 (9th Cir. 1992)).

⁸ *Blue Mountains*, 161 F.3d at 1212; see also 40 C.F.R. §§ 1501.4(e), 1508.13.

⁹ *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 864 (9th Cir. 2005) (“*Ocean Advocates*”).

¹⁰ *Blue Mountains*, 161 F.3d at 1212; *Ocean Advocates*, 402 F.3d at 864; *Kern v. United States BLM*, 284 F.3d 1062, 1066-67 (9th Cir. 2002).

¹¹ 548 F.3d 815 (9th Cir. 2008).

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An action may be considered “significant” enough to warrant an EIS if only one of the factors enumerated at 40 C.F.R. 1508.27 is met.¹² For example, the degree of controversy or the degree of uncertainty “may be sufficient to require preparation of an EIS in appropriate circumstances.”¹³

In *Center for Biological Diversity v. National Highway Traffic Safety Administration*,¹⁴ the U.S. Court of Appeals for the 9th Circuit found that NHTSA’s FONSI, which was based on its EA, was “arbitrary and capricious” because it did not “provide a statement of reasons for a finding of no significant impact, much less a convincing statement of reasons”... because the EA “shunted aside [significant questions] with merely conclusory statements, failed to directly address[] substantial questions, and most importantly, provide[d] no foundation” for the inference it relied on in its finding of no significant impact.¹⁵ “NHTSA makes vague and conclusory statements unaccompanied by supporting data, and the EA do[es] not constitute a ‘hard look’ at the environmental consequences of the action as required by NEPA.”¹⁶

Here, the FONSI ignores the fact that a PEIS is currently being prepared for the entirety of the SJRRP, including we presume the Interim Flow program commencing in year one. The FONSI simply concludes that the first year’s flows are a standalone project without any analysis to support this conclusion. It is difficult to rationalize such an approach with the history of the litigation the resulted in the SJRRP, the terms of the Settlement that was entered into or the legislation that took years to enact in order to implement what NRDC and others have termed an “historic agreement.”

From the outset of planning for the SJRRP, Reclamation has stated it would prepare a PEIS, followed by project specific EISs. That is the correct approach. The fact that the enactment of

¹² *Ocean Advocates*, 361 F.3d at 1125.

¹³ *National Parks*, 241 F.3d at 731.

¹⁴ *Center for Biological Diversity v. National Highway Traffic Safety Admin.*, 538 F.3d 1172 (9th Cir. 2008).

¹⁵ *Id.* at 1223 (citing *Foundation for North American Wild Sheep*, 681 F.2d at 1179 (9th Cir. 1982)) (internal quotation marks omitted).

¹⁶ *Id.* at 1223-24 (citing *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 973 (9th Cir. 2006)) (internal quotation marks omitted).

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legislation caused the timeline for implementation to slip is not a basis for rushing or truncating environmental review. The PEIS is the proper vehicle by which to commence environmental review of this large scale project.

The U.S. Supreme Court has had occasion to provide guidance as to when a PEIS is appropriate. For instance, in *Kleppe v. Sierra Club*, 427 U.S. 390, 409 (1976), the Supreme Court noted that NEPA “may require a comprehensive impact statement in certain situations where several proposed actions are pending at the same time” and that “[b]y requiring an impact statement Congress intended to assure such consideration during the development of a proposal”¹⁷ In determining whether a comprehensive statement – that is, a “programmatic EIS” – is necessary, the Court considers “the extent of the interrelationship among proposed actions and practical considerations of feasibility.”¹⁸ In an early and influential NEPA case, the U.S. Court of Appeals for the D.C. Circuit explained:

A programmatic EIS reflects the broad environmental consequences attendant upon a wide-ranging federal program. The thesis underlying programmatic EISs is that a systematic program is likely to generate disparate yet related impacts. This relationship is expressed in terms of “cumulation” of impacts or “synergy” among impacts that are caused by or associated with various aspects of one big Federal action. Whereas the programmatic EIS looks ahead and assimilates “broad issues” relevant to one program design, the site-specific EIS addresses more particularized considerations arising once the overall program reaches the “second tier,” or implementation stage of its development. In evaluating a comprehensive program design an agency administrator benefits from a programmatic EIS which indubitably “promote(s) better decisionmaking.”¹⁹

The court suggested two questions that would be “helpful” in reviewing a federal agency’s decision whether or not to prepare a programmatic EIS: “(1) Could the programmatic EIS be sufficiently forward looking to contribute to the [agency’s] basic planning of the overall

¹⁷ *Kleppe v. Sierra Club*, 427 U.S. 390, 409 (1976) (citing 42 U.S.C. § 4332(2)(C)).

¹⁸ *Id.* at 412.

¹⁹ *Nat’l Wildlife Fed’n v. Appalachian Reg’l Comm’n*, 677 F.2d 883, 888 (D.C. Cir. 1981) (internal citations omitted).

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program? and, (2) Does the [agency] purport to 'segment' the overall program, thereby unreasonably constricting the scope of . . . environmental evaluation?"²⁰ Thus, a programmatic EIS should be prepared if it can be forward-looking and if its absence will obstruct environmental review.²¹ This obstruction of environmental review appears to be what will result if the EA/IS that has been issued is allowed to proceed.

In *Piedmont Env'tl. Council v. FERC*,²² the recent Fourth Circuit decision regarding transmission line siting, the court cited *National Wildlife Federation*, and proceeded to discuss the specific CEQ regulations that call for a programmatic EIS when federal actions are connected, cumulative, or similar:

"First, actions are connected if they "[a]utomatically trigger other actions which may require environmental impact statements." ... Actions are also connected if they (1) "[c]annot or will not proceed unless other actions are taken previously or simultaneously" or (2) "are interdependent parts of a larger action and depend on the larger action for their justification." ...
... "Third, similar actions are those, "which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together."²³

The CEQ regulations provide that a "programmatic EIS" should be prepared when federal actions are connected, cumulative, or similar, such that their environmental effects are best considered in a single impact statement. As the D.C. Circuit noted in *National Wildlife Federation*, a "systematic program" such as the SJRRP "is likely to generate disparate yet related impacts. This relationship is expressed in terms of 'cumulation' of impacts or 'synergy' among impacts that are caused by or associated with various aspects of one big Federal action." The SJRRP Settlement envisions a multi-step process involving connected, cumulative, and similar actions that constitutes a "major federal action" requiring a programmatic EIS pursuant

²⁰ *Id.* at 889.

²¹ *Foundation on Economic Trends v. Heckler*, 756 F.2d 143 (DC Cir. 1985).

²² *Piedmont Env'tl. Council v. FERC*, 558 F.3d 304 (4th Cir. 2009) (reversing FERC's interpretation of a provision of the Energy Policy Act of 2005 establishing National Interest Electric Corridors).

²³ *Id.* at 316-17 (citing *Nat'l Wildlife Fed'n v. Appalachian Regional Comm'n*, 677 F.2d 883 (D.C. Cir. 1981) and 40 C.F.R. § 1508.25).

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to NEPA because such an EIS would be (1) forward looking, and (2) its absence would obstruct comprehensive environmental review.

Furthermore, “tiering” would be appropriate in this multi-year, multi-party, multi-project proceeding. CEQ regulations themselves indicate that it would be appropriate “when the sequence of statements or analyses is...[from] an environmental impact statement on a specific action *at an early stage*” such as at the point of the SJRRP Settlement, “to a supplement ... or a subsequent statement or analysis at a later stage” upon later flow years, because tiering “helps the lead agency to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe.” Tiering recognizes the reality that the completion of certain projects “involves many separate sub-projects and will take many years”²⁴ such as the implementation of the entirety of the actions to be conducted pursuant to the SJRRP Settlement.

The fact that there is a Settlement with timelines specified does not give rise to a basis to avoid appropriate environmental review. The Settlement provides for slippage in the implementation schedule. (See Settlement, Paras. 23-27) In fact, Reclamation should have finished environmental review, at least at the programmatic level, some time ago, given that the Settlement was entered in to in 2006. NEPA regulations provide that all environmental analyses required by NEPA must be conducted at “the earliest possible time.” 40 C.F.R. § 1501.2. An agency shall commence preparation of an EIS “as close as possible to the time the agency is developing or is presented with a proposal so that preparation can be completed in time for the final statement to be included in any recommendation or report on the proposal. The statement shall be prepared *early enough* so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made.” 40 C.F.R. § 1502.5 (internal citations omitted, emphasis added). And finally, for projects directly undertaken by Federal agencies, the EIS “shall be prepared at the feasibility analysis (go-no go) stage and may be supplemented at a later stage if necessary.” 40 C.F.R. § 1502.5(a).

For purposes of an EIS, a “proposal” “exists at that stage in the development of an action when an agency subject to the Act *has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal* and the effects can be meaningfully

²⁴ *Nevada v. Dep't of Energy*, 457 F.3d 78, 92 (D.C. Cir. 2006).

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evaluated. Preparation of an environmental impact statement on a proposal should be timed (§ 1502.5) so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal. A proposal may exist in fact as well as by agency declaration that one exists.” 40 C.F.R. 1508.23.

In 2000, the U.S. Court of Appeals for the Ninth Circuit noted that “[compliance] with NEPA’s procedures is not an end unto itself. Rather, as the Supreme Court has explained, it is through NEPA’s ‘action forcing’ procedures that ‘the sweeping policy goals announced in § 101 of NEPA are . . . realized.’ NEPA and the CEQ regulations implementing NEPA are intended to ensure that environmental considerations are ‘infused into the ongoing programs and actions of the Federal Government.’”²⁵ It is precisely this “infusion” that justifies considering a comprehensive settlement agreement – **especially one that is conditioned on legislation (see 42 § U.S.C. 4332(2)(c))** – a “major federal action” subject to NEPA requirements.

In *Westlands Water Dist. v. United States*,²⁶ the court addressed water rights and the Central Valley Project Improvement Act (CVPIA), in the context of “major federal actions” requiring an EIS: **“That a new law was required is itself evidence of major federal action for which an EIS is required.”**²⁷ The court went on to discuss the Bureau of Reclamation’s arguments regarding a biological opinion under the Endangered Species Act (ESA): “Under 40 C.F.R. § 1508.18(b)(2), *an activity is a federal action if it ‘guides,’ rather than binds, the use of federal resources.* CVP water is a federal resource. ... Taking the facts alleged in the plaintiffs’ complaints as true, the biological opinion is part of a systematic and connected set of agency decisions which result in the commitment of substantial federal resources for a statutory program, which resulted in reallocation of over 225,000 acre feet of CVP water under the ESA for salmon protection with the environmental impacts alleged. *This is NEPA major federal action.*”²⁸

²⁵ *Idaho Sporting Congress, Inc. v. Alexander*, 222 F.3d 562 (9th Cir. 2000) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) and *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989)).

²⁶ *Westlands Water Dist. v. United States*, 850 F. Supp. 1388 (E.D. Ca. 1994). The San Joaquin River Exchange Water Contractors were a plaintiff in this case.

²⁷ *Id.* at 1415 (citing NEPA at 42 U.S.C. § 4332(2)(c) and *Andrus v. Sierra Club*, 442 U.S. 347, 357-60 (1979) (stating approval of CEQ’s guideline requiring EIS for “a bill or legislative proposal to Congress”)).

²⁸ *Id.* at 1422 (emphasis added).