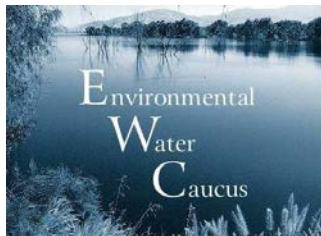




NORTH  
COAST  
RIVERS  
ALLIANCE



### CA Save Our Streams Council



May 3, 2016

The Honorable Sally Jewell  
Secretary of the Interior  
U.S. Department of the Interior  
1849 C Street, NW  
Washington, DC 20240  
[Secretary\\_jewell@ios.doi.gov](mailto:Secretary_jewell@ios.doi.gov)

**Re: URGENT: Proposed Agreement for Northerly San Luis CVP Districts--Grassland Drainers--would Violate Federal Laws of the United States: NEPA Compliance Requires Analysis & Full Disclosure of this Secret Agreement.**

Dear Secretary Jewell:

Our organizations are devoted to protecting and restoring California waterways for all beneficial uses. We submit this letter to you as a matter of extreme urgency to prevent violation of the National Environmental Policy Act (NEPA), Clean Water Act (CWA), and Endangered

Species Act (ESA), and potentially triggering violations of the Migratory Bird Treaty Act and other federal laws and tribal rights if the proposed action is concluded prior to a full environmental impact analysis and compliance with these laws.

Reportedly, the United States government has been negotiating the proposed water deal in secret--an agreement related to the Northerly San Luis Unit CVP Water Districts. This secret agreement is with three public water districts within the San Luis Unit of the Central Valley Project - Panoche, Pacheco and San Luis (Northerly Districts), and likely would include the lands within Broadview Water District now owned by Westlands Water District. The proposed agreement would likely also change existing Federal San Luis Drain use agreements, which require zero discharge of salts or selenium from the San Luis Drain to the San Joaquin River after 2019.

This new secret agreement apparently calls for a \$70 million dollar gift of public money—and water contract in perpetuity with no capital repayments, with no acreage limitations, and guarantees for subsidized water, while suggesting discharges of contaminated storm water through the federal San Luis Drain to the San Joaquin River and Delta Estuary would be sanctioned by federal fiat. This agreement proposes to provide a permanent water contract, billing the American taxpayer for the capital costs and providing no clear toxic control strategy for hundreds of millions of gallons of polluted water that would continue to be created by irrigating these toxic soils. The cumulative impacts of this proposed Northerly Districts' secret agreement and the Westlands Water District settlement signed in September 2015, are not disclosed or analyzed.

The public has been shut out of information about this secret deal. Public evaluation and review of the environmental impacts of such an agreement, along with the control and clean up caused by irrigating these toxic soils including salts, selenium, and other contaminants and other environmental issues, has not occurred as required by NEPA and ESA. Such a "secret agreement" process violates the very foundation of our environmental laws that require public environmental impact analysis and consideration of a range of reasonable alternatives *before* rather than *after* government action. "NEPA procedures must ensure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." NEPA Regulations, 40 C.F.R. § 1500.1(b).

NEPA is an "environmental full disclosure law." *Silvav Lynn*, 482 F.2d 1282, 1284 (1st Cir. 1973). "An agency must use its best efforts to find out all that it reasonably can" about the subject and its environmental impacts. *Barnes v. U.S. Dept. of Transp.*, 655 F.3d 1124, 1136 (9th Cir. 2011). The Ninth Circuit has held in *Oregon Natural Desert Assn. v. Bureau of Land Management*, 625 F.3d 1092, 1111 (9th Cir. 2010), that: The Attorney General lacks the power 'to agree to settlement terms that would violate the civil laws governing the agency,' *United States v. Carpenter*, 526 F.3d 1237, 1242 (9th Cir. 2008) (quoting *Executive Bus. Media, Inc. v. U.S. Dep't of Def.*, 3 F.3d 759, 761 (4th Cir. 1993)), so the Utah settlement is only valid if it comports with the FLPMA, NEPA, and other relevant law. And, in the situation with the proposed Northerly Districts "agreement", there is no litigation to settle, so why are environmental laws ignored and an agreement hatched in secret?

An agreement in which the water supply to the Northerly Districts would be permanent, polluted discharges to the San Joaquin River sanctioned, and lands are included that have no drainage problem is arbitrary and unjustified. There is no rationale for why these select San Luis Unit CVP contractors should receive such preferential financial treatment and potentially a higher water delivery priority. The terms and conditions of how discharges of toxic pollution which would impact other downstream beneficial users is not disclosed. Further there is no information regarding the impacts of potentially shifting hundreds of millions of dollars to the CVP power users in the Bay Area, Sacramento, City of Roseville, and other Northern California power users or to the taxpayers in order to meet existing CVP repayment obligations by 2030 as required pursuant to P.L. 99-456 [100 Stat 3050].

Additionally there is no information as to how the water pollution controls, environmental protections and financing costs for the proposed agreement will be paid and what impacts meeting state endangered species and water quality protection law will have on the State of California along with other water and power users. The terms of the proposed agreement need to be disclosed and evaluated in a public NEPA process *prior to approval*. *Prior to being agreed to*, the agreement terms must be subject to environmental, scoping, and alternatives analysis under NEPA and the ESA.

Federal scientists and federal agencies have been clear, the best solution to the pollution caused by irrigating these toxic soils would be to retire the majority of the Northerly Districts' drainage impaired lands from irrigation. Instead, the government's negotiations with the Northerly Districts are headed toward producing the worst possible environmental outcome of continuing to irrigate lands producing toxic amounts of salt and selenium, with potentially devastating impacts on fish and wildlife.

Cumulative impacts will fall upon land owners and downstream beneficial uses. Under a federal use agreement, hundreds of cubic yards of sediment containing selenium and other contaminants have been discharged to the San Luis Drain by these Grassland Drainers--the same Northerly Districts. Any storm water discharge sanctioned by this proposed agreement would likely mobilize these toxic levels of selenium sending them downstream. A decision to use this federal facility to discharge storm water high in selenium and other contaminants to the wetland areas downstream, the sloughs, San Joaquin River and into the Delta estuary, could have devastating environmental impacts on endangered fish and wildlife, migratory birds and other downstream beneficial uses. Prior to making such a decision a full environmental analysis and compliance with existing federal laws is needed.

It is time to have the proposed agreement fully evaluated by the public as required by NEPA, the ESA and the Clean Water Act. A full evaluation is needed of how the proposed agreement will avoid violating the Migratory Bird Treaty Act and avoid impacts that imperil the Pacific Flyway and the wintering grounds and food supplies in the downstream San Francisco Bay Delta Estuary. Water quality impacts from the proposed discharges likely will be magnified if the proposed Delta Water Export Tunnels are constructed. In light of the current extreme drought, which has further endangered fish and water supplies and required sacrifices by millions of Californians, crafting a secret and lucrative deal benefiting the Northerly Districts, while ignoring public NEPA and ESA processes, is incomprehensible.

Additional violations of Federal laws resulting from the proposed agreement terms include:

1. The continued authorization of water supply to irrigate poisoned lands within the Northerly Districts, which have been recommended for retirement by Reclamation and other federal agencies (in some cases already retired), would be contrary to Reclamation laws and regulations going back to the beginning of the 20<sup>th</sup> century.
2. Because the new agreement attempts to lock in a "contract total" in a permanent contract, it will potentially allow a substantial increase in future exports from the Delta watershed by the Central Valley Project (CVP) and the Northerly Districts. This would conflict with California state law established by the Delta Reform Act, calling for reduced reliance on the Delta. In addition to requiring NEPA and ESA compliance this appears to violate the Reclamation Act of 1992 (CVPIA).
3. Violation of NEPA, the ESA and the CVPIA by approving key terms of the next CVP San Luis Unit Northerly Districts' contracts, including permanent water contract amounts, before environmental review.
4. Issuance of a new long-term CVP contract for the selected CVP San Luis Unit Northerly Districts is in violation CVPIA.
5. Waiving acreage limits for the CVP San Luis Unit Northerly Districts is contrary to Reclamation Acts, including 1902 and 1982.
6. Waiving tiered pricing for the CVP San Luis Unit Northerly Districts is contrary to the Central Valley Project Improvement Act of 1992.
7. Waiving the CVP San Luis Unit Northerly Districts' capital repayment obligations is contrary to the Reclamation Acts including 1939 and 1982.

The proposed agreement terms clearly would cause numerous adverse environmental impacts and adverse cumulative impacts, which requires preparation of an Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA). The agreement terms would also have adverse impacts on listed species and designated critical habitats, which requires preparation of a biological assessment by the Bureau and consultations with the National Marine Fisheries Service and U.S. Fish and Wildlife Service under the ESA.

All persons involved with approving or reviewing the proposed agreement at the Department of Justice, Department of the Interior, other concerned federal agencies and also the Court must be aware of the Ninth Circuit holding in *Oregon Natural Desert Assn. v. Bureau of Land Management*, 625 F.3d 1092, 1111 (9<sup>th</sup> Cir. 2010) set forth at the beginning of this letter, that:

The Attorney General lacks the power 'to agree to settlement terms that would violate the civil laws governing the agency,' *United States v. Carpenter*, 526 F.3d 1237, 1242 (9<sup>th</sup> Cir. 2008) (quoting *Executive Bus. Media, Inc. v. U.S. Dep't of Def.*, 3 F.3d 759, 761 (4<sup>th</sup> Cir. 1993)), so the

Utah settlement is only valid if it comports with the FLPMA, NEPA, and other relevant law.<sup>1</sup> For the same reason, it is inappropriate for Reclamation or the Interior Department to approve an agreement with the Northerly Districts that violates NEPA and other federal laws.

You are hereby requested to immediately transmit a copy of this letter to the persons reviewing the proposed Northerly Districts agreement at the Department of Justice. You are also hereby requested to immediately transmit a copy of this letter to the responsible officials for the agreement and negotiations at the Bureau of Reclamation and the Department of the Interior, and to appropriate officers and employees of the National Marine Fisheries Service and U.S. Environmental Protection Agency.

It is only possible to determine if the proposed agreement comports with NEPA by carrying out the NEPA process before reaching a decision. Please feel free to contact Bill Jennings to discuss this situation or with any questions you may have at (209) 464-5067 or at [deltakeep@me.com](mailto:deltakeep@me.com).

Sincerely,



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Suzette M. Kimball, Director of US Geological Survey  
Christy Goldfuss, Managing Director Council on Environmental Quality  
Gina McCarthy, Administrator, Environmental Protection Agency  
Penny Pritzker, Secretary of Commerce

#### Interested Parties

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<sup>i</sup> The Ninth Circuit said in *United States v. Carpenter*, 526 F.3d 1237, 1242 (9th Cir. 2008), that: “Our conclusion is in line with a decision of the Fourth Circuit in a similar context. Relying on this Court’s opinion in *Guadamuz [v. Bowen]*, 859 F.2d 762, 767 (9th Cir. 1988)] the Fourth Circuit held, in *Executive Business Media, Inc. v. U.S. Department of Defense*, 3 F.3d 759, 761 (4th Cir.1993), that the Attorney General’s decision to settle a contract case was judicially reviewable where the claim alleged that the settlement ‘fail[ed] to comply with competitive bidding procedures.’ Acknowledging the Attorney General’s plenary power over litigation to which the federal government is a party, the Fourth Circuit nevertheless explained that ‘plenary power means absolute authority to pursue legitimate objectives and does not include license to agree to settlement terms that would violate the civil laws governing the agency.’ *Id. at 762*. We find the Fourth Circuit’s reasoning persuasive in this case. We agree with its statement that, ‘[w]e think it alien to our concept of law to allow the chief legal officer of the country to violate its laws under the cover of settling litigation. The Attorney General’s authority to settle litigation for its government clients stops at the walls of illegality.’ *Id. at 762*. We adopt the reasoning of the Fourth Circuit in *Executive Business*.”