



July 7, 2017

Via Email

Jennifer Faler
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RE: Comments of WildEarth Guardians on the Environmental Assessment for the Long Term Contract between Reclamation and the Albuquerque-Bernalillo County Water Utility Authority for Storage of San Juan-Chama Water in Elephant Butte Reservoir, New Mexico dated June 2017

Dear Jennifer:

This letter is submitted by WildEarth Guardians (“Guardians”) to provide the U.S. Bureau of Reclamation (“Reclamation”) with our ongoing concerns with Reclamation’s proposed grant of a long-term contract for storage of San Juan-Chama water in Elephant Butte Reservoir as detailed in the *Environmental Assessment for the Long Term Contract between Reclamation and the Albuquerque-Bernalillo County Water Utility Authority for Storage of San Juan-Chama Water in Elephant Butte Reservoir, New Mexico* dated June 2017 (“EA”). I appreciate the heads up and your solicitation of our comments.

As you may know, Guardians became involved in the review of the implementation of the 2008 Operating Agreement on June 7, 2013 when we commented on the *Draft Supplemental Environmental Assessment for the Rio Grande Operating Procedures, New Mexico and Texas* dated May 8, 2013 (“Draft SEA”). On June 8, 2016, Guardians continued its participation by commenting on the *Draft Environmental Impact Statement for the Continued Implementation of the 2008 Operating Agreement for the Rio Grande Project, New Mexico and Texas* dated March 2016 (“DEIS”), which also included the analysis of a multi-year contract for storage of San Juan-Chama Project water in Elephant Butte Reservoir. Finally, Guardians subsequently commented on the *Final Environmental Impact Statement for the Continued Implementation of the 2008 Operating Agreement for the Rio Grande Project, New Mexico and Texas* dated September 30, 2016 (“FEIS”) summarizing our ongoing concerns. Guardians’ three prior comment letters (in their entirety) are attached and incorporated herein by this reference.

As indicated in our prior letters, we are not satisfied with the scope of the analysis completed by Reclamation and believe that the agency has not done enough to meet the requirements of National Environmental Policy Act (“NEPA”). 42 U.S.C. § 4312 *et seq.*; 40 C.F.R. Parts 1500-1508; 43 C.F.R. 46.10-46.45. While we appreciate that Reclamation did not go forward with including the long-term storage contract as part of the 2016 Record of Decision, we do not believe that the

additional EA does enough to evaluate the impacts that flow from the approval of the long-term contract as required by NEPA and its implementing regulations. Guardians maintains the following concerns regarding the EA for the long-term storage contract:

1. **Purpose and need is too narrow.** As mentioned in our DEIS comments (pages 5-6), the description of the purpose and need is too narrow to facilitate an adequate range of alternatives or effects analysis. *See* 40 C.F.R. § 1502.13; *Davis v. Mineta*, 302 F.3d 1104, 1119 (10th Cir. 2002); *City of Carmel by the Sea v. DOT*, 123 F.3d 1142 (9th Cir. 1997); *Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 666 (7th Cir. 1997). The purpose and need continues to be described as the “need to respond to the Authority’s request for a long-term contract” and the “purpose is to comply with environmental laws.” However, the underlying purpose and need for the storage contract (as described in the Authority’s 2010 EA) include the Authority’s need to: 1) acquire additional storage when upstream reservoirs are full, 2) offset groundwater effects from its drinking water project, 3) move water from Elephant Butte Reservoir via accounting (e.g. exchange) to Abiquiu, and ultimately to 4) facilitate full use of its allocation under the San Juan Chama Project. The EA (page 1) also cites the need for the Authority to find an alternative to “the cumbersome process and uncertainties of annual extension(s) of the previous storage contract.” Based on these end games, the NEPA process undertaken should guide the process of getting from point A to point B while evaluating the environmental and social impacts or costs of moving forward. This EA does not achieve this end.

2. **Reasonable range of alternatives not analyzed.** Reclamation fails to analyze a reasonable range of alternatives in the EA that address the impacts of the connected actions. 42 U.S.C. §§ 4332(2)(C)(iii), 4332(2)(E); 40 C.F.R. § 1502.14(a). The no action alternative and the proposed action do not constitute a range of alternatives. Reclamation again offers no choice to stakeholders when it proposes to continue the “status quo” from 1983 or do nothing. One reason the range of alternatives is so limited is the unreasonably narrow purpose and need as explained above.

3. **Tiering not appropriate.** Reclamation’s tiered analysis is not appropriate in this context. Tiering occurs when an agency has completed a “broad environmental impact statement” for a program or policy, and subsequently prepares another, narrower, NEPA analysis for “an action included within the entire program or policy.” In this case, the 2016 FEIS for the Rio Grande Project Operating Agreement was not a broad programmatic EIS that covers a program or policy; it was an EIS for implementation of a specific agreement in a limited region. The long-term contract was simply included because it shared certain of the impacts analyzed in a particular action area. The problem lies in the long-term contract having impacts outside the limited region of the original EIS. The purpose of this subsequent EA is not to implement a subset of that EIS, but rather to make up for the insufficiency of that document upon its completion with regard to Reclamation’s approval of the long-term contract. The EA at page 1 provides “[w]hile the effects of the storage were analyzed in the EIS, upstream effects of the connected water exchanges by the Authority were not analyzed. This EA is tiered to Reclamation’s (2016) EIS to provide further analysis of potential impacts.” In other words, the EIS was not broad enough to cover the actions included within it. The appropriate course of action to remedy this deficiency is to supplement the 2016 EIS to include the missing analysis, not to prepare an EA and tier to the prior document.

4. **No mention of threatened yellow-billed cuckoo.** Reclamation does not mention or analyze the yellow-billed cuckoo—a threatened species listed under the Endangered Species Act—that may be impacted by the long-term storage contract or the associated connected actions.

EA at 12. The cuckoo was listed in October 2, 2014 and its proposed critical habitat is located in the region impacted by the long-term contract and the associated connected actions.

5. **Effects of action not adequately analyzed.** The EA fails to adequately analyze the effects (including the connected actions) of the approval of the long-term contract for storage of San Juan-Chama water in Elephant Butte Reservoir. While Reclamation acknowledges the connected actions (including three exchanges) on page 4 of the EA, it immediately writes off an analysis of the effects by stating (EA at 14) “relatively few environmental resources [are] potentially affected.” It is not the number of affected resources that matters to an analysis under NEPA, but rather the significance of those impacts. *See* 40 C.F.R. § 1508.27. The factors to be evaluated are the degree to which the effects are uncertain, the degree to which the actions may adversely effect endangered species and critical habitat, whether the action threatens a violation of federal, state, or local law imposed to protect the environment, and whether the action has cumulative significant impacts. *Id.* These questions were not answered or even analyzed in the EA.

An example of this failed analysis (EA at 16), Reclamation recognizes that the exchanges will have “an effect on the timing, magnitude and duration of flows in the Rio Chama below Abiquiu Reservoir.” It goes on to say “[i]f we look at a year of releases the effects are minimal, and we would need a model to assess monthly or even weekly changes.” This is stating the uncertainty of the effects not that they can be discounted. In fact, uncertainty is a factor in finding the “significance” of the effects under NEPA.

Next, the EA at page 7 provides that the Authority can move water throughout the year, but chooses to avoid low flow periods due to high loss rates (which preclude the movement of San Juan-Chama water to storage in Elephant Butte). This decision to not transport water when threatened and endangered species need the water the most is a significant environmental impact that approving another long-term contract would cause on flows in the Rio Grande. Reclamation does not quantify or assess the scope or gravity of such impacts in the EA or any other environmental analysis it attempts to tier to. It simply takes the status quo as unchangeable. *See* EA at 17. This is not in line with the spirit or letter of the law nor does it support Reclamation’s ultimate objective of ensuring the survival and recovery of the species as it has committed to in the December 2, 2016 Biological Opinion for the Middle Rio Grande.

Further, on page 9 of the EA, Reclamation notes that the Rio Chama and Rio Grande are impaired for particular purposes (e.g. aquatic life and dissolved oxygen). However, the EA does not attempt to quantify or assess what the impacts of exchanging water from Elephant Butte Reservoir to Abiquiu Reservoir will have on flows in the Rio Grande, water quality, and what effect the timing of the exchange would have on threatened or endangered species. It appears any need for this analysis is dismissed based on the fact that the 2016 Biological Opinion for the Middle Rio Grande does not have measurable flow requirements (EA at 12).

Finally, Reclamation concludes its effects analysis of threatened and endangered species by quoting from the May 2016 Biological Opinion, regarding effects of storage in Elephant Butte Reservoir on imperiled species, that the project “is not likely to jeopardize the continued existence of the species.” This conclusion, made in the context of the ESA, has no bearing on whether or not Reclamation has conducted enough analysis to show the impacts on the species are not significant under NEPA. More analysis is clearly needed to meet the requirements of an EA (if that is even the proper means of supplementing the inadequate EIS).

6. **Independent duties exist under NEPA and ESA.** Reclamation's duties under NEPA are separate from, and in addition to, any responsibilities it has under the ESA. Reclamation cannot simply rely on existing biological opinions associated with other projects or even this project's effects on listed endangered species to satisfy its obligation under the National Environmental Policy Act ("NEPA"). *See Fund For Animals v. Hall*, 448 F. Supp. 2d 127, 136 (D.D.C. 2006) (Endangered Species Act consultation does not substitute for NEPA review). Relying on consultation to satisfy NEPA ignores the second of the twin objectives of NEPA—to "inform the public that it has indeed considered environmental concerns in its decisionmaking process." *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1153–54 (9th Cir. 2006)¹.

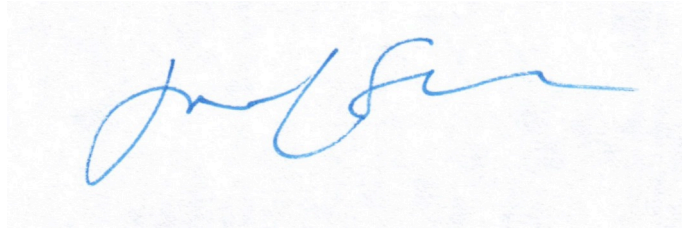
For example, in order to absolve itself of the full analysis required by NEPA, Reclamation claims that its authority over San Juan-Chama water ends when the water is released from Heron Reservoir. It asserts that a "key finding" of the biological assessment—that it drafted) for middle Rio Grande water operations—is that Reclamation's release of San Juan-Chama water and the subsequent storage and release by San Juan-Chama contractors are "beneficial for listed species and their critical habitat." Even if this assertion were true that such releases have only beneficial impacts, those impacts are required to be analyzed under NEPA. No such analysis is provided in the EA. Further, the assertion (EA at page 2) that somehow the wholesale incorporation of the biological assessment and opinion by reference into the EA is sufficient to meet the requirements of NEPA is just not the case.

As you know, NEPA provides an opportunity to evaluate new courses of action and if federal agencies began to use this process (as it was intended by Congress) to "study, develop, and describe appropriate alternatives to recommended courses of action," it is much more likely that "fully informed and well-considered conservation decisions that 'foster excellent action' and 'protect, restore, and enhance the environment'" could be discovered and implemented. *See* 42 U.S.C. §§4332(2)(E); 40 C.F.R. § 1500.1(c); 40 C.F.R. § 1500.2(e). There are many opportunities in the Upper Rio Grande Basin—from its headwaters to Fort Quitman, Texas—to rethink the movement and storage of water to benefit the health of the river environment as well as those communities that depend on it to drink and to farm. Unfortunately, based on the analysis conducted for the operating agreement and this storage contract (as well as in other environmental reviews throughout the Basin), it is clear that NEPA is now merely a hoop necessary for federal agencies to jump through. So long as NEPA reviews are only completed to reach a known end and justify the environmentally-destructive and short-sighted projects that have plagued the Rio Grande for centuries, the future of this iconic river is grave. It is disappointing that the federal government is neglecting one of its most critical duties to its citizens and the environment.

¹ "[P]ublic scrutiny is essential to implementing NEPA." *See Oregon Natural Desert Association v. BLM*, 531 F.3d 1114, 1120 (9th Cir. 2008) (quoting 40 C.F.R. § 1500.1(b)). This is because "NEPA's purpose is realized not through substantive mandates but through the creation of a democratic decisionmaking structure that, although strictly procedural, is 'almost certain to affect the agency's substantive decision[s].'" *Id.* (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)).

Thank you for the opportunity to submit comments on the Environmental Assessment for this contract.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Jen Pelz', is centered on a light gray background.

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