



August 20, 2020

Ernest Conant, Regional Director
through fmorales@usbr.gov
U.S. Bureau of Reclamation
Sacramento, CA

Jacob J. Berens all via email
jberens@usbr.gov
Northern California Area Office
U.S. Bureau of Reclamation

Ryan Everest, Repayment Specialist
reverest@usbr.gov
Northern California Area Office
U.S. Bureau of Reclamation

Georgina Gregory, Repayment Supervisor
ggregory@usbr.gov
Central California Area Office
U.S. Bureau of Reclamation

Re: Written Comments on WIIN Act Draft Repayment Contracts and Contract Amendments between Bureau of Reclamation and Water Contractors in the Delta and Sacramento River Divisions

Dear Regional Director Conant, Repayment Specialist Everest, Mr. Berens, Repayment Supervisor Gregory and U.S. 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

909 12th Street, Suite 202, Sacramento, CA 95814
(916) 557-1100 FAX (916) 557-9669 www.sierraclubcalifornia.org

Species Act (ESA), 16 U.S.C. §1531 et seq., and Reclamation law, on the Bureau of Reclamation's (Reclamation) draft contracts and amendments to contracts with Central Valley Project (CVP) water contractors (hereinafter referred to as "Water Contractors") to convert renewal contracts to *permanent* repayment contracts.¹

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 the contracts. Reclamation, however, has not complied with NEPA by either preparing an EIS on each individual contract, or by preparing a broad "program" EIS on the direct and cumulative environmental consequences of converting all of the contracts. Reclamation, likewise, has not complied with the ESA.

The contracts we refer to in this letter are 16 contracts and/or amendments to 16 existing contracts in the Delta and Sacramento River Divisions. Comments are due on the 15 contracts in the Delta Division on August 31, 2020. Comments are due on the Sacramento River Division contract on August 28, 2020.

These 16 contracts *lock-in deliveries of about 577,106 acre-feet of water per year*. The Westlands Water District contract that locked in 1,150,000 acre-feet of water per year was the subject of our January 7, 2020, joint comment letter. The American River Division contracts which locked in 606,200 acre-feet of water per year and Delta Division contracts locking in deliveries of 42,948 acre-feet of water per year, were the subjects of our February 15, 2020, joint comment letter. The 23 contracts locking in deliveries of 451,756 acre-feet of water per year were the subjects of our April 22, 2020 joint comment letter to you. The 4 contracts locking in deliveries of 43,203 acre-feet of water per year were the subject of an August 7, 2020 comment letter to you from three of our organizations, Restore the Delta, Center for Biological Diversity, and Planning and Conservation League. *All of these contract conversions collectively, would lock-in deliveries of about 2,871,213 acre-feet of water per year*. And all with no NEPA or ESA compliance whatsoever.

The 16 contracts in the Delta and Sacramento River Divisions that are the subjects of this comment letter are identified on page 11, following the signatures at the end of this letter.

¹ 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.

Reclamation Must Comply with NEPA Before Converting the Contracts

Reclamation is converting the contracts with the Water Contractors without any compliance with NEPA. Pursuant to the contracts, Reclamation would be obligated to deliver quantities of water to the Water Contractors each year. Forever. The amended contracts are *permanent*.

Such deliveries have many adverse environmental impacts on the watershed, including the rivers and the San Francisco-San Joaquin Bay-Delta estuary. Adverse impacts include reducing freshwater flows and worsening already degraded Delta water quality; to further endangering and destroying endangered and threatened 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.

Consumptive water rights claims are *5 1/2 times more* than available supply. *Permanent* contracts in the absence of any environmental review whatsoever are a thoughtless recipe for disaster. Especially in the face of reduced runoff, increasing sea level rise and salinity intrusion due to climate change while ignoring progress with such measures as water conservation and recycling reducing the need for water deliveries.

Reclamation is in the process of converting virtually all contracts, about 75 of them, into permanent contracts similar to the first one, the draft Westlands contract.² 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.)³ The cumulative environmental impacts of converting all of Reclamation’s contracts into permanent contracts will be enormous and adverse.

An EIS or at least an environmental assessment (EA) must be prepared by Reclamation before entering into any of the contract amendments. The reason is that each contract conversion would be a major federal action that may significantly affect the quality of the human environment. (42 U.S.C. § 4332(C.) “Actions include new and continuing activities,” (NEPA Regulations § 1508.18(a.) 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.)

² On December 20, 2019, Reclamation gave public notice on its web site that 75 CVP contractors had requested contract conversions. The subject contracts were spread among the Central, Northern, and South Central California Area Offices.

³ The NEPA Regulations are codified at 40 C.F.R. §1500 et seq.

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 contracts. Reclamation *has not even prepared an EA* 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 actions. (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 contracts. (NEPA Regulations § 1508.4.) The subject actions 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 contracts and the water diversions and deliveries authorized by them. 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 EA also must include discussion of alternatives. Reclamation must prepare an EIS or first prepare an EA 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. Alternatives reducing deliveries will also reflect lessened needs for deliveries due to progress in water recycling, conservation, and other modern innovations.

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 contracts 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 contracts as if there is no NEPA statute. Reclamation does refer in “whereas” clauses in the draft contract amendments to the Water Infrastructure Improvements for the Nation Act (Pub. L.) 114-322, 130 Stat. 1628), Section 4011 (a-d) and (f) (WINN Act.) For example, the Del Puerto Water District contract recites in the 13th Whereas clause, p. 4, “WHEREAS, on December 16, 2016, the 114th Congress of the United States of America enacted the WIIN Act;” The contract then recites in the 14th Whereas clause, pp. 4-5,

WHEREAS, Section 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.*”; (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.⁴

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 or amending the water contracts.

NEPA Compliance is also Required by the Central Valley Project Improvement Act Before Converting the 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 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 contracts.

⁴ Such cases include *Forelaws on Board v. Johnson*, 743 F.2d 677 (9th Cir. 1984.)

Reclamation Must Prepare an EIS Before Amending the Contracts

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. The factors make it clear an EIS is required here.

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

The water deliveries to the contractors diminish freshwater flows through the Delta which decreases water supplies and water quality and worsens the amount and frequency of harmful 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 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 contracts will be highly controversial because of the worsening water supply and water quality crisis in the Delta.

(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 contracts 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 75 contractors started negotiations to convert the contracts. Converting these contracts in the pipeline 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.

Each contract conversion is related to other contract conversions in the pipeline that would have cumulatively significant impacts. This includes contract conversions that were the subjects of our January 7, February 15, and April 22, 2020 joint comment letters.

(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 surface waters, groundwater, and soils with pollutants including selenium. The State Water Resources Control Board (SWRCB) explained in its comments on Reclamation's Draft EIS for Reinitiation of Consultation on the Coordinated Long-Term Operation of the CVP and State Water Project (SWP)(September 25, 2019),

Available scientific knowledge indicates that decreasing freshwater flows in the Bay-Delta watershed and increasing exports and associated reverse flows in the interior Delta is expected to have a negative impact on the survival and abundance of native fish species, including threatened and endangered species that are the subject of the existing BiOps for the Projects. There is a body of scientific evidence that increased freshwater flows through the Delta and aquatic habitat restoration are needed to protect Bay-Delta ecosystem processes and native and migratory fish. Accordingly, it is not clear how the proposed project will not further degrade conditions for fish and wildlife species that are already in poor condition, some of which are on the verge of functional extinction or extirpation.⁵

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

The contract conversions threaten violation of federal and state law and requirements imposed for protection of the environment.

Reclamation must prepare an EIS, or an EA followed by an EIS before entering into the contracts.

Reclamation must Comply with the Endangered Species Act Before Converting the Contracts

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

⁵ SWRCB comment letter p.3. [A copy of the SWRCB letter is attached.](#)

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 or threatened 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 contracts until ESA compliance has been completed.

Conclusion

Reclamation must comply with NEPA and the ESA before converting the contracts. That means Reclamation must prepare an EIS and enter into ESA consultation before converting the contracts.

Contacts for this comment letter are Conner Everts, Facilitator, Environmental Water Caucus (310) 804-6615 or connere@gmail.com , or Robert Wright, Counsel, Sierra Club California (916) 557-1104 or 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



John Buse, Senior Counsel
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



Eric Wesselman
Executive Director
Friends of the River



Jonas Minton, Senior Water Policy
Advisor
Planning and Conservation League

Attachment: SWRCB letter, *Comments on Draft Environmental Impact Statement for the Reinitiation of Consultation on the Coordinated Long-Term Operation of the Central Valley Project and State Water Project* (September 25, 2019)

LIST OF CONTRACTS COMMENTED ON BY THIS LETTER

<i>Delta Division</i>	<i>Contract No.</i>	<i>Acre Feet Per Year</i>
Contra Costa Water District	175r-3401A-LTR1-P	195,000
Banta-Carbona Irrigation District	14-06-200-4305A-LTR1-P	20,000
Byron-Bethany Irrigation District	14-06-200-785-LTR1-P	20,600
Del Puerto Water District	14-06-200-922-LTR1-P	140,210
Eagle Field Water District	14-06-200-7754-LTR1-P	4,550
Fresno Slough Water District	14-06-200-4019A-LTR1-P	4,000
James Irrigation District	14-06-200-700-A-LTR1-P	35,300
Mercy Springs Water District	14-06-200-3365A-LTR1-P	2,842
Patterson Irrigation District	14-06-200-3598A-LTR1-P	16,500
Reclamation District No. 1606	14-06-200-3802A-LTR1-P	228
The West Side Irrigation District	7-07-20-W0045-LTR1-P	5,000
Tranquillity Irrigation District	14-06-200-701-A-LTR1-P	13,800
Tranquillity Public Utilities District	14-06-200-3537A-LTR1-P	70
West Stanislaus Irrigation District	14-06-200-1072-LTR1-P	50,000
Westlands Water District - Assigned from Oro Loma Water District	14-06-200-7823J-LTR1-P	4,000
<i>Sacramento River Division</i>	<i>Contract No.</i>	<i>Acre Feet Per Year</i>
Westside Water District	14-06-200-8222-P	65,000
<i>Total Acre Feet of Water Deliveries per year locked in by contracts</i>		577,106