



January 7, 2020

Ernest Conant, Regional Director  
through [fmorales@usbr.gov](mailto:fmorales@usbr.gov) via email  
Bureau of Reclamation  
Sacramento, CA

[eal@usbr.gov](mailto:eal@usbr.gov) via email  
Erma Leal, Repayment Specialist  
Bureau of Reclamation  
Fresno, CA

Re: Written Comments on WIIN Act Draft Repayment Contracts between Bureau of Reclamation and Westlands Water District

Dear Regional Director Conant, Repayment Specialist Leal and Bureau of Reclamation:

By this letter our public interest organizations comment, pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. section 4321 et seq., the Endangered Species Act (ESA), 16 U.S.C. §1531 et seq., and Reclamation law, on the Bureau of

Reclamation's (Reclamation) draft agreements with Westlands Water District (Westlands) to convert Westlands' renewal contracts to repayment contracts.<sup>1</sup>

In order to proceed in the manner required by law, Reclamation must prepare an Environmental Impact Statement (EIS) under NEPA, and must engage in consultation under the ESA with the National Marine Fisheries Service and U.S. Fish and Wildlife Service before converting Westlands' contracts.

### **Reclamation Must Comply with NEPA Before entering into a Contract with Westlands**

Reclamation presently plans to enter into the contract with Westlands with the contract being permanent, and becoming effective March 1, 2020. (Draft Contract, Article 2(a), p. 13.)<sup>2</sup> The public comment period closes January 8, 2020. Pursuant to the contract, Reclamation would be obligated to deliver 1,150,000 acre-feet of Project Water to Westlands each year. (Draft Contract, Article 3(a). p. 14.) Such deliveries have many adverse environmental impacts on the watershed, including the rivers and the San Francisco-San Joaquin Bay-Delta estuary. Adverse impacts range from reducing freshwater flows and worsening already degraded Delta water quality; to further endangering and destroying endangered fish species and critical habitat; to by reducing freshwater flows worsening dangerous toxic algal blooms in the Delta; to adverse impacts on public health and safety in the Delta region; to adverse impacts on agriculture in the Delta.

Moreover, Reclamation is in the process of converting virtually all contracts, about 77 of them, into permanent contracts similar to the draft Westlands contract.<sup>3</sup> Pursuant to NEPA, "cumulative impact" "is 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. . . ." (NEPA Regulations § 1508.7.) The cumulative environmental impacts of converting all of Reclamation's contracts into permanent contracts will be enormous and adverse.

An EIS must be prepared by Reclamation before entering into a contract with Westlands. The reason is that the contract would be a major federal action significantly affecting the quality of the human environment. (42 U.S.C. § 4332(C.) "Actions include

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<sup>1</sup> AquAlliance, California Water Impact Network, California Sportfishing Protection Alliance, Center for Biological Diversity, Environmental Water Caucus, Friends of the River, Planning and Conservation League, Restore the Delta, and Sierra Club California join in this letter.

<sup>2</sup> Reclamation released the draft repayment contract for a public comment period on October 24, 2019.

<sup>3</sup> On December 20, 2019, Reclamation gave public notice on its web site that 77 contractors had requested contract conversions. A copy of the Notice is attached. The same notice said that 14 of the contract conversions had already been negotiated and the public comment period on those contract conversions would close on February 19, 2020. The subject contracts were spread among the Central, Northern, and South Central California Area Offices.

new and continuing activities, . . .” (NEPA Regulations § 1508.18(a).)<sup>4</sup> NEPA requires “that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter [NEPA], . . .” (42 U.S.C. §4332.)

NEPA processes must be integrated with other processes “at the earliest possible time to ensure that planning and decisions reflect environmental values, . . .” (NEPA Regulations § 1501.2.) Reclamation, however, has not prepared an EIS on the proposed contract. Reclamation *has not even prepared an environmental assessment* to determine whether an EIS must be prepared. (NEPA Regulations §§ 1501.3; 1508.9.) Reclamation has not made a “finding of no significant impact” on the action. (NEPA Regulations § 1508.13.) Reclamation has not instituted the required “scoping” process and has not published a notice of intent in the Federal Register. (NEPA Regulations § 1501.7.) Reclamation has not prepared a categorical exclusion or notice thereof on the contract. (NEPA Regulations § 1508.4.) The subject action would not in any event qualify for a categorical exclusion. Consequently, Reclamation has not furnished the public any information whatsoever, by which to evaluate the potential environmental consequences of the contract and the water diversions and deliveries authorized by it. Reclamation also has not furnished the public any information whatsoever, by which to evaluate the *cumulative* environmental impacts of all of the contract conversions in Reclamation’s pipeline and the water diversions and deliveries authorized by them. Reclamation has not prepared a single EIS on the related contract conversions (NEPA Regulations § 1502.4(a) and has not prepared a broad “program” EIS on the contract conversions in its pipeline. (NEPA Regulations § 1502.4(b.) Reclamation has not prepared any “environmental document” on its action. (NEPA Regulations §1508.10.)

The EIS section on “alternatives” “is the heart of the environmental impact statement.” (NEPA Regulations § 1502.14.) The alternatives section,

should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decision-maker and the public. (NEPA Regulations § 1502.14.)

An environmental assessment also must include discussion of alternatives. Reclamation must prepare an EIS or first prepare an environmental assessment and then an EIS, which must “Rigorously explore and objectively evaluate all reasonable alternatives, . . .” to the action. (NEPA Regulations § 1502.14(a.) The EIS will necessarily include alternatives that reduce deliveries of project water in order to increase freshwater flows and begin to restore watershed rivers and the Delta.

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<sup>4</sup> The NEPA Regulations are codified at 40 C.F.R. §1500 et seq.

The Ninth Circuit Court of Appeals reversed a district court decision denying environmental plaintiffs' summary judgment because the challenged environmental document issued by Reclamation under NEPA, "did not give full and meaningful consideration to the alternative of a reduction in maximum water quantities." (*Pacific Coast Federation of Fishermen's Assn's v. U.S. Dept. of the Interior*, 655 Fed.Appx. 595, 2016 WL 3974183\*3 (9th Cir., No. 14-15514, July 25, 2016) (Not selected for publication).) "Reclamation's decision not to give full and meaningful consideration to the alternative of a reduction in maximum interim contract water quantities was an abuse of discretion and the agency did not adequately explain why it eliminated this alternative from detailed study." (*Id.* at \*2.) Reclamation's "reasoning in large part reflects a policy decision to promote the economic security of agricultural users, rather than an explanation of why reducing maximum contract quantities was so infeasible as to preclude study of its environmental impacts." (*Id.* at \*3.)

The requirement under NEPA to consider the alternative of reducing exports to increase flows through the Delta is so obvious that the Ninth Circuit's decision was not selected for publication because no new legal analysis was required to reach the decision. The decision pertained to interim two-year contract renewals. If the alternative of reducing exports must be considered during renewal of two-year interim contracts, it most assuredly must be considered before entering into permanent contracts. Moreover, "an alternative may be reasonable, and therefore required by NEPA to be discussed in the EIS, even though it requires legislative action to put it into effect." *Kilroy v. Ruckelshaus*, 738 F.2d 1448, 1454 (9th Cir. 1984.)

Reclamation will fail to proceed in the manner required by NEPA if it enters into the Westlands contract without having first prepared and issued an EIS.

### **Reclamation's Action is Discretionary**

We have not seen any communication from Reclamation explaining why it is proceeding to enter into the Westlands contract as if there is no NEPA statute. Reclamation does refer in "whereas" clauses in the draft contract to the Water Infrastructure Improvements for the Nation Act (Pub. L.) 114-322, 130 Stat. 1628), Section 4011 (a-d) and (f) (WINN Act.) The contract recites,

WHEREAS, 4011(a)(1) provides that 'upon request of the contractor, the Secretary of the Interior *shall* convert any water service contract in effect on the date of enactment of this subtitle and between the United States and a water users' Association [Contractor] to allow for prepayment of the repayment contract pursuant to paragraph (2) *under mutually agreeable terms and conditions.*' (Draft Contract, 8<sup>th</sup> Whereas clause, p. 4; also, 20<sup>th</sup> Whereas clause, p. 8.) (Emphasis added.)

Reclamation may contend that the WINN Act including use of the word "shall" makes entry into the conversion contracts non-discretionary and thus not subject to

NEPA. As provided by WINN Act section 4011(a)(1), however, the terms and conditions *must be mutually agreeable* meaning they must be agreeable to the Secretary of the Interior, as well as to the contractor. That means under the plain language of the Act, the Secretary of the Interior retains discretion because the terms and conditions of the contracts must be agreeable to him. In *Aluminum Co. of America v. Central Lincoln Util. Dist.*, 467 U.S. 380, 397 (1984), the Supreme Court held,

Because the Regional Act does not comprehensively establish the terms on which power is to be supplied to DSIs [direct-service industrial customers] under the new contracts, it is our view that the Administrator has broad discretion to negotiate them.

NEPA cases have rejected efforts by agencies to avoid complying with NEPA by contending their actions are non-discretionary, when there is some discretion.<sup>5</sup>

The Secretary of the Interior has discretion to determine contract terms and conditions that are agreeable to him. That being the case, Reclamation must comply with NEPA before, not after, converting the water contracts.

### **NEPA Compliance is also Required by the Central Valley Project Improvement Act Before entering into Conversion Contracts**

Savings language in the WINN Act (section 4012(a)(2) requires,

This subtitle shall not be interpreted or implemented in a manner that—

[omitted]

(2) affects or modifies any obligation under the Central Valley Project Improvement Act [CVPIA] (Public Law 102-575; 106 Stat. 4706), except for the savings provisions for the Stanislaus River predator management program expressly established by section 11 (d) and provisions in section 11(g);

[omitted]

The CVPIA was enacted in 1992 to reduce adverse environmental impacts of Central Valley Project (CVP) operations. The CVPIA requires preparation of an EIS before Reclamation renews any long-term water service contract. (CVPIA §§ 3402(a), 3404(c)(1.) That requirement has not been eliminated by the WINN Act.

Reclamation must prepare an EIS before entering into the contract with Westlands.

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<sup>5</sup> Such cases include *Forelaws on Board v. Johnson*, 743 F.2d 677 (9<sup>th</sup> Cir. 1984.)

## **Examples of Environmental Issues Ignored by Reclamation's Failure to Prepare an EIS or even an Environmental Assessment**

The NEPA Regulations give guidance on whether an action "significantly" affects the quality of the human environment. "' Significantly' as used in NEPA requires considerations of both context and intensity." (NEPA Regulations § 1508.27.) Ten factors are listed in § 1508.27(b) 1-10 in evaluating intensity meaning severity of the impact.

*1508.27(b)(2) The degree to which the proposed action affects public health or safety*

The water deliveries to Westlands diminish freshwater flows through the Delta which decreases water supplies and water quality and worsens the amount and frequency of toxic algal blooms in the Delta. That is one of the ways by which the action affects public health and safety.

### *(3) Unique characteristics of the geographic area*

The Delta already fails to meet established water quality standards and is an ecologically critical area. The water deliveries to Westlands exacerbate the decline of the Delta.

*(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.*

The effects of the contract will be highly controversial because of the worsening water supply and water quality crisis in the Delta. The controversy is evidenced by the recent article in the Los Angeles Times entitled *Feds set to lock-in huge water contract for well-connected Westlands Water District* (Bettina Boxall, Los Angeles Times November 11, 2019). According to pertinent information in the article,

The deal would entitle Westlands to annual deliveries that are roughly double what the entire city of Los Angeles uses in a year.

But even partial deliveries result in huge quantities of water flowing from the ailing Sacramento-San Joaquin Delta to hundreds of thousands of district acres farmed by some of California's wealthiest growers.

Long-term control would also allow Westlands to make lucrative water sales to thirsty cities and other agricultural agencies, although district officials say they have no intent to do so.

The prospect of Westlands having a permanent call on so much water for so much water-- regardless of how many salted-up, badly drained acres the district may eventually take out of production or convert to solar farms-- is reviving long-standing criticisms of its contract with the U.S. Bureau of Reclamation.

‘What they’re doing is locking in on a seemingly permanent basis an inflated baseline for themselves at a time when we know they’re going to be irrigating less land in the future. It is just hard to see how that’s in the public’s interest,’ said Rep. Jared Huffman (D-San Rafael), who is demanding more contract details in his role as chairman of a House natural resources subcommittee.

In contrast, the so-called repayment contract the Bureau now proposes to award Westlands would not expire, permanently locking in the terms, including the amount of 1.15 million acre-feet of water.

In California, about 70 Central Valley Project contractors-- most of them farm irrigation districts-- have started negotiations to convert the contracts, according to the reclamation bureau, which oversees a vast irrigation project that greened the Central Valley with copious amounts of federally subsidized water deliveries. The size of Westlands’ water contract has long been controversial in light of the soil problems that plague the 600,000-acre district. Much of it sits atop a clay layer, which prevents water from draining easily and concentrates toxic metals, including naturally occurring selenium.

In the early 1980s, wastewater from Westlands’ fields poisoned waterfowl at the Kesterson National Wildlife Refuge, setting off a long legal battle over its drainage.

The new contract doesn’t include the water reduction. Nor does it contain provisions for reassessing delivery amounts if Westlands retires land on its own without a drainage settlement.<sup>6</sup>

The Westlands contract is highly controversial.

*(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks*

Because Reclamation has failed to engage in any NEPA environmental analysis whatsoever, the impacts of the contract are highly uncertain.

*(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*

About 77 contractors started negotiations to convert the contracts. Converting the Westlands contract would, therefore, establish a precedent for future actions with significant effects.

*(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts.*

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<sup>6</sup> Relying on a newspaper article for factual information is a product of Reclamation not providing any factual information whatsoever in its complete ignoring of NEPA.

The Westlands contract conversion is related to other contract conversions in the pipeline that would have cumulatively significant impacts.

*(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat*

Endangered winter-run Chinook salmon, threatened spring-run Chinook salmon, Central Valley steelhead, Green Sturgeon, and Delta smelt continue to decline because of the reductions in water quality and flows resulting in rising temperatures, increased salinity, and sedimentation. CVP water deliveries harm the fish by reducing water flows and worsen the contamination of San Joaquin Valley surface waters, groundwater, and soils with pollutants including selenium.

*(10) Whether the action threatens a violation of federal, state, or local law or requirements imposed for the protection of the environment*

It appears that the contract would violate reclamation law by enlarging the service area and water quantities beyond the limits authorized by Congress. Reclamation's refusal to prepare an EIS appears designed to facilitate the violation of reclamation law by not providing any information whatsoever by which the public can evaluate how much land will remain in production for how long and how much land will be retired from agricultural production and when.

Reclamation must prepare an EIS before entering into the contract with Westlands.

### **Reclamation must Comply with the Endangered Species Act Before entering into the Contract with Westlands**

Savings language in the WINN Act (section 4012(a)(3) requires,

This subtitle shall not be interpreted or implemented in a manner that—

[omitted]

(3) overrides, modifies, or amends the applicability of the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) or the application of the smelt and salmonid biological opinions to the operation of the Central Valley Project or the State Water Project;

[omitted]

Endangered Species Act (ESA) section 7, 16 U.S. §1536(a)(2) requires consultation to ensure that an agency action is not likely to jeopardize the continued existence of any endangered species or result in destruction or adverse modification of its critical habitat. After initiation of the required consultation the agency shall not make any irreversible or irretrievable commitment of resources with respect to the action which has

the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures. (16 U.S.C. § 1536 (d.))

Reclamation must enter into the required ESA consultation and not enter into the Westlands contract until ESA compliance has been completed.

### Conclusion

Reclamation must comply with NEPA and the ESA before entering into the contract with Westlands. That means Reclamation must prepare an EIS and enter into ESA consultation before entering into the contract with Westlands.

Contacts for this comment letter are Conner Everts, Facilitator, Environmental Water Caucus (310) 804-6615 or [connere@gmail.com](mailto:connere@gmail.com) , or Robert Wright, Counsel, Sierra Club California (916) 557-1104 or [bwrightatty@gmail.com](mailto:bwrightatty@gmail.com) . We would do our best to answer any questions you may have.

Sincerely,



E. Robert Wright, Counsel  
Sierra Club California



Kathryn Phillips, Director  
Sierra Club California



Barbara Barrigan-Parrilla, Executive  
Director, Restore the Delta



Conner Everts, Facilitator  
Environmental Water Caucus



Jeff Miller, Senior Conservation Advocate  
Center for Biological Diversity



Carolee Krieger, Executive Director  
California Water Impact Network



Barbara Vlamis, Executive Director  
AquAlliance



Bill Jennings, Executive Director  
California Sportfishing Protection  
Alliance



Ron Stork  
Senior Policy Staff  
Friends of the River



Jonas Minton, Senior Water Policy  
Advisor  
Planning and Conservation League

Attachment:

Bureau of Reclamation December 20, 2019 web site Notice