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May 14, 2001

The Honorable Doug Ose
Chairman, Subcommittee on Energy Policy,
Natural Resources, and Regulatory Affairs
Committee on Government Reform
House of Representatives

Subject: Opinion on Whether Trinity River Record of Decision is a Rule

Dear Mr. Chairman:

This is in response to your letter of March 19, 2001, requesting our views on whether the Department of the Interior, Fish and Wildlife Service's Record of Decision (ROD) entitled "Trinity River Mainstem Fishery Restoration" is a "rule" under the Congressional Review Act (CRA) provisions of the Small Business Regulatory Enforcement Fairness Act. 5 U.S.C. 801 et seq.

The ROD concerns the decreased river flows in the Trinity River Basin caused by the Trinity River Division of the Central Valley Project in 1963. This decreased flow affected the salmon and steelhead runs, and the ROD documents the selection of actions necessary to restore and maintain the anadromous fish in the Trinity River. We requested the views of the Department of the Interior and received them shortly before the issuance of this opinion.

For the reasons discussed below, we conclude that this ROD is a "rule" covered by the Congressional Review Act.

Rules Subject to Congressional Review

Chapter 8 of title 5, United States Code, entitled "Congressional Review of Agency Rulemaking," is designed to keep Congress informed about the rulemaking activities of federal agencies and to allow for congressional review of rules. The requirements of chapter 8 take precedence over any other provision of law. 5 U.S.C. 806(a).

Section 801(a)(1) provides that before a rule becomes effective, the agency promulgating the rule must submit to each House of Congress and to the Comptroller General a report containing:

"(i) a copy of the rule;

“(ii) a concise general statement relating to the rule, including whether it is a major rule; and

“(iii) the proposed effective date of the rule.”

On the date the report is submitted, the agency also must submit to the Comptroller General and make available to each House of Congress certain other documents, including a cost-benefit analysis, if any, and agency actions relevant to the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., and the Unfunded Mandates Reform Act of 1995, 5 U.S.C. 202 et seq., and any other relevant information or requirements under any other legislation or any relevant executive orders. 5 U.S.C. 801(a)(1)(B)(I)-(iv).

Once a rule, whether determined to be a major rule¹ or not, is submitted in accordance with section 801(a)(1), special procedures for congressional consideration of a joint resolution of disapproval are available for a period of 60 session days in the Senate or 60 legislative days in the House. 5 U.S.C. 802. These time periods can be extended upon a congressional adjournment. 5 U.S.C. 801(d)(1).

A major rule may not become effective until 60 days after it is submitted to Congress or published in the Federal Register, whichever is later. 5 U.S.C. 801(a)(3)(A).

Section 804(3) provides that for purposes of chapter 8, with some exclusions, the term “rule” has the same meaning given the term in 5 U.S.C. 551(4), which defines rules subject to the Administrative Procedure Act (APA). The APA definition of a “rule” is as follows:

“the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing”

Chapter 8 contains several exclusions from the APA definition of “rule”:

“(A) any rule of particular applicability, including a rule that approves or prescribes for the future rates, wages, prices, services or allowances therefor, corporate or financial structures, reorganizations, mergers or

¹ A “major rule” is one found by the Office of Information and Regulatory Affairs, Office of Management and Budget, to meet certain criteria, such as whether the rule will have an annual effect on the economy of \$100 million or more. 5 U.S.C. 804(2).

acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing;

(B) any rule relating to agency management or personnel; or

(C) any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.”
5 U.S.C. 804(3).

Trinity River Record of Decision

The Trinity River Record of Decision (Trinity ROD) was the culmination of a process covering nearly 20 years of detailed, scientific efforts documenting the selection by the Secretary of the Interior of actions determined to be necessary and appropriate to restore and maintain the anadromous fishery resources of the Trinity River. The Trinity ROD implements the Central Valley Project Improvement Act.² That section requires the Fish and Wildlife Service to conduct an extensive study of instream fishery flow requirements and Trinity River Division operating criteria and procedures and prepare alternative recommendations to ensure fishery restoration goals. The Act further requires the implementation of the Study's recommendations if the Secretary and the Hoopa Valley Tribe concur in the recommendations.

The Trinity River Division

California's Central Valley is one of the most fertile agricultural regions in the country.³ The federal Central Valley Project (CVP), the largest federal irrigation project, supports this productivity principally by diverting water from streams that flow out of the Sierra Mountains to the Sacramento River.

The Trinity River rises in the Sierra Mountains of northern California and flows in a generally northwesterly direction to the Klamath River, which in turn empties into the Pacific. The Trinity River Division (TRD) of the CVP, which began operating in the 1960's, diverts the river's flow out of the Klamath Basin and into the Sacramento River Basin.⁴ The TRD has exported as much as 90 percent of the river's flow at Lewiston, California, to the Sacramento River. Since the TRD began operation, the Klamath/Trinity's anadromous fish populations have suffered severe decline.

² Pub. L. No. 102-575, § 3406(b)(23), 106 Stat. 4600, at 4720-21.

³ Westlands Water District v. NRDC, 43 F.3d 457, 459 (9th Cir. 1994).

⁴ U.S. Department of the Interior Record of Decision, Trinity Mainstem Fishery Restoration, Final Environmental Impact Statement/Environmental Impact Report (December 2000) at 1 (hereinafter "ROD").

The Central Valley Project Improvement Act

In 1992 the Central Valley Project Improvement Act (CVPIA⁵) was passed, in part to "protect, restore, and enhance fish, wildlife, and associated habitats in the Central Valley and Trinity River basins in California." Section 3406(b)(23) of the Act contains provisions "to meet Federal trust responsibilities to protect the fishery resources of the Hoopa Valley Tribe, and to meet the fishery restoration goals of the Act of October 24, 1984, Public Law 98-541."⁶ The latter Act established "the long-term goal of restoring fish and wildlife populations in the Trinity River Basin to a level approximating that which existed immediately before the start of construction of the Trinity River division."⁷

Section 3406(b)(23) of the CPIA requires the completion of a Trinity River Flow Evaluation Study "in a manner which ensures the development of recommendations, based on the best available scientific data, regarding permanent instream fishery flow requirements and Trinity River Division operating criteria and procedures for the restoration and maintenance of the Trinity River fishery."⁸ Upon the concurrence of the Secretary of the Interior and the Hoopa Valley Indian Tribe with these recommendations, the Act requires the Secretary to implement them.⁹ Pending the study's completion, the Act established a minimum release of 340,000 acre feet/year (af/yr) from the Trinity River Division.¹⁰ Water released to the Trinity mainstem is necessarily unavailable to the CVP.

To comply with the National Environmental Policy Act of 1969 (NEPA),¹¹ the Fish and Wildlife Service initiated the process of developing and assessing fishery restoration

⁵ P.L. No. 102-575, Title XXXIV; 106 Stat. 4706 (1992).

⁶ Id., at 4720-21

⁷ P.L. No. 98-541, § 1(6), 98 Stat. 2721 (1984).

⁸ P.L. No. 102-575, § 3406(b)(23); 106 Stat. 4706, 4720-21.

⁹ Id.

¹⁰ Id.

¹¹ The National Environmental Policy Act, as amended, 42 U.S.C. § 4332(2)(c), requires that whenever a federal agency undertakes "major federal actions significantly affecting the quality of the human environment," it must first prepare a "detailed statement" of the action's anticipated environmental impacts. The agency must generally prepare a detailed Environmental Impact Statement (EIS), that evaluates alternatives to the proposed action, assesses the environmental impacts of each alternative, and displays the agency's preferred alternative. The agency must announce its final decision in a Record of Decision. 40 C.F.R. 1505.2a.

alternatives in 1994.¹² The review, which provided for public involvement during the process, culminated in the release of a Draft Environmental Impact Statement and an attendant public comment period in October 1999. After twice extending the public comment period, the Service reviewed the comments and issued a Final Environmental Impact Statement (FEIS) in November 2000.¹³ The Secretary of the Interior's Record of Decision, at issue here, followed a month later.¹⁴

The Record of Decision

The FEIS identified (and the ROD adopted) a preferred restoration alternative that would provide for increased variable instream flow releases to the Trinity River mainstem, ranging from 369,000 to 815,000 af/yr depending on annual hydrology.¹⁵ The preferred alternative reduced the average annual export of Trinity River water from 74 percent of the flow to 52 percent.¹⁶ The ROD modified the Bureau of Reclamation's Operating Criteria and Procedures for the TRD to reflect the new flow regimes.¹⁷ The Secretary states in the ROD that the preferred alternative will restore fish habitat necessary to the restoration of the anadromous fishery of the Trinity River.¹⁸ However, the ROD also indicates that the reduction in volume of water diverted to the CVP will result in reduced deliveries to agricultural contractors and reduced CVP power generation.¹⁹

¹² ROD at 8.

¹³ ROD at 9.

¹⁴ In 1997, the National Marine Fisheries Service (NMFS) listed the southern Oregon/northern California coast coho salmon as threatened under the Endangered Species Act. 62 Fed. Reg. 24588 (May 6, 1997). The degradation of coho habitat resulting from dams in the region was one factor supporting the listing. In 1999, NMFS designated the Trinity River below Lewiston Dam as part of the coho's critical habitat. 64 Fed. Reg. 20462 (May 5, 1999).

¹⁵ ROD at 12. "Annual hydrology" refers to the abundance of water in the region in a particular year. Classifications range from critically dry to extremely wet.

¹⁶ ROD at 20.

¹⁷ ROD at 12. However, "full implementation" of the preferred alternative will not occur for at least 2 years to allow for bridge modification and other needed infrastructure improvements. ROD at 22.

¹⁸ ROD at 11.

¹⁹ ROD at 24. The ROD also requires certain habitat restoration activities in the Trinity River, as well as adaptive management and mitigation measures. ROD at 13-16.

The ROD also implements two biological opinions issued by Fish and Wildlife Service and the National Marine Fisheries Service under the Endangered Species Act. These opinions concluded that implementation of the proposed action would not result in the taking of various endangered and threatened species in the Trinity River Basin and Central Valley if Interior adopted certain “reasonable and prudent measures” to limit harm to these species. Interior adopted these measures in the ROD.

Westlands Water District Case

Fearing reduced water deliveries and power availability, several users of CVP water sued Interior last December in federal district court, alleging among other things that the agency violated NEPA by failing to prepare a supplemental Environmental Impact Statement analyzing (1) the impacts of implementing the biological opinions, and (2) the impacts of implementing the ROD on the availability of electricity in California.²⁰ The plaintiffs (agricultural water districts and electric utilities) sought a preliminary injunction prohibiting Interior from implementing the ROD.

The court held that the ROD constituted final agency action under the APA, and that it was therefore reviewable.²¹ The ROD represented “the consummation of Interior’s decisionmaking process ... especially under the CVPIA § 3406(b)(23) (requiring the agreed upon alternative ... to be implemented after the government and the Hoopa Valley tribe so concur.)”²² In addition, the court held that a preliminary injunction was warranted. The plaintiffs established the probability of irreparable injury from the ROD’s implementation resulting from lost water deliveries, which the court found were irreplaceable, and the potential for reduced electricity generation.²³ The court noted that implementation of the ROD would reduce CVP water deliveries by approximately 5 percent to south-of-Delta agricultural service contractors.²⁴ Moreover, the plaintiffs established a likelihood of succeeding on the merits of the two NEPA claims discussed above.²⁵ Accordingly, the court enjoined water allocation pursuant to the ROD, except to the extent of allowing approximately 368,600 af to be released to the Trinity River (which represents the mandated 340,000 af/yr plus approximately 28,600 af for restoration purposes, pending completion of the additional required NEPA analysis).

²⁰ Westlands Water District v. DOI, CIV F 00-7124 OWW DLB, March 22, 2001, slip. op. at 14-15 (hereinafter Westlands).

²¹ Id. at 35.

²² Id.

²³ Id. at 28.

²⁴ Id. at 24.

²⁵ Id. at 49-51.

Analysis

To determine whether the Trinity River Record of Decision is a rule for the purpose of CRA, we must examine two issues. First, we must determine whether the Trinity ROD constitutes an “agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.” Secondly, we must determine whether the Trinity River ROD is excluded by one of the exceptions provided by CRA.

In determining whether the Trinity River ROD is a rule for the purposes of CRA, we must be mindful that Congress intended that the CRA should be broadly interpreted both as to the type and scope of rules covered.²⁶ It was intended to cover not only formal rulemaking, but also to cover rules that are not subject to notice and comment requirements of the APA, informal rulemaking under 5 U.S.C. § 553(c), rules that must be published in the Federal Register before taking effect (5 U.S.C. § 552(a)(1) and (2)), and other guidance documents.²⁷ Hence, the entire focus of the Act is to require congressional review of agency actions that substantially affect the rights or obligations of outside parties.²⁸

Under the CRA, a "rule" is an agency action that constitutes a “statement of general or particular applicability and future effect”²⁹ designed to implement, interpret or prescribe law or policy.” Utilizing the legislative history of the APA and the Attorney General’s Manual on the APA, courts have formulated a test to assist in determining which agency actions constitute “rulemaking.” Thus, the courts have noted that “rulemaking” is legislative in nature, primarily concerned with policy considerations for the future and is not concerned with the evaluation of past conduct based on evidentiary facts. American Express Co. v. U.S., 472 F.2d 1050, 1055 (1973); LeFevre v. Dept. of Veterans Affairs, 66 F.3d 1191, 1196 (1995).

Under this test, the Trinity ROD clearly constitutes a “rule” since its essential purpose is to set policy for the future. It is in no way concerned with the evaluation of past conduct based on evidentiary facts. While the Trinity ROD sets forth the past actions

²⁶ “The committees intend this chapter to be interpreted broadly with regard to the type and scope of rules that are subject to congressional review.” Cong. Rec. S3687 (daily ed. Apr. 19, 1996) (Joint Explanatory Statement of Senate Sponsors); 142 Cong. Rec. E579 (daily ed. Apr. 19, 1996) (Joint Explanatory Statement of House Sponsors).

²⁷ Id.

²⁸ Id.

²⁹ The Trinity ROD is clearly intended to have future effect, namely the restoration and maintenance of anadromous fishery resources in the Trinity River. The court in Westlands clearly indicated that the ROD will have future effect, and in fact, issued a preliminary injunction to prevent the adverse effects to plaintiffs from the reduction of water flow from the Trinity River to the Central Valley Project.

of the federal government that contributed to the current situation, it is presented as background to establish the state of the river basins leading up to the enactment of the CVPIA. The Act then delegated to Interior the authority to determine the action necessary to restore the anadromous fishery on the Trinity River. The entire purpose of the ROD is to set a future course of action intended to achieve that purpose, as directed by the CVPIA.

We next turn to whether the exceptions in 5 U.S.C. § 804(3) to the CRA's definition of "rule" would serve to exclude the Trinity ROD.³⁰ Interior, in its recently submitted comments, contends that the Trinity ROD is excluded as either a rule of agency organization, procedure, or practice or as a rule of "particular applicability."

Interior argues that the ROD is not a "rule" because it is an agency procedure or practice that does not substantially affect the rights and obligations of non-agency parties. According to Interior, the ROD applies only to the Department's own employees and sets out how they are to manage the Bureau of Reclamation's water projects. Also, since the Central Valley irrigators receive their water pursuant to water service contracts between water districts and the United States, and those contracts permit reduced water deliveries under certain circumstances, the ROD does not affect the "rights or obligations" of non-agency parties.

We need not reach the contractual issue since we do not find the ROD to be a rule of agency procedure or practice. Rather than merely directing agency personnel how to manage a water project, it implements the congressional directive contained in the CPVIA of protection and restoration of the Central Valley and Trinity River basins. It is clearly not an agency procedural rule, as Interior portrays it, since it follows the lengthy River Flow Evaluation Study, thousands of public comments, and the ROD's extensive discussion of mitigating the impacts of its implementation. Such internal agency rules are mainly directed toward improving the efficient and effective operation of an agency rather than determining the rights and interests of affected parties.³¹

The next issue is whether section 804(3), which excludes rules of "particular applicability," is sufficiently broad so as to exclude the Trinity River ROD from coverage under the CRA. The legislative history of this exception speaks to rules of particular applicability as follows: "Many agencies, including the Treasury, Justice, and Commerce Departments, issue letter rulings or other opinion letters to

³⁰ The CRA provides three exceptions to the definition of "rule." The exceptions in section 804(3)(A) and (C) are discussed above. The remaining exception pertains to rules relating to agency management or personnel, which is not implicated here. See 5 U.S.C. § 803(3)(B).

³¹ McKenzie v. Heckler, 602 F. Supp. 1150 (1985).

individuals who request a specific ruling on the facts of their situation.”³² Further, it notes that “IRS private letter rulings and Customs Service letter rulings are classic examples of rules of particular applicability, notwithstanding that they may be cited as authority in transactions involving the same circumstances The test is whether such rules announce a general statement of policy or an interpretation of law of general applicability.”³³

Because Congress intended the CRA to have a broad sweep and specifically rejected attempts to narrow the scope of coverage, we do not believe that the “particular applicability” exception should be interpreted expansively. Thus, in determining whether a final agency action announces a general statement of policy or an interpretation of law of general applicability, we believe that the Act does not require a finding that it will generally apply to the population as a whole. Rather, all that is required is a finding that it has general applicability within its intended range, regardless of the magnitude of that range. For example, an Occupational Safety and Health Administration rule pertaining to exposure to a specific chemical compound is not a matter of particular applicability, even though it applies to a very small percentage of the working public. It is intended to protect all workers in the covered range, those who are exposed to the particular chemical compound.

The Trinity ROD is a general statement of policy regarding the issues of water flow in both the Trinity and Sacramento River mainstems. It will have broad effect on both rivers’ ecosystems and potentially significant economic effect within the Sacramento and Trinity River basins. Also, the ROD implements the CVPIA, which provides congressional direction to restore the anadromous fishery of the Trinity River, both for the benefit of certain Indian tribes, as well for the benefit of the environment more generally.³⁴ Interior anticipated that the ROD would have significant positive economic impacts by encouraging increased recreation in the Trinity River, as well as job growth in the commercial fishing and seafood processing sectors resulting from the revival of the anadromous fishery.³⁵ Interior also acknowledged that the ROD would have adverse economic and employment effects on the agricultural sector in the Central Valley, including the farm machinery and cotton production sectors, and would result in approximately a 6 percent reduction in CVP power generation, producing in turn higher power costs to customers within the Central Valley Project.³⁶

In short, applicable congressional direction and the agency's own description of its efforts indicate that the Trinity ROD would have significant economic and

³² Cong. Rec. E578, April 19, 1996

³³ Id.

³⁴ CVPIA, § 3406(b)(23); ROD at 17-18.

³⁵ ROD at 24.

³⁶ Id.

environmental impact throughout several major watersheds in the nation's largest state. Accordingly, we conclude that the section 804(3)(A) exception to CRA coverage does not exclude the Trinity River ROD.

For the foregoing reasons, it is our opinion that the Trinity ROD³⁷ constitutes a “rule” under the Congressional Review Act and should be submitted to Congress and the Comptroller General in accordance with the provisions of the Act.

We trust this is responsive to your request. If you have any questions, please contact James Vickers, Assistant General Counsel, on 202-512-8210.

Sincerely yours,

A handwritten signature in black ink, reading "Anthony H. Gamboa". The signature is written in a cursive, flowing style.

Anthony H. Gamboa
General Counsel

³⁷ We note that there are many contexts in which agencies issue records of decisions. Whether a particular record of decision constitutes a CRA “rule” or is excluded by one of the CRA’s exceptions is an highly fact-intensive inquiry that requires detailed case-by-case examinations of the document at issue. Thus, this opinion only speaks to the Trinity ROD.