STATE OF CALIFORNIA

Governor's Office of Planning and Research

State Clearinghouse and Planning Unit

Arnold Schwarzenegger
Governor

Jan Boel
Acting Director

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October 18, 2004

Lynne Silva
U.S. Bureau of Reclamation
1243 N Street
Fresno, CA 93721

Subject: City of Lindsay Long-Term Contract Renewal
SCH#: 2004094003

Dear Lynne Silva:

The State Clearinghouse submitted the above named Joint Document to selected state agencies for review. The review period closed on October 15, 2004, and no state agencies submitted comments by that date. This letter acknowledges that you have complied with the State Clearinghouse review requirements for draft environmental documents, pursuant to the California Environmental Quality Act.

Please call the State Clearinghouse at (916) 445-0613 if you have any questions regarding the environmental review process. If you have a question about the above-named project, please refer to the ten-digit State Clearinghouse number when contacting this office.

Sincerely,

Terry Roberts

Terry Roberts
Director, State Clearinghouse

1400 TENTH STREET P.O. BOX 3044 SACRAMENTO, CALIFORNIA 95812-3044
TEL (916) 445-0613 FAX (916) 323-3018 www.opr.ca.gov

# Document Details Report
## State Clearinghouse Data Base

| | |
|---|---|
| *SCH#* | 2004094003 |
| *Project Title* | City of Lindsay Long-Term Contract Renewal |
| *Lead Agency* | U.S. Bureau of Reclamation |

| | |
|---|---|
| *Type* | JD Joint Document |
| *Description* | The Supplemental EA is for the long-term contract renewal of Central Valley Project water supplies to the City of Lindsay for 40 years. Reclamation completed a Final EA and FONSI in 2001 for the long-term contract renewal for 25 years. This Supplemental EA analyzes the impacts of continued water deliveries for an additional 15 years. |

### Lead Agency Contact

| | | | |
|---|---|---|---|
| *Name* | Lynne Silva | | |
| *Agency* | U.S. Bureau of Reclamation | | |
| *Phone* | (559) 487-5807 | *Fax* | |
| *email* | | | |
| *Address* | 1243 N Street | | |
| *City* | Fresno | *State* CA | *Zip* 93721 |

### Project Location

| | | | | |
|---|---|---|---|---|
| *County* | Tulare | | | |
| *City* | Lindsay | | | |
| *Region* | | | | |
| *Cross Streets* | | | | |
| *Parcel No.* | | | | |
| *Township* | | *Range* | *Section* | *Base* |

### Proximity to:

| | |
|---|---|
| *Highways* | |
| *Airports* | |
| *Railways* | |
| *Waterways* | |
| *Schools* | |
| *Land Use* | |

| | |
|---|---|
| *Project Issues* | Agricultural Land; Air Quality; Archaeologic-Historic; Cumulative Effects; Economics/Jobs; Flood Plain/Flooding; Growth Inducing; Landuse; Population/Housing Balance; Water Quality; Water Supply |
| *Reviewing Agencies* | Resources Agency; Regional Water Quality Control Bd., Region 5 (Fresno); Department of Parks and Recreation; Native American Heritage Commission; Department of Health Services; Office of Historic Preservation; Department of Fish and Game, Region 4; Department of Water Resources; Caltrans, District 6; State Water Resources Control Board, Division of Water Rights |

*Date Received* 09/16/2004 *Start of Review* 09/16/2004 *End of Review* 10/15/2004

Note: Blanks in data fields result from insufficient information provided by lead agency.

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October 18, 2004

Lynne Silva
U.S. Bureau of Reclamation
1243 N Street
Fresno, CA 93721

Subject: City of Fresno Long-Term Contract Renewal Supplemental EA
SCH#: 2004094004

Dear Lynne Silva:

The State Clearinghouse submitted the above named Environmental Assessment to selected state agencies for review. The review period closed on October 15, 2004, and no state agencies submitted comments by that date. This letter acknowledges that you have complied with the State Clearinghouse review requirements for draft environmental documents, pursuant to the California Environmental Quality Act.

Please call the State Clearinghouse at (916) 445-0613 if you have any questions regarding the environmental review process. If you have a question about the above-named project, please refer to the ten-digit State Clearinghouse number when contacting this office.

Sincerely,

Terry Roberts

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Director, State Clearinghouse

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TEL (916) 445-0613 FAX (916) 323-3018 www.opr.ca.gov

# Document Details Report
## State Clearinghouse Data Base

| | |
|---|---|
| *SCH#* | 2004094004 |
| *Project Title* | City of Fresno Long-Term Contract Renewal Supplemental EA |
| *Lead Agency* | U.S. Bureau of Reclamation |

| | |
|---|---|
| *Type* | EA Environmental Assessment |
| *Description* | The Supplemental EA is the long-term contract renewal of water supplies to the City of Fresno for 40 years. Reclamation prepared a Final EA and FONSI in 2001 for the long-term contract renewal for 25 years. The Supplemental EA examines the impacts of water deliveries for an additional 15 years. |

### Lead Agency Contact

| | | | |
|---|---|---|---|
| *Name* | Lynne Silva | | |
| *Agency* | U.S. Bureau of Reclamation | | |
| *Phone* | (559) 487-5807 | *Fax* | |
| *email* | | | |
| *Address* | 1243 N Street | | |
| *City* | Fresno | *State* CA | *Zip* 93721 |

### Project Location

| | | | | |
|---|---|---|---|---|
| *County* | Fresno | | | |
| *City* | Fresno | | | |
| *Region* | | | | |
| *Cross Streets* | | | | |
| *Parcel No.* | | | | |
| *Township* | | *Range* | *Section* | *Base* |

### Proximity to:

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| *Highways* | |
| *Airports* | |
| *Railways* | |
| *Waterways* | |
| *Schools* | |
| *Land Use* | |

| | |
|---|---|
| *Project Issues* | Air Quality; Cumulative Effects; Economics/Jobs; Growth Inducing; Landuse; Water Quality; Water Supply; Wildlife |
| *Reviewing Agencies* | Resources Agency; Regional Water Quality Control Bd., Region 5 (Fresno); Department of Parks and Recreation; Native American Heritage Commission; Department of Health Services; Office of Historic Preservation; Department of Fish and Game, Region 4; Department of Water Resources; Caltrans, District 6; State Water Resources Control Board, Division of Water Rights |

*Date Received* 09/16/2004 *Start of Review* 09/16/2004 *End of Review* 10/15/2004

Note: Blanks in data fields result from insufficient information provided by lead agency.

NRDC
THE EARTH'S BEST DEFENSE

NATURAL RESOURCES DEFENSE COUNCIL

October 1, 2004

Ms. Lynne Silva
U.S. Bureau of Reclamation
1243 N Street
Fresno, CA 93721

RE: Comments on Draft Supplemental EAs for Cities of Fresno & Lindsay Contracts

Dear Ms. Silva:

These are the comments of the Natural Resources Defense Council (NRDC) on the September 2004 Supplemental Environmental Assessments (EAs) and Draft Findings of No Significant Impact (FONSIs) for Renewals of the long-term Contracts for the City of Fresno and the City of Lindsay within the Friant Division of the CVP (proposed contracts). We are enclosing with these comments numerous materials that are relevant to the proposed renewal contracts and the supplemental EA/FONSIs. We request full consideration of these comments, along with all materials submitted with or incorporated or referenced herein. 2.1

1. Request for Extension of Comment Deadline

The Bureau has not provided adequate time for the public to review the EA and FONSI or the proposed contracts for these and other CVP contractors. For all of the reasons stated in the letters previously submitted to you by the Pacific Coast Federation of Fishermen's Associations (PCFFA), Taxpayers for Common Sense, Northern California/Nevada Council-Federation of Fly Fishers, Senator Dianne Feinstein, Senator Barbara Boxer, and Rep. George Miller and five other Members of Congress, we urge you to reopen or extend (or both) the public comment periods for the contracts and the EA/FONSI so that there will be at least 60 days of public comment allowed after the completion and public distribution of the final Biological Opinion of NOAA Fishers (NMFS) on the new OCAP for the Central Valley Project (CVP) and the State Water Project (SWP). 2.2

2. The Supplemental EAs and the proposed FONSIs are Legally Inadequate.

The Bureau has failed to correct the numerous deficiencies in its prior environmental review documents pertaining to CVP long-term renewal contracts and interim renewal contracts. Numerous comments criticizing these earlier documents have been submitted to the Bureau and are contained in the administrative records on those contracts and their associated NEPA review processes, including NRDC's own extensive comments dated December 7, 2000, which are attached and incorporated herein, and the comments of the 2.3

Hoopa Valley Tribe (letter of Thomas Schlosser to Frank Michny), which are also attached. Among other things, the Bureau has failed to meet its legal obligation to prepare a full Environmental Impact Statement (EIS) on these proposed contracts, failed to consider a reasonable range of alternatives, and failed to disclose and analyze adequately the environmental impacts of the proposed action, including cumulative impacts. Associated CEQA review is likewise insufficient. Some of these defects are more fully addressed below.

3. The Bureau has failed to address the concerns previously identified by EPA and failed to comply with the Findings of the Council on Environmental Quality.

2.4

In a series of letters, the US EPA has expressed repeated concern over the adequacy of the Bureau's environmental review process for its contract renewal program, including but not limited to EPA's letters dated December 8, 2000, August 30, 2001, January 4, 2002, and January 23, 2004 that are contained in the Bureau's files on its CVP renewal contracts. Yet the Bureau has failed to adequately address those concerns in its new EA/FONSI. Similarly, back in 1989, EPA challenged the Bureau's failure to complete a full EIS on each group of CVP renewal contracts and the Council on Environmental Quality (CEQ) upheld EPA's critique. See 54 Fed. Reg. 28477 (July 6, 1989). The Bureau has numerous copies of the complete record of that proceeding, including in its copies of the court record in *NRDC v. Patterson*, Civ. No. S-88-1658-LKK, and should review and reconsider that record, including EPA's numerous submissions, and the CEQ findings.

4. The Bureau has failed to adequately consider the effects of its operations and proposed contracts.

Among many other defects, the Bureau has failed to adequately consider the impacts to fish species and fish habitat from its operations on the San Joaquin River, including but not limited to the operation of Friant Dam and the Friant-Kern Canal and the Bureau's new overall OCAP. Among other things, the Bureau's new EA/FONSIs ignore the impacts of the Friant Division on downstream fisheries, and the obligations to protect those fisheries under state and federal law, as fully detailed by the federal courts in the ongoing *NRDC v. Patterson (Rodgers)* litigation, including the Court's recent liability ruling on August 27, 2004. In addition to the information provided in and referenced in the record of that case, we also attach and direct your attention to the following relevant documents, and incorporate each of them by reference:

2.5

a. July 11, 2003 letter from NRDC and The Bay Institute to Ms. Ann Lubas-Williams on the Draft OCAP and Draft OCAP Biological Assessment.
b. July 28, 2004 letter from NRDC to Mr. Wayne White of US FWS re ESA Consultation on OCAP.

5. The Bureau fails to analyze meaningful alternatives on the key terms of the contracts including price and water quantity.

2.6

Numerous members of the public have written to the Bureau in past years urging the Bureau to evaluate a broader range of alternatives to its current policy of rolling over most water quantity terms in its long term renewal contracts and keeping water prices significantly below cost and below market without any adjustment for conservation incentives or environmental repayment. The EA/FONSI has utterly failed to evaluate such alternatives.

6. The Bureau is acting in an arbitrary and capricious manner in its NEPA process on contract renewals.

2.7

These EA/FONSIs are part of a larger pattern of arbitrary NEPA compliance by the CVP in addressing its OCAP and contract-renewal program. For example, the Bureau is proposing significant changes in its operations in its OCAP, yet failing to do any NEPA or CEQA review. The Bureau is conducting an EIS on the Sacramento River Settlement Contracts, the American River Division renewal contracts and the San Luis Unit renewal contracts, yet continuing to rely on mere EA/FONSIs for its Friant Division contracts. In sum, the approach is irrational and arbitrary and contrary to NEPA and its implementing regulations.

Thank you for considering our comments.

Sincerely,

Hamilton Candee
Senior Attorney

NRDC
THE EARTH'S BEST DEFENSE

NATURAL RESOURCES DEFENSE COUNCIL

December 7, 2000

Bureau of Reclamation
Attention: Mr. Al Candlish
2800 Cottage Way
Sacramento, CA 95825-1898

3.1

Dear Mr. Candlish:

On the behalf of its more than 400,000 members, the Natural Resources Defense Council ("NRDC") hereby files its comments on the draft environmental assessments ("EAs") on long-term renewal of Central Valley Project water service contracts prepared by the Bureau of Reclamation ("the Bureau").

We are deeply disappointed by the Bureau's inadequate attempts to comply with the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., in its proposed long-term renewal of CVP contracts. First, we strongly object to the Bureau's failure to prepare an environmental impact statement on these proposed agency actions that would have significant, far-reaching and fundamental effects. Second, the EAs themselves fail to meet the requirements of NEPA and cannot possibly support a finding of no significant impact by the Bureau. We urge the Bureau in the strongest possible terms to prepare NEPA documentation on long-term contract renewal which comports with the law, as these EAs emphatically do not.

I. The Bureau Must Prepare an Environmental Impact Statement on the Proposed Long-Term Contract Renewals.

NEPA requires federal agencies to prepare a detailed environmental impact statement ("EIS") on all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The purpose of this mandatory requirement is to ensure that detailed information concerning potential environmental impacts is made available to agency decisionmakers and the public before the agency makes a decision. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989).

Under NEPA's procedures, an agency may prepare an EA in order to decide whether the environmental impacts of a proposed agency action are significant

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enough to warrant preparation of an EIS. 40 C.F.R. § 1501.4(b), (c). An EA must "provide sufficient evidence and analysis for determining whether to prepare an [EIS] ..." 40 C.F.R. § 1508.9(a)(1). The U.S. Court of Appeals for the Ninth Circuit has specifically cautioned that "[i]f an agency decides not to prepare an EIS, it must supply a convincing statement of reasons to explain why a project's impacts are insignificant." Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1212 (9th Cir. 1998) (internal quotation marks omitted), cert. denied, 527 U.S. 1003 (1999). To successfully challenge an agency decision not to prepare an EIS, a plaintiff need not show that significant effects will in fact occur. So long as the plaintiff raises "substantial questions whether a project may have a significant effect on the environment," an EIS must be prepared. Id. (emphasis added, internal quotation marks omitted).

The long-term renewal contracts proposed by the Bureau are virtually certain to have a significant effect on the environment if they are executed. Collectively they cause the diversion of millions of acre-feet of water each year from the natural environment to (primarily) agricultural water users in the Central Valley, for use (primarily) in irrigated agriculture that itself has significant environmental impacts. The Bureau simply cannot, consistent with NEPA, allow these environmental impacts to escape full analysis in an EIS on long-term contract renewals.

A. There is Ample Evidence That Long-Term Renewal Contracts Would Have Significant Environmental Effects.

The Bureau has failed to meet its duty under governing Ninth Circuit precedent to supply a convincing statement of reasons why the execution of long-term renewal contracts would have insignificant environmental effects. By contrast, there is ample reason to believe that executing contracts for delivery of millions of acre-feet of water annually for an effective duration of 50 years would have a significant impact on the environment.

The U.S. Fish and Wildlife Service has recently completed a biological opinion on, among other things, the continued operation and maintenance of the Central Valley Project ("CVP"). U.S. Fish and Wildlife Service, Biological Opinion on Implementation of the CVPIA and Continued Operation of the CVP (November 2000).[1] This biological opinion describes in some detail the adverse environmental consequences that have been caused by the Central Valley Project, consequences that include harm to fish and wildlife from actions such

[1] We incorporate by reference this biological opinion in these comments. We also incorporate the documents referenced in that biological opinion, including the prior biological opinions on the Central Valley Project listed in section 1 of the November 2000 biological opinion.

as water diversion, impoundment, pumping and conveyance; from habitat conversion; from the effects of agricultural drainwater; and from urbanization. All of these effects constitute effects of CVP water service contracts, since they are the consequences of the provision of water under these contracts. See 40 C.F.R. § 1508.8 (defining effects required to be analyzed under NEPA to include indirect as well as direct effects). Because these effects on the environment are significant, they and other effects of signing long-term renewal contracts for the provision of CVP water must be analyzed in an EIS.

Other evidence of significant environmental effects from long-term water service contracts include the evidence submitted by the plaintiffs in NRDC v. Patterson, No. Civ. S-88-1658 LKK (E.D. Cal.), which we also incorporate in these comments by reference. The main point here is an obvious one: Through the proposed contracts, the Bureau is proposing to commit to the diversion of millions of acre-feet of water from the natural environment and to the delivery of that water to farms and cities for a nominal period of 25 years and an effective period of 50 years (given the right of renewal contained in the contracts). Activities of this scale and type cannot help but have significant environmental impacts, particularly in light of the significant impacts that have occurred to date under the current and previous CVP water service contracts. Moreover, the scale and duration of the activities that would be committed to under the proposed contracts threaten to cause a deterioration in the current state of the environment, as the environmental effects of the activities mandated under the proposed contracts are added to the environmental harm that has been caused to date under the current and previous contracts. For all these reasons, the Bureau must prepare an EIS on long-term contract renewal.

B. NEPA's Regulations Make Clear That an EIS Must Be Prepared Here.

NEPA's implementing regulations list a variety of factors that federal agencies are required to consider in determining whether a proposed action may significantly affect the environment and hence must be the subject of an EIS. 40 C.F.R. § 1508.27. While the Bureau has failed to undertake an adequate evaluation of these factors here, nearly all of the factors (any one of which is sufficient to require preparation of an EIS) are satisfied in the case of the proposed long-term contracts. For example:

- Water pollution from agricultural drainwater, which is triggered and would be made possible by the delivery of water under the proposed contracts, "affects public health" in a substantial way. See 40 C.F.R. § 1508.27(b)(2).

- The area to be served under the proposed contracts is in "proximity" to "prime farmlands," "wetlands" (including riparian wetlands), and "ecologically critical areas" (such as the Sacramento-San Joaquin Delta). See id. at 1508.27(b)(3).
- The effects of the water diversions, impoundments and deliveries required under the proposed contracts, and the consequences of the irrigated agriculture made possible by deliveries pursuant to the contracts, "are likely to be highly controversial." See id. at 1508.27(b)(4).
- The "possible effects" of the activities and actions made possible by the proposed contracts "are highly uncertain or involve unique or unknown risks," especially in light of the lengthy duration of the contracts. See id. at § 1508.27(b)(5).
- Since numerous CVP contractors are not prepared to sign long-term renewal contracts at the present time and will negotiate such contracts in the future, executing the proposed contracts would "establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration." See id. at § 1508.27(b)(6).
- In light of the environmental effects that have occurred from CVP operations to date, and in light of the long duration of the proposed contracts (during which many additional actions will necessarily be taken), the proposed contracts are related to other actions with "cumulatively significant impacts." See id. at § 1508.27(b)(7).
- In light of the well-established adverse effects of CVP activities on threatened and endangered species and their habitat, as shown by the biological opinions cited previously in this letter, the proposed contracts "may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973." See id. at § 1508.27(b)(8).

The evidence in favor of an EIS being required here is overwhelming – particularly since "the threshold for requiring an EIS is quite low." NRDC v. Duvall, 777 F. Supp. 1533, 1538 (E.D. Cal. 1991). In that same case, Chief Judge Emeritus Karlton further held that:

> only in those obvious circumstances where no effect on the environment is possible, will an EA be sufficient for the environmental review required by NEPA. Under such circumstances, the conclusion reached must be close to self-evident ...

Id. We urge the Bureau in the strongest terms to prepare the required EIS on the proposed long-term contract renewals, in order to comply with the requirements of NEPA.

II. The Environmental Assessments Fail to Meet the Requirements of NEPA.

Even if an EIS were not clearly required here, the EAs prepared by the Bureau are so inadequate as to violate NEPA on their own. They fall far short of the analysis that is necessary to meet NEPA's requirements and to support a finding of no significant impact.

A. The EAs Fail to Consider a Reasonable Range of Alternatives.

NEPA's implementing regulations call analysis of alternatives "the heart of the environmental impact statement," 40 C.F.R. § 1502.14, and they specifically require an alternatives analysis within an EA, id. at § 1508.9. The statute itself specifically requires federal agencies to:

> study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning available uses of resources.

42 U.S.C. § 4332(2)(E). Because the Bureau's EAs on long-term contract renewals look only at a narrow range of alternatives and fail to evaluate numerous reasonable alternatives, the EAs violate NEPA.

The caselaw makes clear that an adequate alternatives analysis is an essential element of an EA, in order to allow the decisionmaker and the public to compare the environmental consequences of the proposed action with the environmental effects of other options for accomplishing the agency's purpose. In a leading NEPA case in which it overturned an EA for failure to consider alternatives adequately, the Ninth Circuit pointedly held that "[i]nformed and meaningful consideration of alternatives ... is ... an integral part of the statutory scheme." Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228 (9th Cir. 1988), cert. denied, 489 U.S. 1066 (1989). To meet NEPA's requirements an EA must consider a reasonable range of alternatives, and courts have not hesitated to overturn EAs that omit consideration of a reasonable and feasible alternative. See People ex rel. Van de Kamp v. Marsh, 687 F. Supp. 495, 499 (N.D. Cal. 1988); Sierra Club v. Watkins, 808 F. Supp. 852, 870-75 (D.D.C. 1991).

Each of the contract-renewal EAs considers only two alternatives, in addition to the no-action alternative. Given the scope and importance of the proposed agency action under review, this small number of alternatives is by itself a violation of NEPA's requirement to consider a reasonable range of alternatives. What makes matters worse is the similarity

between the alternatives that the EAs do consider. For example, each of the alternatives, the two action alternatives and the no-action alternative, specify exactly the same quantities of water under contract. The similarities between the alternatives, though, do not stop with water quantity. The summary tables that compare the alternatives repeatedly use the phrases "Same as NAA [No Action Alternative]," "Similar to NAA" and "minor changes" to describe the components of the alternatives. See, e.g., Draft Friant Division Long-Term Contract Renewal Environmental Assessment ("Friant EA"), at Table DA-1.[2] See also id. at 3-57 ("The impacts of EA Alternative 1 are assumed to be identical to the impacts to [sic] the NAA because the water supply and pricing scenarios are identical in both alternatives. The only differences in the alternatives are administrative."), 3-58 ("the NAA and Alternative 1 are assumed to have the same environmental consequences because of their similarities and the fact that the only differences are contractual arrangements among the parties to the contracts").

In addition to considering too few alternatives that are too similar to each other, the EAs reject or ignore several obvious and reasonable alternatives. These unexamined or rejected reasonable alternatives include:

- Alternatives that decrease the water quantities under contract. Each of the alternatives in the EAs contains the exact same water quantities that are currently under contract. It plainly is reasonable for the Bureau to consider and evaluate the option of changing those quantities. The Bureau should consider changing the contract quantities to (a) a level that matches the actual level of deliveries in recent, normal water years, and (b) a level that would leave a meaningfully larger amount of water in the environment compared with current use, so that the EAs can illustrate the choices and consequences between consumptive and nonconsumptive uses of water. The EAs' rejection of the alternative of reducing water quantities, see, e.g., Delta-Mendota Canal Unit Environmental Assessment, Long-Term Contract Renewal, at 2-9, ignores the fact that such an alternative is reasonable and accords with the purpose and need for the agency action under evaluation. See also 40 C.F.R. § 1502.14(a) (agencies must "[r]igorously explore and objectively evaluate all reasonable alternatives").
- An alternative that increases the cost of water to full market rates. Each of the action alternatives in the EAs charges the minimum price for water under the contract. The Bureau should evaluate at least one alternative that prices water at the level the water

[2] The EAs are all very similar. Thus, each of the comments contained in this letter applies equally to each of the EAs. Each citation to a specific EA is intended as an illustration and in no way suggests that the comment is restricted to that particular EA.

would receive on the open market.[3] At a minimum, the Bureau must consider price increases that would "encourage the full consideration and incorporation of prudent and responsible water conservation measures." Reclamation Reform Act of 1982, Sec. 210(a), 43 U.S.C. 390jj(a).

- An alternative that does not give the contractor a specific right to renew the contract. (While it is possible that there is no right of renewal contained in Alternative 2, the EAs do not make this clear and do not analyze the environmental consequences of this difference, if it does exist in the alternative.)
- Alternatives that affirmatively mandate or encourage increased water conservation by water users, through (a) aggressive, prescriptive requirements for water conservation and (b) through financial incentives for water conservation.

Each of the above reasonable alternatives can and should be analyzed and considered for contracts in each of the CVP divisions. In addition, for contracts in each individual division the Bureau should consider at least one strongly environmentally protective alternative that is tailored to the leading environmental problem relating to the operation of that division. So, for example, the Bureau's NEPA analysis for long-term renewal contracts for the Friant Division should consider at least one alternative that conditions the provision of water service on effective restoration of the San Joaquin River and/or creates specific incentives in the contract for restoration of the river.[4] As a further example, the NEPA analysis for the Delta-Mendota Canal Unit should consider at least one alternative that conditions the provision of water service on discrete improvements in protection and restoration of the Sacramento-San Joaquin Delta and/or creates specific incentives in the contract for such increased environmental protection and restoration of the Delta.

The EAs prepared by the Bureau fail to evaluate a reasonable range of alternatives and hence violate NEPA. We urge the Bureau to prepare NEPA documentation for long-term contract renewals that meets NEPA's requirements for alternatives analysis and that, at a minimum, fully analyzes the alternatives described above.

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[3] The Bureau clearly has discretion to consider higher prices. See, e.g., Reclamation Project Act of 1939, sec. 9(e), 43 U.S.C. 495h(e) (rates shall be "at least sufficient to cover an appropriate share of the annual operation and maintenance cost..."); Reclamation Reform Act of 1982, sec. 208(a), 43 U.S.C. 390hh(a) ("the price...shall be at least sufficient to recover all operation and maintenance charges..."); see also NRDC v. Houston, 146 F.3d 1118, 1125-26 (9th Cir. 1998) (Bureau has discretion over terms of renewal contracts, including price and quantity).

[4] The Friant EA fails to conduct an adequate analysis of the effect of the proposed contracts on the San Joaquin River and on restoration of the river.

B. The EAs Fail to Disclose and Analyze Adequately the Environmental Impacts of the Proposed Action.

NEPA's implementing regulations require that an EA "provide sufficient evidence and analysis for determining whether to prepare an [EIS]." 40 C.F.R. § 1508.9(a). For the reasons discussed above, the EAs fail to discuss and analyze adequately the environmental effects of long-term contract renewals. Courts have not hesitated to overturn EAs that fail to contain an adequate discussion of the environmental consequences of a proposed agency action, e.g., Foundation on Economic Trends v. Heckler, 756 F.2d 143 (D.C. Cir. 1985), and the EAs prepared by the Bureau here deserve that same fate.

The discussion and analysis of environmental impact contained in the EAs is cursory and inadequate, and it falls far short of NEPA's requirements. As an example, the discussion of water-quality impacts contained in the Friant EA shows the cursory and conclusory "analysis" contained in all of the EAs. First, the analysis is breathtakingly brief, occupying a single page with considerable space between the short paragraphs – a plainly inadequate treatment in light of the great importance of water quality to public health and the environment. Friant EA at 3-34. Second, the analysis essentially says that there will be no change in water quality impacts under the No Action Alternative and Alternative 1 – without describing in any meaningful way what the qualitative impacts of existing water quality is on human health and the environment and why those impacts will not change for better or for worse. Id. The six-sentence analysis of the effect of Alternative 2 appears to say that this alternative would cause some changes, but the EA fails to describe what those changes would mean for human health and environment. Id.

This plainly inadequate discussion of environmental impacts is, sadly, far from an isolated example. For example, the same document's discussion of fishery impacts occupies approximately a page and a half and concludes (with no analysis), for the no-action alternative and for Alternative 1, that there would be "no impacts to fishery resources" – a conclusion based apparently on the logic that no changes in environmental impacts from the current effects equals no environmental impacts at all. Id. at 3-48. On the next page, the EA presents the amazing , thoroughly unsupported statement that "Alternative 1 and 2 have little or no effect on surface water quantities and flows," id. at 3-49, despite the fact that both alternatives would result in the diversion and delivery to irrigated agriculture of more than a million acre-feet of water each year for 25 or 50 years. Elsewhere in the same document, the Bureau presents the astonishing and unsupported statement that "Alternative 1 is assumed to have similar effects to the NAA. Therefore, there are no impacts to biological resources under this alternative." Id. at 3-76.

In addition to failing to disclose or to analyze adequately the environmental effects of the proposed contracts, the EAs impermissibly restrict the timeframe of their analyses. None of the study periods extends forward more than 25 years, e.g., Friant EA at 1-4, despite the fact that each of the contracts contains an easily satisfied conditional right of renewal that means that the likely and effective duration of these contracts would be 50 years. By failing to analyze the environmental effects of the contracts in the likely event that they are renewed under the right of renewal contained in the contracts, the Bureau has violated NEPA.

We urge the Bureau to prepare NEPA documentation that adequately discloses and analyzes the environmental effects of the contracts over the full lifetime of the contracts, including the renewal period, as the draft EAs do not.

C. The EAs Fail to Analyze Cumulative Impacts Adequately.

These proposed long-term renewal contracts do not exist in a vacuum but instead add to more than half a century of environmental impacts from the construction, operation and maintenance of the CVP. The fact that these contracts would operate for at least a quarter century, and likely then would be renewed for another quarter century, means that their environmental effects will also be added to additional actions that will take place over the next 50 years. These facts make an adequate analysis of cumulative impacts especially important for these proposed contracts.

The Ninth Circuit has made clear that NEPA mandates "a useful analysis of the cumulative impacts of past, present and future projects." Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800, 810 (9th Cir. 1999). That Court has further directed that "[d]etail is required in describing the cumulative effects of a proposed action with other proposed actions." Id. The very cursory cumulative-effects discussions contained in the EAs plainly fail to meet these standards of adequacy.

The cumulative-effects discussions contained in the EAs are cursory, unanalytic, unenlightening, and often illogical. Here, in full, is the Friant EA's cumulative effects "analysis" of the proposed contracts' cumulative effects on surface water:

> The cumulative effects of all foreseeable projects will be to place additional demands on the available water supply. Also, the restoration projects may result in additional flows in local rivers for habitat restoration. Implementation of Alternative 1 or 2 will not influence the cumulative effects of other projects to surface water resources.

Friant EA, at 3-12. In addition to being almost entirely uninformative, this three-sentence discussion asks more questions than it answers. What are the foreseeable projects, and what are their additional demands likely to be? What impact would the proposed contracts have on the opportunities to restore the San Joaquin River? What other cumulative impacts might occur over the life of the project? How is it possible to conclude that the diversion of more than a million acre-feet of water every year, for 25 or 50 years, "will not influence cumulative effects" on surface water?

The Ninth Circuit has not hesitated to reject cumulative-impact statements that are "too general and one-sided to meet the NEPA requirements" and that fail to provide the "useful analysis" mandated by the caselaw. Muckleshoot, 177 F.3d at 811. The inadequate cumulative effects discussions contained in the contract renewals EAs fail these tests and deserve rejection here.

III. Conclusion.

The contract-renewals EAs prepared by the Bureau fall well short of NEPA's established requirements. We urge the Bureau to prepare NEPA documentation on the proposed contracting actions which complies with all requirements of the law.

Sincerely,

Drew Caputo
Senior Attorney

Hamilton Candee
Senior Attorney

cc: Hon. David Hayes, Deputy Secretary of the Interior
Hon. John Leshy, Solicitor
Hon. George Frampton, Chairman, CEQ

NRDC
THE EARTH'S BEST DEFENSE

NATURAL RESOURCES DEFENSE COUNCIL

July 28, 2004

**By Federal Express and Facsimile to (916) 414-6714**
Mr. Wayne White
Field Supervisor
U.S. Fish and Wildlife Service
2800 Cottage Way
Sacramento, CA 95825

4.1

Re: Endangered Species Act Consultation on the Coordinated Operations of the Central Valley Project, State Water Project, and Long Term Central Valley Project Operations Criteria and Plan

Dear Mr. White:

We write of behalf of the 550,000 members of the Natural Resources Defense Council ("NRDC"), more than 100,000 of whom live in California, to express concern over the ongoing Endangered Species Act ("ESA") consultation between the U.S. Bureau of Reclamation ("Bureau") and the U.S. Fish and Wildlife Service ("FWS") on the coordinated operations of the Central Valley Project ("CVP"), State Water Project ("SWP"), and the June 30, 2004 Long-Term Central Valley Project Operations Criteria and Plan ("OCAP"). We appreciate your consideration of our comments.

The Bureau and the Department of Water Resources ("DWR") are proposing one of the most sweeping suites of changes in CVP and SWP operations in decades. These changes include both those features that the Bureau has itself acknowledged as major "future actions" (such as increased exports from the Delta; permanent barriers in the South Delta; and an intertie between the California Aqueduct and the Delta-Mendota Canal), and certain significant "operational changes" that can be discerned, if at all, only by plowing through the fine print of the voluminous OCAP and BA. We are dismayed that the Bureau initiated formal consultation long before finalizing its OCAP and BA, and has insisted on breakneck consultations rather than a thoughtful and thorough dialogue regarding the impacts of these proposed changes. We are also concerned that, perhaps due to time pressure from the Bureau, the FWS has not offered the broadly affected public an opportunity to review and comment on a draft biological opinion. The net result of this process seems to be that important analytic assumptions regarding

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significant operational changes – assumptions that could well affect the health of the San Francisco Bay-Delta estuary and its watershed for decades, such as the size and stability of any future Environmental Water Account – have been largely hidden from public view. Nevertheless, in an effort to encourage more thorough and fully informed consultations, we will provide what comments we can at this time, reserving our rights with respect to any additional concerns that may become clear once the Biological Opinion is released.[1]

It is important to note that many of the decisions proposed in the OCAP, such as implementation of the Napa Agreement, are currently being addressed by the CALFED process. Unfortunately, to date, the OCAP has been prepared largely outside of the CALFED framework. For example, the implications of the OCAP have not been adequately presented to the BDPAC or the BDA. The decisions proposed in the OCAP may render moot many of the issues currently being discussed in the CALFED process.

The hallmarks of CALFED are interagency cooperation, transparency and full stakeholder involvement. However, the Bureau has taken the opposite approach with regarding to OCAP. It has failed to coordinate adequately with other agencies (e.g. by clarifying to what extent OCAP is legally a joint state-federal document). It has failed to lay out a clear regulatory roadmap regarding this plan. And finally, OCAP has been developed with remarkably little stakeholder involvement, or even comment. Simply put, CALFED cannot succeed if the Bureau continues to bypass the program in making such important decisions.

## I. Status of the Delta Smelt

Several months ago, the FWS completed its five-year status review of the Delta smelt (*Hypnomesus transpacificu*). That status review reached troubling conclusions regarding the future of this species, even under the status quo. In particular, the status review noted that:

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[1] The Bureau's Biological Assessments ("BA") raises considerable concern both with respect to the effect of the Bureau's proposed operations on fish, wildlife, and plant species under the FWS' jurisdiction and with respect to the adequacy of the ongoing consultations. By letter dated July 11, 2003, NRDC provided the Bureau with initial comments on the 2003 draft OCAP and draft Biological Assessment that circulated in June 2003. As, it does not appear that the Bureau's final Biological Assessment addresses our concerns, we enclose a copy of our July 2003 letter.

- the Delta smelt "is at risk of falling below an effective population size and therefore in danger of becoming extinct" (p. 29);
- "[t]he threats of the destruction, modification, or curtailment of [Delta smelt's] habitat or range resulting from . . . the operations of the State and Federal water projects could result in the extinction of the delta smelt" (p. 28);
- "[t]he California Department of Fish and Game (CDFG) (2003g) is concerned that entrainment at the CVP and SWP may be a major source of *population* impacts under certain conditions" (p. 23; emphasis added);
- it is "unclear how effective . . . water management tools [including Delta water quality standards, the Vernalis Adaptive Management Plan, and the Environmental Water Account] will be over time based on available funding and future water demands for water (p. 24), and "the effectiveness of these [CALFED] measures remains to be seen" (p. 28);
- notwithstanding CALFED and other existing environmental regulatory standards, "there is little compelling information which would suggest that delta smelt populations are increasing over pre-decline levels" (p. 17), and indeed "[t]he two year running average of the Delta Smelt Recovery Index for 2003 is the second lowest since the species was listed" (p. 16); and
- "threats of other natural or manmade factors affecting the delta smelt's continued existence . . . remain and will increase" (p. 27).

It is against this baseline – which recognizes a significant risk of jeopardy to Delta smelt even with existing regulatory and non-regulatory safeguards – that the Bureau and DWR are proposing to significantly increase Delta exports.[2]

## II. The Biological Opinion Must Consider the Best Available Science, Including the Science Concerning Global Climate Change, Which Is Not Discussed in the Biological Assessment

In formulating its biological opinion and any reasonable and prudent alternatives or measures, the FWS is required to consider and rely on the best scientific and commercial data available. 40 C.F.R. § 402.14(g)(8). The best scientific data available today establishes that global climate change is occurring and will affect western hydrology. At least half a dozen models predict warming in the western United States of several degrees Celsius over the next 100 years (Redmond, 2003).

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[2] To ensure full consideration of the FWS' recent conclusions regarding the Delta smelt's status, we request that the status review itself, as well as all of the references cited in that status review, be included in the administrative record on the present consultation.

Such sophisticated regional climate models must be considered as part of the FWS' consideration of the best available scientific data.

Unfortunately, the Biological Assessment provided by the Bureau to the FWS entirely ignores global climate change and existing climate change models. Instead, the BA projects future project impacts in explicit reliance on seventy-two years of *historical* records. In effect, the Biological Assessment assumes that neither climate nor hydrology will change. This assumption is not supportable.

In California, a significant percentage of the annual precipitation falls as snow in the high Sierra Nevada mountains. Snowpack acts as a form of water storage by melting to release water later in the spring and early summer months (Minton, 2001). The effects of global climate change are expected to have a profound effect on this dynamic. Among other things, more precipitation will occur as rain rather than snow, less water will be released slowly from snowpack "storage" during spring and summer months, and flooding is expected to increase (Wilkinson. 2002; Dettinger, 2003). These developments will make it more difficult to fill the large reservoirs in most years, reducing reservoir yields, and will magnify the effect of CVP operations on downstream fishes (Roos, 2001). These developments will also dramatically increase the cost of surface storage relative to other water supply options, such as conservation.

While the *precise* magnitude of these changes remains uncertain, judgments about the likely range of impacts can and have been made. *See, e.g.*, U.S. Global Climate Action Report – 2002: Third National Communication of the United States of America Under the United Nations Framework Convention on Climate Change, at 82, 101 (2002).[3] The Service can and must evaluate how that range of likely impacts would affect CVP operations and impacts, including the Bureau's ability to provide water to contractors while complying with environmental standards. We therefore request that the Service review and consider the work cited above, as well as the background and Dettinger presentation at a recent climate change conference held in Sacramento, June 9-11, 2004 (http://www.energy.ca.gov/global_climate_change/2004_conference/index.html) and climate change reports at http://www.energy.ca.gov/pier/energy/energy_reports.html.

We appreciate that the FWS' discharge of its consultation responsibilities has been made considerably more difficult by the Bureau's failure to provide an adequate

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[3] Available at yosemite.epa.gov/OAR/globalwarming.nsf/UniqueKeyLookup /SHSU5BNQ7Z/$File/ch6.pdf.

and timely Biological Assessment addressing this issue. The FWS would be well within its authority to demand the Bureau provide additional information on these issues, and we urge the FWS to do so. Should the Bureau not provide the necessary data and analysis, the FWS has an independent obligation to identify and consider this information itself. *See* 50 C.F.R. § 402.14(g)(8).

## III. The Biological Opinion Must Address the Effects of All Interrelated and Interdependent Activities, Including the Effects of Long-Term Contract Renewals and Planned Future Construction Activities

While the Bureau has not requested consultation on its imminent planned execution of CVP long-term renewal contracts, construction of facilities such as permanent South of Delta barriers and the DMC-California Aqueduct intertie, the Bureau has repeatedly made clear – both in public meetings concerning the OCAP and in documents and correspondence before the FWS – that these planned activities are part of the larger action at issue in this consultation. Indeed, the Bureau has specifically stated that its plan to renew long-term CVP contracts this year is driving its desire to complete the present OCAP consultation quickly. And the modeling used in this OCAP consultation assumes operations of facilities, such as the DMC intertie, that have not yet been built.

The Endangered Species Act and its implementing regulations require the Bureau and FWS to consult on the "effects of the action," which include not just those activities on which the Bureau has specifically initiated consultations, but also actions that are either "part of a larger action and depend on the larger action for their justification" or have "no independent utility apart from the action under consideration." *See* 50 C.F.R. § 402.02. Failure to consider the effects of interrelated and interdependent activities renders the consultation inadequate and invalid.

The Bureau is planning to execute long-term CVP water service renewal contracts that would authorize the delivery of far more water than the Bureau has, in the past, actually delivered. The Bureau has also acknowledged that one of the purposes of OCAP is to facilitate the renewal of CVP contracts. Certain out-of-Delta effects of existing deliveries have not been analyzed or even discussed by the Bureau in its BA, let alone the effect of any increase in deliveries. Nor have the storage and diversion activities that would be necessary to deliver full quantities authorized under the contracts, or the effects of construction activities associated with the future actions on which the Bureau has sought consultation. Yet these are all plainly interdependent and interrelated effects, within the

meaning of FWS' regulations. Those effects must therefore be analyzed in the FWS' biological opinion.[4]

## IV. The Biological Opinion Must Consider Species Impacts that Are Inadequately Addressed by the Bureau's Biological Assessment

### a. Species Marginally Addressed in the Biological Assessment

The Bureau's BAs contain an extraordinarily truncated assessment of the effects, direct and indirect, of joint CVP and SWP operations on numerous species other than steelhead, winter- and spring-run Chinook salmon, and Delta smelt. Yet the proposed action is "to continue to operate the CVP and SWP," writ broadly, as well as to make significant operational changes that can reasonably be expected to significantly alter and expand the intensity of project impacts. BA at 1-10. The effects of CVP and SWP operations on other species are extensively documented in the FWS' files, including its files from previous Bureau consultations on particular CVP facilities and operations. Unfortunately, those previous consultations do not, and could not have, addressed the effects of the Bureau's newly proposed operations. Nor did those prior consultations address the best scientific data available on these species today. Accordingly, the present consultation cannot simply reference those prior consultations but must, at a minimum, address how the existing and planned future operations of the CVP and SWP affect these species, in light of the best current scientific knowledge.

To take just one important example, the Fish and Wildlife Service should address the effects of the CVP on the federally threatened giant garter snake, *Thamnophis gigas*. The giant garter snake is a semi-aquatic/aquatic-dependent species that occurs in both the Sacramento and San Joaquin Valley portions of the proposed project. This population is critical to the recovery of the species, and represents a significant portion of its range. The best scientific data and data from prior FWS documents indicates, among other things, that the giant garter snake population in and around the Bureau's West San Joaquin Division is at risk from selenium

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[4] Although the Biological Assessment does discuss certain proposed operations of the State Water Project, the BA does not identify the State of California as an applicant and does not explain how or whether the State "requires formal approval or authorization from a Federal agency as a prerequisite to conducting the action." 50 C.F.R. § 402.02 (defining "applicant"). If the State is deemed an "applicant" an explanation of that treatment should be provided. If the State is *not* an applicant, as seems apparent on the face of the BA, it is unclear what authority the FWS would have to grant the State incidental take coverage in a section 7 consultation. *See, e.g.*, 16 U.S.C. § (b)(4); 50 C.F.R. § 402.15(i)(1)(iv), (3).

contamination from project operations and project water contracts in and downstream of areas with selenium-laden soils. An increase in Delta-exports of irrigation water to such selenium-laden areas is likely to directly increase selenium runoff and therefore to directly increase threats to the giant garter snake. The Service should also consider whether salinization, other contaminants, and other project effects may adversely affect or jeopardize the giant garter snake.

**b. Delta Smelt**

In its analysis of effects of increased pumping on Delta smelt, the Bureau's BA essentially ignores the impact of changes in Delta flows and circulation, caused by the pumps, drawing smelt into low-quality habitat or high-predation areas, or removing them from population spawning or rearing areas for the species. The FWS should address these effects.

**c. Contaminants**

The word "mercury" does not occur in the Biological Opinion, notwithstanding that a considerable portion of the Bay-Delta watershed is impaired by mercury pollution and that much of the mercury is mobilized and transported by Project operations. The FWS should address the effects of the Project on mercury mobilization, transport, and availability, and the resulting impacts to listed species and critical habitat. The FWS should also address the impacts of other contaminants, including selenium, pesticides, herbicides, PCBs, and other organic contaminants on listed species, critical habitat, and EFH – and specifically including how the proposed project will affect water quality with respect to contaminants and the cumulative impact of Project-related and other contributions to contaminant threats to listed species.

**d. Dissolved Oxygen**

The San Joaquin River suffers from a well-known dissolved oxygen (DO) problem in the Stockton deep-water ship channel. At times, DO levels are so low that they pose a substantial barrier to salmon migration, including steelhead migration. That the operations of Central Valley Project in diverting freshwater flows out of the River and increasing agricultural runoff and pollution contribute to this problem is clear. The proposed action would perpetuate, and almost certainly exacerbate, these conditions, yet the BA contains essentially no discussion and absolutely no analysis of the issue. It is not sufficient to say, as the BA does, that compliance with D-1641 will obviate the DO concern, for compliance with state water quality standards is at best uncertain (the Bureau's operating plans *assume* frequent violations of Vernalis standards) and, to date, has not eliminated the

problem. Fish kills associated with this DO problem provide graphic illustration of the effects of this problem.

## V. The FWS May Not Rely on Uncertain Future Mitigation Measures

The Bureau's BA speaks glowingly (chapter 15) of several water management and habitat restoration projects that may benefit listed species; some of these are existing projects that are not fully funded and some of these are planned future projects. The future status of many of these projects is uncertain and their effects, even if fully implemented, uncertain. For example. the status of CALFED funding presents a clear illustration of the uncertainty of future CALFED programs. The state bond funds that have supported much of the CALFED program for the past several years are nearly exhausted. Another water bond in the near future is unlikely. Water users appear to have succeeded in eliminating from the 2005 state budget proposed user fees designed to support CALFED activities. And finally, congressional appropriations committees have clearly indicated that they will not provide funding for CALFED until an authorizing bill is signed into law. At the moment, the fate of proposed authorizing bills are far from clear. In short, within the coming year or two, funding for much of the CALFED program may be exhausted, requiring much of the program, including ecosystem restoration and the Environmental Water Account, to be shut down. The FWS explicitly recognized the uncertain future of CALFED programs in its recent Delta smelt status review. The FWS may not rely on these speculative benefits to reach a "no jeopardy" opinion.

## VI. The Bureau Has Repeatedly Violated Existing Legal Requirements in Its Operation of the Central Valley Project

The BA disingenuously attempts to portray Bureau's CVP operations as highly constrained by existing legal requirements. The Bureau has. however, a long record of repeatedly failing to comply with a wide array of legal obligations, including water quality-related requirements imposed by the California State Water Quality Control Board;[5] federal statutory requirements;[6] state statutory

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[5] *See, e.g., Central Delta Water Agency v. United States*, 306 F.3d 938, 947-48 (9th Cir. 2002) (recognizing that existing Bureau operational plan would essentially guarantee periodic violations of Vernalis standard).

[6] *See* Rivers and Harbors Act of 1937 (making "improvement of navigation" and "river regulation" Project purposes that are *primary* to irrigation supply); *see also State Water Resources Control Board v. United States*, 182 Cal. App. 3d 82, 136 (Cal. Ct. App. 1986) (holding that "river regulation" means Delta salinity control).

requirements applicable to the Bureau pursuant to Section 8 of the Reclamation Act of 1902;[7] and numerous terms and conditions of existing biological opinions. *See, e.g.*, NRDC's 60 Day Notice Letter on Friant Contracts (May 15, 2003) (in FWS files; incorporated herein by reference). Such violations of federal and state requirements are, of course, generally illegal. *See, e.g.*, CVPIA § 3406(b) (requiring the Bureau to "operate the Central Valley Project to meet all obligations under state and federal law").

The Bureau and the Department of the Interior have also failed to carry out a number of mandatory duties imposed by Congress more than a decade ago. For example, Interior has not improved and replaced the fish screens at the Tracy Pumping Plant (CVPIA § 3406(b)(4)); has not "ensure[d] that, by the year 2002, natural production of anadromous fish in Central Valley rivers and streams will be sustainable, on a long-term basis, at levels not less than twice the average levels attained during the period of 1967-1991" (CVPIA § 3406(b)(1)); eliminated, to the extent possible, loss of anadromous fish due to flow fluctuations attributable to CVP facilities; or developed any plan to "to reestablish where necessary and to sustain naturally reproducing anadromous fisheries from Friant Dam to its confluence with the San Francisco Bay/Sacramento-San Joaquin Delta Estuary" (CVPIA § 3406(c)(1)). The Department of the Interior has similarly failed to provide sufficient funding to fulfill its share of the obligations under the CALFED program.

Given this track record, the FWS' consideration of the likely effects of the Bureau's proposed operations cannot assume that the Bureau will suddenly become a model actor, fully implementing every existing environmental protection or restoration requirement. Rather, the Service must take into account the very real likelihood that the Bureau will continue its history of unlawful disregard for a wide variety of statutory and regulatory authorities.

We understand that FWS may attempt to address this issue by requiring, in the Biological Opinion, a self-styled "adaptive management" process in the event of violations of regulatory requirements. We are unaware of any legal authority that would support a no jeopardy finding based on the uncertain results of indefinite future interagency *processes* that are *substantively unconstrained* by any certain regulatory standard. While adaptive management may often be a helpful tool, standing alone it provides no guarantee of protection against current or future threats to listed species.

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[7] *See, e.g.*, Calif. Fish & Game Code § 5937.

## VII. The Bureau's Proposed Operations Fail to Ensure Compliance With the Bureau's Resource Management Obligations Under Federal and State Law

The Bureau's proposed operations fail to ensure compliance with its resource management obligations under the Central Valley Project Improvement Act; other reclamation law, including the congressional authorization of the CVP for the primary purposes of improving irrigation and salinity control and the requirement under Section 8 that the Bureau ensure reasonable and beneficial use of all irrigation deliveries; section 7(a) of the Endangered Species Act; section 5937 of the California Fish and Game Code; and other state and federal requirements. These issues are generally discussed in our earlier-filed comments on the Bureau's June 2003 draft Biological Assessment. To the extent that the Bureau's modeling and analysis rest on an assumption that the Bureau will continue to violate these obligations, that modeling and analysis should not be relied upon.

## VIII. Conclusion

We appreciate your consideration of our concerns. For reasons including those articulated above and documented in the FWS' files, we believe that the Bureau's proposed operations and facilities could well jeopardize listed species and would adversely modify any critical habitat. We ask the FWS to analyze these effects fully and to consider reasonable and prudent alternatives and measures in formulating its biological opinion.

Should you have any questions, please do not hesitate to call me or Hal Candee, NRDC Senior Attorney, on (415) 875-6100.

Sincerely,

Michael E. Wall
Senior Attorney
Western Water Project

encl.

cc: Chester V. Bowling, Operations Manager, U.S. Bureau of Reclamation
Cay Goude, Assistant Field Supervisor, U.S. Fish & Wildlife Service

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# Natural Resources Defense Council
# The Bay Institute

July 11, 2003

**By Federal Express and**
**Electronic Mail to alubaswilliams@mp.usbr.gov**
Ms. Ann Lubas-Williams
U.S. Bureau of Reclamation
3310 El Camino Avenue, Suite 300
Sacramento, CA 95821

5.1

Re: Comments on Draft OCAP and Draft OCAP Biological Assessment

Dear Ms. Lubas-Williams:

On behalf of the more than one hundred thousand California members of the Natural Resources Defense Council and of The Bay Institute, we appreciate this opportunity to comment on the "Preliminary Working Draft Long-Term Central Valley Project Operations Criteria and Plan CVP-OCAP" (June 2003) ("Draft OCAP") and "Draft – Preliminary Working Draft Long-Term Central Valley Project OCAP BA CVP-OCAP" (2003) ("Draft OCAP BA").

## I. The Planned OCAP Schedule Is Not Sustainable

Before addressing the merits of the Draft OCAP and BA, we would like to urge the Bureau to take the time necessary for sound decision making. The Bureau's announced schedule for revision of the CVP OCAP and completion of associated Endangered Species Act consultations with the National Marine Fisheries Service ("NMFS") and Fish and Wildlife Service ("FWS") appears designed principally to revise the CVP OCAP before the Bureau renews numerous CVP long-term water contracts in early 2004. This rush is perplexing. On the one hand, CVP contractors have survived with interim contracts for many years. On the other hand, many of the most critical decisions facing the federal and state projects – including the expansion of Banks' pumping capacity and the future of the Environmental Water Account ("EWA") – will not be made in sufficient time to include in the OCAP revision process. Nor will NMFS and the FWS have time to conduct careful and honest consultations on both the OCAP revisions and the

numerous long-term contract renewals under the Bureau's present, rushed timetable.

Particularly for such long-term commitments, such rushed and piecemeal decision making undermines the environmental review process and is likely to produce consultations that are unstable at best. Indeed, the likely result of rushing the OCAP revision here is that the federal and state agencies involved will devote enormous resources on a process that they will have to revisit just months later – an extraordinary waste of agency and taxpayer resources at a time when those resources are urgently needed to protect California's environment and the purity and reliability of the public's drinking water supplies. We urge the Bureau and its partner agencies to take a more deliberate and careful approach.

## II. The Draft OCAP Fails to Ensure Compliance with All Obligations Under Federal and State Law

Section 3406(b) of the Central Valley Project Improvement Act ("CVPIA") requires the Bureau of Reclamation to "operate the Central Valley Project to meet all obligations under state and federal law." Among those obligations are those established by the State Water Resources Control Board, the Endangered Species Act, the Clean Water Act, and the CVPIA itself. We are concerned that the measures described in the Draft OCAP are insufficient to fulfill the Bureau of Reclamation's obligations under these laws.

### A. The Draft OCAP Fails to Meet the CVPIA's Anadromous Fish Doubling Requirements

Section 3406(b)(1) of the Central Valley Project Improvement Act directs the Secretary to:

> develop within three years of enactment and implement a program which makes all reasonable efforts to ensure that, by the year 2002, natural production of anadromous fish in Central Valley rivers and streams will be sustainable, on a long-term basis, at levels not less than twice the average levels attained during the period of 1967-1991.

The Draft OCAP BA demonstrates that the Secretary has failed adequately to implement this statutory mandate. Total Chinook salmon production for all CAMP streams for the period 1995 to 1999 failed to meet the Bureau's "rebuilding schedule" target for each of the three Chinook salmon races reported. Just 5 of 18 stream runs being monitored had met their target. Across all streams,

spring-run rebuilding reached just 22% of its target, and winter-run rebuilding barely attained 5% of its target. Draft BA at 4-27 to 4-28. Moreover, the Bureau's failure to achieve the congressionally mandated anadromous fish doubling goal has also resulted in a failure to achieve California's state objective to double natural production of Chinook salmon. *Cf.* Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (1995) at 30 ("[P]rompt and efficient actions taken to implement CVPIA [anadromous fish doubling] goal, in concert with other recommended actions in this plan, are important to achieving the [Bay-Delta Plan's] narrative salmon protection objective.").

The Draft OCAP's lack of attention to this lapse is inexplicable. In 1992, Congress directed the Bureau to operate the CVP in such a manner as to give "mitigation, protection, and *restoration* of fish and wildlife" equal priority with delivery of water for irrigation. CVPIA § 3406(a)(1). The Bureau has not implemented Congress' direction. If finalized as proposed, the Draft OCAP would contravene Congress' intent and be unlawful.

### B. Bay/Delta Plan – Vernalis Flow Objectives

The Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary ("Bay/Delta Plan") establishes a number of water quality objectives for the San Joaquin River that are critical to protecting the Bay-Delta estuary and the salmon and other wildlife it supports, the purity of drinking water supplies for tens of millions of Californians, and the quality of the water relied on by downstream farmers to grow their crops. *See, e.g., Central Delta Water Agency v. United States*, 306 F.3d 938, 947-48 (9th Cir. 2002).

The Draft OCAP assumes that the Bureau will meet the Bay/Delta Plan's Vernalis flow objectives in the manner set out in Revised Decision 1641. Recently, however, the Sacramento Superior Court held this aspect of D-1641 invalid, since implementation of the VAMP is not sufficient to ensure compliance with the relevant Bay/Delta Plan standards. The Draft OCAP should not, and lawfully cannot, be premised on an assumed compliance plan that has been struck down. We urge the Bureau, as the operator of the most significant diversion facilities on the San Joaquin River, to revise the OCAP to ensure full compliance with the Bay/Delta Plan flow standards – including releases from Friant Dam that contribute to meeting flow requirements at Vernalis.

### C. Bay/Delta Plan – Vernalis Salinity Objective

Another of the Bay/Delta Plan's water quality objectives is that which establishes maximum salinity levels for the San Joaquin River near Vernalis. In Revised Decision 1641, the State Board reaffirmed that the Bureau of Reclamation is required to ensure this salinity objective is met "using any measures available." *See also* CVPIA § 3406(b) (requiring the Bureau to operate the CVP in compliance with obligations imposed by state law, including State Board orders). Historically, the Bureau has partially addressed this requirement by releasing water from New Melones pursuant to the Bureau's "New Melones Operations Plan." The Bureau has candidly acknowledged, however, that under that plan the Bureau will violate the Vernalis salinity objectives. *See* Revised Decision 1641, § 10.1; *Central Delta Water Agency*, 306 F.3d 938, 948-49. Such violations are unlawful.

The State Water Resources Control Board has concluded that the CVP's operations in the San Joaquin Basin are the "principal cause" of violations of the Vernalis salinity objective. *See* Revised Decision 1641, § 10.2.1. Specifically, the Bureau's diversion of high quality upper San Joaquin River flows at Friant Dam has devastated the River's assimilative capacity, and what little assimilative capacity remains is then rapidly overwhelmed by drainage from areas for which the CVP provides the primary water supply. *See id.* Indeed, such drainage is responsible for more than 70 percent of the salinity discharged to the San Joaquin River. *See id.* As the Ninth Circuit has held, "the salinity level of Project waters is under the control of the Bureau" and "any violation of the Vernalis standard . . . would be 'fairly traceable' to the Bureau's decision to release waters" from CVP facilities, or not. *See Central Delta Water Agency*, 306 F.3d at 947.

Although the Bureau has a clear legal obligation to comply with the Vernalis salinity objective, the Bureau's current operations plan is apparently calculated to ensure a perpetual state of intermittent noncompliance. Two obvious solutions exist: First, reduce irrigation water deliveries to the west side lands that are a source of the saline drainage. Second, release high quality San Joaquin River water from behind Friant Dam. The State Board has made clear that the Bureau's Friant permit authorizes the release of water for salinity control. *Id.* at 10.4. And, by happy coincidences, restoring flows to the San Joaquin River below Friant is also required by California Fish & Game Code § 5937, among other laws.

The Draft OCAP's failure to provide for compliance with the Vernalis salinity objective cannot be reconciled with either the CVPIA or the Clean Water Act and Porter-Cologne Act requirements established by the State Board. The Bureau

must meet the salinity objective either by releasing water from Friant Dam, or through other means (such as reduced deliveries to the west side areas that discharge saline drainage to the River), or by some combination of approaches. A perpetual state of intermittent noncompliance simply is not lawful.

## III. The Draft OCAP Does Not Reflect the Ninth Circuit's "B2" Decision

The draft OCAP and OCAP BA are premised on the Department of the Interior's May 9, 2003 "Decision on Implementation of Section 3406(b)(2) of the Central Valley Project Improvement Act." That May 9, 2003 decision was, in turn, premised on the district court's final partial judgment in *San Luis & Delta Mendota Water Auth. v. United States*, Civ. Nos. 97-6140, 98-5261 (E.D. Cal. 2002). On June 3, 2003, however, the U.S. Court of Appeals for the Ninth Circuit reversed a portion of the District Court's partial judgment regarding the Secretary's implementation of CVPIA § 3406(b)(2). *Bay Institute v. United States*, No. 02-16041 (9th Cir. June 3, 2003) (mem. op.). The Ninth Circuit's decision reverses a portion of the District Court's ruling related to the accounting for water that is "used for water quality and Endangered Species Act purposes," and requires the Secretary to "give[] effect to the hierarchy of purposes established in Section 3406(b)(2)" of the CVPIA. *Id.* Any OCAP revision must take into account the Ninth Circuit's decision.

## IV. The Draft OCAP and BA Assume Continuation of the Environmental Water Account

The Draft OCAP and BA rest on the assumption that the EWA will continue for two more decades in essentially the same form described in the CALFED Record of Decision. This assumption is flawed for several reasons. First, actual assets and resources secured to implement the EWA have differed substantially from the ROD, calling into question whether the level of protection and recovery of endangered species mandated by the ROD is actually being achieved. Second, even were the actual EWA identical to the one described in the ROD, the assumption is arbitrary and unwise given that the EWA described in the ROD is a four-year program, and the future existence and size of the EWA have not been determined. Does the Bureau really believe that it makes sense to finalize the CVP OCAP revisions and accompanying BA based on unsupported assumptions regarding an unsettled EWA?

## V. The Draft OCAP BA Inadequately Addresses Impacts to Protected Species Even While Acknowledging Unacceptable Impacts

The Draft OCAP BA acknowledges a number of unacceptable adverse impacts of future CVP operations, including elevated temperatures on most streams during the critical adult migration, egg incubation, and early rearing periods for spring-run Chinook salmon and Central Valley steelhead, as well as fall/late fall-run Chinook salmon. *See* Draft OCAP BA, Chapter 9. For some streams, the analyses indicate that, in addition to the presently unsuitable stream conditions resulting from project operations in many dry and critical years, future operations will similarly adversely affect normal years. In addition to these adverse impacts in upstream habitats, future operations are predicted to further degrade Delta environmental conditions, increasing the *E/I* ratio during the Delta smelt spawning season and shifting X2 upstream. *See* Draft OCAP BA, Chapter 10. Direct take of federally listed adult Delta smelt and splittail is also predicted to increase.

We are deeply concerned by these conclusions. In 1992, Congress amended the CVP authorizing act to make clear that protection and mitigation of fish and wildlife impacts is as important a purpose of the Project as providing irrigation deliveries. CVPIA § 3406(a). Particularly in view of the Bureau's palpable failure to meet the CVPIA's anadromous fish doubling objective, the Bureau's proposal to operate the CVP in a manner that is more, not less, harmful to these protected species is both disturbing and contrary to law.

Perhaps more troubling yet, the Draft OCAP BA assumes the continuation of the current adverse impacts on the environment as an acceptable baseline. Yet overwhelming evidence demonstrates that operations of the CVP have caused sharp declines in numerous species, including winter- and spring-run Chinook salmon, Central Valley steelhead, Delta smelt, and Sacramento splittail. These adverse impacts result directly from CVP water diversions and the pollutants introduced into the Bay-Delta system by contaminated return flows and, for a number of operational factors (e.g., export rates), the magnitude of the adverse impact (e.g., reduced survival) is directly related to the intensity of project operations.

No substantial evidence exists that these long-term downward trends have been halted, let alone reversed. To the extent that short-term improvements have occurred in certain populations, those improvements may simply reflect generally favorable hydrologic and ocean conditions that will not continue forever. What is clear is that CVPIA fish doubling goals – and specific stream flow targets – are not being met. In this context, and without any meaningful analysis of the recent

effect of those favorable hydrologic and ocean conditions, or of the effect of future extended drier year cycle conditions on the estuary's resources – the Bureau's conclusion that *increases* in Delta exports (particularly in view of decreased inter-basin imports) will not jeopardize these protected species or adversely modify critical habitat cannot be sustained.

Two particular deficiencies in the Draft OCAP BA's analysis are its failure to report ranges of impacts (rather than just average impacts) and failure to analyze the reduction in the flexibility of the system. On the first point, reporting an "average" impact of, for example, a two percent increase in egg mortality may hide widely variable impacts that could, in some years, reach far higher levels. It is these occasional (and predictable) high magnitude impacts that can jeopardize species already made vulnerable by consistently sub-optimal environmental conditions in most other years. Reporting average impacts, rather than ranges, minimizes these potential impacts. Similarly, given that fish inhabit the affected streams on a daily basis, evaluating the magnitude of future operations using, for example, predicted increases in monthly mean temperatures, is extremely coarse and almost certainly underestimates the true impacts. On the second point, absent an analysis of remaining flexibility, there is no ability to evaluate how the Draft OCAP would reduce the Bureau's existing flexibility to respond to unforeseen developments. Reductions in that flexibility will, predictably, lead to adverse impacts on protected species that the Bureau will be ill-positioned to address.

## VI. The Draft OCAP Improperly Treats Freeport Diversions as "In Basin"

The Draft OCAP and its supporting studies, including the CALSIM studies used as the basis for the Draft OCAP BA, rest on an assumption that Freeport Regional Water Project diversions to the East Bay Municipal Utility District are put to "in basin" use. Draft OCAP at 2-9. This assumption is not tenable, since EBMUD's service area is not within the relevant basin. While it is unclear how this assumption affected the results of the CALSIM studies reported in the BA, it is clear that those studies must be rerun.

We respectfully request that the Bureau provide the public with an opportunity to comment on the results of these revised studies and resulting changes to the draft BA.

## VII. Water Needs Assessments

The Draft OCAP inaccurately reports that "[w]ater needs assessments have been performed for each CVP water contractor eligible to participate in the CVP long-

term contract renewal process" and that "[t]hese water needs assessment [*sic*] serve to confirm a contractor's past beneficial use and to determine future CVP water supplies needed to meet the contractor's anticipated future demands." We have previously explained that the Bureau's water needs assessment process, as carried out with respect to the so-called "Sacramento River settlement contractors," suffered from misplaced and inconsistent assumptions and flawed and irrational analysis. Many of those same errors are common to the Bureau's CVP-wide needs assessment methodology. We incorporate by reference NRDC's August 11, 2002 and November 27, 2002, comment letters on this issue.

Of particular note, and as we observed in the incorporated letters, the Bureau's needs assessments fail to ensure that CVP water is put to reasonable and beneficial use, as required by state and federal law. There is a remarkable and unexplained contrast between the Department of the Interior's recent approach to this issue in non-CVP water allocation decisions and its handling of the reasonable and beneficial use inquiry in its CVP OCAP and contract renewal processes. Regardless, one thing is clear: The Bureau must comply with state reasonable and beneficial use requirements in operating the CVP. *See* CVPIA § 3406(b). The Draft OCAP's minimal discussion of this issue, taken in combination with the Bureau's plainly inadequate needs analyses, suggest that the Bureau has abdicated its legal duty to ensure reasonable and beneficial use.

## VIII. Friant Division

The Draft OCAP states that the Friant Division "is operated separately from the rest of the CVP and is not integrated into the CVP Operations Criteria and Plan." Draft OCAP at 3-40. Elsewhere, the Draft OCAP states that "the Friant Division is covered by the CVP-OCAP." Draft OCAP at 1-12. The Bureau's inconsistency on this issue makes it difficult to evaluate what, exactly, the Bureau is proposing to do through the OCAP and on what suite of actions it intends to consult. That inconsistency also reflects what is in fact reality: While the Bureau claims that the Friant Division is "operated separately from the rest of the CVP," that is plainly not so.

Operational and contracting decision made within the Friant Division and the Hidden and Buchanan Units have a direct and immediate impact on the health of the lower San Joaquin River and the entire Bay-Delta system. Water deliveries to Friant Division contractors divert virtually the entire flow of the San Joaquin River at Friant Dam – degrading downstream water quality and requiring increased Delta exports to the "Exchange Contractors." And it is only because the Bureau is proposing to continue Delta exports as a means of satisfying its obligations to the

Exchange Contractors that the extent of the Bureau's ongoing deliveries to the Friant Division contractors remains possible. These interrelated effects must, of course, be considered together. 50 C.F.R. § 402.02. *See generally Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1056 n.12 (9th Cir. 1994); *Greenpeace v. NMFS*, 80 F. Supp. 2d 1137, 1144 (W.D. Wash. 2000). The Draft OCAP BA does not do so.

## VIII. Essential Fish Habitat

The Draft OCAP BA's discussion of essential fish habitat is quite peculiar for failing to consider the essential fish habitat of a number of species, including Chinook salmon and steelhead. The consideration of project impacts on designated essential fish habitat for these species is not entirely congruent with the requirements of Endangered Species Act consultation. Among other things, essential fish habitat exists in areas from which salmon and steelhead runs have been essentially extirpated. Accordingly, the Bureau's Draft OCAP BA does not constitute an adequate analysis of essential fish habitat for these species.

## IX. The Draft OCAP and BA Fail to Consider the Effects of Global Climate Change

At a recent public meeting regarding the Draft OCAP, Bureau staff were asked why the Draft OCAP and Biological Opinion did not account for global climate change. The Bureau's response was that, at present, global climate change is too uncertain to address.

This explanation is not credible. That global climate change *is* occurring, and *will* affect western hydrology, are by now beyond any reasonable dispute. It is not simply one model that is predicting warming, but at least a half a dozen - and all of these indicate warming in the western United States of several degrees Celsius over the next 100 years (Redmond, 2003). Yet the Draft OCAP and OCAP BA ignore this phenomenon, thereby implicitly assuming that neither climate nor hydrology will change. These implicit assumptions are unsupported and indefensible.

In California, a significant percentage of the annual precipitation falls as snow in the high Sierra Nevada mountains. Snowpack acts as a form of water storage by melting to release water later in the spring and early summer months (Minton, 2001). The effects of global climate change are expected to have a profound effect on this dynamic. Among other things, less water will be slowly released from this snowpack "storage" to streams and existing reservoirs during spring and

summer months (Wilkinson, 2002; Dettinger, 2003). This in turn will make it more difficult to fill the large reservoirs in most years, with corresponding reductions in yield and possible concerns for downstream fisheries (Roos, 2001). These developments will also dramatically increase the relative costs of surface storage to other water supply options such as conservation.

The precise magnitude of these changes might be uncertain, but judgments about the likely range of impacts have been made. *See, e.g.*, *U.S. Global Climate Action Report – 2002: Third National Communication of the United States of America Under the United Nations Framework Convention on Climate Change*, at 82, 101 (2002).[1] The Bureau can and must evaluate how that range of likely impacts would affect CVP operations and the Bureau's ability to provide water to contractors while complying with environmental standards. The Bureau's failure to conduct such an analysis would be indefensible.

## X. Conclusion

We appreciate this opportunity to de comment on the preliminary Draft OCAP and BA. For the reasons set forth above, we urge the Bureau to take the time necessary to fully address these concerns before moving forward with its OCAP revisions.

Sincerely,

Michael E. Wall, Attorney
Monty Schmidt, Restoration Scientist
Natural Resources Defense Council

By: _____
Michael E. Wall

Gary Bobker, Program Director
Christina Swanson, Ph.D, Senior Scientist
The Bay Institute

[1] Available at yosemite.epa.gov/OAR/globalwarming.nsf/UniqueKeyLookup/SHSU5BNQ7Z/$File/ch6.pdf.

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**Via Facsimile and First-Class Mail**

August 27, 2004

Bureau of Reclamation
ATTN: Frank Michny
2800 Cottage Way
Sacramento, CA 95825-1898

Re: Comments on Draft Supplemental Environmental Assessment and Draft Finding of No Significant Impact for Central Valley Project Interim Renewal Contract

6.1

Dear Mr. Michny:

On behalf of the Hoopa Valley Indian Tribe, we have reviewed and now submit the following comments on the above referenced Draft Supplemental Environmental Assessment (SEA) and Draft Finding of No Significant Impact (FONSI). These comments reflect the Tribe's ongoing concern with management of the Central Valley Project ("CVP"), which includes the Trinity River Division. Because of the CVP's effect on fisheries reserved for our tribe, we are committed to ensuring that Reclamation actions subject to the National Environmental Policy Act (NEPA) reflect and comply with recent court decisions requiring, for example, that mitigation measures imposed as a result of consultation under Section 7 of the Endangered Species Act be addressed in draft environmental review documentation prepared pursuant to NEPA. *See e.g. Westlands v. United States*, 275 F.Supp.2d 1157 (E.D. Cal. 2002) (discussed below). This approach ensures that the public is fully informed and has the opportunity to comment and participate in the decision-making process on all aspects of projects affecting the human environment.

Reclamation has tentatively concluded that the proposed project, the renewal of up to fifty-nine (59) water service contracts for a term of up to two (2) years, will have no significant impact requiring assessment in an Environmental Impact statement. Draft FONSI at 2. That conclusion, however, is unsupported in a number of particulars as more fully described below. It also relies in part on deferral of consideration of impacts to threatened and endangered species pending completion of consultation with NOAA-Fisheries and the Fish and Wildlife Service. *Id.* Such an approach is impermissible in light of recent court decisions.

1. **Failure to Require Interim Contract Language to Reflect CVPIA Mandated Fishery Restoration Flows.**

On February 5, 2004, the Hoopa Valley Tribe ("Tribe") formally requested that language referencing the instream fishery flow requirements of the Trinity River be incorporated into the terms of interim renewal contracts between the Bureau of Reclamation ("Bureau") and Central Valley Project ("CVP") water service contractors. This language is authorized by section 3404 of the Central Valley Project Improvement Act, Pub. L. 102-575, 106 Stat. 4600 (1992) ("CVPIA"), which subjects new and renewal CVP water service contracts to the fishery restoration provisions of the CVPIA, which includes the Bureau=s obligation to meet the fishery restoration requirements of the Trinity River as established by the Trinity River Flow Evaluation-Final Report ("Flow Study"). *See* CVPIA § 3406(b)(23).

Contract language acknowledging Trinity River restoration requirements also reflects long-standing congressional directives that prioritize Trinity fishery releases over transbasin diversions to Central Valley contractors and is consistent with the federal government's trust responsibility to protect and preserve the Hoopa Valley Tribe's federally reserved fishing right. The Tribe's request was narrowly tailored to require compliance with scientifically based fishery flow requirements set forth in the Flow Study. Those requirements must be implemented pursuant to CVPIA § 3406(b)(23), and should be included as conditions on supply made available for delivery to Central Valley Project contractors.

The decisions of the federal courts since the enactment of the CVPIA make clear that the Bureau can and should reduce quantities of water delivered when fishery needs demand greater allocations. *See O'Neill v. United States*, 50 F.3d 677, 686 (9th Cir. 1998) (holding that the CVPIA modified priority of water users and thus changed contractual obligations under pre-existing long-term water delivery contracts); *NRDC v. Houston*, 146 F.3d 1118, 1126 (9th Cir. 1998) (invalidating CVP renewal contracts for failure to comply with environmental requirements); *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1213 (9th Cir. 1999) (recognizing Bureau's responsibility to manage project operations to "meet the requirements of the ESA, requirements that override the water rights of the Irrigators"). The Ninth Circuit has expressly recognized the Bureau's obligation to operate to meet the water needs of vested tribal fishing rights. *Klamath Water Users*, 204 F.3d at 1214 (holding that the Bureau has "a responsibility to divert the water and resources needed to fulfill the Tribes' rights, rights that take precedence over any alleged rights of the Irrigators"). Accordingly, the terms of interim renewal contracts should expressly acknowledge those requirements, and the impacts of incorporating those requirements into the contracts should be assessed in an EIS.

Express subordination of water service delivery obligations to fishery restoration needs is hardly unprecedented. *E.g. id.* The Bureau has historically included fishery restoration requirements as among the conditions on supply available to satisfy interim renewal contracts. For example, in *California Trout v. Schaefer*, 58 F.3d 469 (9th Cir. 1995), the court noted that an interim renewal contract for allocations from the New Melones Reservoir provided "a maximum of 75,000 acre-feet of water annually, subject to availability after the Bureau satisfied the water

needs of in-basin users and higher priority out-of-basin users." *Id.* at 471 (emphasis added). The "in-basin" needs given priority under that contract included those of "fish and wildlife resources" in the Stanislaus River Basin established under CVPIA § 3406(c)(2). *Id.* Given that precedent, the Bureau would not be breaking new ground by heeding the command of CVPIA § 3404(c) to include similar conditions in the terms of interim renewal contracts.

As of the date of these comments, HVT has received no indication from Reclamation that the agency intends to honor the Tribe's February 5, 2004 request. Should such language be added to the interim contracts, additional environmental review may be necessary in order to evaluate what effect giving priority to the Trinity fishery flows will have on the availability of supplies and hence the reasonableness of the delivery obligations incurred in the interim contracts, as well as the various mitigation obligations outlined in the EA/FONSI. To the extent that additional mitigation measures may be required as a result of prioritizing Trinity fishery releases over contract deliveries, the effect of those mitigation measures must be fully and fairly presented in any draft NEPA documentation, so as to allow the public the opportunity to review and comment on that analysis. *See e.g. Westlands*, 275 F.Supp.2d at 1182.

**2. Improper Deferral of Mitigation.**

As noted above, the SEA improperly defers consideration of impacts to threatened and endangered species pending completion of ESA § 7 consultation with NOAA-Fisheries and the Fish and Wildlife Service. Draft FONSI at 2; Draft SEA at 13.[1] Such an approach is impermissible under the recent ruling in *Westlands*, 275 F.Supp. 2d at 1182 -1185. In that case, the court found that a Draft Environmental Impact Statement (DEIS) did not adequately analyze the impact of the proposed action on certain ESA-listed species. *Id.* at 1183. Further, the court found that the DEIS "did not consider or identify mitigation measures" for those impacts, other than to "specify that mitigation for impacts...would consist of consulting with the Service on impacts and implementing any required conservation measures." *Id.* The court concluded that Reclamation violated NEPA.

That is precisely the approach adopted in the interim contract renewal SEA. In the words of the *Westlands* court, this approach "defers consideration of mitigation efforts" and "precludes the parties from meaningful analysis." *Id.* at 1184. See also *id.* at 1188 ("The omission of discussion of mitigation measures foreclosed any public input on the issues of whether and what CVP operations management alternatives existed and were feasible; and whether alternate water sources existed or if reduced flows could reduce the impact on species and other CVP users.").

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[1] The Draft SEA at page 11 purports to incorporate by reference the FWS Biological Opinion for 2002 interim contracts ("2002 Interim BiOp"), which it asserts contains "the commitments that reclamation will undertake during the proposed 2004 interim renewal period." To the extent that as a result of consultation on the 2004 renewal, FWS imposes RPMs, terms and conditions, or other requirements that differ in any respect from those contained in the 2002 Interim BiOp, the environmental impacts of those requirements must be disclosed to the public in a draft environmental document that is released to the public for review and comment.

Moreover, to the extent that mitigation measures are imposed as a result of deferred ESA § 7 consultation, either in the form of Reasonable and Prudent Measures (RPMs) or other terms and conditions that may have significant effects, the *Westlands* case requires that the environmental impacts of those mitigation measures be discussed "with reasonable thoroughness." *Id.* at 1192. These measures and their environmental impacts must be disclosed to the public in a process that "included public participation", *i.e.* they must be disclosed in a manner that allows meaningful public scrutiny, comment, and participation. *Id.* at 1198. By deferring discussion of species impacts pending completion of consultation with the fisheries agencies, the Draft EA/FONSI for interim contract renewals fails to meet these requirements.

**3. Inadequate Discussion of Alternatives.**

The Draft EA is insufficient because it lacks any discussion of the "environmental impacts of the proposed action and alternatives" 40 C.F.R. § 1508.9 (emphasis added). Council on Environmental Quality (CEQ) regulations require that an environmental assessment "shall include" a discussion of the environmental impacts "of the proposed action and alternatives...." *Id.* The Draft EA/FONSI, however, discusses only the proposed action of renewing interim contracts for an additional two-year period on the same terms as previous interim contracts. It contains no comparative evaluation of alternatives to that action, and expressly excludes from consideration a number of reasonable alternatives, including non-renewal, tiered pricing, and renewal at reduced delivery amounts that would more accurately reflect current delivery constraints. *See* Draft EA at 8-9. A comparative analysis of differential environmental impacts of a range of alternatives to the proposed action must be undertaken in order to allow the public a meaningful opportunity to assess the proposed action.

**4. City of Shasta Lake (City) – Unjustified Increase in Contract Amount.**

An addendum to the interim renewal contract proposed action/project description proposes increasing the City's contract amount by 1650 acre-feet. The addendum asserts that no significant or demonstrable effects will result from this increase, in large part because actual use of water will not change due to the presumption that the City will "suspend the series of temporary water transfers it has relied upon in recent years." However, no analysis is included addressing the potential scenario in which the City does not suspend transfers but instead seeks to further augment its supply by continuing to secure transfer of other CVP water.

Furthermore, there is no explanation as to why the revised contract amount is almost twice the City's projected needs. The revised contract represents a 60% increase from current contract amount, over 46% more than 2003 projected actual use. The addendum claims that the City's water usage has increased on average 4½ percent annually over the last four years, and thus projects that by 2005 the City will require 3,276ac-ft /year. The addendum also asserts that increasing water supplies will not affect regional settlement or development patterns, due to availability of groundwater supplies to meet projected urban development needs. Given these facts, there is no readily apparent justification, and certainly no justification given in the SEA, for the proposed increase to 4,400 ac-ft.

Thank you for allowing us the opportunity to comment on the Draft EA/FONSI. We trust that our comments will be appropriately considered and responded to in any final NEPA documentation for this proposed action.

Sincerely yours,

MORISSET, SCHLOSSER, JOZWIAK & McGAW

Thomas P. Schlosser

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# Taxpayers for Common Sense
# National Taxpayers Union

May 3, 2004

The Honorable Gale Norton
United States Department of Interior
1849 C Street NW, Suite 6151
Washington, DC 20240

Dear Secretary Norton:

On behalf of our members, the undersigned groups urge you to exercise fiscal responsibility as the Bureau of Reclamation (USBR) completes Central Valley Project (CVP) water contract renewals. USBR is negotiating on behalf of federal taxpayers and must draft contracts that are in the best interests of taxpayers. The agency has a chance to break with the heavily subsidized past and demonstrate a modicum of fiscal responsibility by implementing essential pricing reforms found in the Central Valley Project Improvement Act (CVPIA) of 1992. By following both the spirit and the letter of this law, the USBR can protect taxpayers and ensure repayment of project capital costs in at least 41 long-term contracts now being negotiated. Sidestepping these required reforms would guarantee that federal taxpayers are stuck with the vast majority of the project's $3.6 billion tab.

7.1

We urge the Bureau of Reclamation to draft Central Valley Project water contracts that:

1. are short-term and must be fully renegotiated prior to any renewals;
2. bring water prices more in line with the open market;
3. create an effective rate structure to meet the legally-required 2030 date of complete project repayment;
4. realistically assess the water available in the system when promising water contract amounts, therefore ensuring that tiered pricing reforms included in the CVPIA go into effect.
5. set a good precedent for fiscal responsibility in federal water contracts throughout the West;

The Central Valley Project, originally intended to help destitute farmers recover from the Great Depression, has become the largest federal water project in the United States serving approximately 3 million acres of farmland and 2 million urban residents in the Central Valley. The CVP distributes more than 7 million acre feet of water a year, 90% of which goes to farmers. CVP contractors pay only a small fraction of the market rate for water due to federal price fixing. As a result of ridiculously cheap water rates, farmers use water lavishly in the Central Valley, including growing crops such as cotton, alfalfa, and rice in the California desert.

The Bureau of Reclamation should implement common sense pricing reforms that would save taxpayers millions of dollars, help encourage responsible water use in the west, and set a good precedent for future negotiations of more than 1800 water service contractors throughout the West. We urge you to implement CVPIA reforms to end the wasteful and unnecessary spending in the Central Valley Project.

Given skyrocketing budget deficits, we cannot afford to continue policies that waste taxpayer dollars. We urge you to implement rational reforms that will protect taxpayers. We would be happy to answer any questions you might have regarding this matter. Please contact Aileen Roder at Taxpayers for Common Sense at (202) 546-8500 x130 or aileen@taxpayer.net for more information.

Sincerely,

Jill Lancelot
President
Taxpayers for Common Sense

John Berthoud
President
National Taxpayers Union

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September 1, 2004

The Honorable Gale Norton
Secretary
U.S. Department of Interior
1849 C Street, NW
Washington, DC 20240

Dear Secretary Norton:

I write to request an extension of the deadlines for public comment on proposed renewals to Central Valley Project (CVP) contracts.

As you know, the CVP supplies about 20 percent of California's developed water supplies. The CVP contracts will have significant impacts on California's water supply, its fisheries and the San Francisco Bay-Delta ecosystem. All interested stakeholders – agriculture, urban and environmental – have issues of concern related to these contracts. An extended time for public comment would ensure all stakeholders have sufficient opportunity to provide feedback.

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Further, the biological opinion on a new operations plan for the CVP is not completed yet. This will provide critical information for assessing the impacts of the contracts on fisheries. Therefore, once the biological opinion is completed, I ask you to make sure the public is given adequate time to comment.

Thank you in advance for your attention to this important issue.

Sincerely,

Barbara Boxer
United States Senator

COMMITTEE ON ENERGY AND NATURAL RESOURCES
COMMITTEE ON THE JUDICIARY
COMMITTEE ON RULES AND ADMINISTRATION
SELECT COMMITTEE ON INTELLIGENCE

# United States Senate

WASHINGTON, DC 20510-0504
http://feinstein.senate.gov

August 30, 2004

The Honorable Gale Norton
Secretary of the Interior
Washington, DC 20240

Dear Secretary Norton:

This is to request for an extension of the deadlines for public comment on the renewal of Central Valley Project (CVP) contracts.

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There is much at stake here: long-term commitments concerning a substantial portion of California's water supply. Before any final decisions are made, the public should have the opportunity to comment based on an informed evaluation of potential impacts to endangered and threatened salmon and strategies for mitigating those impacts.

I ask that you provide a reasonable period for public input following the release of the biological opinion on the Operations Criteria and Plan (OCAP), which provides the most complete picture of the proposed contracts' effect on the fish.

Californians deserve this full disclosure before the federal government makes important decisions concerning our water future. Thank you for your consideration.

Sincerely yours,

Dianne Feinstein
United States Senator

# Congress of the United States
Washington, DC 20515

August 20, 2004

Hon. John Keys, Commissioner
U.S. Bureau of Reclamation
1849 C Street, NW
Washington, DC 20240

Re: Renewal of the Central Valley Project long-term water contracts

10.1

Dear Commissioner Keys:

The undersigned Members of Congress have a strong interest in the appropriate allocation of California's water resources and the need to ensure prompt and full repayment of the federal investment in Reclamation projects, consistent with federal law. For reasons of fiscal responsibility and of equitable water use, we are extremely concerned about the imminent renewal of long-term Central Valley Project (CVP) contracts that are currently being proposed by the Bureau's Sacramento office.

First, it is our understanding that the Bureau has determined that many of these water districts will never have to repay the capital costs invested by the federal government in their water projects, compounding their generous interest subsidy with additional "ability to pay" capital subsidies. More than $1 billion of the original federal investment in the CVP remains unpaid after over 50 years, despite federal repayment requirements. Because the Bureau has recouped only a bare fraction of its capital investments and continues to offer contracts with below-cost water prices, we believe it is essential that taxpayers be given a full opportunity to comment on these new contracts after the Bureau first makes public its rationale for waiving all capital costs and restoration charges for so many of these new contracts, and explains how complete CVP capital repayment will be ensured in a timely manner.

Second, the Bureau has already set final comment deadlines for several groups of proposed CVP contracts, including contracts for up to 322,000 acre-feet of water to the users in the Sacramento River Division, and for over 2,000,000 acre-feet in other contracts, before the public has reviewed the potential impact of these contracts on endangered salmon. As of this writing, almost three-quarters of the comment period for these contracts has elapsed without the required National Marine Fisheries Service (NMFS) analysis of potential impacts. The Central Valley Project Improvement Act (CVPIA) states as a central purpose the protection of fish, wildlife, and associated habitat; to rush through the process of approving long-term water contracts without this analysis runs counter to this core CVPIA purpose.

This type of long-term commitment could have enormous impacts on federal taxpayers, California's fisheries, and the San Francisco Bay-Delta ecosystem. Therefore, to better evaluate these impacts, we respectfully request the following:

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1. Please extend the comment period on all of the proposed contracts, and on the draft Environmental Assessments or Environmental Impact Statements on the contracts, by at least 60 days after the completion of the current Endangered Species Act consultation with the Department of Commerce to allow the public an opportunity to review the analysis by the NMFS on the impact of the contracts on endangered salmon. It is unfair to ask the public to evaluate the proposed contracts, and your proposed determination that the contracts will have "no significant impact" on the environment, before allowing the public to review the government's own analysis of likely impacts to fish habitat and endangered salmon runs.

2. Please provide public workshops or hearings on these proposed contracts, their pricing terms and repayment assumptions, and their potential impacts on the environment before you close the comment periods. Especially as the current period for public comment on these important contracts overlaps with Congress' traditional district work period, and with many of our constituents' summer holidays, we are extremely concerned that many potential impacts will not be publicly understood and discussed until the window has closed. Only by giving the public an opportunity to ask questions and understand the impacts of these major 25-year water commitments can the Bureau hope to win confidence from the public that these contracts will benefit rather than harm the public interest.

Thank you for considering our views. We request a response before your current comment deadline.

Very truly yours,

George Miller | Nancy Pelosi | Mike Thompson

Anna G. Eshoo | Ellen O. Tauscher | Howard L. Berman

Cc: The Hon. Gale Norton, Secretary of the Interior
Mr. Kirk Rodgers, Regional Director, Mid-Pacific Region