

Attachment 1

Comment Letters and Reclamation's Response to Comments



Department of Public Utilities

Administration Division
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June 23, 2017

Email Address: remerson@usbr.gov

Ms. Rain Emerson
U.S. Bureau of Reclamation
1243 N Street, Fresno, CA 93721

Subject: Response to DRAFT USBR Finding of No Significant Impact (FONSI)
Madera Irrigation District Request to Use Central Valley Project Facilities to
Deliver Non-Central Valley Project Water for Municipal and Industrial Purposes in
Madera County through Lateral 6.2

Dear Ms. Emerson:

The purpose of this letter is to present the City of Fresno, Department of Public Utilities (DPU), comments regarding the Madera Irrigation District's (MID) request to use Central Valley Project (CVP) facilities to deliver non-CVP water for municipal and industrial (M&I) purposes in Madera County through a new point of delivery designated Lateral 6.2.

SUMMARY

The Director of Public Utilities (Director) has reviewed MID's request to use CVP facilities to deliver non-CVP water for municipal and industrial (M&I) purposes in Madera County through a new point of delivery designated Lateral 6.2. The Director's review and assessment was conducted using NEPA documents prepared and distributed by the United States Army Corps of Engineers (Corps) and the United States Bureau of Reclamation (Reclamation) on June 9, 2017.

As stated in the NEPA documents, under the No Permit Alternative, Reclamation would not authorize approval of Madera Irrigation District's (MID) request for an additional point of delivery under its existing Warren Act contract to allow use of federal CVP facilities to deliver non-CVP water through a new point of delivery designated Lateral 6.2. Non-CVP water is any source of water conveyed or stored in Reclamation facilities for which Reclamation does not have a water right.

The Director requests that Reclamation include language in all environmental documents, records of decision, authorizations, permit conditions, contract amendments, approvals, and similar documents issued to MID, that clearly specifies the limitations and restrictions

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↑ that will be placed on MID's use of CVP facilities to deliver non-CVP water for M&I purposes through a new point of delivery designated Lateral 6.2.

BACKGROUND

On June 9, 2017, the United States Bureau of Reclamation (Reclamation) released for public review a DRAFT Finding of No Significant Impact (FONSI) for the proposed issuance of land use authorization(s) to the County of Madera.

Reclamation proposes to issue land use authorization(s) to the County of Madera for the proposed construction, operation, and maintenance of four free-span bridge crossings over the Madera Canal, the piping of Lateral 6.2, and various road crossings through Reclamation right-of-way. Reclamation also proposes to add Lateral 6.2 as an additional point of delivery to MID's Warren Act Contract for the delivery of up to 3,000 acre-feet per year (AFY) of MID's Soquel Water to serve municipal and industrial (M&I) water demands in Madera County.

The Director's comments on Reclamation's DRAFT FONSI are specifically related to MID's proposed use of CVP facilities to deliver non-CVP water for M&I purposes in Madera County, with the water being delivered through a new point of delivery designated Lateral 6.2.

MID SOQUEL WATER

MID has entered into a Water Supply Agreement to deliver up to 3,000 AFY of MID's pre-1914 appropriative water rights to North Fork Willow Creek (referred to as Soquel Water) for M&I purposes in Madera County. MID proposes to deliver the Soquel Water through a new point of delivery designated Lateral 6.2.

It is important to note that Soquel Water is only available for diversion October 1 through July 31, and no diversions are allowed August 1 to September 30.

The North Fork Willow Creek is a tributary of the San Joaquin River and is located approximately nine (9) miles upstream of Bass Lake. The North Fork Willow Creek provides an estimated annual average supply of 9,700 AFY, depending on annual precipitation, snow pack, and watershed yield. Water from the North Fork Willow Creek can be redirected to flow through Soquel Ditch to Nelder Creek, a tributary of the upper Fresno River or left in the creek to flow to Bass Lake and eventually to the San Joaquin River, where it can be diverted further downstream at Millerton Lake.

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MID's Soquel Water is non-CVP water. Therefore, in order for MID to deliver Soquel Water (non-CVP water) for M&I purposes through Lateral 6.2, MID must first obtain approval from Reclamation to add the additional point of delivery to MID's Soquel Water Warren Act Contract. Warren Act Contracts are required when a public or private entity desires to use Reclamation's facilities to convey or store water that is non-CVP water. In these instances, when storage and conveyance capacity are available, there is a charge assessed to the Warren Act Contract holder for the privilege to convey and store non-CVP water using Reclamation's facilities. Again, such storage and conveyance can only be authorized by Reclamation when storage and conveyance capacity is available and not being used by existing CVP contractors.

DPU PROPOSED COMMENTS ON MID PROPOSED WATER SUPPLY PLAN

Fresno- 2
It is the City's expectation that all environmental documents, records of decision, authorizations, permit conditions, contract amendments, approvals, and similar documents issued to MID will clearly state that no alternative water supplies have been identified by MID for delivery through Lateral 6.2 to meet M&I demands in Madera County, when Soquel Water deliveries are not possible. Such alternative water supplies, and uses of Reclamation facilities to deliver such alternative water supplies, should not be allowed by Reclamation until MID has prepared and submitted the required NEPA documents, and the required reviews and assessments have been completed for those alternative water supplies.

Comment No. 1: Use of CVP Facilities for Non-CVP Water

Fresno- 3
The City requests that all Reclamation environmental documents, records of decision, authorizations, permit conditions, contract amendments, approvals, and similar documents issued to MID for the proposed use of CVP facilities to deliver non-CVP water through Lateral 6.2 for M&I purposes, should clearly reflect that non-CVP water stored and conveyed in Reclamation facilities using a Warren Act Contract has a lower priority than CVP water supply resources. Accordingly, when water supply conditions in the Friant Division are such that pro-rating of storage and conveyance capacity is required, it may not be possible for MID to deliver Soquel Water through Lateral 6.2 for M&I purposes using CVP facilities, because the water conveyance and storage needs of CVP water will have a higher priority for storage and conveyance.

Fresno- 4
In addition, if MID elects to transfer Soquel Water from North Fork Willow Creek to Millerton Reservoir, then all Reclamation environmental documents, records of decision, authorizations, permit conditions, contract amendments, approvals, and similar documents issued to MID should clearly state that the non-CVP waters will be spilled before CVP ↓

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waters are spilled during flood release conditions or similar, as the CVP waters will maintain a higher priority for storage in Millerton Reservoir. Additionally, given that MID has not identified in the environmental documents alternative water supplies that may be delivered through Lateral 6.2 for M&I purposes when Soquel Water may not be available for delivery, then Reclamation should clearly state in all environmental documents, records of decision, authorizations, permit conditions, contract amendments, approvals, and similar documents issued to MID, that Reclamation will not approve or authorize the transfer or exchange of MIDs CVP water, or other CVP contractor water, for delivery through Lateral 6.2 in lieu of Soquel Water which may, at times, not be available for delivery. For example, MIDs pre-1914 rights to North Fork Willow Creek do not allow MID to divert water from North Fork Willow Creek from August 1 to September 30 of each year, and during these periods an alternate water supply source will be required to meet M&I water demands in Madera County, or Reclamation facilities will be used to reschedule Soquel Water deliveries during such times when Soquel Water diversions are not allowed from North Fork Willow Creek. An alternative water supply source, or a rescheduling plan using Reclamation facilities, have not been described in the environmental documents published by Reclamation on June 9, 2017.

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cont.

As the NEPA documents have been published for public review by Reclamation on June 9, 2017, MID proposes to use Soquel Water (non-CVP water) exclusively to serve the M&I water demands in Madera County through Lateral 6.2. It is the City's expectation that Reclamation will require MID to comply with this requirement under all hydrologic conditions, including severe droughts. If MID proposes to rely on alternative sources of water, or to use Reclamation facilities to reschedule Soquel Water during those periods when Soquel Water is not available (August 1 through September 30, severe droughts, pro-rating conditions, etc.) for delivery through Lateral 6.2, then MID should recirculate the NEPA documents describing those alternative water supply sources, and the use of Reclamation facilities, so that the environmental impacts can be fully reviewed, vetted, and mitigated as necessary.

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The City will monitor the activities of Reclamation closely, to ensure that lower-priority Soquel Water being used by MID never gains priority over the City's CVP water for conveyance and storage. In addition, the City will monitor the activities of MID to ensure that MIDs CVP water, or other CVP contractor water, is not delivered through Lateral 6.2 to support the M&I demands in Madera County when it is not possible to deliver Soquel Water through Lateral 6.2 (August 1 through September 30, severe droughts, pro-rating conditions, etc.). Such use of MIDs CVP water, or other CVP contractor water, for M&I purposes through Lateral 6.2, through either transfers or exchanges, have not been published for environmental review, vetting, and mitigation as may be required, and

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cont. ↑ therefore should not be authorized by Reclamation until such reviews have been completed.

Comment No. 2: Use of Holding Contract Water

Fresno- 7 Based on data provided to the City by Reclamation, the City has observed that consumptive losses between Friant Dam and Gravelly Ford appear to be trending higher during the past 20 years. This is a concern for the City as any excessive water losses occurring between Friant Dam and Gravelly Ford require Reclamation to release additional water from Friant Dam to maintain the minimum flow targets at Gravelly Ford. These additional releases adversely impact water supply available to the City and other Friant Division Contractors. The potential causes of these increased consumptive losses could include, but may not be limited to, groundwater overdraft conditions occurring along the San Joaquin River, which could reduce the amount of flow reaching Gravelly Ford (i.e. a losing-stream condition) or excessive run-of-river withdrawals by property owners with Holding Contracts. The City will work through the Friant Water Authority to request Reclamation to conduct an audit of San Joaquin River withdrawals between Friant Dam and Gravelly Ford to ensure that all withdrawals from the San Joaquin River through Holding Contracts are consistent with the original Holding Contracts terms and conditions related to the land area qualified to receive water, and the agriculture-related beneficial uses.

Comment No. 3: Priorities for Public Health and Safety (PHS) Requests

Fresno- 8 During the 0-percent allocation years for the Friant Division in 2014 and 2015, the City submitted requests to Reclamation for Public Health and Safety (PHS) Allocations. During both years, the City was denied a PHS Allocation. The City wants to clearly articulate to Reclamation that under no circumstances will the City accept MID being awarded a PHS Allocation ahead of the City of Fresno for delivery through Lateral 6.2 for M&I purposes. The City does not believe this will be an issue in the future as MID is proposing to deliver non-CVP water exclusively through Lateral 6.2 for M&I purposes; however, this would not preclude MID from submitting a PHS Allocation request on behalf of M&I users relying on Lateral 6.2 using MID's Friant Division Contract, or through exchanges and transfers with other CVP contractors. The City requests that all Reclamation environmental documents, records of decision, authorizations, permit conditions, contract amendments, approvals, and similar documents issued to MID for the delivery of non-CVP water through Lateral 6.2 for M&I purposes clearly state that MID will not be granted a PHS Allocation ahead of the City of Fresno during future severe drought conditions. In the environmental documents reviewed for MID's request, it has been represented that MID will meet all the M&I demands at Lateral 6.2 using non-CVP water exclusively, and under no circumstances, no

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↑ matter how dire, should MID be granted access to CVP water to address severe drought conditions for M&I users relying on Lateral 6.2 for water supply.

Fresno-8
cont. If MID proposes to rely on alternative sources of water, or to use Reclamation facilities, during those periods when Soquel Water is not available (August 1 through September 30, severe droughts, pro-rating conditions, etc.) to meet M&I demands at Lateral 6.2, then MID should recirculate the NEPA documents describing those alternative water supply sources, and the planned uses of Reclamation facilities, so that the environmental impacts can be fully reviewed, vetted, and mitigated as necessary.

CLOSING COMMENTS

The Director's comments to Reclamation, as presented in the preceding sections, are not intended to deny MID from using its Soquel Water to meet M&I water demands at Lateral 6.2 as represented in the NEPA documents published by the Corps and Reclamation on June 29, 2017. It is clearly within the rights and authorities of MID and Reclamation to enter into such agreements and the Director does not propose to interfere with those rights and authorities.

Fresno- 9 However, it should be recognized (a) that Soquel Water is only available ten (10) months per year, and (b) in order for MID to deliver Soquel Water to Lateral 6.2 for M&I purposes, then the use of Reclamation facilities will be required. These two items are a potential concern to the City of Fresno as it relates to the City's San Joaquin River allocations. In the NEPA documents circulated for public review by the Corps and Reclamation on June 9, 2017, there is no discussion regarding alternative water supply sources that MID may call upon to deliver through Lateral 6.2 during the two (2) months when Soquel Water diversions are not allowed, or how Reclamation facilities will be used to reschedule Soquel Water deliveries during these two months, or how water supply will be provided to Lateral 6.2 when conveyance and delivery of Soquel Water may be limited or prohibited when pro-rating conditions are declared for Friant Division Contractors.

As the NEPA documents prepared by the Corps and Reclamation have been published, it is understood that MID will not deliver any CVP water to Lateral 6.2 for M&I purposes, and that should be clearly stated in all Reclamation environmental documents, records of decision, authorizations, permit conditions, contract amendments, approvals, and similar documents issued to MID establishing the terms and conditions of approval for an additional point of delivery for non-CVP water under its existing Warren Act contract.

↓ If MID proposes to rely on alternative sources of water, or use Reclamation facilities to reschedule the delivery of Soquel Water during those periods when Soquel Water is not

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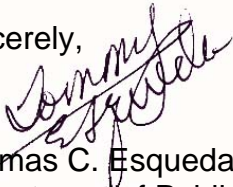
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available (August 1 through September 30, severe droughts, pro-rating conditions, etc.) for delivery through Lateral 6.2 for M&I purposes, then MID should recirculate the NEPA documents describing those alternative water supply sources, and the planned uses of Reclamation facilities to reschedule Soquel Water deliveries through Lateral 6.2, so that the environmental impacts can be fully reviewed, vetted, and mitigated as necessary.

This concludes Director's comments regarding MID's request to use CVP facilities to deliver non-Central Valley Project (CVP) exclusively through Lateral 6.2 M&I purposes in Madera County. If you have any additional questions, or require additional information, please do not hesitate to contact me at your earliest convenience by email at Thomas.Esqueda@Fresno.Gov or by telephone at 559-621-8610.

Sincerely,



Thomas C. Esqueda, Director
Department of Public Utilities

c: Honorable Mayor Lee Brand
Bruce Rudd, Fresno City Manager
Fresno City Councilmembers

Fresno-9
cont.

Response to City of Fresno Comment Letter, June 23, 2017

Fresno-1 Comment noted. The commenter “requests that Reclamation include language in all environmental documents, records of decision, authorizations, permit conditions, contract amendments, approvals, and similar documents issued to MID [Madera Irrigation District], that clearly specifies the limitations and restrictions that will be placed on MID’s use of CVP facilities to deliver non-CVP water for M&I purposes through a new point of delivery designated Lateral 6.2.”

All Warren Act Contracts that allow for the introduction, conveyance, and/or storage of non-Project water in federal facilities already includes language regarding the use of those facilities, including availability and restrictions. The following language has been added to page 7 of the Draft FONSI: “The Soquel water would only be introduced into federal facilities when there is excess capacity, as determined by Reclamation.”

The remainder of this comment includes a background summary of Reclamation’s release of environmental documents and Madera Irrigation District’s pre-1914 Soquel water rights water. As these do not raise concerns or issues specific to the environmental analysis presented in the Draft FONSI, no other changes have been made and no response is required.

Fresno-2 The comment asserts that “all environmental documents, records of decision, authorizations, permit conditions, contract amendments, approvals, and similar documents issued to MID will clearly state that no alternative water supplies have been identified by MID for delivery through Lateral 6.2 to meet M&I demands in Madera County, when Soquel Water deliveries are not possible.”

As stated on page 2 of the Draft FONSI, the Tesoro Viejo Master Planned Community (Tesoro Viejo) project proponents “have entered into a Water Supply Agreement with Madera Irrigation District in order to receive up to 3,000 acre-feet per year (AFY) of Madera Irrigation District’s pre-1914 appropriative water rights to North Fork Willow Creek (referred to as Soquel water) for municipal and industrial (M&I) purposes”. Madera Irrigation District has not identified any other sources of water for delivery to Tesoro Viejo. Reclamation would only consider approving the delivery of other sources of water after receiving a proposal from the Contractor and completion of applicable environmental review.

As noted in the comment letter, Madera Irrigation District’s Soquel water can be diverted by Madera Irrigation District from October 1st to July 31st of the following year. During the period of non-diversion (August 1st through September 30th), Tesoro Viejo project proponents will either deliver water previously stored on site and/or Madera Irrigation District will provide Tesoro Viejo with Soquel water previously stored in Millerton Lake pursuant to their Warren Act Contract(s) with Reclamation.

- Fresno-3 Warren Act Contracts/Agreements are issued with the understanding that non-Project water will only be conveyed in Project facilities when there is capacity to do so. Likewise, it is made clear that should there be capacity issues and pro-rating in the Project conveyance system becomes necessary, the non-Project water delivery will be the first halted. Also, should non-Project water be stored, that water will be the first lost to spill if full capacity in the Project reservoir, etc. is reached. The Operating Non-Federal Entity (ONFE) for each Reclamation conveyance system is provided a copy of each Warren Act Contract/Agreement that is issued for that particular conveyance system. The contractor holding the contract/agreement provides schedules to the ONFE when its non-Project water is to be conveyed. Holders of Warren Act Contracts/Agreements are made aware of pro-rating periods by the ONFE. See also Response to Fresno-1.
- It should be noted that the Madera Canal and the Friant-Kern Canal are separate and distinct conveyance systems operated and maintained by separate and distinct ONFEs. Pro-rating on one canal does not impact the other. The recent (June 2017) pro-rating of the Friant-Kern Canal had no impact on the Madera Canal. Had Madera Irrigation District conveyed its Soquel water through Lateral 6.2 during this period, it would in no way impact deliveries to Friant-Kern Canal contractors.
- Fresno-4 See Responses to Fresno-2 and Fresno-3.
- Fresno-5 Madera Irrigation District's pre-1914 water rights associated with the Soquel water are senior appropriative water rights. It should be noted that during the recent drought of record (2014-2015), Madera Irrigation District's Soquel water was not curtailed by the State Water Resources Control Board. As described on page 26 of the Corps Environmental Assessment (EA), Tesoro Viejo Project proponents have "existing rights to withdraw groundwater from the property and to withdraw water from the San Joaquin River pursuant to Reclamation Holding Contract No. 7." Should Madera Irrigation District's Soquel water be curtailed in the future due to drought or other conditions, Tesoro Viejo would utilize available groundwater resources (on an emergency basis) and/or available water supply pursuant to Reclamation Holding Contract 7. See also Responses to Fresno-2 and Fresno-3.
- Fresno-6 See Responses to Fresno-2 and Fresno-3.
- Fresno-7 Comment noted. The comment expresses concerns related to trends in "consumptive losses between Friant Dam and Gravelly Ford" over the last 20 years that could be due to "but may not be limited to, groundwater overdraft conditions occurring along the San Joaquin River, which could reduce the amount of flow reaching Gravelly Ford (i.e. a losing-stream condition) or excessive run-of-river withdrawals by property owners with Holding Contracts." The commenter expresses the intent of working through the Friant Water Authority to request an "audit of San Joaquin River withdrawals between Friant Dam and

Gravelly Ford to ensure that all withdrawals from the San Joaquin River through Holding Contracts are consistent with the original Holding Contracts terms and conditions related to the land area qualified to receive water, and the agriculture-related beneficial uses.”

The comment does not express specific comments or concerns related to the environmental analysis in the Draft FONSI, as such, no changes or response is required.

- Fresno-8 Comment noted. The City of Fresno wasn't allotted any Public Health and Safety (PH&S) water in 2014 and 2015 as it was determined that the City had resources available to it that the other municipalities in the Friant Division did not, i.e., a Kings River water supply and its own Leaky Acres ponding basin system, plus an agreement with Fresno Metropolitan Flood Control District which allows the City “to deliver available surface water through Fresno Irrigation District canals to numerous flood control basins throughout the city for groundwater recharge during dry months.” (From www.rechargefresno.com website). Madera Irrigation District did not request, nor was it allotted any PH&S water in those years or any other. Reclamation makes PH&S water available to a particular contractor based on M&I deliveries made by that contractor over the last three unconstrained water years. As Madera Irrigation District has made no M&I deliveries (it is an Irrigation and Other water contractor, not an Irrigation and M&I contractor) during the last three unconstrained water years, it would not be allotted any PH&S water for itself or the Tesoro Viejo development. See also Responses to Fresno-2 and Fresno-3.
- Fresno-9 See Responses to Fresno-2 through Fresno-8.



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[SENT VIA EMAIL: REMERSON@USBR.GOV]

Rain Emerson
Supervisory Natural Resources Specialist
Bureau of Reclamation
South-Central California Area Office
1243 N Street
Fresno, California 93721

RE: Draft Finding Of No Significant Impact – Reclamation Approvals Associated With The Tesoro Viego Master Planned Community
FONSI-15-008

Dear Ms. Emerson:

Thank you for the opportunity to provide written comments on the Finding of No Significant Impact (“FONSI”) referenced above. For the reasons set forth below, the undersigned organizations believe that the FONSI and supporting Environmental Assessment (“EA”) and attachments are legally inadequate and inadequately explained, and the Bureau of Reclamation (the “Bureau”) must instead prepare an Environmental Impact Statement (“EIS”).

I. LEGAL STANDARD

An agency must prepare an Environmental Impact Statement (“EIS”) “if ‘substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factor.’” *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1219-20 (9th Cir. 2008) quoting *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998). As such, a challenger need not “show that significant effects will in fact occur,” but only that there are “substantial questions whether a project may have a significant effect.” *Id.* Further, “[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.” *Ctr. for Biological Diversity*, 538 F.3d at 1220 quoting *Blue Mts. Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998). “The statement of reasons is crucial to determining whether the agency took a ‘hard look’ at the potential environmental impact of a project.” *Id.*

Consistent with these requirements, the first step under NEPA is for the agency to prepare an Environmental Assessment “in order to determine whether a proposed action may ‘significantly affect[]’ the environment and thereby trigger the requirement to prepare an EIS.” *Ctr. for Biological Diversity*, 538 F.3d at 1185. “Even though an EA need not ‘conform to all the requirements of an EIS,’ it must be ‘sufficient to establish the reasonableness of th[e] decision’ not to prepare an EIS.” *Ctr. for Biological Diversity*, 538 F.3d at 1220 quoting *Found. for N. Am. Wild Sheep v. United States Dep’t of Agric.*, 681 F.2d 1172, 1178 (9th Cir. 1982). An EA “[s]hall



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include brief discussions of the need for the proposal . . . [and] the environmental impacts of the proposed action and alternatives.” *Ctr. for Biological Diversity*, 538 F.3d at 1220 quoting 40 C.F.R. § 1508.9(b). Additionally, in some circumstances, an EA must “include an analysis of the cumulative impacts of a project” and “[a]n EA may be deficient if it fails to include a cumulative impact analysis” *Ctr. for Biological Diversity*, 538 F.3d at 1220 quoting *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 895 (9th Cir. 2002).

“Whether an action may ‘significantly affect’ the environment requires consideration of ‘context’ and ‘intensity.’” *Ctr. for Biological Diversity*, 538 F.3d at 1185 citing 40 C.F.R. § 1508.27. Under 40 C.F.R. § 1508.27(a), “context” is defined to mean:

that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

Under § 1508.27(b), “intensity” refers to “the severity of impact,” and the following should be considered in evaluating severity:

- (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.
- (2) The degree to which the proposed action affects public health or safety.
- (3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
- (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.
- (5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
- (6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

Counsel- 1
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(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action 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.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

II. THE EA IS INADEQUATE, AND THE BUREAU MUST PREPARE AN EIS.

a. The FONSI And EA Fail To Properly Analyze Impacts On Environmental Justice Communities.

i. The FONSI And EA Do Not Comply With The Bureau's Own NEPA Handbook.

Attachment 6 to the Bureau's current NEPA Handbook is an Environmental Justice policy, which sets forth "NEPA Responsibilities Under Departmental Environmental Justice Policies." (hereinafter the "Environmental Justice policy.") Pursuant to the Environmental Justice policy, the Bureau must "consider the impacts of the Department's actions on minority and low-income populations and communities, as well as the equity of the distribution of benefits and risks of those decisions." ECM95-3. Further, the policy states that "henceforth all environmental documents should specifically analyze and evaluate the impacts of any proposed projects, actions or decisions on minority and low-income populations and communities, as well as the equity of the distribution of the benefits and risks of those decisions." *Id.* During the scoping and/or planning processes, "any anticipated effects, direct or indirect, from the proposed project" on minority or low-income communities must be identified and evaluated, and if any such impacts are identified, the "environmental document should clearly evaluate and state the environmental consequences of the proposed project" on those communities. *Id.* According to the policy, these requirements apply to "any environmental document," including both an EIS and an EA. *Id.*; see also 43 C.F.R. § 46.215(i) ("extraordinary circumstance" exist where a project has a "disproportionately high and adverse effect on low income or minority populations (EO 12898).")



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Here, the Bureau did not comply with its own NEPA Environmental Justice policy. The FONSI makes no reference to environmental justice whatsoever, though it does contain the unsupported conclusory statement that “[t]he Proposed Action will not disproportionately affect minorities or low-income populations and communities...” (p. 9.) The EA contains a similarly cursory statement:

Environmental Justice: In accordance with Title III of the Civil Rights Act of 1964 and Executive Order 12898, it has been determined that the proposal would not directly or through contractual or other arrangements, use criteria, methods, or practices that discriminate on the basis of race, color, or national origin nor would it have a disproportionate effect on minority or low-income communities.

These two short and conclusory statements represent the entirety of the discussion of environmental justice in the FONSI, EA, and supporting documents. This is wholly inadequate, and does not represent the “analysis” and “evaluation” of “any anticipated effects, direct or indirect, from the proposed project” on low-income and disadvantaged communities required by the Environmental Justice policy. *See, e.g., Skranak v. Castenada*, 425 F.3d 1213, 1221 (9th Cir. 2005) (an Administrative Procedure Act claim may lie where an agency violates its own regulations); *Los Padres Forestwatch v. United States Forest Serv.*, 776 F. Supp. 2d 1042, 1049 (N.D. Cal. 2011) (an agency action under NEPA may be arbitrary and capricious when it is contrary to the agency’s “own regulations.”).

Moreover, as demonstrated below, had the Bureau complied with its own Environmental Justice policy, it would have determined that the proposed action will have – or will at a minimum risk – having direct or indirect impacts on disadvantaged communities and low-income communities. It would have further determined that the proposed action will result in an inequitable distribution of the benefits and risks of the relevant decisions.

ii. There Are Substantial Questions Regarding Impacts Of The Project And Tesoro Viejo In Terms Of Reducing Investment In Existing Disadvantaged And Low-Income Communities.

In its General Plan, Madera County recognizes that it contains many disadvantaged unincorporated communities, including but not limited to Fairmead, Valley Lake Ranchos, Lake Madera Estates, River Road Estates, Raymond, Yosemite Lakes, Indian Lakes Estates, Oakhurst, Ahwahnee, Yosemite Forks, Teadford Meadows and North Fork. (*See* General Plan 1-36 – 1-57.) Additionally, Madera County includes disadvantaged unincorporated communities that have not been identified in its General Plan, including La Vina, Parksdale and Parkwood. Each of these communities struggles with various issues and service deficiencies which, depending on the community, include lack of safe water and wastewater services, lack of proper storm drainage, lack of emergency services, and lack of transportation and transit infrastructure. (*Id.*)

↑ This project, and the Tesoro Viejo development more broadly, would direct County funds away from disadvantaged and low-income communities in Madera County. It would also direct infrastructure dollars and funds for emergency services, parks, transit, and active transportation away from existing disadvantaged communities, low-income communities and communities of color. This represents a disparity in terms of access to the improvements associated with the project, and thus an inequitable distribution of the benefits and risks of the relevant decisions.

Disadvantaged communities also exist in the nearby cities of Madera and Fresno, as well as in Fresno County. Moreover, both the City of Fresno and City of Madera have general plans in place that contain policies supporting infill development and restricting sprawl development. (See, e.g., Fresno General Plan pp. 1-7 (Including as a goal of the plan, “[e]mphasize the City as a role model for good growth management planning...Positively influence the same attributes in other jurisdictions of the San Joaquin Valley—and thus the potential for regional sustainability—and improve the standing and credibility of the City to pursue appropriate State, LAFCO, and other regional policies that would curb sprawl and prevent new unincorporated community development which compete with and threaten the success of sustainable policies and development practices in Fresno.”).) To the extent that sprawl development such as Tesoro Viejo is permitted to proceed in unincorporated portions of Madera County, the policies favoring investments in existing communities, infill, and smart growth in existing communities will be much less likely to succeed and be successfully implemented. Inherently, this result has a negative impact on investment in existing communities, and the effects of such disinvestment will be most acutely felt in disadvantaged and low-income communities.

iii. There Are Substantial Questions Regarding Impacts Of The Project And Tesoro Viejo On Disadvantaged And Low-Income Communities That Are Reliant - In Whole Or In Part - On Groundwater.

The analysis contained in the FONSI and EA is very limited with respect to the adequacy and legality¹ of proposal to use Willow Creek water delivered through Lateral 6.2 of the Madera Canal. Under project description, the FONSI states only the following in terms of water supply for Tesoro Viejo:

Madera Irrigation District’s 3,000 AFY Soquel water would serve all dwelling units and commercial and industrial uses throughout the development site. In addition, a water treatment system would be installed that would recycle the used Soquel water, which will then be distributed throughout the site in a purple pipe distribution system for irrigation of open space, parks, and trails. Agricultural irrigation water for crop cultivation that is currently supplied to the project site pursuant to Holding Contract No. 7 would continue to be used for

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¹ An agency must consider “[w]hether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment. 40 C.F.R. § 1508.27(b)(10) See also *Border Power Plant Working Group v. DOE*, 260 F.Supp.2d 997, 1026 (S.D.Cal. 2003) (“An agency has an obligation under NEPA to consider whether an action might violate state or local rules.”).

irrigation of the agricultural vignettes that are dispersed throughout the Project area consistent with that contract.

(FONSI-15-008, p. 7.) This water would be delivered via Lateral 6.2, which the proposed action would modify to replace 1.12 miles of unlined open channel with approximately 12,000 linear feet of pipeline. (FONSI-15-008, p. 2, 5.)

The EA also contains a brief discussion of water supply related to the proposed action and Tesoro Viejo. (EA, pp. 25-27.) In addition to the description of the project that is essentially identical to that in the FONSI, the EA states that the Soquel water would only be the “primary” source of drinking water for Tesoro Viejo, but expressly acknowledges that the applicant has existing groundwater rights and that groundwater may be used. (EA, p. 26.) If groundwater is used, the EA states that “for any groundwater that is extracted on the project site, the project would provide for a 1:1 recharge for each acre foot extracted.” (EA, p. 26.)

This brief discussion does not constitute a “convincing statement of reasons” for why there is no significant impact on disadvantaged or low-income communities in the same subbasin, as is required by NEPA. *See Ctr. for Biological Diversity*, 538 F.3d at 1220. Rather, it is a cursory restatement of arguments put forth by the applicant, without any independent analysis conducted by the Bureau.

The EA does not, but should, consider the issues including but not limited to the following:

1. Whether the delivery of Soquel water through Lateral 6.2 for purposes of residential, commercial and industrial uses is permitted under the relevant Warren Act contract(s) and other applicable contracts between the Bureau and MID, especially given that agricultural land will be converted as a result and that water will be used in a materially different way than it historically has been for both M&I and basin recharge;
2. Whether any downstream riparian users affected by the delivery of Soquel water will be negatively impacted;
3. Whether the 40% reduction assumed for per capita daily average water use in the Tesoro Viejo development (EA, p. 26) is reasonable and reasonably certain;
4. Whether, given such uncertainty, the “potential reduced demand of 2,900 acre feet/year serving a population of 15,650 residents” (EA, p. 26) represents an acceptable risk of inadequate potable water supply to the development where the only proposed source of drinking water (Soquel water) supplies 3,000 acre feet/year;

Counsel- 9

5. Whether the Soquel water source is reliable in severe drought years, and if it is not, whether there is an available source of water to avoid interruptions of potable water service;

Counsel- 10

6. Whether and to what extent Tesoro Viejo will be forced to rely on groundwater during severe drought years and should the 40% reduction in per capita average water use prove overly optimistic;

Counsel- 11

7. Whether, replacing an unlined portion of Lateral 6.2 with concrete pipeline will reduce groundwater recharge;

Counsel- 12

8. Whether the applicant’s claims regarding a 1:1 ratio of groundwater recharge to groundwater extraction (EA, p. 26) withstand scrutiny, especially given the EA’s seemingly contradictory conclusion that “the project site is not identified as an important recharge area” (EA, p. 20);

Counsel- 13

9. Whether groundwater recharge is practicable or efficient in the project area given soil conditions and the existence of confining clay layers;

Counsel- 14

10. Whether and to what extent additional groundwater extractions related to the project will cause or contribute to land subsidence;

Counsel- 15

11. Whether and to what extent additional delivery of water through the unlined portions of Lateral 6.2 will cause land subsidence; and

Counsel- 16

12. Whether Holding Contract 7 can legally² be used to deliver water for use in “agricultural vignettes” in the project area, thus obviating the need for use of Soquel water or groundwater for those uses.

Counsel- 17

Neither the FONSI nor the EA contain any analysis of these issues, and if an analysis of each issue had been included, the Bureau would have properly concluded that the proposed action will have significant effects.

Counsel- 18

Given the assumptions and uncertainty involved in estimates of the water needs of the Tesoro Viejo development, and the very small buffer between the need estimate and the Soquel water supply (even during non-drought years), it is a near certainty that the Tesoro Viejo project will at times be forced to rely on the only other water source that is presently identified – groundwater. In a severely overdrafted groundwater subbasin such as the one at issue here, where groundwater users reliant on domestic wells have already seen their wells run dry in recent years, a project

² See Note 1, *supra*.

↑ placing new significant demands on the basin will likely have a negative impact on existing groundwater users and on land subsidence.

Counsel- 18 cont. The proposed action, as well as Tesoro Viejo more generally, overlay the same subbasin as communities like Fairmead, where many residents rely on groundwater as their only source of drinking water. Many of those wells went dry during the drought, both because of the drought itself and because of overdraft. The project will likely exacerbate the already dire groundwater situation in the relevant subbasin, and further impact those in disadvantaged communities that are presently without an adequate supply of safe drinking water. Those impacts will be felt more acutely by residents of low-income and disadvantaged communities, who are both more likely to rely on groundwater from domestic wells and less likely to have the ability to drill deeper wells.

At a minimum, these issues related to the sufficiency, legality and related impacts of relying on the Soquel water supply require the completion of a full EIS.

b. The FONSI And EA Fail To Properly Analyze Air Quality And Greenhouse Gas Emissions.

Counsel- 19 The FONSI makes no mention of air quality impacts or impacts on greenhouse gases. The EA briefly discusses air quality in the context of conformity with the Clean Air Act, concluding that direct emissions would be de minimis and that any indirect emissions would be outside of the Corps continuing program responsibility. (EA, p. 36.)

This analysis is inadequate for purposes of NEPA, and the project as well as Tesoro Viejo as a whole will have impacts related to air quality and greenhouse gas emissions. Specifically, as recognized by the EA, the project and Tesoro Viejo will result in increased traffic from the new residential area to employment opportunities in the City of Fresno. (EA, p. 28.) This increased traffic will have negative impacts on both air quality and greenhouse gas emissions. As such, the Bureau was required to complete an EIS, and the discussion limited only to the requirements of the Clean Air Act rather than NEPA is inadequate.

c. The FONSI And EA Fail To Properly Analyze The Impacts On Endangered Species.

Counsel- 20 The FONSI states that the project may affect the California tiger salamander (“CTS”), vernal pool fairy shrimp, succulent owl’s clover, the San Joaquin kit fox, and designated critical habitat for the CTS and succulent owl’s clover. (FONSI-15-008, p. 9.) However, on the sole basis of a non-jeopardy biological opinion issued by the U.S. Fish and Wildlife Service, the FONSI concludes that the proposed action will not have a significant impact on endangered species. (*Id.*)

This conclusion in the FONSI and EA is arbitrary and capricious for at least two (2) reasons: (1) the biological opinion itself is invalid for failure to consider site-specific and short-term impacts that may affect the relevant species, as well as impacts on those species associated with other reasonably foreseeable actions; and (2) the FONSI and EA may not rely solely on the biological opinion’s “no jeopardy” conclusion in finding that the action will have no significant impact on endangered species.

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Turning to the biological opinion, while it is true that it contains a non-jeopardy finding, the opinion also concludes that the action will have negative effects on these endangered species. For example, with respect to the CTS, the biological opinion states that the project will negatively effect the CTS's critical habitat, and that the inclusion of an open-space preserve for presently active breeding pools will "provide little to no conservation value for the species" because of human encroachment and other factors. (BO, pp. 27-29.) The reasoning for the non-jeopardy finding, then, is not that the project will have no significant effect on the CTS, but that on balance the harm to the species will be offset by a conservation easement on a nearby property known as Upper Jameson Ranch. (BO, pp. 11-12, 24-25.)

Counsel- 20
cont.

The legal standard for proper analysis of significant effects under NEPA is different from the non-jeopardy finding. *See Env'tl. Prot. Info. Ctr. v. United States Forest Serv.*, 451 F.3d 1005, 1012 (9th Cir. 2006) ("Clearly, NEPA and the ESA involve different standards..."). While the Bureau should not "disregard" the "no jeopardy" conclusion, neither should it rely solely upon that conclusion. *Id.* It is clear from the FONSI and EA that the Bureau did just that, and did not consider whether there will be significant effects on protected species that do not rise to the level of jeopardy.

As the EA does not properly consider whether there will be significant effects on the endangered species listed above, and because there likely would be significant adverse impacts, the Bureau is required to complete an EIS.

d. The FONSI And EA Fail To Properly Analyze The Conversion Of Wetlands And Prime Agricultural Land.

Though the EA acknowledges that the project will include conversion of wetlands, the FONSI concludes – without analysis – that the proposed action will not have a significant impact on wetlands. ("Impacts would occur as a result of fill in existing wetlands associated with grading of the site to construct residential and commercial development and piping of Lateral 6.2.") *with* FONSI-15-008, p. 8.)

Similarly, though the FONSI acknowledges that the project will involve conversion of prime farmland, it concludes that this will not be a significant impact because "prime and unique farmland on the project site represents less than 0.9 percent of the total farmland in Madera County..." (FONSI-15-008, p. 8.)

This discussion is wholly inadequate, and amounts to a mere tallying of the amount of land affected as a percentage of the total in the County without any stated reason for that comparison, rather than an analysis of whether the impact is significant or potentially significant. *See Nat'l Wildlife Fed'n v. Norton*, F.Supp.2d 170, 176-77 (D.D.C. 2004) quoting *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 89, 103 S. Ct. 2246, 2248 (1983) (simply stating the amount of impacted acreage and calculating it as a percentage of the relevant whole is not sufficient reasoning for a significance analysis because the agency has not made "a rational connection between the facts found and the choice made.").

Counsel- 21

e. **The FONSI And EA Fail To Consider Cumulative Impacts And Reasonably Foreseeable Projects In EA.**

As noted above, under certain circumstances, an EA must include an analysis of cumulative impacts related to a project. A cumulative impact is defined as “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency...or person undertakes such other actions.” *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1215 (9th Cir. 2008). As such, when there are reasonably foreseeable future actions, an agency must consider whether cumulative impacts can “can result from individually minor but collectively significant actions taking place over a period of time.” *Id.* quoting 40 C.F.R. § 1508.7.

Here, even assuming *arguendo* that the impacts identified above do not individually rise to the level of significant impacts, they are cumulatively significant.

Further, the FONSI and EA fail to analyze reasonably foreseeable future actions. Specifically, the FONSI concludes without analysis that “[t]he Proposed Action will not have a direct relationship to other actions with individually insignificant but cumulatively significant environmental effects.” (FONSI-15-008, p. 9.) With respect to impacts on aquatic resources, the EA states that:

Reasonably foreseeable future developments within the watershed with the potential to impact aquatic resources include some of the off-site alternatives determined to be impracticable due to water supply constraints and/or relying solely on groundwater for proposed future development, such as the Freels Property, Highway 41 Property, and Road 36 Property, as well as some other potential developments not within the off-site alternatives review such as the 162-acre Tra Vigne proposed development. Currently, none of these potential future developments have received county approvals. However, were any or all able to obtain reliable water sources in the near future, they may be expected to restart their approvals process. When considering the overall impacts that would result from the project, in relation to the overall impacts of similar past, present, and reasonably foreseeable future projects, the cumulative impacts are not considered to be significantly adverse. Compensatory mitigation would be required to help offset the impacts to WOUS. It is likely similar activities would be proposed in the future, and these would be subject to the appropriate review process at that time.

(pp. 37-38.)

The FONSI and EA thus properly recognize that there are other reasonably foreseeable projects in the vicinity of the proposed action and Tesoro Viejo, but conclude with little analysis that these foreseeable projects will not cumulatively have significant impacts. However, the impacts of Tesoro Viejo in conjunction with the reasonably foreseeable future projects (one of which has

↑ already broken ground) are not discussed or analyzed with respect to impacts on disadvantaged and low-income communities, impacts to groundwater or surface water supplies, impact on endangered species, impacts on agricultural land, or air quality impacts.

Further, from the FONSI and EA, it is unclear whether the Bureau is aware of the breadth of the developments planned for the relevant portion of Madera County, nor whether it is cognizant of the likelihood that they obtain any required County approvals given strong County support. The south-eastern portion of Madera County is covered by a series of general area plans and specific plans that have been approved and adopted by the County, which as of 2006 were planned to include a total of 33,998 dwelling units. (*See e.g.*, Ex. A, Rio Mesa Area Plan; Ex. B, Gateway Village Specific Plan; Ex. C, Gunner Ranch Specific Plan; Ex. D, Tesoro Viejo Specific Plan; Ex. E, Documentation of Rio Mesa Cumulative Land Use and Travel Forecasts, Korve Engineering, p. 4.) Collectively, Madera County refers to these developments as “New Town,” which it views as incorporating the future. (Ex. F, Southeast Madera County Development, Joint Board of Supervisors Meeting Fresno County & Madera County (March 19, 2013).)

To conclude, without analysis, that planned communities within a tight geographic proximity in an overdrafted basin that are anticipated to involve just under 34,000 dwelling units incorporated into “New Town” will not have any significant effects on the environment, and are thus not worthy of analysis in a full EIS, strains credulity.

c. The FONSI and EA Fail To Consider All Reasonable Alternatives.

An agency must “[r]igorously explore and objectively evaluate all reasonable alternatives.” 40 C.F.R. § 1502.14(a); *Ctr. for Biological Diversity*, 538 F.3d at 1217. Further, “‘NEPA requires that alternatives . . . be given full and meaningful consideration,’ whether the agency prepares an EA or an EIS [citations].” *Ctr. for Biological Diversity*, 538 F.3d at 1217. In an EA, the agency must “provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.” *Id.* at 1217-18 quoting 40 C.F.R. § 1508.9.

Here, the EA considers several potential alternatives, but concludes that none of them are practicable or reasonable. (EA, p. 15.) However, the FONSI and EA have failed to consider many reasonable alternatives, including but not limited to the use of alternative water sources, the use of other off-site properties such as Cottonwood Creek Ranch, and infill development in existing communities.

d. Based On The Above Discussion, “Context” And “Intensity” Require An EIS.

As previously noted, NEPA requires consideration of both “context” and “intensity” when determining whether the project may have a significant effect and whether to prepare an EIS. 40 C.F.R. § 1508.27.

With respect to “context,” the “significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality.

Counsel- 24 cont. ↑ Significance varies with the setting of the proposed action.” 40 C.F.R. § 1508.27(a). Here, the significance of the proposed action is analyzed in the context of the relevant watershed. (EA, p. 37.) While this may be appropriate for purposes of surface water, it is not sufficient with respect to groundwater impacts (where the context should be the relevant basin and subbasin), impacts on disadvantaged or low-income communities (where the context should be the region including both Madera and Fresno counties and the cities within both counties), impacts on agricultural lands (where the context should be the locality and the region), or impacts on air quality (where the context should be the locality, County and San Joaquin Valley).

With respect to “intensity,” the agency should consider, at a minimum, the ten (10) factors set forth in 40 C.F.R. § 1508.27(b). “An action may be ‘significant’ if one of these factors is met.” *Ctr. for Biological Diversity*, 538 F.3d at 1220.

Counsel- 25 In this case, all of the ten (10) “intensity” factors point to a finding of “significance.” First, under subdivision (b)(1), “[a] significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.” As discussed in subsection c., *supra*, the EA improperly conflates the question of whether the project at a whole is beneficial to endangered species with the right question – whether the project will have significant effects on endangered species. While the creation of a preserve at Upper Jameson Ranch may have beneficial effects on, for example, the California Tiger Salamander, the preserve does not change the conclusion that the project will have significant effects on the CTS.

Counsel- 26 Second, under subdivision (b)(2), the agency must consider “[t]he degree to which the proposed action affects public health or safety.” As noted in subsection b., *supra*, the proposed action, Tesoro Viejo and other reasonably foreseeable developments will have significant impacts on air quality, which will have a negative impact on the health of those living near the project and within the region as a whole.

Counsel- 27 Third, under subdivision (b)(3), the agency must consider “[u]nique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.” As noted in subsection d., *supra*, the proposed action and, Tesoro Viejo and other reasonably foreseeable developments will have significant effects on prime farmlands and wetlands.

Counsel- 28 Fourth, under subdivision (b)(4), the agency must consider “[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial.” The Tesoro Viejo development and other related developments are the subject of several active lawsuits, and have received a multitude of opposition in CEQA comment letters in the past. This opposition in conjunction with the comments received on the instant FONSI render the proposed action “highly controversial.” This factor alone requires preparation of an EIS. *See Greenpeace Action v. Franklin*, 14 F.3d 1324 (9th Cir. 1992).

Counsel- 29 ↓ Fifth, under subdivision (b)(5), the agency must consider the “degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.” Here, there is a high level of uncertainty regarding the water supply for the Tesoro Viejo development, both

Counsel- 29 cont. ↑ in terms of sufficiency and reliability during drought, what other developments will proceed and what their impacts will be, the extent of impacts on endangered species, and the other issues raised above. Additionally, the entire project is within the inundation zone of a failure of Friant Dam, which adds uncertainty with respect to public safety.

Counsel- 30 Sixth, the agency must consider under subdivision (b)(6) the “[t]he degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.” As discussed in subsection e., *supra*, this proposed action relates to one of many proposed developments in the relevant locality, and will serve as precedent for future projects to proceed using potentially inadequate and illegal surface water supplies.

Counsel- 31 Seventh, under subdivision (b)(7), the agency must consider “[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.” As demonstrated in subsection e., *supra*, the proposed action would have cumulatively significant impacts.

Counsel- 32 Eighth, the agency must consider “[t]he degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.” The instant project will adversely affect the Madera Canal as well as tribal resources of significant cultural and historical value.

Counsel- 33 Ninth, under subdivision (b)(9), the agency must consider “[t]he degree to which the action 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.” The proposed action will adversely affect endangered or threatened species and critical habitat as discussed in subsection c., *supra*.

Counsel- 34 Finally, under subdivision (b)(10), the agency must consider “[w]hether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.” For the reasons discussed above, the proposed action threatens to violate several Federal, State and local laws, including but not limited to the Environmental Protection Act, the Clean Water Act, the Warren Act, and State laws and regulations regarding diversion of surface water. The proposed action may also violate the California Sustainable Groundwater Management Act.

Counsel- 35 Given that any of these factors individually would require the preparation of an EIS, and that each of these factors weighs in favor of an EIS, the FONSI and related EA are inadequate.

* * * * *

Based on the foregoing, the FONSI and related EA are inadequate. The FONSI and EA do not represent the requisite “hard look” or a “convincing statement of reasons” explaining why a



A Tides Center Project

Counsel- 35
cont.

↑ projects impacts are not significant. *Ctr. for Biological Diversity*, 538 F.3d at 1220 quoting *Blue Mts. Biodiversity Project*, 161 F.3d at 1212. As a result, the Bureau must prepare an EIS.

Best Regards,

A handwritten signature in black ink, appearing to read "Michael K. Claiborne".

Michael K. Claiborne, Esq.
Leadership Counsel for Justice & Accountability

Chris Acree
Executive Director
Revive the San Joaquin

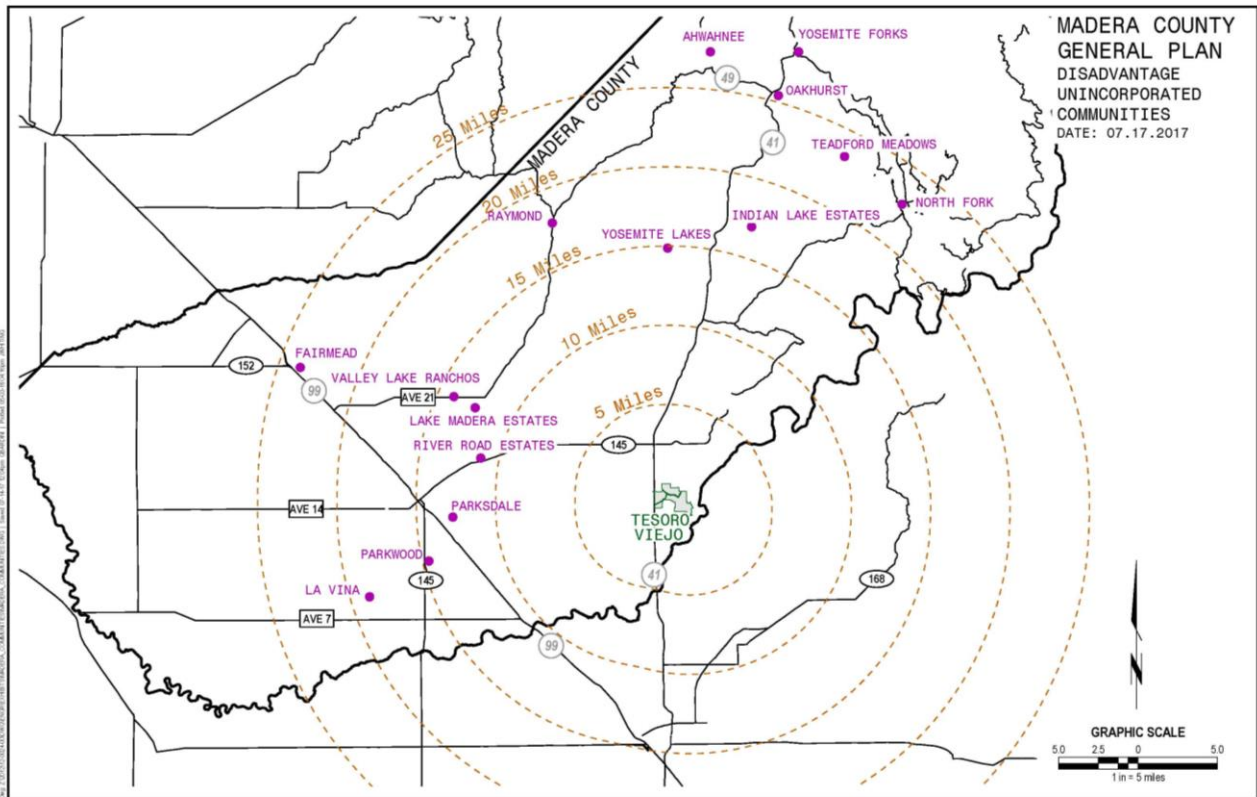
Response to Leadership Counsel for Justice & Accountability Comment Letter, June 23, 2017

Counsel-1 Comment noted. This comment consists of conclusory summary statements of the comments that are set forth in more detail in the remainder of the letter. Please see specific responses below.

Counsel-2 Reclamation disagrees that the “FONSI and EA fail to properly analyze impacts on Environmental Justice Communities” and that Reclamation did not “comply with its own NEPA Environmental Justice policy”.

The Corps identified existing conditions in the Proposed Action area on page 3 of the Environmental Assessment (EA): “The majority of the Project site is currently cultivated with perennial and annual crops; however, there are portions of the northern and eastern areas of the Project site that remain undeveloped annual grasslands. Cultivated portions of the Project site consist primarily of perennial crops including grape vineyards, berry bush orchards, and tree orchards. Canals owned by the Reclamation cross through the Project site and are not a part of the property. A single house exists on the Project site, and various other improvements associated with agriculture such as a ranch office, roads, fences, and irrigation systems exist throughout the Project site. Immediately north of the Project site is open range land; to the east is the unincorporated community of Sumner Hill; to the south is a mixture of cultivated agriculture, open range land, and vernal pool grassland preserve; and to the west is existing residential and commercial development.”

Reclamation also reviewed the Proposed Action area to determine if there were any minority and/or low-income communities within the Action area that could potentially be affected by the Proposed Action. As stated on page 1 of the Draft FONSI, “Tesoro Viejo is a proposed development on an approximately 1,555 acre site in southeastern Madera County, about nine miles north of the city of Fresno and 13 miles east of the city of Madera.” As shown in the Figure below, the closest disadvantaged community listed by the commenter is approximately 12 miles away from the Project site.



As there are no minority or disadvantaged communities/populations in the Proposed Action area, and as addressed further in the various responses to comment below, the actions subject to approval by Reclamation and the Corps will not result in any direct or indirect impacts on disadvantaged communities, further analysis of environmental justice concerns is not warranted and Reclamation’s determination in the Draft FONSI still stands.

Counsel-3 Reclamation acknowledges the commenter’s concerns regarding the possible diversion of County funds away from disadvantaged communities in the County of Madera and City of Fresno, but neither the Corps nor Reclamation have land use authority over the proposed Tesoro Viejo development and accordingly have no control over how the County allocates its funding. In addition, Reclamation understands that the Tesoro Viejo Project proponent will be financing all Project-related infrastructure improvements, including schools, parks, trails and public roadways. County funds will not be diverted to pay for Tesoro Viejo-related Project costs and improvements. Rather, the County will benefit from the receipt of additional tax revenue generated by the enhanced property values and additional sales tax revenue generated by the proposed development.

Counsel-4 As stated on page 2 of the Draft FONSI, the Tesoro Viejo Master Planned Community (Tesoro Viejo) Project proponents “have entered into a Water Supply Agreement with Madera Irrigation District in order to receive up to 3,000 acre-feet per year (AFY) of Madera Irrigation District’s pre-1914 appropriative water rights to North Fork Willow Creek (referred to as Soquel water) for municipal and

industrial (M&I) purposes”. This is the primary source of water contemplated to serve the development. However, as described on page 26 of the Corps’ EA, Tesoro Viejo Project proponents have “existing rights to withdraw groundwater from the property and to withdraw water from the San Joaquin River pursuant to Reclamation Holding Contract No. 7.” While Tesoro Viejo does not intend to utilize groundwater as a principal source of water supply for the Project, Tesoro Viejo, as an owner of land overlying a groundwater basin, holds rights to groundwater under California law. Tesoro Viejo may utilize groundwater for Project purposes to supplement its surface water supplies if necessary to address a water supply emergency. As discussed in the EIR for the Project, the maximum quantity of groundwater Tesoro Viejo would utilize is 400 AFY. If Tesoro Viejo utilizes groundwater for municipal and industrial (M&I) purposes it will construct and operate groundwater recharge facilities so that any groundwater extracted is replaced at a 1:1 ratio consistent with the County of Madera’s groundwater balance policy¹ for new residential and commercial developments. Even if groundwater were required in an emergency situation, as shown in the above figure, more than half of the disadvantaged communities listed by the commenter are north and northeast of the Tesoro Viejo Project site, outside of the aquifer subbasin that Tesoro Viejo overlies. In addition, the closest listed disadvantaged community is approximately 12 miles away from the Project site, too far removed for any groundwater supply impacts that could be directly attributed to the Tesoro Viejo Project. As a result, even in the event that groundwater were to be used, it would not result in a significant impact on disadvantaged or low-income communities in the same subbasin that are reliant – in whole or in part – on groundwater.

Counsel-5 The commenter is mistaken that the EA does not consider whether delivery of the Soquel water through Lateral 6.2 for M&I purposes is permitted under relevant Warren Act contracts between Reclamation and Madera Irrigation District. The EA clearly states that the delivery of the Soquel water to the Tesoro Viejo Project is contingent upon Reclamation’s approval of an additional point of delivery for Madera Irrigation District’s existing Warren Act Contract (EA, p. 26). The Draft FONSI also states that in order to convey the water to Tesoro Viejo, Madera Irrigation District “has requested approval from Reclamation to add an additional point of delivery to their Soquel water Warren Act Contract(s)” (FONSI, p. 2). The EA further provides that although construction of the Tesoro Viejo Project would increase the amount of impervious surfaces to approximately 40 percent of the Project site, the Madera County *Groundwater Management Plan* does not identify the Project site as an important recharge area (EA, p. 20). Moreover, the Project is designed to maintain off-site water flows to meet current conditions by collecting stormwater in one of five detention basins or natural drainage basins that would be designed to reduce discharge rates to current conditions, prevent the Project from altering natural or current hydrology on-site, and prevent stormwater pollutants from entering the drainages (EA, pp. 16, 20).

¹ County of Madera. 2013. Proposed Policy Governing Groundwater Balance. 52456.001\Groundwater Policy 8-22-13.

- Counsel-6 As stated in the EA, the Tesoro Viejo site has existing rights to withdraw water from the San Joaquin River pursuant to Reclamation Holding Contract No. 7 (EA, p. 26). However, the amount of water currently diverted from the river pursuant to Reclamation Holding Contract No. 7 will be reduced as agricultural uses are replaced on the Project site by residential, commercial, and industrial uses that will be supplied by Madera Irrigation District's Soquel water instead of Reclamation Holding Contract No. 7 water. Madera Irrigation District's pre-1914 Soquel water rights water can only be diverted by Madera Irrigation District from October 1st to July 31st of the following year. During the period of non-diversion (August 1st through September 30th), Tesoro Viejo Project proponents will either deliver water previously stored on site and/or Madera Irrigation District will provide Tesoro Viejo with Soquel water previously stored in Millerton Lake pursuant to their Warren Act Contract(s) with Reclamation. As there would be no change in available flows (i.e., Soquel water would be delivered to the development pursuant to Madera Irrigation District's existing pre-1914 water rights), the delivery of Soquel water would not have a negative impact on downstream riparian users.
- Counsel-7 As set forth in the EA, the 40 percent reduction in per capita daily average water use for the Tesoro Viejo Project is a result of incorporating the water conservation guidelines included in the Department of Water Resources Integrated Regional Water Management Plan's *20 x 2020 Water Conservation Plan* as well as the direct beneficial reuse of all wastewater generated by the Project (EA, p. 26). As stated in the Supplemental Water Supply Assessment for the Tesoro Viejo Project attached as Appendix J1 to the EIR, the projected per capita daily average water use of 165 gallons per capita per day (GPCD) for the Tesoro Viejo Project represents an approximately 40 percent reduction from the Integrated Regional Water Management Plan average water demand calculation of 270 GPCD for municipal and industrial uses but is generally consistent with the State's *20X2020* goal of 160 GPCD for San Joaquin Valley residential and commercial development. The 40 percent reduction assumed for per capita daily average water use in the Tesoro Viejo Project is therefore reasonable and reasonably certain.
- Counsel-8 As stated in the Response to Counsel-7, the 40 percent reduction in per capita daily average water use is reasonably certain based on the *20 x 2020 Water Conservation Plan* goal of 160 GPCD for San Joaquin Valley residential and commercial development. As set forth in the Supplemental Water Supply Assessment for the Tesoro Viejo Project attached as Appendix J1 to the Project EIR, projected potable water demand for the fully built Project is slightly less than the 3,000 AFY identified in the Draft FONSI.
- Counsel-9 The pre-1914 water rights associated with the Soquel Water are senior appropriative water rights. Due to their seniority, the Soquel water was not legally curtailed even during the severe drought of 2014-2015. However, in the

extreme event that the Soquel water does need to be curtailed, any such curtailment will be made in accordance with all applicable laws and rights pertaining to the protection of public health and safety. See also Response to Counsel-4.

- Counsel-10 As stated above, the 40 percent reduction in per capita daily average water use is reasonably certain based on the *20 x 2020 Water Conservation Plan* goal of 160 GPCD for San Joaquin Valley residential and commercial development and is therefore not overly optimistic. Madera Irrigation District's rights to the Soquel water are senior appropriative water rights which were not curtailed even during the severe drought years of 2014-2015. However, as described on page 26 of the Corps' EA, Tesoro Viejo Project proponents have "existing rights to withdraw groundwater from the property and to withdraw water from the San Joaquin River pursuant to Reclamation Holding Contract No. 7." While Tesoro Viejo does not intend to utilize groundwater as a principal source of water supply for the Project, Tesoro Viejo, as an owner of land overlying a groundwater basin, holds rights to groundwater under California law. Tesoro Viejo may utilize groundwater for Project purposes to supplement its surface water supplies if necessary to address a water supply emergency. As discussed in the EIR for the Project, the maximum quantity of groundwater Tesoro Viejo would utilize is 400 AFY. If Tesoro Viejo utilizes groundwater for M&I purposes it will construct and operate groundwater recharge facilities so that any groundwater extracted is replaced at a 1:1 ratio consistent with County of Madera groundwater balance policy for new residential and commercial developments.
- Counsel-11 Replacing the unlined portion of Lateral 6.2 with concrete pipe could reduce groundwater recharge to some nominal extent; however, the portion of Lateral 6.2 proposed to be replaced is only approximately 1.12 miles long (FONSI, p. 5). Lateral 6.2 is a clay lined earthen canal that receives intermittent flows between March 1 and October 15 of each year (EA, p. 4). Replacing a portion of Lateral 6.2 with concrete pipe is therefore not expected to significantly affect groundwater recharge. Moreover, "The major drainage features that would be preserved in open space along with the proposed stormwater detention basins would function in a recharge capacity." As a result, "The Project would not result in a substantial impact on aquifer recharge" (EA, p. 20).
- Counsel-12 As part of the EIR analysis for the proposed Tesoro Viejo development, the County of Madera required groundwater recharge tests for the Tesoro Viejo Project site in order to determine a sustainable yield figure in the event that groundwater pumping is ever required. As reported in the EIR, a sustainable safe yield of at least 400 AFY could be achieved based on the recharge capabilities of the site (EIR, p4.8-66). See also Response to Counsel-4.
- Counsel-13 As part of the EIR analysis for the proposed Tesoro Viejo development, a recharge test was conducted in the southwestern portion of the Project site. As reported in the EIR, a total of 25.7 AF was applied to the test recharge basin over

a four month period, resulting in a 98.8 feet water level rise in the observation well, indicating that the recharge water was reaching deeper groundwater during the test (EIR, p4.8-66). Notwithstanding these results, and as described in Response to Counsel-12, if the Project were not able to recharge groundwater on a 1:1 basis, it would be prevented from extracting groundwater. Any limitations on the recharge of groundwater due to soil conditions would result in a corresponding limitation on the use groundwater consistent with the County of Madera's groundwater balance policy for new residential and commercial developments.

- Counsel-14 Any use of groundwater would be required to be replaced on a 1:1 basis per the County of Madera's groundwater balance policy for new residential and commercial developments. Therefore, there would be no net loss of groundwater that could lead to land subsidence. In addition, there is no known ground subsidence in the Project area.
- Counsel-15 The unlined portion of Lateral 6.2 that will remain on the Project site after 1.12 miles of the Lateral have been piped is located at the downstream end of the Lateral near its existing crossing under State Route-41. No "additional delivery of water" through this unlined portion is planned as a result of this Project. Water scheduled for delivery to the Project site via Lateral 6.2 will be diverted from the newly piped Lateral prior to its discharge from the Project site.
- Counsel-16 Agricultural irrigation water for crop cultivation is currently supplied to the Project site pursuant to Reclamation Holding Contract No. 7. A reduced amount of water would continue to be supplied pursuant to Reclamation Holding Contract No. 7 for irrigation of the agricultural vignettes that are dispersed throughout the Project site (FONSI, p. 7). The commenter provides no basis for questioning whether Reclamation Holding Contract No. 7 can legally be used to deliver water to the Project.
- It should be noted that Article 7 (How owner may divert water) of Reclamation Holding Contract No. 7 states: "The United States does not and will not so far as it and its successors and assigns are concerned, object to any reasonable beneficial use of the water of the River for irrigation and/or domestic purposes exclusively upon the land described in Exhibit A: Provided, That water to supply each beneficial use or uses shall be taken only from water in the River at a point or at points upon, adjacent to or opposite said described land or at a point or at points upon said described land from underground sources."
- Counsel-17 See Responses to Counsel-2 through Counsel-16.
- Counsel-18 See Responses to Counsel-4 and Counsel-7 through Counsel-10.
- Counsel-19 As described in Response to Counsel-2, neither the Corps nor Reclamation have land use authority or jurisdiction over the proposed Tesoro Viejo development

(FONSI, p. 1). However, as acknowledged in the Draft FONSI, the Tesoro Viejo Project was subject to approval by the County of Madera in 2012 following certification of an EIR pursuant to the requirements of the California Environmental Quality Act (FONSI, p. 1). Air quality and greenhouse gas impacts of the Project as a whole, including those elements subject to the jurisdiction of the Corps and Reclamation, were considered in the EIR and resulted in a number of mitigation measures. Consistent with that analysis, Attachment 2 to the Draft FONSI includes the relevant mitigation measures imposed by the County to minimize air quality impacts. See pages 13-9 through 13-10 and 13-52 through 13-55 of the Mitigation Monitoring and Reporting Program for the Tesoro Viejo Master Planned Community attached as Attachment 2 to the Draft FONSI.

- Counsel-20 The EA’s conclusion that there are no significant impacts on endangered species is based on all of the analysis in the Biological Opinion prepared by the U.S. Fish and Wildlife Service (FWS), including the Biological Assessment that was submitted by Reclamation to FWS on August 24, 2016 and was the basis for the Biological Opinion. As noted by the commenter elsewhere, this information is relevant to the application of the “intensity” factor with a focus on the “degree” to which the Project may adversely affect endangered species. Here, the conclusion of the FWS that the Project would not jeopardize endangered species, in conjunction with the Project’s approved avoidance, minimization and mitigation measures, supports Reclamation’s determination in the Draft FONSI because the intensity of impact on endangered species caused by the Project is not significant impact.
- Counsel-21 Commenter summarily states that the Project’s impact to wetlands were reported in the EA, but without analysis. To the contrary, impacts and analysis to vernal pools, wetlands, streams, drainages, and ponds were identified and assessed (EA, pp. 21-22). With regard to prime agricultural land, the commenter asserts that simply stating the amount of impacted acreage as a percentage of the whole is insufficient, and for that proposition, relies on a case that dealt with the impacted range of the endangered Florida panther. Reclamation makes no comment on whether the amount of impacted acreage for the range of a Florida panther is the correct analysis or not, but for impacts to prime farmland, the EA analysis at pages 21-22 allowed a proper assessment to be made of this issue.
- Counsel-22 Reclamation disagrees that the “FONSI and EA fail to consider cumulative impacts and reasonably foreseeable projects”. The Corps EA reviewed cumulative effects throughout the document (see pp. 9, 28, 32, 37, 38). In addition, as noted by the commenter, the FONSI and EA properly recognize that there are other reasonably foreseeable projects in the vicinity of the Proposed Action. Such other potential projects in the regional vicinity are listed in the County of Madera’s Rio Mesa Area Regional Community Plan (RMAP), cross-referenced in the EA in several locations. With the exception of the Riverstone Project (aka Gateway Village) and possibly the Gunner Ranch West Project, none

are deemed to be reasonably foreseeable, principally for lack of a dependable water supply as discussed in the EA's alternatives analysis (see also Response to Counsel-23). With the exceptions of Tesoro Viejo, Riverstone, and Gunner Ranch West, none have received County approvals, nor have proposed development applications been submitted. The Freels property was previously approved by the County for development, but those approvals were overturned by the court based on a lack of a proven water supply (EA, p. 11).

As noted in the EA, the Riverstone Project has been approved for development and is currently under construction (EA, p. 12). The Gunner Ranch West Project (also a RMAP Project) has been approved by the County for development, but is currently tied up in litigation over that Project's intended sole reliance on groundwater supplies. Neither Project includes the fill of any jurisdictional waters of the United States, and neither have need to apply for permits to take any threatened or endangered species, thus mooting the issue of cumulative impacts to those sensitive resources. Both developments would rely solely on groundwater for their respective water supplies, although the Gunner Ranch West Project has been tied up in litigation over this issue for at least two years, stalling the commencement of Project construction. Since the proposed Tesoro Viejo Project will principally rely on surface water resources, with reliance on groundwater pumping only in emergency situations, there are no significant water supply cumulative impacts to either surface or groundwater resources resulting from development of the Tesoro Viejo Project in tandem with the Riverstone and Gunner Ranch Projects. There will be impacts to existing agricultural operations from the development of these Projects, but these impacts are not considered to be cumulatively considerable in light of their combined nominal impact on overall agricultural production in the region. As detailed in the Mitigation and Monitoring Report included as Attachment 2 to the Draft FONSI, the proposed Project is subject to a number of mitigation measures intended to minimize the effects of Project-related air emissions, as are the Riverstone and Gunner Ranch West Projects in accordance with their respective County-imposed mitigation measures.

Counsel-23 The EA considered 12 alternatives to the proposed Project, including eight off-site alternatives, two onsite alternatives, one "no permit" alternative for the Corps, and one "no permit" alternative for Reclamation (EA, pp. 10-15). The off-site alternatives were undeveloped tracks of land large enough to meet the Project's purpose and need. For purposes of assessing a reasonable range of alternatives, half of the onsite alternatives were undeveloped rangeland (off-site alternatives 1, 2, 3, and 6), and half included at least some cultivated agriculture like the Tesoro Viejo Project site (off-site alternatives 4, 5, 7, and 8). Six of the off-site alternatives (1, 2, 3, 5, 6, and 8) would be reliant on groundwater for water supply. Given that the groundwater in this region of the County is deemed to be in a critical overdraft condition, the water supply regulatory constraints rendered those alternatives impracticable. One of the off-site alternatives (7) is in Madera Irrigation District's service area, and therefore could potentially be served by

surface water supplies with the appropriate permits and approvals, but this alternative was deemed impracticable because the central portion of this Project site was already approved for construction by another developer and was therefore not deemed to be available to the Project applicant (Tesoro Viejo). The remaining off-site alternative (4) considered the possibility of utilizing the Project proponent's Reclamation Holding Contract No. 7 water rights to pump water from the San Joaquin River, but previous attempts to develop the property based on these contract rights was successfully challenged in court and therefore was not considered to be a practicable option for the Project. Alternative onsite water supplies were also considered. Reliance on groundwater resources was ruled out for the same reason it was deemed impracticable for the off-site alternatives – the critical overdraft condition of the existing aquifer. Removing an existing almond orchard approximately eight miles to the west of the Project site was considered for purposes of conveying groundwater pumped for irrigation of that orchard to the Project site, but that alternative was rejected for being financially infeasible. Infill development was not considered in light of the purpose and need for the proposed Project, which includes approximately 5,000 new residential units and three million square feet of new commercial and light industrial development.

- Counsel-24 The commenter asserts that an EIS is required based on the “context and intensity” of impacts to groundwater, disadvantaged or low income communities, agricultural lands, and air quality. See Responses to Counsel-4, Counsel-10, and Counsel-12 through Counsel-14 with respect to groundwater resources; Responses to Counsel-2 and Counsel-3 with respect to disadvantaged or low income communities; Response to Counsel-19 with respect to air quality; and Response to Counsel-21 regarding agricultural lands.
- Counsel-25 See Response to Counsel-20.
- Counsel-26 See Response to Counsel-19.
- Counsel-27 See Response to Counsel-21.
- Counsel-28 There are no active lawsuits against the Project. Reclamation has received three comment letters regarding the Draft FONSI. Two of the comment letters were from public agencies, neither of which expressed outright objections to the proposed Project, and one which affirmatively stated that it does not oppose the Project. The receipt of a limited number of comments on a FONSI do not render a proposed action highly controversial.
- Counsel-29 See Response to Counsel-2, Responses to Counsel-4 through Counsel-18, Response to Counsel-20, and Response to Counsel-23. With regard to the commenter's comment about the inundation zone resulting from the failure of Friant Dam, Reclamation has conducted safety inspections of the dam in the past and reached a satisfactory finding. Even in the highly unlikely event of a dam

failure, the steep bluffs and raised elevation of the Project site would minimize its potential inundation.

- Counsel-30 See Response to Counsel-23. As stated in the EA, activities proposed in the future would be subject to the appropriate review process at that time, and the proposed action will not serve as precedent in that regard.
- Counsel-31 See Responses to Counsel-22 and Counsel-23.
- Counsel-32 As set forth in the EA, the Corps consulted with the State Historic Preservation Officer (SHPO) in compliance with Section 106 of the National Historic Preservation Act (EA, p. 7). The Corps concluded that “based on development plans submitted to the Corps and Reclamation, there would be No Adverse Effect to Historic Properties by these Undertakings (i.e., the Corp’s permit decision and Reclamation’s land use authorization to access their rights of way) with the implementation of avoidance and minimization measures specified in the Cultural Resources Management Plan (CRMP). The Corps initiated consultation with SHPO, also on Reclamation’s behalf in August 2016. SHPO issued its concurrence on February 7, 2017” (EA, pp. 35-36). As also set forth in the EA, the proposed action “has no substantial direct effect on one or more Indian tribes. There are a number of pre-historic sites located on the proposed Project site. The proposed action would avoid all known pre-historic resources within open-space areas that would be preserved under a conservation easement. On February 25, 2013, [the Corps] initiated Native American coordination through letters sent to the following individuals: Honorable Chairperson Jerry Brown (Chowchilla Tribe of Yakuts), Honorable Chairperson Robert Ledger Sr. (Dumna Wo-Wah Tribal Government), Mr. Eric Smith (Dumna Wo-Wah Tribal Government), Mr. John Ledger (Dumna Wo-Wah Tribal Government), Honorable Chairperson Kenneth Woodrow (Wuksache Indian Tribe), Honorable Chairperson Katherine Erolinda Perez (North Valley Yokuts Tribe), Honorable Chairperson Reggie Lewis (Picayune Rancheria of the Chukchansi Indians), Honorable Chairperson Lois Martin (Southern Sierra Miwuk Nation), Mr. Les James (Southern Sierra Miwuk Nation) and Interim Chairperson Lawrence Bill (Sierra Nevada Native American Coalition). No comments were received in response to these letters” (EA, p. 40). Impacts on historic and tribal resources have therefore been adequately considered.
- Counsel-33 See Response to Counsel-20.
- Counsel-34 See Responses to Counsel-2 through Counsel-33.
- Counsel-35 This comment consists of a legal conclusion. As such, it does not directly address the contents of the Draft FONSI, and no response is required.

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June 23, 2017

VIA EMAIL, FACSIMILE, & OVERNIGHT COURIER

Rain L. Emerson
Bureau of Reclamation
1243 N Street
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**Re: Draft Finding of No Significant Impact:
Reclamation Approvals Associated with the Tesoro
Viejo Master Planned Community [FONSI-15-008]**

Dear Ms. Emerson:

My law firm serves as counsel to Madera Irrigation District (the "District"). On the District's behalf, I submit the following comments on the draft Finding of No Significant Impact (the "FONSI") for the proposed Reclamation Approvals Associated with the Tesoro Viejo Master Planned Community, FONSI-15-008 (the "Proposed Action"). The District is beneficially interested in the Proposed Action, as it includes, *inter alia*, (i) proposed modifications to the District's Warren Act contract with the Bureau of Reclamation ("Reclamation"), and (ii) proposed modifications to District facilities, which are necessary for the District to deliver water supplies to the proposed Tesoro Viejo Master Planned Community (the "Project") pursuant to water supply agreements between Tesoro Viejo and the District. As explained in more detail below, the FONSI should be augmented and recirculated to accurately describe the Project, and to analyze all potentially necessary project approvals.¹

¹ The District, of course, would prefer not to submit a comment letter on a Proposed Action relating to its own facilities and contracts with Reclamation. As a result, the District attempted to seek a continuance of the comment period and/or a withdrawal of the FONSI pending further review and augmentation. Reclamation, however, instead requested that the District submit a comment letter on the Proposed Action.

A. The District Was Not Consulted on the Scope of the Proposed Action

As explained in the FONSI, the Proposed Action includes modifications to District facilities, including “the piping of Lateral 6.2,” and the addition of “Lateral 6.2 as an additional point of delivery to Madera Irrigation District’s Warren Act Contract for the delivery of up to 3,000 AFY of Madera Irrigation District’s Soquel water to Tesoro Viejo for M&I purposes.” (FONSI at 2.) While the District provided Reclamation with authorization to proceed with the application process for the Proposed Action, the District anticipated and expected that it would be included in the development of the scope of the Proposed Action and the environmental analysis under NEPA, and provided an opportunity to review a draft/screencheck version of the FONSI. Unfortunately, that did not occur.

In fact, over the past several weeks, representatives of the District have been in contact with representatives of Reclamation. On some of those occasions, District representatives specifically asked about the status of the environmental review for the Proposed Action. The representatives of Reclamation advised that they were not aware of the status of the environmental review. The District was therefore surprised to learn on June 16, 2017, that Reclamation had released a FONSI for public review on June 9, 2017, and that the FONSI had an accelerated review period ending June 23, 2017. Making matters worse, the FONSI is incomplete and does not address several components of the Project that are material to the District, including but not limited to the omission of a point of diversion on the San Joaquin River necessary for the District to deliver water to the Project – *i.e.*, the “Rio Mesa POD.”

To be clear, the District does not oppose the Project; however, because the Proposed Action involves modifications to District facilities and one of the District’s contracts with Reclamation, it is important that the District be kept apprised of the status of Reclamation’s processing of such applications, and be afforded an opportunity for input on Reclamation’s release of environmental documents for such projects *before* the public review period.²

As such, for both the Proposed Action and any other requested approval that concerns the District’s facilities and/or contracts with Reclamation, the District respectfully requests that it be timely advised of the status of all such approvals, and provided an opportunity to provide input regarding the scope of any such proposed action *prior to* the release of any environmental document for public review. This request, of course, is not limited to Tesoro Viejo or the Project.

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² The District notes that it also first learned of draft FONSI-16-007 (which also involved the District’s Warren Act contract) *after* the document had been released for public review.

B. The FONSI Fails to Adequately Define or Describe the Proposed Action

The FONSI fails to adequately describe the Proposed Action in a way that would allow the public and the responsible decisionmakers to meaningfully evaluate the potential impacts of the Proposed Action. (See 40 C.F.R. § 1502.14.) Specifically, the FONSI states that the District’s “3,000 AFY Soquel water would serve all dwelling units and commercial and industrial uses throughout the development site. . . .” In addition, Tesoro Viejo would use recycled water “for irrigation of open space, parks, and trails,” and water under Tesoro Viejo’s Holding Contract No. 7 “for irrigation of the agricultural vignettes that are dispersed throughout the Project area” (FONSI at 7.)

The practical problem with the above analysis is that the only facility described in the FONSI that can be used to physically deliver municipal and industrial (“M&I”) water to the Project is Lateral 6.2 and, as explained in the Environmental Assessment (“EA”) accompanying the FONSI, Lateral 6.2 only “runs intermittently between March 1 and October 14.” (EA at 4.) In other words, the FONSI and the EA fail to describe any component of the Project that would allow water to be supplied to Project M&I uses year-round.

1. Because Lateral 6.2 Only Runs Intermittently, the FONSI/EA Should Be Augmented to Include Reference to Tesoro Viejo’s Use of the Rio Mesa POD

Although Lateral 6.2 supports only an “intermittent summer flow regime,” (EA at 2), the EA elsewhere states that “MID would be the primary provider of water to the project site for all residential, commercial and industrial uses, utilizing Reclamation’s Madera Canal and Lateral 6.2 to convey the water.” An “intermittent summer flow regime,” however, cannot satisfy the residential, commercial, and industrial land uses on a year-round basis. As a result, the District’s contractual agreements with Tesoro Viejo provide the District (at its discretion) the flexibility to deliver water to Tesoro Viejo via *either* Lateral 6.2 *or* at Rio Mesa’s existing point of diversion on the San Joaquin River which is located approximately four miles downstream of Friant Dam (the “Rio Mesa POD”), which the District understands Tesoro Viejo can use year-round.

Despite this, the FONSI does not include any recognition that the District intends to deliver water to the Project through the Rio Mesa POD. Because Lateral 6.2 cannot be used on a year-round basis, and the FONSI presently only contemplates that the M&I land uses would be served through Lateral 6.2, the addition of another point of diversion to supply water to the M&I land uses is critical to ensure the Project can receive its water supply. As such, the Proposed Action in the FONSI should be augmented to include recognition that the Project will be served with water through the Rio Mesa POD.³

³ The FONSI/EA should also be augmented to include any necessary off-canal storage required to serve the Project.

Madera-3

2. To the Extent Tesoro Viejo Intends to Use Groundwater and/or Holding Contract Water, the Proposed Action Should Be Augmented to Include Analysis of the Use of those Proposed Water Supplies

Madera-4 Based on discussions with Tesoro Viejo, the District's understanding is that Tesoro Viejo may assert that, when Lateral 6.2 cannot be used to deliver water to the Project site, the Applicant may either use groundwater or water under Reclamation Holding Contract No. 7 to serve the Project's M&I uses. Neither option would allow Tesoro Viejo to avoid augmentation and recirculation of the FONSI.

Madera-5 **Groundwater.** First, neither the FONSI nor the EA contemplate the use of groundwater to serve M&I land uses. Rather, the EA considered the environmental impacts that would attend the project's reliance on groundwater under the No Action Alternative ("NAA"). It found that, if no water is delivered to the project site via the use of Lateral 6.2, "water would need to be piped from MID's point of diversion on North Fork Willow Creek, or from groundwater wells currently being used to irrigate existing almond orchards approximately eight miles to the west of the project site, and/or pumped from newly drilled groundwater wells on the project site." (EA at 26-27.) But, as the EA recognizes, "[n]one of these alternative water supply sources are practicable" because "[t]here would be *substantial environmental impacts* associated with building miles of new canal and and/or pipeline connections to either MID's point of diversion on North Fork Willow Creek or the almond orchards eight miles to the west." (*Id.* at 27 [emphasis added].) The EA also dismissed the possibility of on-site groundwater pumping, finding that "on-site groundwater pumping . . . would result in unacceptable impacts to the existing critical condition of groundwater over-draft in the region."⁴ (*Id.*)

Madera-6 **Water Available Under Holding Contract No. 7.** There is likewise nothing in the FONSI or the EA to suggest the Project may use water under Tesoro Viejo's Holding Contract No. 7 for M&I uses. Rather, the EA and the FONSI represent that the Holding Contract water would be used for the irrigation of "agricultural vignettes." (See FONSI at 7; see also EA at 26 ["Agricultural irrigation water for crop cultivation that is currently supplied to the project site pursuant to Reclamation Holding Contract No. 7 would continue to be used for irrigation of the agricultural vignettes that are dispersed throughout the project site consistent with that contract."].) There is likewise no analysis of the terms of Holding Contract No. 7, and whether water supplied under that contract may be used for the M&I land uses during times when the District is not using Lateral 6.2.

⁴ Among other things, the NAA assumes that "[m]ost development would be precluded by lack of a surface water supply with the possible exception of a few single family homes." (*Id.* at 14.) And there is certainly no attempt in the EA to assess the environmental impacts associated with increased groundwater reliance in the context of the Proposed Project, which envisions "5,170 units of housing, schools and three million square feet of commercial, office and light industrial development." (*Id.* at 2.)

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June 23, 2017

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Madera-7
In short, the FONSI and the EA describe only one method for the District to deliver water to the Project – Lateral 6.2. Because water is unavailable through Lateral 6.2 for much of the year, the scope of the Proposed Action is incomplete and unclear, and the FONSI/EA should be augmented to include discussion concerning the delivery of surface water through the Rio Mesa POD. In addition, to the extent Tesoro Viejo seeks to use groundwater and/or Holding Contract water to supply the Project's M&I uses, the Proposed Action should be expanded to include the use of such water.⁵

C. The FONSI Does Not Address or Analyze Potentially Significant Effects of the Project

Madera-8
An environmental document under NEPA is required to contain information about a project's direct and indirect effects on the environment and their significance. (40 C.F.R. § 1502.16, subds. (a), (b).) The information must be sufficient to insure a fully informed and well-considered decision. (*See Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980).) Any effect that has a reasonable causal connection to the proposed action must be discussed. (*See Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983).)

The FONSI and EA do not contain important information about the Project's direct and indirect effects on the environment. Specifically, the District understands that Tesoro Viejo may seek to rely upon groundwater and/or holding contract water to supply the Project's M&I land uses. As explained above, however, neither the FONSI nor the EA describe the potential environmental effects associated with the use of such water for M&I land uses. As a result, to the extent Tesoro Viejo seeks to rely upon groundwater and/or holding contract water to supply the Project's M&I land uses, the FONSI and EA are deficient as drafted, and must be augmented.

D. The Environmental Documents Impermissibly Piecemeal Environmental Review for the Project

Madera-9
NEPA prohibits the segmentation (or piecemealing) of environmental review for different stages or approvals for a development project. (*See, e.g., O'Reilly v. United States Army Corps of Engineers*, 477 F.3d 225 (5th Cir. 2007).) The practical problem with a segmented or piecemealed project is that it results in the obscuring of environmental impacts for a project, and also forecloses potential mitigation measures. (*See id.*)

Here, the environmental review has improperly segmented the development project because Reclamation has not included analysis of the Rio Mesa POD, which will be necessary for the Project to have a reliable, year-round water supply. As discussed above,

⁵ In addition to these issues, the FONSI/EA refers to a water supply of "up to" 3,000 acre-feet per year ("AFY"). (See FONSI at 2.) This figure is inaccurate, as the District is contractually obligated to supply only 2,800 AFY to the Project, and an additional 100 AFY to another nearby project

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Madera-9
cont. ↑ Lateral 6.2 cannot be used for a substantial portion of each year and groundwater is not a feasible alternative water source. To the extent an amendment to the Warren Act contract is necessary to include the Rio Mesa POD for the Project, that would need to be analyzed under NEPA. As a result, to avoid piecemealing, the Rio Mesa POD should be included as part of the Proposed Action. (See EA at 2-3.)

E. The Scope of the Proposed Action Must Be Resolved Prior to Execution of the Temporary Construction Permit Between the District, Reclamation and the County

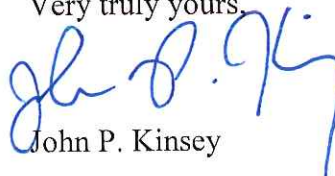
Madera-10 As you are aware, Reclamation has requested the District to execute a Temporary Construction Permit for Access to Install Crossing Structures Along the Madera Canal and Madera Irrigation District – Lateral 6.2 (the “TCP”), to facilitate project improvements. The TCP, however, is predicated upon the prior issuance of environmental commitments from Reclamation (specifically, the FONSI/EA). (See TCP ¶ 10.) As such, please understand that the District does not intend to execute the TCP until the environmental review process under NEPA has been satisfactorily completed.

F. Conclusion

Madera-11 In short, the FONSI and EA omit a critical approval necessary for the District to deliver water to the Project – *i.e.*, the Rio Mesa POD. Without discussion of the Rio Mesa POD, the scope of the Proposed Action is incomplete. As a result, the District respectfully requests that Reclamation augment the FONSI and EA to include recognition and discussion of the use of the Rio Mesa POD to supply water to the Project (and any other source of water for which Tesoro Viejo intends to use to supply water to M&I land uses).

Should you have any questions regarding the above, please do not hesitate to contact either me or Thomas A. Greci, the District’s General Manager.

Very truly yours,



John P. Kinsey

cc: Michael Jackson

Response to Madera Irrigation District Comment Letter, June 23, 2017

Madera-1 Comment noted. This comment consists of conclusory summary statements of the comments that are set forth in more detail in the remainder of the letter. Please see specific responses below.

The commenter includes a footnote to this comment that states that the “District attempted to seek a continuance of the comment period and/or a withdrawal of the FONSI pending further review and augmentation. Reclamation, however, instead requested that the District submit a comment letter on the Proposed Action.” It should be noted that the District contacted Reclamation during the public comment period for the Draft FONSI regarding the need to include an additional point of delivery for their pre-1914 Soquel water and asked Reclamation whether they should provide a comment letter and/or request an extension of the comment period in order to address the issue. The District did not request a withdrawal of the Draft FONSI and Reclamation indicated to the District that it was up to them how they chose to address the issue and that it could be addressed through the ongoing NEPA process by submitting a comment letter.

Madera-2 The commenter states that the “District was not consulted on the scope of the Proposed Action” included in the Draft FONSI. This is not an accurate reflection of the communication, coordination, and consultation that Reclamation has conducted with the District. Reclamation has dealt directly with the District regarding the various actions associated with the Tesoro Viejo project. Although the District did not see a draft of the FONSI prior to release for public review, Reclamation had coordinated directly with the District on the proposed modifications to Lateral 6.2 and the requested amendment to the District’s Warren Act Contract with Reclamation.

It should be noted that the District’s request for a point of delivery on the San Joaquin River was not included in the letter dated February 26, 2016 requesting amendment of their existing Warren Act Contract (Agreement No. 10-WC-20-3984B) “to include a relocated point of delivery for up to 3,000 af of its Soquel non-CVP water to be delivered to Tesoro Viejo, Inc. and the Tesoro Viejo Maser Mutual Water Company (collectively, “Tesoro Viejo”), for use on the Tesoro Viejo Project.” As noted above, Reclamation was made aware of the District’s need to add the San Joaquin River point of delivery after the Draft FONSI was released for public review. Reclamation agrees that it is unfortunate that this was not corrected prior to posting the Draft FONSI and will strive to provide the District with an opportunity to review, as a project proponent, any future NEPA documents prior to public circulation to ensure that the project descriptions accurately reflect the understanding of the District.

Madera-3 Reclamation has added an additional point of delivery on the San Joaquin River for Madera Irrigation District’s Soquel water to the Proposed Action. The revised language now reads: “Reclamation also proposes to add Lateral 6.2 and the San

Joaquin River as additional points of delivery to Madera Irrigation District's Warren Act Contract for the delivery of up to 3,000 AFY of Madera Irrigation District's Soquel water to Tesoro Viejo for M&I purposes."

It should be noted that the water would be delivered to Tesoro Viejo's existing Reclamation Holding Contract No. 7 facilities (referred to as the Rio Mesa POD in the comment letter). Existing river diversion pumps and water pipeline infrastructure are already in place and in use for purposes of diverting Reclamation Holding Contract No. 7 water to the Project site for irrigation purposes. No modifications of this existing diversion system are required to allow the delivery of the contracted Soquel water. As the water diverted at this location would be from the same source and used for the same purposes described and analyzed in the Draft FONSI and the Corps' EA, the additional point of delivery does not substantially change the project description or the determinations made by Reclamation. See also Response to Fresno-2.

Madera-4 As described on page 26 of the Corps EA, Tesoro Viejo Project proponents have "existing rights to withdraw groundwater from the property and to withdraw water from the San Joaquin River pursuant to Reclamation Holding Contract No. 7." As this was addressed in the Draft FONSI and the Corps EA, no augmentation or recirculation of the FONSI is needed.

Madera-5 See Responses to Madera-4 and Fresno-5. The commenter is correct that the Draft FONSI and EA do not contemplate groundwater to be used to primarily serve M&I land uses. As stated on page 2 of the Draft FONSI, the Tesoro Viejo Project proponents "have entered into a Water Supply Agreement with Madera Irrigation District in order to receive up to 3,000 acre-feet per year (AFY) of Madera Irrigation District's pre-1914 appropriative water rights to North Fork Willow Creek (referred to as Soquel water) for municipal and industrial (M&I) purposes". This is the primary source of water contemplated to sever the development. However, as described on page 26 of the Corps EA, Tesoro Viejo project proponents have "existing rights to withdraw groundwater from the property and to withdraw water from the San Joaquin River pursuant to Reclamation Holding Contract No. 7." While Tesoro Viejo does not intend to utilize groundwater as a principal source of water supply for the Project, Tesoro Viejo, as an owner of land overlying a groundwater basin, holds rights to groundwater under California law. Tesoro Viejo may utilize groundwater for Project purposes to supplement its surface water supplies if necessary to address a water supply emergency. As discussed in the Environmental Impact Report (EIR) for the Project, the maximum quantity of groundwater Tesoro Viejo would utilize is 400 AFY. If Tesoro Viejo utilizes groundwater for municipal and industrial (M&I) purposes it will construct and operate groundwater recharge facilities so that any groundwater extracted is replaced at a 1:1 ratio consistent with the

County of Madera’s groundwater balance policy¹ for new residential and commercial developments.

Madera-6 See Response to Madera-5. The commenter is correct that the Draft FONSI and EA do not contemplate Reclamation Holding Contract No. 7 supplying water to be used to primarily serve M&I land uses. As stated on page 7 of the Draft FONSI, “agricultural irrigation water for crop cultivation that is currently supplied to the Project site pursuant to Holding Contract No. 7 would continue to be used for irrigation of the agricultural vignettes that are dispersed throughout the Project area consistent with that contract.”

It should be noted that Article 7 (How owner may divert water) of Reclamation Holding Contract No. 7 states: “The United States does not and will not so far as it and its successors and assigns are concerned, object to any reasonable beneficial use of the water of the River for irrigation and/or domestic purposes exclusively upon the land described in Exhibit A: Provided, That water to supply each beneficial use or uses shall be taken only from water in the River at a point or at points upon, adjacent to or opposite said described land or at a point or at points upon said described land from underground sources.”

Madera-7 See Responses to Madera-3, Madera-5, and Madera-6.

Madera-8 Reclamation disagrees that the Draft FONSI does not address potentially significant effects of the project. The Corps reviewed the direct, indirect, and cumulative effects of its and Reclamation’s actions associated with the proposed development, including the uses, where applicable, of groundwater and/or Reclamation Holding Contract No. 7 water by Tesoro Viejo. See also Responses to Madera-5 and Madera-6.

Madera-9 Reclamation disagrees that the “environmental review improperly segmented the development project because Reclamation has not included analysis of the Rio Mesa POD, which will be necessary for the Project to have a reliable, year-round water supply.” See Response to Madera-3.

Madera-10 Comment noted. The comment does not express specific comments or concerns related to the environmental analysis in the Draft FONSI, as such, no changes or response is required.

Madera-11 See Response to Madera-3.

¹ County of Madera. 2013. Proposed Policy Governing Groundwater Balance. 52456.001\Groundwater Policy 8-22-13.