

# Voluntary Groundwater Pumping Program/U.S. Bureau of Reclamation: Federal Court Addresses National Environmental Policy Act Challenge



**Walter Wright, Jr.**  
wwright@mwlaw.com  
(501) 688.8839

10/01/2021

A United States District Court (“E.D. California”) (“Court”) addressed in a September 14th Order a National Environmental Policy Act (“NEPA”) challenge to a groundwater extraction project in the Sacramento River Valley. See *AquAlliance, et al. v. The United States Bureau of Reclamation, et al.*, 2021 WL 4168534.

AquAlliance and other environmental organizations (collectively, “AquAlliance”) sought a preliminary injunction barring the United States Bureau of Reclamation (“Bureau”) from continuing with the voluntary groundwater pumping program.

The Bureau had approved a voluntary groundwater pumping program (“Program”) seeking to incentivize groundwater pumping. The groundwater pumping would be undertaken in lieu of obtaining water from the Sacramento River. The Bureau provides funding to offset costs to those obtaining water by groundwater pumping rather than extracting from surface water.

The Bureau issued a draft NEPA Environment Assessment (“EA”) on July 7th. The EA evaluated the impacts of the project and was public noticed to receive comments.

The Bureau subsequently issued a final EA. The EA contained a Finding of No Significant Impact (“FONSI”). As a result, no Environmental Impact Statement (“EIS”) was required.

AquAlliance filed a Complaint on August 26th asking for a Temporary Restraining Order and/or Preliminary Injunction. The Motion for Temporary Restraining Order was denied on September 8th. A hearing on the request for a preliminary junction was held on September 9th.

NEPA requires federal agencies to assess the environmental effects of their proposed actions prior to making decisions. The range of actions covered by NEPA has typically been broadly defined to include as examples:

- Making decisions by federal agencies on permit applications
- Federal land management actions
- Construction and/or funding highways and other publicly owned facilities

The federal agencies are required to evaluate the environmental and related social and economic effects of their proposed actions. Agencies are also required to provide opportunities for public review and a comment on those evaluations.

NEPA was arguably designed to force mission-oriented agencies to consider the environmental impacts of a particular decision or activity in addition to other objectives. For example, a decision by the Department of Defense to construct a base in a particular location would traditionally consider a variety of issues such as logistics, infrastructure, etc. In the event that this proposed activity triggers a review, the environmental issues would also have to be addressed. This would include situations in which a state or local government utilizes federal funds to construct infrastructure. In other words, the objective has been to ensure that environmental considerations are integrated into the planning of the agency actions as early as possible.

NEPA requires federal agencies to include environmental values and issues in their decision-making processes. This federal mandate is accomplished by agency consideration of environmental impacts of proposed actions and reasonable alternatives to those actions. The statute requires federal agencies in certain instances to prepare a detailed EIS. However, the requirement to produce this document is only triggered in the event of a “major federal action” that will “significantly affect the environment.” In other words, an EIS is only required to be produced if:

- there is a federal action
- that will significantly affect the environment

As opposed to an EIS, which is a much more detailed document, an EA provides sufficient evidence and analysis for determining whether a finding of no significant impact for an EIS should be prepared.

NEPA differs from action enforcing environmental statutory programs such as the Clean Air Act or Clean Water Act. It does not impose substantive mandates. Instead, it is limited to requiring federal agencies to meet procedural requirements such as preparation of an EA or EIS in certain instances. As a result, NEPA does not require a certain alternative or meet a particular standard. Nevertheless, the failure to comply with procedural mandates can result in an activity or project being enjoined.

In addressing the AquAlliance request, the Court identifies the requirements for granting injunctive relief which include:

1. Likely to succeed on the merits
2. Likely to suffer irreparable harm in the absence of preliminary relief
3. The balance of equities tip in its favor; and
4. An injunction is in the public interest

As to alleged irreparable harm, it is alleged that the Bureau’s approving and contracting for additional groundwater extractions will result in damage to private and public property via land subsidence and aquifer depletion, and harm to habitats to endangered species. However, merely alleging irreparable harm is not deemed adequate. Immediate threatened injury must be demonstrated.

The Court notes that scientific exactitude is not required. Nevertheless, declarations by individuals “believing” prior data shows decline in ground surface elevation due to pumping is not deemed specific evidence of a causal link between the pumping and damage. Further, there was stated to be no attempt to quantify issues related to prior pumping and how they might relate to subsequent activities.

Similar concern is expressed about allegations regarding groundwater-dependent ecosystems and endangered species potentially being harmed. The Plaintiffs’ declarations are characterized as conclusory statements.

The Court also addresses the claim that the project will incentivize groundwater pumping because of the contracts and lead to historic groundwater lows. The Court states there is an absence of information provided on the baseline of current groundwater pumping or potential increases. In addition, it is noted that the alleged harm that is being addressed is already occurring in the Program’s absence.

Consequently, a preliminary injunction would not stop or prevent the alleged harm. Third parties are noted to be currently pumping groundwater and will continue to do so regardless of the outcome of the Program.

The Court finds that Plaintiffs have failed to demonstrate the likelihood of irreparable harm. Regardless, the Court moves ahead and assesses whether the Plaintiffs would be able to show a likelihood of success on the merits. It notes that to satisfy NEPA, the record must show that the Bureau took a hard look at the project's potential impact. The Plaintiffs had raised six ways in which they contended the EA and FONSI are deficient and therefore inadequate under NEPA. These include:

1. Failure to Describe Existing Conditions

The EA used two years that were deemed "critical drought" and "historic lows." The Bureau argued that the Plaintiffs' failure to object to this approach in public comments resulted in a waiver and an inability to raise the argument in litigation. Further, the Court deems the Bureau's utilization of this baseline as a rational opinion (i.e., using historic lows would be adequate for the purpose of the limited project). Therefore, a challenge to the EA on the basis that it lacks a description of existing groundwater levels does not demonstrate that the Bureau failed to take the requisite hard look at the project's potential impact.

2. Effects to Third-Party Groundwater Users

The EA acknowledged possible impacts to ground wells and subsidence. Rates of subsidence that had been measured in recent decades are acknowledged. However, the EA also indicates that the Bureau will monitor pumping at participating wells to evaluate the impact of additional production. This is characterized by the Court as a "considered response" on the Bureau's part as to the acknowledged risk. As a result, it withstands the "hard look" review as to third-party effects. It is also characterized as a mitigation measure to soften a proposed action's impact.

3. Impacts to Groundwater-Dependent Ecosystems, Hydrology, and Threatened Species

The Plaintiffs argued that the Bureau used data from the Yuba County Groundwater Sustainability Plan in determining that the project was unlikely to significantly impact shallow groundwater in the Sacramento River Valley. These areas were argued to be different.

The Bureau responded that the proposed plan had not been completed and therefore the other Yuba plan provided the most comparable analysis. This is deemed to be a "hard look" on this point.

The Bureau was further deemed to have been correct in reasonably concluding that additional groundwater pumped due to the Program incentives would likely achieve the use of additional surface water. As to the impact on the two species, this was deemed addressed.

4. Mitigation Measures

The Bureau characterized groundwater monitoring as a mitigation measure to evaluate performance. However, the Bureau is not required to include a completely developed mitigation plan. Instead, a reasonably thorough discussion of mitigation measures is enough to satisfy the "hard look" standard. Also rejected is Plaintiffs' claim that the mitigation measures lack data demonstrating they can avoid potential adverse impacts. The Bureau's use of data provided by regional networks is an informed method to address adverse impacts. In addition, the mitigation plan is also deemed to address potential long-term damage and will consider complaints that arise from third parties.

5. Greenhouse Gas Emissions

The Court rejects a claim that the Bureau failed to take a "hard look" at the effects of greenhouse gases resulting from the program. The pollutants associated with groundwater pumping are listed in the EA and

are stated to ensure compliance with local rules and regulations concerning air quality and greenhouse gas emissions. As a result, this demonstrated a “hard look” at greenhouse gas emissions.

6. Cumulative Effects

The Bureau is stated to have examined groundwater pumping already occurring in the region to determine cumulative effects. The proposed pumping was found to be insignificant relative to total groundwater pumping in the area. As a result, cumulative effects were adequately considered.

The Court deems it in the best interest of the public to implement the Program as soon as possible and that Plaintiffs have not met their burden on any of the injunctive relief factors. Their request is denied.

A copy of the Order can be downloaded [here](#).