

Bureau of Reclamation Responses to Public Comments on Draft ENV 06-01
(addressing comments received from October through December 2013)

NOTE: Comments are summarized/paraphrased below, followed by Reclamation's response in red.

Various Southern Nevada Municipal Interests, NV (conference call 10/21/13)

1. Consider adding a definition for "Project Water" to the Definitions section.

A definition for "Reclamation Project Water" was added as item 3.D.

2. Consider clarifying the flow chart, second box down, to indicate that we are referring to "Reclamation project water", and make sure this crosswalks appropriately with any definitions added to the D&S.

This change was made to the flow chart.

3. Consider re-wording the flowchart, fifth dashed box down, to say "Is the discharge made directly to a Reclamation facility (such as a canal or ditch), or conveyed to the point of discharge by ~~crossing~~ discharging onto Reclamation-owned land ~~and/or crossing~~ Reclamation right of way."

This change was made to the flow chart.

The City of Las Vegas' (Dan Fischer's) subsequent comment (email 11/15/13)

"The City's comments to this revision are limited to a simple acknowledgement of the D&S and its relationship to City activities. The City discharges highly treated wastewater and stormwater into the Las Vegas Wash, well above any Reclamation land or facilities. These discharges are covered by long-standing NPDES Permits. For the purposes of the D&S, these are 'indirect discharges'. Therefore, the City will not be submitting 'use authorization' applications to Reclamation."

If the regional office concurs that these are "indirect discharges" and/or "Reclamation Project water discharges" as defined in this D&S, no corresponding use-authorization requirements would be triggered. These determinations must be made on a case-by-

case basis by the corresponding regional office – as is now more explicitly stated under 5.A.

City of Henderson, NV subsequent written comments (letter dated 11/25/2013)

The City interprets its discharges of treated wastewater effluent and stormwater to the Las Vegas Wash to be either an “indirect” discharge to a Reclamation facility, comprised solely of “Project water”, and/or not subject to the requirements of this D&S due to the existence of a perpetual right-of-way from Reclamation granting access to Reclamation land. As such, the City does not anticipate it will need to submit any use authorization applications to Reclamation in order to conform with this D&S.

Based on our current (and possibly incomplete) understanding of the described situation, the City of Henderson’s interpretation appears valid. However, final determinations must be made on a case-by-case basis by the corresponding regional office (in this case, the Lower Colorado Region).

East Columbia Basin Irrigation District, Othello, WA (written comments dated 11/4/13)

1. Reclamation’s Columbia-Cascades Area Office already has a policy that no discharges enter Federal facilities and waters under its jurisdiction. This is important for the reasons articulated in the draft D&S, and this policy should be continued. Any non-agricultural discharges that jeopardize existing agricultural exemptions are [potentially] detrimental to the Columbia Basin Project, and “must not be allowed”.

This D&S establishes minimum standards to be applied Reclamation-wide, by all regional offices. Regional offices, including the Pacific Northwest, are free to establish additional requirements, as noted in the D&S under paragraph 5. This includes not accepting any non-agricultural discharges, should they so choose.

Note that the following sentence has been added to the D&S, under paragraph 5: “Reclamation will deny the authorization of any discharge that, in its judgment and sole discretion, would jeopardize existing exemptions from NPDES permit requirements associated with the receiving waters.”

2. The applicability flowchart should include a step for review and authorization in the beginning phase of obtaining an NPDES permit, instead of after a permit has been issued (and before granting a use authorization).

Because the flowchart's purpose is to identify circumstances under which the requirements of this D&S are triggered (or not), rather than to describe the steps to evaluate and authorize requests, this comment has been addressed in the body of the document. A sentence has been added under 5.G stating that "To facilitate the review process, Reclamation will consider initiating its evaluation of the applicant's use authorization request concurrently with the applicant's efforts to obtain the necessary NPDES documentation."

South Columbia Basin Irrigation District, Pasco, WA (written comments dated 11/6/13)

1. These discharges should be prohibited within the Columbia Basin Project and other USBR irrigation facilities. They are not compatible with Columbia Basin Project purposes or authorizations, and would needlessly set up irrigation districts for additional permitting burdens, potential infrastructure failings, and water quality degradation. While the D&S does allow for a discharge to be denied, SCBID believes they should never be authorized.

This D&S establishes the minimum standards to be applied Reclamation-wide, by all regional offices. Regional offices, including the Pacific Northwest, are free to establish additional regional requirements, as noted in the D&S under section 5. This includes not accepting any non-agricultural discharges, should they so choose.

Note that the following sentence has been added to the D&S, under Paragraph 5: "Reclamation will deny the authorization of any discharge that, in its judgment and sole discretion, would jeopardize existing exemptions from NPDES permit requirements associated with the receiving waters."

2. Downstream discharges of co-mingled flows (agricultural + non-agricultural) are not exempt from NPDES permitting requirements: see *Pacific Coast Federation of Fishermen's Associations v. Glaser*, 2013.

The cited court case addressed the plaintiffs' contention that a subsurface tile system to drain excess groundwater from agricultural lands for the Grasslands Bypass Project does not constitute "return flows from irrigated agriculture" that are exempt from NPDES permitting, because some of that water is unrelated to irrigation.

In Reclamation’s opinion, after consultation with the Department of the Interior’s Office of the Solicitor, the U.S. District Court’s order in this case is not controlling with respect to this D&S. We reach this conclusion because (a) the Court dismissed the case on the basis that the plaintiffs failed to state a claim on which relief could be granted, and did not render an opinion on the ‘co-mingled waters’ issue, and (b) Reclamation’s contention in this case was that there was no comingling of non-exempt, non-agricultural flows with exempt agricultural flows; thus an opinion on the status of co-mingled flows was not relevant nor requested.

Additionally, we note that the same paragraph cited by SCBID, in which the Court describes a hypothetical industrial discharge scenario, goes on to recognize that a “discharge from an industrial facility that is included in such ‘joint’ [commingled] discharges may be regulated pursuant to an NPDES permit either at the point at which the storm water flow enters or joins the irrigation flow, or where the combined flow enters waters of the United States or a municipal separate storm sewer.” (emphasis added). Here, the Court is citing EPA’s own discussion of NPDES Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47996.

Moffatt Thomas Law on behalf of Pioneer Irrigation District, ID (written comments dated 11/12/13)

1. Pioneer has pending litigation against the City of Caldwell, Idaho, alleging that Caldwell has “in excess of 50 unauthorized urban stormwater discharge pipes” in Reclamation’s transferred drain facilities, “operated and maintained by Pioneer for approximately 100 years.” There is a need for this final D&S to “fully protect the interests of its irrigation district partners in Idaho and throughout the West”. Language should be added to clarify that authorizations provided by Reclamation must also be “approved by the irrigation district” in cases where O&M has been transferred – not simply “seeking written concurrence” from the district.¹

Language under what is now paragraph 5.D, titled “Transferred Works”, has been modified and expanded as follows:

Where affected Reclamation facilities are operated by a transferred works operating entity that has accepted full liability for facility O&M, Reclamation

¹ The commenters elaborate by stating that an NPDES permit does not provide a guarantee that Reclamation project purposes will be protected. At most, they say, “it provides Reclamation with a level of comfort, but does not protect the operating irrigation district from the ‘real world’ consequences of pollution to its water supplies.”

shall consult with that entity and seek its written concurrence with the proposed use. Where the transferred works operating entity withholds written concurrence, and Reclamation determines that the objections raised by that entity are reasonable, Reclamation will deny the use authorization request. Incompatibility of the proposed discharge with relevant Reclamation contract provisions will provide a sufficient basis for rejecting the request.

2. Reclamation “should recognize” the pending rulemaking of the FDA to implement the Food Safety Modernization Act of 2011 ... “Reclamation projects throughout the West will be impacted by these rules.”

As this FDA rule has not yet been established, and its ultimate relevance to this D&S remains speculative, we do not address it in this document.

Robert Lynch, on behalf of Irrigation and Electrical Districts’ Association of Arizona (11/12/13)

1. “In the midst of uncertainty” with respect to the moving target of CWA definition of jurisdictional waters and the proposed EPA rule, “we question why your agency needs to go forward with this effort at this time.”

We do not anticipate any conflict between a potentially evolving definition of “jurisdictional waters” pursuant to the Clean Water Act and this D&S – if anything, we feel that the uncertainty regarding the scope of waters potentially affected by the CWA further affirms the value of having this protective D&S in place.

2. Need to correct sentences at bottom of page 1 and top of page 2. Irrigations return flows are excepted from the CWA definition of a “point source”, and are thus regulated as nonpoint sources. They are not point sources simply exempt from NPDES permit requirements.

The descriptions in the D&S under 1.A and Footnote 5 have been modified accordingly.

3. If a potential non-agricultural discharge must get an NPDES permit, it is because the Reclamation facility is deemed a water of the U.S. or a tributary thereof. “If you want to reserve the [jurisdictional waters] issue for a case-by-case determination, you need to say it [more explicitly]”

Footnote 3 has been expanded to more explicitly articulate that “jurisdictional water” determinations pursuant to the CWA must be made on a case-by-case basis.

4. Language indicates that O&M costs won’t *necessarily* be charged to the applicant. In cases where they are not, won’t other customers therefore be footing the bill? And if so, how can they be protected from taking on this “inappropriate burden”? “Obviously, this subject needs more work.”

The language under 5.E (formerly 5.D) has been modified to say that “additional O&M costs shall [replacing “may”] be passed along to the applicant as a cost to be paid on an annual basis to the entity with O&M responsibilities.” This is consistent with requirements already established by Reclamation law.

5. Mr. Lynch requests that Reclamation “respond in writing to our comments and questions before you decide whether to finalize this D&S.”

This ‘responses to comments’ document and the final D&S are publicly posted. Note that Reclamation’s policy allows for the formal review and, as appropriate, revision of D&S’s every two years. A review of this D&S in two years’ time will allow any remaining problematic elements to be identified and addressed, potentially better informed by Reclamation’s experience implementing this D&S.

Kevin Williams, Grand Valley Drainage District, CO (phone call to Karl Stock 11/14/13)

1. There are potential concerns associated with certain stormwaters originating from federal lands (e.g. Forest Service, BLM) that are directed into Reclamation facilities (e.g., Highline Canal and Grand Valley Canal). Mr. Williams suggested this may present problems because the canals may not be designed to handle the inflow from large storm events. He expressed support for this D&S because of the additional protection it could provide with respect to these kinds of concerns.

Reclamation will expect federal as well as non-federal dischargers to conform to the procedures described in this D&S. We agree with Mr. Williams that this D&S is intended to ensure greater protection of Reclamation facilities under the kinds of situations he cites, as well as others.

Quincy-Columbia Basin Irrigation District, Quincy, WA (written comments dated 11/22/2013)

1. The D&S implies that commingled agricultural and non-agricultural flows would not likely impact CWA exemptions. *Pacific Coast Fishermen vs. Glaser*, 2013, suggests otherwise. Thus, the District believes that the language beginning “If a non-agricultural discharge into a Reclamation facility is covered by an NPDES permit, then Reclamation generally will not be required to obtain a separate permit ...” is not accurate.

This is the same point that was raised by the South Columbia Basin Irrigation District. For the reasons already cited above, Reclamation believes the U.S. District Court’s order in this case is not controlling for this D&S. Nevertheless, the sentence cited, which was interpretive in nature, has been removed from the D&S.

2. The QCBID would like to emphasize the importance of a multidisciplinary review to include local Reclamation field offices in any nonagricultural discharge decision-making process.

The procedures for making these determinations will be left to the regional offices working with their area office counterparts on a case-by-case basis.

Klamath Water Users Association, OR (written comments dated 11/25/2013)

1. This D&S seems to set up Reclamation as another regulatory agency to monitor water quality, which is “neither necessary nor helpful.” Requiring acceptable written documentation in cases where an NPDES permit is not required “creates a new burden ... inefficiency and a risk of conflicts that are unnecessary.”

Each Reclamation regional office has the flexibility to determine what constitutes “acceptable written documentation” for purposes of compliance with this D&S. The purpose of requesting acceptable documentation is to help protect the public’s investment in federal projects by minimizing the risks and costs that Reclamation (or the transferred works operating entity) may otherwise incur – whether as a result of degraded water quality, additional Clean Water Act permitting requirements, or threats to the physical integrity of the project and the safety of its operations.

We do encourage Reclamation regional offices to consult with applicants early-on to identify the kinds of “written documentation” that will be adequate to provide the necessary assurances, while minimizing unnecessary burdens on applicants. Where feasible, we also encourage Reclamation staff to work with the applicant and the

relevant regulatory agency to establish appropriate monitoring protocols as part of the NPDES permit itself, rather than as a separate monitoring practice.

2. Congress has not charged Reclamation with determining whether a discharger is in compliance with its NPDES permit. “Given the fact that Reclamation will pass on costs for any monitoring that it performs, this requirement could result in substantial additional costs to the discharger that are completely unwarranted.”

As the commenter notes, responsibility for determining whether a discharger is in compliance with its NPDES permit is the responsibility of the permitting authority (EPA or the state), not Reclamation. The referenced requirement in the D&S (paragraph 5.C.(2)) asserting Reclamation’s “right to monitor flows, collect and conduct analysis of water samples, or require the discharger to periodically provide data” is, as noted therein, “for purposes of verifying that the authorized discharges comply with their use authorization” (not the NPDES permit). Flexibility is provided to each regional office to determine, in consultation with the discharger at the time the use authorization is established, whether, when, and in what manner such data may be obtained for that purpose. Note that we have added to this article language establishing that “Reclamation, at its discretion, may transfer this right to the relevant transferred works operating entity.”

3. The D&S should clearly identify the circumstances under which it will and will not apply. The flow chart provides some assistance, but is insufficient in itself. The D&S should contain a clear definition of the non-agricultural discharges that are subject to the D&S’s requirements so that “potential users of Reclamation facilities do not have to guess.”

Language was added to 5.A to read: “Determinations of applicability will be made by Reclamation’s regional offices on a case-by-case basis, in consultation with the entity potentially interested in discharging to a Reclamation facility”.

City of Richland, WA (written comments dated 11/25/2013)

1. The City understands that the proposed D&S would consider their existing municipal stormwater discharges, which the City asserts are (a) in compliance with NPDES permits, and (b) discharge into a Reclamation return flow facility in accordance with a 1982 agreement, as being in compliance with this new policy, “and for that reason supports the amendments”. If Reclamation does not believe that these conditions represent

compliance with the policy as currently written, then the City urges Reclamation to change the D&S to grant compliance for these types of discharges.

While this information suggests that the City's discharges may be in compliance with this D&S, this determination ultimately must be made by the corresponding regional office (Pacific Northwest). It is recommended that you begin to work with your local Reclamation office to begin the review of your existing agreement.

2. The City's municipal drinking water storage reservoir discharges to Reclamation's delivery and return flow facilities, but these are discharges that have not yet been authorized by Reclamation. "In the City's opinion these discharges pose a very small risk of non-compliance with any discharge regulation applied to the Bureau's facilities. The City would appreciate a risk-based evaluation of the risks of discharges as part of the Bureau's administration of discharge review and authorization."

The determination of whether a use authorization is needed, and the circumstances under which such an authorization may be granted, must be made on a case-by-case basis, and will be the responsibility of the corresponding regional Reclamation office (in this case, Pacific Northwest).

National Water Resources Association and Family Farm Alliance (written comments submitted 12/16/13)

These comments were submitted in the form of numerous suggested deletions and additions to specific D&S language, and were generally addressed as follows:

In numerous places throughout the document, immediately following references to "Reclamation" or to "the United States", the commenters proposed insertion of the phrase "its water contractors and any non-Federal contracting entity with operation and maintenance responsibilities for the facilities."

Where these expanded references were incorporated (see additional discussion below), we instead inserted the phrase "transferred works operating entity" – the definition of which has been added to the document at 3.F.

With respect to specific proposed deletions and additions throughout the document:

The editing changes proposed for the Introductory section 1 were adopted, using the more concise wording identified above.

The commenter's editing change proposed for the introductory paragraph of section 5, and for paragraphs 5.C.(1), (2) and (4) were adopted, using the more concise wording identified above.

The editing changes proposed for 5.C.(2) were partially adopted. The proposed wording change that "all costs of sample collection and analysis shall be paid by the discharger" was not made. It is understood such costs will normally be O&M costs, and in those cases they will be the responsibility of the discharger, consistent with Reclamation law and with paragraph 5.E of this D&S. We did add the following clarifying language to 5.C.(2): "Reclamation, at its discretion, may transfer this right [to monitor flows, collect and conduct analysis of water samples, or require the discharger to provide verification data] to the relevant transferred works operating entity."

The editing changes proposed to 5.C.(5) and (6) were not adopted, as they were deemed to be inconsistent with Reclamation's responsibilities and authorities.

Substantial changes were made to the paragraph addressing Transferred Works (formerly 5.C.(7); now paragraph 5.D.), as the result of these comments and subsequent discussions with the commenters. That paragraph now reads:

Transferred Works. *Where affected Reclamation facilities are operated by a transferred works operating entity that has accepted full liability for facility O&M, Reclamation shall consult with that entity and seek its written concurrence with the proposed use. Where the transferred works operating entity withholds written concurrence, and Reclamation determines that the objections raised by that entity are reasonable, Reclamation will deny the use authorization request. Incompatibility of the proposed discharge with relevant Reclamation contract provisions will provide a sufficient basis for rejecting the request.*

Some of the suggested changes to 5.E (Assessments and Determinations, formerly 5.D) were made to more explicitly identify effects on the transferred works operating entities as a relevant Reclamation consideration. However, various specific impacts that the commenters proposed be itemized have not been incorporated into 5.E, as we believe those are already incorporated among the more general issues identified within this paragraph.

Finally, substantial changes were made to 5.F (Renewals and Termination, formerly 5.E), largely incorporating the suggestions of these commenters.