

R-2 Bruce A. Wales, Santa Ynez River Water Conservation District

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October 31, 2008

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Jack Collins, Resource Specialist
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Re: Comments of Santa Ynez River Water Conservation District
on the Cachuma Lake Draft Resource Management Plan /
Environmental Impact Statement (June 2008)

Dear Mr. Collins:

The Santa Ynez River Water Conservation District ("SYRWCD" or "District") appreciates the opportunity to provide the following comments on the above-referenced Draft Resource Management Plan ("RMP") / Environmental Impact Statement of June 2008 ("EIS") of the United States Department of Interior Bureau of Reclamation ("Reclamation"), relating to existing and additional recreational and other activities at Cachuma Lake Recreation Area including Cachuma Lake, the County Park, and the surrounding shores and hillsides (collectively, the "Lake").

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I. INTRODUCTION

SYRWCD encompasses most of the Santa Ynez River Watershed downstream of Cachuma Lake and Bradbury Dam. One of SYRWCD's primary functions is to protect the downstream rights of its landowners and residents in and to the use of Santa Ynez River water below Bradbury Dam, including their substantial interest in the continued downstream release of River water from the Dam.

As you are aware, as provided in various decisions and orders of the State Water Resources Control Board and its predecessor, the State Water Rights Board, ("State Board"), Reclamation's appropriative permits for storage and use of Santa Ynez River water in Cachuma Lake reservoir have been, since their inception in 1958, and continue to be expressly subject to a continuing obligation on the part of Reclamation to release certain waters from Bradbury Dam through its outlet works for the benefit of water users in the Santa Ynez River Watershed downstream of the Dam including SYRWCD's constituents ("Water Rights Releases"). As you are also aware, in 1997, the National Marine Fisheries Service ("NMFS") designated the southern steelhead (*Oncorhynchus mykiss*) as an endangered species, including the population in the Santa Ynez River below Bradbury Dam. Later, a Fish Management Plan ("FMP") and a Biological Opinion ("BO") (collectively, "FMP/BO") were prepared and implemented for protection of such steelhead population. The FMP/BO provides for (among other things) water releases from Bradbury Dam through the Hilton Creek Watering System to benefit the endangered steelhead ("Fish Releases") in addition to and in conjunction with the downstream Water Rights Releases required by Reclamation's Cachuma permits.¹

R-2-1

Because the final RMP/EIS will involve Cachuma Lake operations and recreational activities that may have significant impacts on the physical environment below Bradbury Dam within SYRWCD, particularly in light of the necessity for continued downstream Water Rights Releases and Fish Releases, the final RMP/EIS is of utmost importance to SYRWCD and its constituents. However, the EIS only makes scant reference to SYRWCD and its interests, and its evaluation of the environmental consequences of the RMP alternatives is unduly confined to the Plan Area even though scoping revealed the need for an evaluation of the impacts of recreational activities at the Lake on water supplies and fish *downstream* of Cachuma Lake and Bradbury Dam.

R-2-2

SYRWCD appreciates the effort that has been put into the development of the EIS and the RMP alternatives, but more needs to be done. SYRWCD does not believe the EIS, or the process that led to development of the RMP alternatives, complies with the National Environmental Quality Act ("NEPA") for the reasons more specifically set forth below. These reasons include, but are not limited to: (1) a failure to develop and consider a balanced, reasonable range of RMP alternatives, which (in addition to more recreation) should also include one or more alternatives that provide for reduced recreation and provide for downstream water

¹ In addition to the outlet works and the Hilton Creek Watering System, water also flows downstream of the Dam through its spillway during certain hydrologic events.

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- R-2-2, Cont.** supply protection and species enhancement, along with additional appropriate mitigation measures, and (2) a failure to adequately study the impacts of the proposed action and alternatives on the physical environmental *downstream* of Cachuma Lake, including the outlet works and Hilton Creek Watering System (necessary for continued Water Rights Releases and Fish Releases, but which could become clogged by Quagga or Zebra mussels), and the ecosystem *downstream* of Bradbury Dam where endangered steelhead reside.
- R-2-3** In conclusion, for the reasons detailed below, SYRWCD requests that Reclamation consider additional RMP alternatives, conduct further study and evaluation of downstream and other environmental impacts, further consider appropriate mitigation, and take whatever further actions (which may include possible circulation of a revised draft EIS or supplemental EIS) necessary to develop an EIS that complies with NEPA and that can serve as the basis for approval of an appropriate RMP for future Cachuma Lake operations and activities.
- R-2-4** **II. SYRWCD HAS A SUBSTANTIAL INTEREST IN THE FINAL RMP/EIS FOR CACHUMA LAKE**
- A. SYRWCD Was Formed To Protect the Santa Ynez River Water Supplies of its Landowners and Residents Downstream of Cachuma Lake and Bradbury Dam**
- SYRWCD was formed in 1939 under the Water Conservation District Act of 1931 for the primary purpose of preserving and protecting the water rights and supplies of landowners and residents in the Santa Ynez River Watershed principally downstream of Cachuma Lake reservoir and Bradbury Dam. The District's formation was in response to the construction of two dams on the Santa Ynez River upstream of the District's lands and plans to construct a third -- Bradbury Dam which would form the Cachuma Lake reservoir (collectively, "Cachuma Project"). The District's boundaries encompass about 75,000 acres and most of the lands within the Santa Ynez River Watershed downstream of Bradbury Dam including the Santa Ynez and Lompoc Valleys.
- Santa Ynez River Water Consideration District -- (Special) Improvement District No. 1 ("ID#1") and the cities of Solvang, Buellton, and Lompoc are each located within the District.² In addition, there are at least 27,000 acres devoted to irrigated agriculture which produce a wide variety of crops, including vegetables and grapes. The economy within the District is driven in large part by agriculture and tourism, and these industries and the small towns and cities within the District have been and will continue to be dependent upon the development and maintenance of surface and groundwater resources supplied by Santa Ynez River water temporarily stored in, and then spilled or released from, Cachuma Lake through Bradbury Dam facilities consisting of a spillway, outlet works and the Hilton Creek Watering System.³
- ² SYRWCD hereby joins in the written comments submitted by ID#1 on the RMP/EIS, which comments are hereby incorporated herein by reference in their entirety.
- ³ The outlet works, located at the base of the Dam, are used to both release water downstream and transport State Water Project ("SWP") water to Cachuma Lake for delivery to SWP contractors on the

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**R-2-4,
Cont.**

As explained in greater detail below, from its inception, Congress, Reclamation and the State Board all recognized that the Cachuma Project could adversely affect the downstream flow of Santa Ynez River water to the detriment of SYRWCD's constituents, and they made commitments and placed restrictions on the project to ensure that did not occur. In accordance with State Board decisions and orders, SYRWCD is entitled to make calls for Water Right Releases from Cachuma Lake reservoir and manages the timing and rates of those flows in order to promote recharge of water to support current and future uses in the District. As emphasized below, Reclamation must ensure that recreational and other activities at Cachuma Lake do not come into conflict with its commitment and obligation to operate the Cachuma Project so as not to deprive the District's constituents of Santa Ynez River water to which they are entitled to have flow downstream of Bradbury Dam.

B. Incidental Recreational and Other Uses Authorized by the RMP for Cachuma Lake Are Subordinate To and Must Not Come Into Conflict with the Cachuma Project's Prior Obligation to Provide for Water Rights Releases and Fish Releases, as required by Reclamation's Permits and the FMP/BO, for the Benefit of SYRWCD's Constituents and the Environment Downstream of Bradbury Dam

R-2-5

From the very beginning, it was recognized that Cachuma Project operations could have adverse impacts on the downstream water rights and supplies of SYRWCD's constituents and that such supplies must be protected. Thus, SYRWCD has historically been involved in Cachuma Project proceedings before the State Board including the proceedings involving Reclamation's permits.

The Cachuma Project was authorized in 1948 by House Document 587, 80th Congress, 2nd Session, and designed to conserve the runoff of flood waters of the Santa Ynez River. (D-886, p. 12.) The State Board described the objective of the Project as follows:

"[t]he objective of the Cachuma Project . . . was to divert waters principally for use within the south coast area, that would otherwise waste to the ocean, and not to divert water which would normally flow down the Santa Ynez River and be beneficially used in that watershed." (D-1486, p. 15 at fn. 11.) (Emphasis added.)

South Coast. (Final Program and Project Specific Environmental Impact Report/Environmental Impact Statement, Lower Santa Ynez River Fish Management Plan and Cachuma Project Biological Opinion for Southern Steelhead Trout, Vol. 1, February 2004, COMB and Reclamation ("FMP/BO FEIR/EIS"), p. 3-11). If the outlet works were to become clogged by Quagga or Zebra mussels, for example, then Reclamation would not be able to meet its obligation to make Water Rights Releases and SWP could not be delivered to the South Coast. (Personal communication with Ali Shahroody, October 21, 2008.) The Hilton Creek Watering System is principally used to implement Fish Releases required by the FMP/BO. (FMP/BO FEIS/EIS, p. 2-25.) If that system were to become clogged by mussels, for example, then Reclamation would not be able to meet its obligations to make Fish Releases to Hilton Creek.

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The State Board's key decision regarding the Cachuma Project is Decision D-886 issued February 28, 1958. In D-886, the State Board's predecessor held, in part, that Reclamation is required to release water from Cachuma Reservoir in such amounts and at such times and rates as will be sufficient to:

"maintain percolation of water from the stream channel as such percolation would occur from unregulated flow, in order that operation of the project shall not reduce natural recharge of groundwater from the Santa Ynez River." (D-886, p. 33.)

This requirement, which provides for Water Rights Releases for the benefit of SYRWCD's constituents, is contained in Condition 11 of Reclamation's permits and is based, in part, on the State Board's observation that:

"The United States has committed itself to operate the Cachuma Project so as not to export water from the watershed of the Santa Ynez River which is, or will be, required to maintain natural percolation below Cachuma Dam, and the Board has declared its intention to retain jurisdiction for the purpose of requiring sufficient releases of water to so accomplish this purpose." (D-886, p. 29). (Emphasis added.)

**R-2-5,
Cont.**

Later, the State Board confirmed and interpreted Condition 11 *broadly* to require:

"... releases from Cachuma Dam sufficient, together with inflow from downstream tributary sources, to supply downstream diversions of the surface flow under vested prior rights and to maintain percolation and recharge of groundwater [consisting of underflow of the River and water in adjacent groundwater basins] as would occur in the Cachuma Project were not in existence." (D-1338, p. 5; *see also*, D-1486, p. 26 fn. 18.)

The Water Rights Releases required by Condition 11 include not only Santa Ynez River flows that are necessary to satisfy vested rights to divert surface flows, but also unregulated flows necessary to recharge River underflow and water in adjacent groundwater basins which need, it was recognized, "will progressively increase with increased use of the groundwater for future development in the watershed...without regard to whether such diversions will be technically classified as appropriative diversions or extractions for use on overlying land." (D-1338, p. 7.)

Adversarial proceedings have been ongoing for over 50 years to determine the appropriate level of releases to ensure the protection of downstream interests, as recited in D-886 and its progeny. Over the years, there have been numerous proceedings and disagreements, relating to whether appropriate releases were being made to satisfy the downstream water rights and supply protection requirements of D-886. Most recently, concerns have been expressed by the City of Lompoc that, although the release regime under WR 89-18 may provide adequate

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quantities of water, operation of the Cachuma Project adversely affects water quality in the Lompoc Plain and, in particular, water drawn from wells operated by the City of Lompoc.

In WR 94-5, the State Board ordered Reclamation to submit reports or data compilations developed pursuant to a 1994 MOU⁴ to address and resolve outstanding fish and fish habitat issues related to the portion of the Santa Ynez River below Bradbury Dam. (WR 94-5, Finding Nos. 10 & 11, Order No. 3(b).) At the same time, the State Board also ordered Reclamation to submit information developed and conclusions reached during negotiations among Lompoc and the Cachuma Member Units relating to the water quantity and quality issues in the Lompoc Plain. (WR 94-5, Finding No. 15, Order No. 3(d).)

As directed by WR 94-5, the parties to the 1994 MOU conducted studies and worked together to develop and implement a Fish Management Plan ("FMP"). The FMP protects and provides habitat for steelhead in the Santa Ynez River below Bradbury Dam through a combination of measures including water releases (Fish Releases) from the Dam. During development of the FMP, NMFS listed the Southern California Evolutionary Significant Unit of steelhead as an endangered species under the federal Endangered Species Act. The parties to the 1994 MOU coordinated with NMFS, which resulted in a Biological Opinion ("BO") that provided for steelhead protection consistent with the FMP. The FMP, which was presented to the State Board in 1999, provides for Fish Releases below Bradbury Dam. The release regime provided for in the FMP/BO then formed the basis for the negotiations among the downstream water right interests and the Member Units relating to resolution of their outstanding water quantity and quality issues.

After much negotiation, the downstream water right interests (including SYRWCD and the City of Lompoc) and the Member Units reached a compromise that settled their long-standing disputes relative to downstream water quantity and water quality issues. The compromise is set forth in the "Settlement Agreement between Cachuma Conservation Release Board, Santa Ynez River Water Conservation District, Santa Ynez River Water Conservation District Improvement District No. 1, and the City of Lompoc, relating to Operation of the Cachuma Project," dated December 17, 2002 ("Settlement Agreement"). The Settlement Agreement is the first time since proceedings commenced before the State Board that all parties – Reclamation, its Member Units and all downstream interests – are in agreement on a release mechanism that protects the downstream water right interests but which is also acceptable to the project users and Reclamation, and is consistent with the protections of the FMP / BO for steelhead. Reclamation previously requested that the State Board modify those specific provisions of Reclamation's permits to implement the Settlement Agreement, in two enclosures under cover of a letter dated March 21, 2003, entitled "Proposed Modifications to WR 73-37 as

⁴ In addition to Reclamation, representatives for all the downstream water right interests, Lompoc and the Member Units, the California Department of Fish and Game and the United States Fish and Wildlife Service were also parties to the 1994 MOU. (WR 94-5, Finding No. 11.)

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amended by WR 89-18 Pertaining to Permits 11308 and 11310 and Revised USBR Exhibit 1, February 1, 2003.”

From the foregoing history relating to SYRWCD and the Cachuma Project, which is given cursory treatment in the EIS, at best, there is no question that Cachuma Lake recreational activities and operations, if not properly managed, at least have the potential to significantly adversely impact Reclamation’s ability to make, and the quantity and quality of, required downstream Water Rights Releases and Fish Releases, to the substantial detriment of SYRWCD’s constituents and the steelhead population downstream of Bradbury Dam. However, as explained below, despite the obvious and well-known connection between activities at the Lake and the environment downstream of the Dam, the EIS fails to (among other things) develop a balanced set of RMP alternatives that adequately consider the need to provide for such releases or to evaluate the environmental consequences of the RMP alternatives on the environment downstream of Cachuma Lake and Bradbury Dam as required by NEPA. Indeed, as explained in detail in ID#1’s comment letter, the EIS’s analysis is inconsistent with the foundational premise of the Cachuma Project: recreation is subordinate to water supply.

III. THE RMP/EIS DOES NOT COMPLY WITH NEPA

A. General Overview of NEPA Law

R-2-6

NEPA was passed by Congress in 1969 and signed into law on January 1, 1970. (42 USC 4321 *et seq.*) NEPA’s purposes are: “To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote the efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.” (42 USC 4321.) The Council on Environmental Quality (“CEQ”) subsequently issued regulations implementing NEPA (40 CFR 1500-1508) (“CEQ Regulations”), and a NEPA guidance memorandum titled “*Forty Most Asked Questions Concerning CEQ’s NEPA Regulations* (March 23, 1981).” (46 Fed.Reg. 18026.)

NEPA’s purposes are realized not through substantive mandates but through the creation of a democratic decision-making structure that, although strictly procedural, is “almost certain to affect the agency’s substantive decision[s].” (*Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989); *see also Churchill County v. Norton*, 276 F.3d 1060, 1072-73 (9th Cir.2001) (describing NEPA’s theory of democratic decision-making).) By requiring the consideration of environmental factors in the course of agency decision-making on major federal actions, NEPA serves two purposes:

First, “it ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts.” Second, it “guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that

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decision.” (*Dep’t of Transp. v. Public Citizen*, 541 U.S. 752, 768, 124 S.Ct. 2204, 159 L.Ed.2d 60 (2004) (quoting *Methow Valley*, 490 U.S. at 349, 109 S.Ct. 1835) (internal citations and alteration omitted).)

In other words, by requiring federal agencies to take a “hard look” at how the choices before them affect the environment, and then to place their data and conclusions before the public, *see Or. Natural Res. Council Fund v. Goodman*, 505 F.3d 884, 889 (9th Cir.2007), NEPA relies upon democratic processes to ensure—as the first appellate court to construe the statute in detail put it—that “the most intelligent, optimally beneficial decision will ultimately be made.” (*Calvert Cliffs’ Coordinating Comm. v. U.S. Atomic Energy Comm’n*, 449 F.2d 1109, 1114 (D.C.Cir.1971).) “NEPA’s purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action.” (40 CFR 1500.1(c).)

As “public scrutiny [is] essential to implementing NEPA,” (40 CFR 1500.1(b)), “[a]n agency preparing a final [EIS] shall assess and consider comments both individually and collectively, and shall respond ..., stating its response in the final statement.” (*Id.* 1503.4(a).) Responses may include “[d]evelop[ing] and evaluat[ing] alternatives not previously given serious consideration by the agency” and “[s]upplement[ing], improv[ing], or modify[ing] its analyses.” (*Id.*) If an agency opts not to make changes, it must, at least, “[e]xplain why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency’s position.” (*Id.* 1503.4(a)(5).)

**R-2-6,
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The EIS is NEPA’s chief tool, designed as an “action-forcing device to [e]nsure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government.” (40 CFR 1502.1.) To fulfill its purpose, an EIS must “provide full and fair discussion of significant environmental impacts and shall inform decision makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.” (*Id.*; *see also* 42 USC 4332(C) (enumerating EIS requirements)). To fulfill this mandate, agencies must “consider every significant aspect of the environmental impact of a proposed action” in an EIS, (*Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 781 (9th Cir.2006) (quoting *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1153-54 (9th Cir.2006)); *see also* 40 CFR 1502 (discussing EIS requirements)), including the direct, indirect, and cumulative impacts of the action (*see* 40 CFR 1508.7, 1508.8 (defining those terms)).

As the EIS is intended to be used to guide decision-making, the alternatives analysis is naturally “the heart of the environmental impact statement.” (40 CFR 1502.14.) In that section, the agency must “[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.” (*Id.*) “The existence of a viable but unexamined alternative renders an environmental impact statement inadequate. *Westlands Water Dist. v. U.S. Dep’t of Interior*, 376 F.3d 853, 868 (9th Cir.2004) (quoting *Morongo Band of Mission Indians v. Fed. Aviation Admin.*, 161 F.3d 569, 575 (9th Cir.1998)).” (*Oregon Natural Desert Ass’n v. Bureau of Land Management*, 531 F.3d 1114, 1120 -1121 (9th Cir. 2008).)

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Cont.

B. The Original Purpose of the Cachuma Project and the Importance of Cachuma Water Supply Facilities and Continued Releases to SYRWCD's Constituents and the Steelhead Population Downstream of Bradbury Dam are Significant Information to the Development of RMP Alternatives and Evaluation of their Environmental Consequences, but Largely Absent from and Insufficiently Described in the EIS

NEPA mandates a process to be followed so that an EIS will serve two functions. First, it ensures that agencies take a hard look at the environmental effects of proposed projects. Second, it ensures that relevant information regarding proposed projects is available to members of the public so that they may play a role in the decision-making process. (*Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989).) The CEQ Regulations stress the need for sufficient environmental information in an EIS: "NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question.... The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." (40 CFR 1500.1(b).) "NEPA emphasizes the importance of coherent and comprehensive up-front environmental analysis to ensure informed decision-making to the end that the agency will not act on incomplete information, only to regret its decision after it is too late to correct." (*Center for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1166 (9th Cir.2003).) Complete analysis under NEPA also assures that the public has sufficient information to challenge the agency's decision. (*Robertson v. Methow Valley Citizens*, 490 U.S. 332, 349, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989); *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1151 (9th Cir.1998).)

The EIS notes that recreational uses at the Lake are incidental to and must be "consistent with the original purpose of the Reclamation project," and notes that such recreational uses must not interfere with reservoir operations for downstream interests or protection of endangered steelhead. (EIS, 1-1.) We agree. However, the EIS does not provide sufficient information about these very important matters.

The EIS should describe the history and original purpose of the Cachuma project and explain why that is important to have an understanding of the potential downstream environmental consequences of activities at the Lake. Further, the EIS only makes general passing reference to "release requirements for downstream water rights" and "steelhead." (EIS, 1-2.) More information is necessary to understand the significance of Water Rights Releases and Fish Releases. The purpose and importance of the Water Rights Releases and the Fish Releases should be explained. The facilities necessary to allow for continued water releases to occur downstream and to allow for continued SWP supplies to the South Coast should also be described in detail, including the outlet works, the Hilton Creek Watering System and their respective functions and importance. Furthermore, even though SYRWCD provided verbal and

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written comments during scoping (EIS, 2-6), the EIS should have, but hardly (if at all), acknowledged the existence and interests of SYRWCD or its constituents downstream of Bradbury Dam, and should have explained that cities, industries and economies within SYRWCD are dependent upon the continuation of downstream Water Rights Releases. While the EIS did, appropriately, give significance to the interests of those Cachuma Project Member Units receiving water on the South Coast (e.g., EIS, 3-4), it seems to have lost sight of the fact that significant interests downstream of Bradbury Dam may also be adversely affected by recreational activities and operations at the Lake.

In conclusion, the EIS should contain additional information regarding the original purpose of the Cachuma project and the downstream interests of SYRWCD and its constituents, and the endangered steelhead, consistent with the information provided in Section II, above. The cursory treatment of and minimal information provided regarding such matters suggests to the public that the *downstream* impacts of the recreational and other activities at the Lake sanctioned by the ultimate RMP are not and will not in the future be significant and, frankly, as explained below, the remainder of the EIS suffers as a result, including the development of RMP alternatives, the study and evaluation of impacts, and discussion of mitigation measures.

C. The Proposed Action is Lacking and/or Not Adequately Described and Analyzed

R-2-7

NEPA clearly requires that an EIS present the environmental impacts of both a “proposed action” and “alternatives” to the proposed action including an alternative of “no action.” (42 USC 4332(C); 40 CFR 1502.14; Question 5b., *Forty Most Asked Questions Concerning CEQ’s NEPA Regulations* (March 23, 1981).) The EIS suggests that Reclamation has developed an RMP, as the proposed action, and three alternatives to the RMP including the no action alternative. (EIS, 1-2, 2-7, 2-8.) However, assuming Reclamation has already developed a “proposed action,” it is never specifically described in the EIS – only the RMP “alternatives” are described. Furthermore, the EIS only evaluates the impacts of the alternatives, but not the impacts of the proposed action.⁵ As provided above, this analytic route would appear to be contrary to what NEPA requires.

R-2-8

D. The EIS Fails to Evaluate a Reasonable Range of RMP Alternatives – It Should Have Included and Evaluated Alternatives Involving Reduced Recreational Activities and Management Actions That Would Result in Protection and Enhancement of Downstream Water Supplies

The alternatives requirement is the linchpin of NEPA, and the alternatives section is “the heart” of the EIS. (*Save Our Canyons v. U.S. Forest Service*, 297 F.3d 1012, 1030 (10th Cir. 2002); 40 CFR 1502.14). Early in the NEPA process, a federal agency is required to “[s]tudy,

⁵ Because the EIS only defines and evaluates RMP alternatives and does not ever define or evaluate a proposed action, our comments about deficiencies in the EIS, including its impact analysis, are necessarily directed at the RMP alternatives.

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develop, and describe” alternatives to its proposed action. (42 USC 4332(2)(E); 40 CFR 1501.2(c).) If the federal agency prepares an EIS, NEPA requires that it rigorously explore and objectively evaluate reasonable alternatives to its proposed action. (42 USC 4332(2)(C)(iii); 40 CFR 1502.14(a); *Utahns for Better Transp. v. U.S. Dept. of Trans.*, 305 F.3d 1152, 1166 (10th Cir. 2002).) A “reasonable alternative” is one that is non-speculative and bounded by some notion of feasibility. (*Utahns for Better Transp.*, 305 F.3d at 1172.) “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.” (Question 2a, CEQ, *Forty Most Asked Questions Concerning CEQ’s NEPA Regulations*, March 23, 1981.)

The requisite level of detail and the number of alternatives an agency must consider depends on the purpose and scope of the agency’s proposed action. (*Dubois v. U.S. Dep’t of Agric.*, 102 F.3d 1273, 1289 (1st Cir.1996)). However, it is well established that an agency cannot define the purpose of its proposed action so narrowly that it simply meets its desires and precludes consideration of other reasonable alternatives. (*Davis v. Mineta*, 302 F.3d 1104, 1119 (10th Cir. 2002)). Courts have recognized that “[o]ne obvious way for an agency to slip past the structures of NEPA is to contrive a purpose so slender as to define competing ‘reasonable alternatives’ out of consideration (and even out of existence). (quoting *Simmons v. U.S. Army Corps of Eng’rs*, 120 F.3d 664, 666 (7th Cir.1997)).” (*Wyoming v. U.S. Dept. of Agriculture*, 570 F.Supp.2d 1309, 1335-1336 (D.Wyo., 2008)).

To comply with NEPA, an agency must give each reasonable alternative “substantial treatment” in the EIS. (40 CFR 1502.14(b); *Save Our Canyons*, 297 F.3d at 1030.) When the agency eliminates an alternative from detailed study, it must briefly discuss the reason for eliminating that alternative. (40 CFR 1502.14(a); *Utahns for Better Transp.*, 305 F.3d at 1166.) “The existence of a reasonable but unexamined alternative renders an environmental impact statement inadequate.” (*Oregon Natural Desert Ass’n v. Bureau of Land Management*, 531 F.3d 1114, 1120-1121 (9th Cir. 2008), citing *Westlands Water Dist. v. U.S. Dep’t of Interior*, 376 F.3d 853, 868 (9th Cir. 2004) (quoting *Morongo Band of Mission Indians v. Fed. Aviation Admin.*, 161 F.3d 569, 575 (9th Cir.1998)).) The alternatives must not be unreasonably narrow or virtually indistinguishable from one another -- but be varied enough to allow for a real informed choice. (*Friends of Yosemite v. Kempthorne*, 520 F.3d 1024, 1038-1039 (9th Cir. 2008).)

R-2-9

1. The Process Used to Develop the RMP Alternatives Failed to Identify Significant Issues and Consider Significant New Information Relative to Downstream Impacts and, consequently, the EIS Does Not Contain a Reasonable Range of RMP Alternatives

Both the RMP Guidebook⁶ and NEPA emphasize the importance of the public scoping process in identifying the significant issues that will drive the development, without any

⁶ Resource Management Plan Guidebook, *Planning for the Future*, Department of Interior, Bureau of Reclamation (February 2003).