



May 17, 2005

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Acting Director Matthew Hogan  
U.S. Fish and Wildlife Service (FWS)  
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*Re:* Petition and Notice Letter on Significant Legal Deficiencies in present Proposal to **Build and Line an Alternative All-American Canal in Imperial County, California**

Dear Madam Secretary/Watermaster and Senior Appointees:

On behalf of Consejo de Desarrollo Economico de Mexicali, A.C. (CDEM), a Mexican non-profit organization comprised of leading industrial, commercial, service, agricultural, environmental and civic leaders in the Mexicali Valley, and Citizens United for Resources and the Environment (CURE), a California non-profit organization dedicated to solutions for multi-disciplinary environmental problems, as well as these two organizations' members and supporters, the undersigned hereby submit this petition and notice letter pursuant to various federal laws described, *infra*.

## **Introduction**

The proposal to build a new All-American Canal (II) in Imperial County, California – immediately adjacent to the U.S.-Mexican border and parallel to the existing All-American Canal (AAC) – creates grave environmental and economic impacts for the Imperial/Mexicali Valleys that have never been addressed and that threaten to destabilize a region already facing

significant problems. The defective eleven year-old Environmental Impact Statement (EIS) offers no meaningful analysis (and in some instances no analysis at all) of these issues, and the process leading to its adoption did not seek public comment from those individuals most directly impacted by this proposal – residents and farmers of the Mexicali Valley. Legally, the U.S. simply cannot ignore bi-national environmental, economic and social impacts caused by U.S. governmental actions taken in the United States.

The construction of second lined AAC has been treated as a *fait accompli* by the Department of Interior and others on the assumption that impacted individuals and entities on both sides of the border can do nothing to stop this proposed action. This is not the case. We hereby allege that the current AAC proposal violates numerous federal laws for which relief can and will be sought in federal court, unless a resolution is reached within the next 60 days. Thus, this letter is an urgent follow-up on correspondence we have previously sent to the Department of the Interior on this subject and, in the spirit of constructive dialogue, an opportunity for the parties to address whether settlement discussions and alternatives can be addressed and adopted short of litigation.

## Legal Overview

Our legal grievances include but are not necessarily limited to the following three broad defects:

1. The affected Mexican, American, and bi-national citizens have simply not been adequately included in the process that has led to the current proposal to build a new All-American canal. We certainly believe that CDEM or CURE could (if given the opportunity) constructively contribute to a better water conservation solution with regard to the AAC and its seepage, the aqueducts and groundwater supplies in this bi-national region, as well as related water issues, in light of significant changes that have occurred or been uncovered since 1994. In fact, efforts by CDEM in 2002 to question the construction of a second AAC were rejected by BuRec Commissioner Keys, who advised that the water transfers, which are a centerpiece of the Quantification Settlement Agreement (QSA), “will not impact the lining of the All-American Canal.”<sup>1</sup> Failure to notify or directly engage interests in the Mexicali Valley was particularly short-sighted and unlawful given the groundwater rights possessed by many members and supporters of CDEM. This is not a matter, for instance, directly covered or governed by the 1944 Mexico-U.S. Water Treaty.
2. The 1994 final EIS, updated by agency action in 1999 and reportedly in 2003, prepared pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. §§

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<sup>1</sup> Commissioner Keys’ statement eliminates any claim that CDEM and CURE’s efforts on the AAC are somehow meant to undermine the QSA. As Keys himself succinctly concluded, “These two projects are not dependant on one another for their implementation.”

4321-4345, is clearly stale and outdated. **We thus, *inter alia*, petition you pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 553(e), to prepare a rule covering the unique role of the All-American Canal in federal water management, and request you also to issue a supplemental environmental impact statement (SEIS) to the over decade-old EIS completed by Interior and BuRec in March 1994.** *See, e.g.,* Sonoran Institute *et al.*, Assessment of Environmental Impacts (2005). The March 1994 EIS fails to accurately evaluate and mitigate: a) wetlands loss and related negative impacts, b) migratory bird takes, c) a number of endangered species issues and violations, d) growth inducement impacts of this proposal, e) the cumulative impacts of many related actions, f) immigration from Mexico, particularly in light of heightened security issues since September 11, 2001, g) the overall cost and other negative bi-national economic impacts, and h) the impact on water rights and water security. CEQ regulations, Interior/BuRec rules, and plain sense dictate that Interior's agencies must improve and update the existing environmental review analysis that is woefully inadequate. *See, e.g.,* 40 C.F.R. § 1502.9(c). In this letter, accordingly, we have included some of the many articles, excerpts, and citations that support our view, and which must be included in the administrative record for this federal agency action. We hereby incorporate all references and contents in this letter, its bibliography and its attachments into the administrative record of the All-American Canal matter (and all related federal matters).<sup>2</sup>

3. There will be potentially serious damage done to clean water, clean air and imperiled wildlife by this proposed second AAC. **We accordingly notice you, *inter alia*, under the Endangered Species Act (ESA), 16 U.S.C. § 1540(g), the Clean Water Act (CWA), 33 U.S.C. § 1365, and the Clean Air Act (CAA), 42 U.S.C. § 7604, regarding the violation of these and other federal statutes on the current AAC proposal.** Significant problems include: the continued endangerment of the Yuma clapper rail and this project's adverse impact upon this species; the near certainty that listed migratory birds will be taken as a direct and indirect result of this project as now configured; the listing and critical habitat designation of the Peirson's milk-vetch under the ESA, as well as the ESA re-consultation duties all the aforementioned actions necessitate; the complete destruction of at least 15, 500 acres of wetlands in both the U.S. and Mexico; and, the failure to address the fact that the Imperial Valley was been designated as an area of extreme non-attainment under the Clean Air Act since the 1994 EIS, a problem that will only be exacerbated by the extremely large amount of dirt that will be displaced as a result of this project.

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<sup>2</sup> However, we do not at all concede that, if this matter goes to federal court, we are limited to your administrative record in a "failure to act" case such as this one.

## Description of Legal Violations and Problems

Although the following list is not meant to be exhaustive<sup>3</sup>, it identifies those cause of actions for which notice is necessary pursuant to statutory jurisdictional requirements, and/or serves to flag those legal defects for which immediate dialogue would be helpful. It includes our allegation, discussed elsewhere in this letter, that alternatives were arbitrarily, capriciously and severely limited under NEPA for the 1994 AAC EIS, and that such unreasonably narrow alternatives led to a preferred alternative that harms CDEM's existing water and environmental rights.

### *Wetlands*

As noted above, we hereby give you notice that the current AAC proposal will needlessly and illegally destroy wetlands in both the U.S. and Mexico without a permit, in violation of the Clean Water Act. 33 U.S.C. § 1344. Further, the methodology and data contained in the 1994 AAC EIS, and its attachments, are both outdated. Professor Ed Glenn from the University of Arizona, among others, possesses more complete and accurate wetlands data in this region that demonstrates this wetlands complex is (and has been for some time) supplied by AAC seepage. Wetlands play several important roles in the lower Colorado River ecosystem. *See, e.g.,* Bergman, Life at the End of the Colorado River (2002). The 1994 EIS utterly ignores the impacts of the current proposal upon identified wetlands in Mexico that support imperiled migratory birds and other wildlife, including endangered species such as the Yuma clapper rail. *See, e.g.,* Hinojosa-Huerta *et al.*, Andrade Mesa Wetlands of the All-American Canal (2002). The EIS simply does not address the full complex of 15,000 acres of important bi-national wetlands fed by the AAC. This is one of many reasons why a SEIS, available for full public comment (including by plainly impacted Mexican interests), is mandated. 40 C.F.R. § 1502.9(c). We also question whether your current proposal, as we understand it, is in compliance with Title II (All-American Canal) of the San Luis Rey Indian Water Rights Settlement Act, P.L. 100-675 (1988), which mandates, *inter alia*, that “replacement of incidental fish and wildlife values adjacent to the canals foregone” as a result of the project “be on an acre-for-acre basis, based on ecological equivalency, and shall be implemented concurrent with construction of the works.” Section 203(a)(2).<sup>4</sup>

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<sup>3</sup> For example, the 1994 EIS does not address the factual and legal developments with regard to non-native invasive species that will likely be encouraged by the land disturbance activities contemplated by Interior's present preferred alternative.

<sup>4</sup> A related water problem is the increased selenium, highly toxic to humans and wildlife at certain levels, which will be created and/or exacerbated by the new drains and water infrastructure. See FPEIR for Implementation of Colorado River Quantification Settlement Agreement (June 2002) at 3.1-45. This issue must at least be discussed in a SEIS or other appropriate NEPA document.

### *Endangered Species*

As noted above, we hereby give you notice pursuant to the ESA, 16 U.S.C. § 1536 and 50 C.F.R. § 402.16, that you must re-initiate consultation on the All-American Canal project because the plant Peirson's Milkvetch has been listed, 63 Fed. Reg. 53596 (1998) due to habitat destruction and loss, and this species by the AAC EIS's own account, FEIS at B-8, is found in the AAC project area. Critical habitat was proposed for the Peirson's Milkvetch by the FWS that included land to be covered by the current AAC proposal, but that land was dropped in the final rule. *Compare* 68 Fed. Reg. 46143, 46160 (August 5, 2003) *with* 69 Fed. Reg. 47330, 47351 (August 4, 2004). In any event, we do not accept the conditions and measures identified in the 1996 Biological Opinion (BO) for the AAC Project (itself almost ten years old) to be adequate legally or biologically for the milkvetch, razorback sucker, flat-tailed horned lizard, or other species. We also give you notice that you must reinitiate consultation on the AAC project based upon the new information on impacts to endangered Yuma clapper rails and their habitat, at least based upon the five year review that you are presently undergoing for this species. In sum, we do not believe you are doing what is possible under Section 7 of the ESA with regard to all listed species affected by your proposal, including the razorback sucker. *See, e.g., TVA v. Hill*, 437 U.S. 153, 173, 184 (1978) (Chief Justice Burger commenting that one "would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7" and the ESA's "plain intent" reflected "in literally every section of the statute" to "halt and reverse the trend toward species extinction, whatever the cost."). Finally, we give you notice that updated impacts to the endangered southwestern willow flycatcher and threatened western snowy plover – each of which has been listed or had critical habitat designated for it since the 1994 EIS and 1996 BO – have not been adequately accounted for under either NEPA or the ESA.<sup>5</sup> None of the conservation plans related to the actions cited in this letter cure the ESA defects described, *supra*.

### *Migratory Birds*

Relatedly, we allege that construction of a second, lined ACC will "take" migratory birds listed under the U.S. Migratory Bird Treaty Act, 16 U.S.C. § 703, as well as under the 1936 U.S.-Mexico Convention for the Protection of Migratory Birds, as amended in 1972. 50 Stat. 11; TS 912.<sup>6</sup> The Yuma clapper rail, willow flycatcher, western snowy plover and upwards of 100

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<sup>5</sup> The continued legal battles over the imperiled flat-tailed horned lizard, which is present on the new proposed canal site and would be harmed by the current AAC proposal, is perhaps indicative of the tunnel vision that has gripped Interior with regard to the AAC. *See Defenders of Wildlife v. Norton*, 258 F.3d 1136 (9<sup>th</sup> Cir. 2001)(Interior's decision to withdraw proposal to list lizard found to be arbitrary and capricious, and remanded back to agency, which promptly withdrew listing proposal again and is back in court).

<sup>6</sup> In terms of geographic reach of actionable migratory bird "takes," the Supreme Court in *United States v. Bowman*, 260 U.S. 94, 98 (1922), and its progeny, has held that the territorial (footnote continued)

other bird species could or would be negatively impacted by your proposal, and ornithological experts believe that actual bird deaths and serious injury would result consequent to your proposal. *See, e.g.,* Osvel Hinojosa-Huerta *et al.*, Caracterizacion de la Avifauna de los Humedales de la Mesa de Andrade (2004). Recent case law makes it abundantly clear that federal agencies such as the Bureau of Reclamation are bound by the MBTA's prohibitions. Humane Society of the United States v. Glickman, 217 F.3d 882 (D.C. Cir. 2000). Finally, negative impacts to the Salton Sea are also acknowledged but not accurately analyzed in the old 1994 EIS. FEIS S9-11. Of course, much of this significant information is new, again triggering the supplementation requirement of NEPA. 40 C.F.R. § 1502.9(c)

### *Human Migration and Security Issues*

Whatever attributes your EIS section on "Immigration from Mexico" contained in 1994, time has made this cursory one-page analysis poignantly insufficient.<sup>7</sup> Most glaring are the omissions on what economic destabilization as a result of water loss would do to Mexicali, and how 9/11/01 impacts security of border communities and border construction zones. *See, e.g.,* Nolde, Living on Borrowed Water? (2005); Moreno and Mintz, *Terrorist Ties* (2004). The vast majority of farm workers in the Imperial Valley are residents of Mexicali. With the Imperial Irrigation District's fallowing program, many of these workers will be displaced. Simultaneously, the lining of a second AAC would decrease available usable water for farming in the Mexicali Valley. These massive potential job losses will impact not only Mexicali, but also Calexico on the U.S. side of the border, which is extraordinarily dependant upon the health of Mexicali consumers who come to Calexico from Mexicali. "If not for people coming from Mexicali to shop, I don't know how we would survive," said Calexico Mayor David Ouzan, who reckons that Mexicans easily account for 75% of the \$4 million in annual city sales tax revenue." Dickerson and Iritani, *An Economy That Knows No Borders*, Los Angeles Times at C1 (March 20, 2005).<sup>8</sup>

### *Growth Inducement*

The AAC EIS states, in less than one page, that the preferred alternative (i.e., current proposal) "would not have any growth-inducing effect. The growth in this area depends upon national and global economic factors, and regional population and job growth trends." EIS at III-71. However, even a brief look at California law since 1994 demonstrates the centrality of

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presumption does not govern the interpretation of statutes that implicate the interests of the United States outside its strict territory, as is the situation here with internationally protected migratory birds.

<sup>7</sup> "(C)onstruction activity would make it more difficult for the Border Patrol to conduct surveillance and detect the presence of illegal aliens." EIS at III-70.

<sup>8</sup> This article and ones like it also talk about the impact that tighter border security measures are having upon this phenomenon. All of this, of course, is not discussed in the March 1994 EIS or its 1999 recertification.

water to growth in the lower basin states, and particularly California as it strives to live within its water means. Enacted in 1995, SB 901 (*stats.* 1995, c. 881) tightened the link between water supply and land use planning under existing state environmental procedures. Enacted in 2001, SB 221 (*stats.* 2001, c. 642) goes a big step further and imposes new substantive requirements on water suppliers relating to an analysis of the sufficiency of the water supply for new residential development projects. Also enacted in 2001, SB 610 (*stats.* 2001, c. 643) among other things mandated more detailed information in water supply assessments and relied/focused upon actual water rights, not “paper” water rights. *See also* Public Hearings and Submissions on Amended Joint Petition of the IID and the SDWA for Approval of a Long-Term Transfer of Conserved Water Pursuant to an Agreement, January 23, 2002 to October 28, 2002 (particularly the testimony and submissions from groups such as the Center for Biological Diversity, Defenders of Wildlife, PCL, and the National Wildlife Federation). We think it is quite reasonably foreseeable that the current AAC proposal will not only heighten national security and human migration concerns, but will also tangibly impact housing growth in (at least) California that has not been examined by you and your agencies. At the very least, the EIS must be supplemented to account for the significant changes in the relationship between growth and water that has occurred since 1994.

#### *Cumulative Impacts, Related Actions, and Environmental Effects*

As a result of being outdated, the AAC EIS also fails to take into consideration a large number of other related federal, state and private actions that impact the assumptions, purpose, need, facts, analysis, and conclusions made by your agencies in 1994. These developments are on top of the recent drought in the West, and the Secretary’s concomitant duty to devise annual allocations including potential shortage criteria (including with Mexico). *See, e.g.,* T.R. Reid, *Wet Winter Doesn’t Douse Water Wars*, The Washington Post at A3 (May 2, 2005). At the very least, this proposed AAC action must take into account all the actions initiated or completed since a formal environmental review was completed. 40 C.F.R. § 1502.9(c). Such a non-segmented list would presently include:

- Inadvertent Overrun and Payback Policy
- Interim Surplus Guidelines
- Quantification Settlement (and allocation) Agreements and Secretarial Implementation Agreement(s)
- Rule for Offstream Storage of Colorado River Water
- Coachella Canal Water Management Plan
- Imperial Irrigation District water conservation and transfer agreements
- Salton Sea Restoration Project
- Cadiz Groundwater Storage Plan (and related proposals)
- Lower Colorado River Multi-Species Habitat Conservation Plan

Interior and BuRec have issued separate NEPA documents for most, if not all, of the above in violation of NEPA. 40 C.F.R. §§ 1502.4, 1508.25. All indirect and direct effects of these related

actions should be tied to one coordinated or tiered analysis, including the full negative effects of your current AAC proposal. *See, e.g.*, Letter from David Farrel (EPA) to William Rinne (BuRec), 22 October 1999.

### *Clean Air Compliance*

Imperial County possesses severe clean air and particulate matter problems, leading to serious human health impacts in the area. The current AAC proposal, with the upheaval of many tons of dirt and sediment<sup>9</sup>, will trigger the requirements in § 189(d) of the Clean Air Act (CAA) for submission by the state of California of a state implementation plan (SIP) revision providing for attainment of the particulate matter standard, PM-10 NAAQS, and for annual reductions of at least 5% in emissions of PM-10 or PM-10 precursors. CAA, 42 U.S.C. § 7513a(d). We also allege that the plan revision must provide for expeditious implementation of best available control measures pursuant to § 189(b)(1)(B). Further, these requirements do not represent all of the CAA's requirements for the Imperial Valley PM-10 SIP, as the SIP must meet all of the moderate area requirements in § 189(a)(1) and must extend new source review to sources with the potential to emit at least 70 tons per year of PM-10 as required by § 189(b)(3). The 1994 EIS does not take into recent account enforcement action in the Imperial Valley regarding worsening air quality conditions in that area.

### **Reasonable and Feasible Alternatives without Severe Legal Problems**

Given the human and environmental impacts resulting from the lining of the canal, it is regrettable that more serious dialogue did not take place on feasible bi-national alternatives. In fact, those alternatives may be far less expensive than the lining project. In June 1988, the BuRec published a report evaluating the feasibility of a water bank in a document entitled Colorado River Water Underground Storage and Recovery Study, prepared for the Colorado River Board of California. *See also, e.g.*, Mumme, Managing Transboundary Groundwater on the U.S.-Mexico Border (2000); Hall, Transboundary Groundwater Management (2004); Kishel, Lining the All-American Canal: Legal Problems and Physical Solutions (1993). In the interest of avoiding litigation, we urge the recipients of this letter to meet with us, and be open-minded to different alternatives as solutions that benefit *all* affected stakeholders. As CDEM recently wrote to Secretary Norton, "We would welcome the opportunity to present more detailed technical analysis of the above-referenced conjunctive use project and to update you and your agencies on the cumulative environmental and economic impacts we are facing."

Any meaningful pre-litigation settlement discussions require a stipulation that the parties will not proceed with letting contracts for the ACC proceed in any fashion until such time as the parties have had an opportunity to address the issues raised in this correspondence. Barring such

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<sup>9</sup> According to the 1996 biological opinion by FWS, at least 25 million cubic yards of material will be excavated. *Id.* at 5.

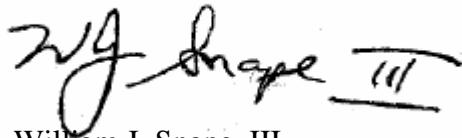
an agreement and a clear process for dialogue, CDEM and CURE will have no option but to commence federal litigation this summer.

### Conclusion

While we reiterate the strength of our conviction to maintain the rights of these two groups, we genuinely look forward to resolving these problems with you without conflict. On behalf of CDEM and CURE, we look forward to hearing from you soon.

Please contact undersigned counsel or Mr. Rene Acuna, Executive Director of CDEM<sup>10</sup>, for follow-up communication. Thank you for your consideration.

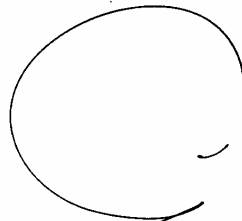
Sincerely,



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Rene X. Acuna  
Executive Director  
CDEM



Federico Prieto Gaxiola  
Chairman of the Board  
CDEM

Attachments

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Cc: Secretary Condoleezza Rice, Department of State (w/o attachments)  
Secretary Michael Chertoff, Department of Homeland Security (w/o attachments)  
Commissioner Arturo Duran, U.S. I.B.W.C. (w/o attachments)  
Administrator Steve Johnson, E.P.A. (w/o attachments)

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