DECLARATION OF REX WAHL

I, Charles Rex Wahl, depose and state as follows:

1. I am an adult resident of the State of New Mexico.

2. The information provided and cited herein along with the letters submitted by my attorneys and the information contained and cited therein constitutes my response to the agency's notice of proposed removal dated September 18, 2006 (Letter).

BACKGROUND

3. The context of employment and service at Yuma Area Office (YAO) is relevant to understanding the actions cited. I will provide a description of the relevant projects, management environment and "atmosphere" at YAO as context for the cited actions.

4. **Service, Duties and Responsibilities at YAO**

Your[1] letter summarizes the circumstances of my hiring and position description as follows.

> In February 2004, you were hired by the Bureau of Reclamation, Lower Colorado Region, Yuma Area Office, as an Environmental Specialist, GS-401-12. According to your position description of record, you were responsible for managing "all elements of assigned National Environmental Policy Act (NEPA) compliance activities associated with actions and initiatives of the Yuma Area Office." This was a position of trust and a high level of responsibility in carrying out policies, mission and directives of the Yuma Area Office (YAO) in relation to all NEPA activities. [Letter at 1]

5. In accepting employment at YAO, I realized that I was a part of the Executive Branch of the U.S. Government, and as any employee, was responsible for compliance with federal and state law and regulation, Executive Orders, and agency policy consistent with that law. I was aware that the American public has trust in agency staff to abide by the nation's laws and carry out the government's business in an economical, ethical, legal and appropriate manner.

6. At the time of employment, I had over 20 years experience as a biologist and consultant dealing with environmental regulation. I had worked for the private sector as a consultant, I had worked for various state agencies that used federal funds, and I had worked for a variety of non-governmental organizations (NGO's), whom many would consider "environmental groups." I have an excellent background in National Environmental Policy Act (NEPA) practice and compliance which includes tiered compliance with myriad federal regulations and executive orders. I am considered an expert in the Endangered Species Act (ESA), Clean Water Act (CWA), wetland delineation, and arid lands riparian ecosystems. Immediately prior to working for the government, I had a successful consultant practice in Phoenix, Arizona primarily helping land-developers with ESA and CWA compliance.

[1] The terms "you" and "your" refer to the agency and/or Mr. Valverde.

7. I have worked on ESA compliance in Texas, NM, AZ, OK, and CA. I have prepared wetland delineations and CWA Section 404 applications for clients and agencies in AZ. I have prepared NEPA documents in TX, NM and AZ for a variety of federal agencies and their state counterparts, including Texas Department of Transportation (TxDOT), Arizona DOT, Bureau of Land Management, Bureau of Reclamation, Bureau of Indian Affairs, US Forest Service, and others.

8. Shortly after reporting to YAO, I reviewed Department of Interior Policy for Reclamation[2], including:

- Part (DM) 516, Chapters 1-7 and 14
- Part (DM) 518, Chapters 1 & 2

9. Regarding NEPA process, DM 516 makes clear that the agency's policy is to: (a) encourage public involvement to the fullest extent practicable; (b) provide timely information to the public; (c) interpret and administer the policies, regulations and laws administered by the agency in compliance with NEPA; (d) consult, coordinate, and cooperate with other agencies; and (e) base decision making on adequate environmental data in order to identify reasonable alternatives to proposed actions. See, DM 516 § 1.2. Agency policy also requires the Heads of Bureaus and Offices to: (f) comply with NEPA, CEQ regulations and relevant Executive Orders; (g) use consensus –based management for NEPA activities; and (h) comply with the Federal Advisory Committee Act (FACA). See, DM 516 § 1.3. In addition, agency policy requires consideration of environmental values including: (i) the preparation of environmental analyses that will factually, objectively, and comprehensively analyze the environmental effects of proposed actions and their reasonable alternatives; (j) systematic analysis of alternatives and measures that would reduce, mitigate or prevent adverse environmental impacts or that would enhance environmental quality; and (k) the preparation of environmental analyses that are integrated to ensure adequate consideration of resource use interactions, to reduce resource conflicts, to establish baseline data, to monitor and evaluate changes in such data. DM 516 § 1.4.

10. I also reviewed the Department's Government Performance and Results Act (GPRA) goals, especially because these were to be integrated into my performance evaluations. FY 2005-6 GPRA goals (http://www.usbr.gov/gpra/) for Reclamation included:

> **End Outcome Goal and FY 2005 Annual Performance Indicators:**
> ***Deliver Water Consistent with Applicable State and Federal Law, in an Environmentally Responsible and Cost-Efficient Manner***

11. Reported Reclamation GPRA successes are:

> *UEM 5.03 - Percent of water facilities that do not receive Federal or State notices of violation under environmental requirements as defined by Federal and State Law*
>
> *During 2005, 99.9 percent of Reclamation's facilities were in compliance with environmental laws. FY 2004 was the baseline year for this goal.*
>
> *FY 2006-Performance Targets: For FY 2006, the level of compliance*

[2] See, http://elips.doi.gov/app_dm/act_getfiles.cfm?relnum=3611, and http://elips.doi.gov/app_dm/act_getfiles.cfm?relnum=3593.

*is expected to be at **97%**. That level of performance is expected to remain steady for the next several years.*

12. My position description (GS-401-12) from YAO describes my duties and performance factors as follows:

MAJOR DUTIES (emphasis added):

1. The incumbent has the overall responsibility for **all aspects of the NEPA and NEPA-related compliance processes** from initiation to final documents by taking **leadership responsibility for coordinating with and appropriately consulting with regulatory agency representatives**, contractors, consultants, cooperators or joint leads, and for actively involving Reclamation subject matter specialists. Reviews and prepares/edits portions of NEPA and NEPA-associated documents for purposes of clarity and compliance with applicable Acts, regulations and guidelines. Manages the completion of such assignments with the objective of providing timely, adequate, and economical (within established budget constraints) products for specified Reclamation offices and external customers.

2. Manages the gathering and analysis of data for impact projections, development of avoidance and mitigation measures, and preparation of individual environmental impact statements (EISs), environmental assessments (EAs), categorical exclusions (CEs), section 106 (NHPA) documents, section 7 documents (ESA) and other associated environmental documents for various projects assigned to the Environmental and Hazardous Materials Group. In this capacity identifies the program and data requirements necessary to **prepare accurate, adequate and appropriate environmental and cultural resource documents.** Evaluates these requirements in light of personnel availability, existing data, funding, and established schedules to development an overall plan for preparation of environmental and cultural resource documents for inclusion into the appropriate NEPA document.

3. Prepares Scopes of Work (SOW) for special data needs (e.g. contracts with consultants)…

4. Assists the Contracting Officer in evaluation, negotiation, and monitoring of contracts for environmental baseline data collection….(contracts with consultants)

5. Designs and coordinates the **implementation of public involvement programs** for assigned environmental documents under NEPA and related Acts and regulations. Makes arrangements for and conducts public scoping meetings, workshops, public hearings, and other forums. Guides subject matter specialists in the preparation of written materials and oral presentations. Prepares, assembles, and edits written materials for public dissemination. Makes presentations pertaining to environmental and cultural resource documents and other related

compliance processes. Documents the results of public forums including issues, comments, questions and responses.

6. Develops and manages service agreements for work orders concerning preparation, compliance and mitigation for environmental requirements of YAO programs, as well as external customer projects. Assures that quality products are received on schedule and within approved budgets and appropriations.

7. **Provides technical and policy consultation and advice to area office personnel on environmental compliance and cultural resource issues.** Reviews project internal and external environmental compliance documents including EISs, EAs, and CEs for **accuracy and adequacy** and makes recommendations on these reviews to the Group Manager.

8 . . . . .

9. Prepares environmental and cultural resource commitment plans for projects to implement mitigation and other environmental and cultural resource commitments developed during NEPA compliance. Provides oversight and guidance to internal and external project construction and operations personnel in implementing environmental commitments in these plans.

10. . . . .

11. **Participates as an official Reclamation** representative at meetings, public hearings, and conferences attended by representatives of other **Federal, state, and local agencies for the collection and evaluation of environmental, cultural and planning data, formulation of environmental documents, and the review of matters pertaining to environmental programs**. Represents the role, mission and authority of Reclamation **as determined by law and officially adopted policies.**

12. As assigned, serves and actively participates as an official member of Reclamation planning and program teams. Provides guidance, oversight and advice on environmental and cultural resource compliance requirements for assigned projects. Serves to coordinate the appropriate review and input on environmental and cultural resource data included in these team activities.

Factor 1- Knowledge Required by the position. (Weighted 44%)

A **thorough understanding and working knowledge of Federal environmental and cultural resource legislation, regulations, procedures and policies pertaining to the protection, preservation, restoration, conservation, and enhancement of the environmental and cultural resources are necessary.** Such understanding shall also include **a good working knowledge of the implementing regulations of the Department of Interior, Bureau of Reclamation,** and other Federal agencies having jurisdiction by law or special expertise over certain

programs and lands. Practical experience and knowledge of the Section 106 consultation process with State Historic Preservation Officers; the **ESA Section 7 FWCA consultation processes with the Fish and Wildlife Service; and consultation processes under the CWA** and CAA are **essential abilities and skills of this position.** This knowledge is needed in order to **ensure compliance with the various environmental and cultural resources regulations when implementing Lower Colorado Region programs.** Also required is an applied knowledge of the Federal Land Policy and Management Act, and the Organic Acts of other sister agencies due to the mix of Federal lands associated with programs and project operations….

Factor 2- Supervisory Controls, (Weighted 16%)

Works under the **general supervision** of the Group Manager within the Resource Management Office and YAO. Incumbent receives general assignments or projects and then exercises considerable independence in accomplishing work assignments. The incumbent has the responsibility for managing the preparation of assigned environmental and cultural resource documents and **independently plans and carriers out these projects, selecting the approaches and methods to be used in solving problems.** The incumbent is responsible for **coordinating** efforts with the Regional Office staff, the Denver Office of Policy, **outside regulatory Federal and state agencies as well as cooperating agencies and project sponsors.** Work is reviewed periodically by supervisor and staff specialists for purposes of peer review and to provide advice on extremely controversial and complex issues. The supervisor and staff specialists, as assigned by supervisor, also review completed EISs, EAs, reports, and correspondence for effectiveness and conformance with Reclamation policies and practices.

Factor 3- Guidelines. (Weighted 16%)

General guidelines are available in the form of **legislation, regulations, Executive Orders, Environmental memoranda, Reclamation Handbooks, the Departmental Manual,** and general policy statements. More specific guidance is available from Reclamation Instructions, plus similar procedures of other Federal and state resource agencies. However, **incumbent exercises considerable judgment and interpretation to assess the applicability and implications of these guidelines to diverse problems and issues related to assigned project.**

Other **Factors** concern the importance and responsibility of regulatory compliance, large scope and complexity of projects, controversial nature of the work and high risk of legal problems if work is **not adequate or procedurally correct (Factor 4).**

13. Thus, my understanding of my duties in **"managing all elements of assigned National Environmental Policy Act (NEPA) compliance…of the Yuma Area Office."** included:

- A lead role in ensuring that YAO projects and plans were in compliance with federal laws, regulations, Executive Orders and policy, especially in my area of practice.

- Rigorous, fact-based, comprehensive analysis of project impacts to ensure legally defensible conclusions and adequate compliance.

- Extensive efforts to invite and encourage public involvement in plans and programs; including project alternatives development, impact analysis, issues identification and resolution of conflicts.

- Sharing information with interested public regarding projects, environmental data, baseline conditions, etc.

- Cooperate with state and federal agencies in recognition of their legal mandates regarding resources, project impacts, and federal regulatory matters.

- Provide accurate, competent advice within the agency in my areas of responsibility.

14. **NEPA and Compliance Practice at YAO**

When I began working for YAO in February 2004, it didn't take long for me to realize that NEPA and compliance practice was inadequate and, in many cases, contrary to law and policy. Examples included use of Categorical Exclusions (CE) for major projects with potentially significant impacts, complete lack of public involvement in NEPA, violations of the CWA involving wetlands, and considerable disregard for historic and archeological features contrary to well-established law.

15. Around the time of my arrival, my former supervisor, Thayer Broili, Supervisor, Environmental Compliance Group, was building up the Environmental Compliance Group, which began to operate in a professional manner, achieving necessary approvals for projects in compliance with environmental laws and requirements. However, management could not accept the fact that some projects as proposed simply could not meet environmental requirements without modification, and that others faced significant obstacles to compliance, requiring major time commitments and possible modifications to the projects in order to proceed legally. Management responded by undermining and marginalizing the Environmental Compliance Group, eventually driving away Broili and others, including me. Management demonstrated a clear animus toward those of us who were attempting to do our jobs in accordance with legal and departmental policy requirements. As described below, my work on projects with environmental compliance concerns angered management, and likely led to this retaliatory dismissal, precisely because I was attempting to perform my duties consistent with written departmental policy (quoted above) and to comply with environmental requirements.

16. In 2004, the Environmental Compliance staff grew from one to four people. The Hazardous Materials group also increased in size. Mr. Broili named me as Team Leader for the NEPA group. Mr. Broili emphasized a results-based approach which fit my consultant background -- demonstrate that what seems like a daunting array of legal

requirements can be met in getting projects legally covered by NEPA and associated law, and on schedule. Mr. Broili and I worked to demonstrate that we could attain clearances and meet legal requirements for projects. We also hired contractors to provide needed services, such as archeological survey and NEPA support. The group began to have some successes.

17. In 2004 we permitted, in cooperation with regulatory agency staff:

- A dike repair at Senator Wash Reservoir (endangered species issues)
- A herbicide spraying program for an exotic aquatic weed, *Salvinia molesta*, on the Colorado River, including an endangered species consultation under ESA
- A large-scale dredging operation at Imperial Reservoir (ESA and wetland issues)
- Numerous smaller maintenance projects

18. With these successes, the Environmental Compliance Group even began to receive compliments from other divisions, whose work depended on successful environmental permitting (*e.g.*, dredging group, maintenance group, procurement group). The Environmental Compliance Group was demonstrating that compliance could be done in the right way, and on time. Federal and state regulatory agency staff were becoming more cooperative and welcomed the change. A productive working relationship with these agencies was established.

19. However, I found that senior management's attitude toward environmental compliance was hostile and mistrustful of other federal agency roles. There had been (prior to my employment) some projects that were halted due to endangered species or federal Clean Water Act (CWA) permit mistakes. Because proper Endangered Species Act (ESA) or CWA clearances and permits were not obtained for projects, the YAO found itself on the enforcement end of federal regulations. There was considerable enmity for the federal agency staff, particularly U.S. Fish and Wildlife Service and U.S. Army Corps of Engineers. Senior YAO staff, and other Groups' leaders frequently vilified and diminished the role of regulatory agencies, and demonized the staff. The ANTEON report [3] is a fine example of this thinking. The report, a 10-year plan for river channel maintenance frequently refers to "environmental holdups" in regards to permitting proposed actions. The report represents a complete misunderstanding of applicable environmental regulation, necessary compliance and the processes necessary to achieve that compliance. Basically, it represents the erroneous and dated opinion of a few as to environmental compliance by a federal agency for federal projects.

20. YAO management feared and misunderstood the public involvement requirements of NEPA. Most projects were given a "don't ask, don't tell" treatment. Often a Categorical Exclusion (CE) was used to cover NEPA compliance for a project with no involvement of the public, and little regard for the limited applicability of CEs under department policy and regulation. Short environmental assessments (EAs) were written for the files, but were not made available for public review and comment as a draft. Public notice of their existence, required by NEPA, was done in obscure ways, if at all. It was a paper exercise.

[3] Bob Brose, Bob Strand, Art Pipkin, Betsy Thompson. 2000. Lower Colorado and Gila River Work Program Assessment 10 year schedule FY 2000. Final Report (June 13, 2000) to Bureau of Reclamation, Yuma Area Office. Anteon Corporation. My communication concerning this report is attached to your letter as Email #10.

21. Adding to the pressure-filled atmosphere at YAO was an on-going, severe drought throughout the southwest. There was increased political pressure to deliver more water and maintain supplies. Booming residential growth in the region, with changes in agricultural areas to urban, brought demands for easements and changes in Reclamation structures and facilities. YAO was under outside pressure to have more projects and permit substantial alteration to historic resources (the Yuma Valley irrigation system, for instance). There was high political pressure to begin to operate the Yuma Desalting Plant (YDP); an aged, mothballed, large-scale reverse-osmosis plant. The 1980s vintage structure was not operated at capacity after being built and was of antiquated technology. Pressure mounted to desalt agricultural drainage waters to supply treaty requirements to Mexico, thereby freeing water upstream for existing U.S. users.

22. In 2004, a list of projects that had not progressed due to failed compliance, inadequate NEPA and an inability to effectively involve and cooperate with staff from other regulatory agencies included:

- A plan to stabilize the mouth of the Gila River confluence with the Colorado River, near Yuma. This included about 10 miles of river channelization, levees and bank armoring (Your letter: e-mail no. 10),
- A plan to dredge out a large reservoir at Laguna Reservoir on the Colorado River. The old dam had silted in during floods in 1993. However the proposed dredge area was in the midst of high quality wetlands and was opposed by resource agencies (Your letter: e-mails no's. 3, 7, 9).
- A plan to build a 1200 ft. long stone wing-wall in mid-channel of the Colorado River upstream of Palo Verde Diversion Dam. COE staff suspected the purpose of the project was to create a marina on the California shore for an Indian tribe. (YAO had dredged a boat basin and outlet for a resort-based private marina years before near Laughlin, Nevada using public resources).

23. YAO management could not accept what they viewed as “environmental holdups,” and began to undermine the work of the Environmental Compliance Group. This problem was greatly exacerbated when we were unable to obtain a Section 404 Clean Water Act permit for a proposed Palo Verde Training structure above Palo Verde Diversion Dam. In July-August 2005 we received substantial comment on the permit application from EPA, Arizona Game and Fish Department, California Department of Fish and Game, and U.S. Fish and Wildlife Service. The proposed structure is a 1200 ft. long rock dike in the channel, intended to divert the river to mid channel. It is a massive structure and was opposed by resource agencies and the U.S. Army Corps of Engineers (COE) in a previous permitting attempt. Due to substantial concerns from the agencies, we were obliged to withdraw our permit application to COE rather than suffer a permit denial.

24. The other agencies felt that a lesser structure was adequate, with fewer resource impacts. YAO had even invited COE engineers to analyze YAO's proposal, with negative results. YAO management had insisted on the proposed structure, despite the fact that it was difficult to justify under the CWA requirement for Individual Section 404 permits: that impacts to wetlands and jurisdictional waters be first avoided, then minimized, then mitigated (CWA § 404 (b)(1.) guidelines). Management direction forced us to attempt to justify the project to COE as the best practical project meeting those requirements. That failed.

25. YAO Management reacted angrily and harshly to the set-back. There was considerable talk from YAO senior officials about "collusion" against Reclamation among the resource agencies and COE. The key COE staff was often referred to as "Bitch"---appalling language used to describe another federal official. As the YAO staff most knowledgeable about CWA, I realized that COE staff was exactly within the letter of law and regulation. My observations on compliance needs were not appreciated, in fact, Cincy Hoeft's reply to my attorney's request for information[4] suggests that I had somehow sabotaged the permitting effort for the Palo Verde Dam Training Structure. That is an absurd accusation and certainly not true! It does exemplify YAO Management's deep mistrust and misunderstanding of the role of environmental professionals.

26. I heard that senior management staff from the Regional Office traveled to Los Angeles and discussed "problems" with this COE staffer with the COE District Commander. To me, this was an unconscionable attempt to affect her job because Reclamation didn't like the response to our permit application. There were "white papers" written about the issue to Reclamation senior management (Regional Director), however the authors (engineers) barely consulted with our group, even though the issue was completely a matter of federal environmental law. Ms. Jennifer McCloskey who had been hired at YAO as Deputy Area Manager became involved with the issue, as did all of senior management.

27. In early 2005, I was lead for compliance for two other projects that presented significant environmental hurdles: Drop 2 Reservoir and Laguna Restoration Project. These were high priority projects for the Region; each initially intended to gain greater storage capacity for operation of the Colorado River. Both were on tight schedules. Both had significant hurdles regarding environmental analysis and compliance. Both projects were aided by a well-qualified environmental firm working under contract to our group. In both cases, my efforts to insure environmental compliance, as reflected in some of the offending e-mails, were not appreciated by management.

28. **Laguna Restoration Project**

The Laguna Restoration Project had been around for a while. The YAO preferred proposal was to dredge a basin in an existing high-quality wetland in an old river channel to provide a reservoir. Art Pipkin, Assistant Area Manager, had proposed a very large reservoir, to be done in two phases; dredging the old channel, then dredging the active channel as a "maintenance action" (Colorado River Storage Alternatives Study, 2004). The old channel, valued by fishermen and environmental advocates for its productive marsh habitat, was targeted by management solely because it was the lowest elevation landscape and would be most economical to dredge (less overburden to be removed). This view failed to take into account the requirement under Clean Water Act Section 404 Regulation that wetlands be avoided if at all possible in implementing federal construction projects. There would be impossible permitting obstacles including the high costs of mitigation and the loss of the habitat values, and difficulty with resource agency permitting. Each "Phase" was to be represented as a single project with discrete environmental compliance. I and others (consultants) pointed out that this approach was

[4] C. Hoeft's statement of Aug. 31, 2006 Re: Statement Regarding Rex Wahl: "bankline scallop project above Palo Verde Dam…"

fragmentation of a project to reduce the significance of effects in each individual analysis, circumventing NEPA requirements; in fact illegal under NEPA. It also violated the requirement for a "single and complete project" application to COE for Section 404 CWA permits. The consultant was later fired from his firm due to his accurate comments regarding permitting for this project and Drop 2 Reservoir Project, which did not please the client (Reclamation).

29. After months of detailed explanation about Laguna Restoration Project permitting reality, we ultimately convinced the project design and management staff that the proposed alternative was impossible to permit lawfully. The experience with Palo Verde Training Structure reinforced this conclusion. Several comments afterwards by Art Pipkin convinced me that he intended to do what he wanted anyway, after obtaining the a COE permit to dredge into the old river channel. He said he would dredge the California river channel (including wetlands) under an existing maintenance permit, which was conditioned that no wetlands be altered, and would not apply to the proposed Laguna Dredging.

30. Because my supervisor realized that I was swamped with work, the Laguna Restoration Project lead was turned over to Kim Garvey, a GS-9 biologist in my group. Kim lacked Section 404 permitting experience and this project was going to encounter similar issues as did the Palo Verde Training Structure: wetland impacts requiring an individual Section 404 permit. Jennifer McCloskey insisted on reviewing Laguna Restoration Project draft environmental documents and permit applications herself and met frequently with Kim regarding the project. The project was also the first "covered" project under the MSCP, an endangered species conservation plan for the region. Thus, there was considerable management attention.

31. Kim Garvey asked for my review and comment on draft Section 404 permit application, which I gave. However, McCloskey's review and comments on the same documents were not available to me for review as to adequacy, accuracy and suitability for required regulations. Basically, my critical review of compliance documents here was negated by higher ranking staff review. Peer review suffered, because higher ranking management were intervening in areas they had no technical qualifications for, and were asking for the impossible.

32. E-mail numbers 3, and 7 and 9 involve my work with the Laguna Project.

33. **Drop 2 Reservoir Project**

The Drop 2 Reservoir Project is a proposed new storage reservoir to be located on the All American Canal in the California desert west of Yuma. The 8,000 acre foot reservoir would serve as a regulating reservoir, allowing timely adjustments for water delivered in excess of need. The Lower Colorado River has a 3-day lag time between water orders and delivery that results in what some consider inefficient operation and delivery of water to Mexico in excess of treaty obligations. Drop 2 Reservoir is located in habitat for a species of concern (the Flat-tailed Horned Lizard), and an area of intense off-road vehicle recreation (Algodones Dunes). Construction of a new All American Canal was the subject of an EIS and is presently in litigation over environmental and socio-economic issues.

34. I was in charge of environmental review for this project. YAO was pursuing an environmental assessment (EA) for the project. After some analysis of impacts, I believed that a full environmental impact statement (EIS) would be needed, primarily because the project might affect an endangered species and there may be cumulative effects exceeding local Clean Air Act parameters. I had several times written to my supervisors about this issue and it was the subject of several meetings. There was a rush to implement the project to meet the schedule of the related All American Canal construction.

35. I presented a briefing to the Basin States meeting in San Diego, CA on May 16, 2006 which summarized our conclusions regarding endangered species habitat impacts of the Drop 2 Reservoir Project. Prior to the Basin States meeting, I had met several times with the Regional Director, his staff, and senior management staff at YAO, including Ms. McCloskey, to review environmental issues in the Drop 2 Reservoir Project. At the latest of those, we discussed the **"may affect"** ESA determination we had come to regarding Drop 2 Reservoir operational effects on the Limitrophe Division of the Colorado River. An agency determination of **"may affect"** triggers Section 7 ESA consultation with USFWS. I was the senior (and only) biologist at YAO at the time and was the key NEPA lead for the project. I had formally requested permission from the Regional Office to initiate Section 7 consultation, required by established protocol. The request is a form, which I had prepared and forwarded through my supervisor to the Regional Office. The Regional Office Deputy Regional Director, Larry Walkoviak replied to the request by e-mail to me, authorizing initiation of Section 7 ESA consultation for this project. Despite this conclusion, vetted through supervisory chain of command through the Deputy Regional Director, Jennifer McCloskey has represented to NGO's that Reclamation has not reached a conclusion re: endangered species impacts.[5] Cindy Hoeft also states that no conclusion has been reached re: Drop 2 Reservoir ESA impacts[6] and that information (e.g. "may affect" conclusion) previously presented to water interests at the Basin States Meeting was not presented to NGO's to "avoid confusion and argument".

36. I also had concluded that the Yuma Groundwater Management Plan had a direct bearing on the cumulative environmental impacts of the Drop 2 Reservoir Project, should have been given proper NEPA analysis, and should have been part of the public discussion concerning Drop 2 Reservoir. Thus, I had a reasonable belief that NEPA and ESA law and regulations were being violated. See, E-mail #8. E-mail number 7 also related to my work on the Drop 2 Project.

37. In this mid-2005 time period, in connection with these and other projects requiring environmental compliance, management resorted to a time-honored approach at YAO: circumvent and isolate the Environmental and Hazardous Material Group manager and select compliant junior staff , who provide answers you like, to work on projects outside of established peer review. The new Deputy Area Manager (McCloskey) adopted the policy of the Assistant Area Manager (Pipkin), selecting junior staff in the group to individually address key work. As noted above, McCloskey selected a biologist with no Section 404 permitting experience (Kim Garvey) to take the lead on the Laguna Restoration Project, and outside the normal technical review. Art Pipkin had a long history of going to Julian DeSantiago in our group for CEs and wetland permits. Julian

[5] J. McCloskey statement of Aug. 22, 2006. Statement Re: Rex Wahl: email #1

[6] C. Hoeft's statement of Aug. 31, 2006 Re: Statement Regarding Rex Wahl: June 26, 2006 meeting with NGOs

always did what was asked, and usually failed to say anything about the work to Broili. Broili, was no longer invited to key project and management meetings, instead, junior and more pliable compliance staff were invited directly, circumventing established chain-of-command.

38. Organization of the Environmental Compliance Group was being revised (to bypass them on YDP permitting). Broili was ostracized because he often presented regulatory requirements accurately and clearly in a rigorous way. To YAO Management this was seen as internal regulation by agency staff, not good advice. Sound regulatory advice from Broili regarding proposed start-up of the YDP was clearly being ignored, and the desalting group bypassed the Environmental and Compliance group in its work. E-mails #5 and 6 involve issues concerning the YDP.

39. Management interference and circumvention was clear to all; other YAO groups began to ignore the Environmental Compliance and Hazardous Materials group. The group's role, ensuring compliance for YAO, was now compromised by senior management meddling. There was clearly no trust or confidence by management in the group. Marginalized, Broili sought and accepted another position and by January 2006 was a lame-duck.

40. When Broili left, there was a long period of "acting" assignments to YAO and Regional Office staff sitting in as Group Manager. They were good people, but not qualified to do peer review in the highly technical business of the group. Kim Garvey left in April 2006. With my leaving in May 2006 the Environmental Compliance team was left with two staff. This event followed a similar event at YAO in about 2001-2002, the entire team was dissolved due to senior management hostility and misunderstanding of their crucial role.

41. There is gross dysfunction at YAO, lead by senior management, in the area of environmental compliance. It is characterized by mistrust, micromanagement, and blaming and hostility toward those professionals charged with compliance activities.

42. In sharp contrast to my YAO experience, I find that the Albuquerque Area Office has an effective, professional and appropriate approach to the complex business of environmental compliance. At AAO, environmental staff are true members of the interdisciplinary teams, management seeks and values the group's advice, and management trusts and supports them in doing their job. Clearly, they are valued and seen as an essential part of the AAO work. This functional relationship is characterized by mutual trust, interdependence, professionalism, and success. The relationship is also reflected in the productive working relations with Federal and state resource agencies, and most of the public. I believe that AAO's record of successful project permitting and NEPA compliance reflects the fruits of the trust and confidence placed in the environmental staff. I believe that my experience and approach will be valued there, and not rejected as it was at YAO.

43. By contrast with YAO, the AAO does not seek to circumvent or ignore regulations for Federal Projects. There is no attempt to avoid public involvement for controversial projects. The management staff at AAO appear to trust and depend on the Environmental Compliance Group and support them in their work. Regulatory agency staff are regarded professionally, and with respect. In short, the office conducts its work appropriately and professionally. I knew this prior to application for the position at AAO

and it was an attractive feature of the job; working with a professional team in a supportive management atmosphere.

44. In a workplace climate of honesty, integrity and professionalism, I would not expect that there would be any need for whistleblower disclosures or so-called "unauthorized" disclosures to public groups. Among my reasons for moving to the AAO was the ability to work in an honest and appropriate work environment. Management at AAO has cited an inability to trust me in the position, an attitude fostered by the claims from YAO. It seems the intent of YAO management, to damage my professional reputation, has been realized.

45. I would assure management at AAO that in an appropriate, regulatory compliant work environment, that I can be trusted to perform my duties. There is no need for whisleblower actions at AAO. Also, given the open approach to informing the public about federal projects, I doubt that many of the communications portrayed by YAO as subversive would even be regarded as inappropriate.

46. There is no need to separate me from Federal Service, indeed that would be contributing to the retaliation I have already suffered. I have relocated my family here at great effort, in order to have a better working environment. I have unique contributions to make to the AAO and will work to prove that in the future and have demonstrated this in my short tenure here.

RESPONSES TO SPECIFIC CHARGES

47. **Adversarial Relationship Issue:**

Your letter makes the following claims:

> In May of 2006, you transferred to the Albuquerque Area Office (AAO) of the Upper Colorado Region as a Supervisory Environmental Protection Specialist. As part of that transfer, your computer accounts in Yuma were turned over to Ms. Cynthia Hoeft, your previous supervisor. Ms. Hoeft went through those records to evaluate if any documents needed to be passed on to others for action or completion. In reviewing your last 90 days of emails, Ms. Hoeft was extremely concerned to find that you were in regular contact with organizations who you described as having an adversarial relationship with the Yuma Office and who you believed had threatened litigation over the proposed Drop 2 Project. [Letter at 1]

Contrary to what is stated in the letter, my YAO computer hard drive was confiscated several weeks prior to my scheduled leaving for AAO. A hard-drive crash was faked on my computer and IT staff came and removed it, later returning it with a new hard drive. It is not true that the search of my e-mail records was in the normal course of business, in order to “evaluate if any documents needed to be passed on to others for action or completion” after I left YAO. The hard-drive search, weeks before I left YAO, appears to have been part of an effort to find a pretext to retaliate against me for diligently carrying out my environmental compliance duties, as described above.

48. As for my contact with outside organizations, part of my NEPA responsibilities was to stay in regular contact with conservation groups, as members of the interested public (DM 516 §§ 1.2.B. and 1.2.E.) My March 2006 Performance Appraisal lists as Critical Element 2:

> **---As such, is the primary individual for planning, scheduling, controlling work effort, producing deliverables and results and interacting with individuals internal and external to the agency.**

49. My duty to interact with such groups and seek their input into environmental reviews applies whether or not anyone characterizes them as "adversarial" to the agency. My public communication and co-ordination duties were not limited to groups who agree with YAO. Apparently, however, this is not the view of management, who regard environmental groups as the enemy rather than as legitimate interests whose goal is conservation of natural resources. The "adversarial relationship" claim is the phrasing used by Sterling Egan (Upper Colorado Regional Office, Human Resources) during my Aug. 3, 2006 interrogation. He asked if I would consider these groups and agencies adversarial to Yuma. I said, "I guess." This was in the context of their involvement and interests, as concerned members of the public, in the projects and programs of YAO. Later in the questioning, Egan asked if I was aware of the "secret agenda of these groups, that is, agendas that aren't displayed on their web sites." I answered "no, that as far as I knew, these groups were interested in conservation of the natural environment, species and habitats."

50. The fact that management believes these groups have a "secret agenda," and was "extremely concerned" about my having contacts with them, is itself of extreme concern with regard to the proper implementation of the Bureau of Reclamation's environmental responsibilities.

51. **Issue Regarding Alleged Intent to Sue:**

Your letter states:

> The information that you were sharing was highly sensitive to ongoing policy development, and was highly damaging to Reclamation in pursuing resolution to ongoing disputes with these organizations. In at least one instance, you shared agency information with an organization who you believed had given notice of their intent to sue Reclamation, and the information you shared dealt directly with the proposed Drop 2 Project. This caused harm to the agency, and directly affected the efficiency of the service by hampering Reclamation's ability to accomplish its work. [Letter at 2]

The communication referred to (E-mail # 1) is with the organization Environmental Defense (ED). It is discussed in the section below with regard to specific e-mails. I explain there that the communication was a protected disclosure of evidence of violations of the Endangered Species Act. In addition, it is not true that I believed ED had given notice of their intent to sue Reclamation at the time I communicated this information to them. ED had not given notice of intent to sue, but had identified itself as interested member of the public in the NEPA scoping for the project.[7] Sharing Drop 2 Project information with interested members of the public is consistent with NEPA and DM 516 and policy guidance regarding public input into agency projects.

[7] See discussion below, explaining the context of my conversation with Ms. McCloskey which she misinterpreted as stating my belief that ED had expressed an intent to sue Reclamation.

52. Management's apparent view that ED intended to sue is consistent with the presumption of an adversarial public and is symptomatic of the management philosophy at YAO. ED had sent a letter regarding Drop 2 Reservoir during the public scoping period (Drop 2 Reservoir Public Scoping Summary 2005), which was widely viewed in YAO as a "shot across the bow." At the time, YAO was pursuing an Environmental Assessment (EA) for Drop 2 Storage Reservoir, and in my view intended to avoid endangered species act consultation under ESA for the project in the mistaken belief that they could underestimate impacts and get by with an EA, shortening the time required for environmental analysis. ED's letter said that because of ESA and other concerns, an EIS was warranted for the project. There was a legitimate conflict of views there.

53. In fact, the legitimacy of ED's view was acknowledged by upper management. During several meetings with Regional Director, **Robert Johnson** and his staff, we clearly discussed that an EA might not ultimately be the proper level of NEPA review (I had written to my supervisors about this). The result of the EA evaluation may be that an EIS is needed because of "significant, or potentially significant effects". Johnson acknowledged this and said he always prefaced his discussion of the project with interested parties (*e.g.*, Nevada and California) with the caveat that an EIS may be required (extending the project execution date). The issue hinged, in part, on the agency's determination of **"may affect"** under the ESA. At the last of such meetings, the meeting with the Basin States in May 2006, I presented our conclusion of **"may affect"** stating that the significance (scale) of the effect had yet to be determined (see **Basin States PowerPoint Presentation of May 16, 2006**).

54. Thus, as the Drop 2 Reservoir impacts were analyzed it appears that the views expressed by ED were consistent with those of the Regional Director; that an EIS may be the appropriate level of environmental analysis required for the project. Additionally, what is adversarial about an organization expressing an interest in a federal project, including the degree of environmental analysis required? The "adversarial" claim made in Reclamation's proposal is a canard intended to suggest that I was cooperating with the enemy. In fact, the public has a right to express its interests to government regarding federal projects and is insured a legitimate input into the process in NEPA regulation. In sum, my action in sharing information with ED was entirely appropriate. And while your letter claims that it caused harm to the agency, the harm is not specified. That claim has no support.

E-MAILS CITED IN SUPPORT OF PROPOSED DISMISSAL ACTION

55. A discussion of each e-mail purportedly supplying grounds for my dismissal follows. In each case, the information disclosed 1) was public information, and/or 2) was properly disclosed in the course of my job duties, and/or 3) was disclosed based on a reasonable belief that it evidenced a violation of law, rule or regulation, or a substantial and specific danger to public health and safety, and thus was a protected whistleblower communication.

56. **Yuma Groundwater Management Plan – E-Mail #8.**

Your letter states:

> On February 13, 2006, you emailed Jennifer Pitt, Senior Research Analyst for the Environmental Defense (ED), giving ED advance knowledge that the Yuma Groundwater Management Plan was being reviewed. This information was not public knowledge at the time and apprised ED that the plan would soon be open for public review. [Letter at 2]

This information was already in the public domain. The Yuma Valley Groundwater Management plan was briefly discussed in the MSCP EIS (2004) and Section 10 (a.) Permit Application. The Yuma Valley Groundwater Management Plan had been submitted to AZ Department of Water Resources (ADWR) in February 2006 as required by state law. Advising ED to the existence of the Plan was consistent with my duties as NEPA officer relevant to the Drop 2 Reservoir Project. As noted above, ED had identified itself as interested public in the NEPA scoping process for Drop 2 Reservoir. The Groundwater Plan, involving extensive pumping of groundwater from the Yuma Valley to lower groundwater elevations, had a direct bearing on the cumulative impacts regarding Drop 2 Reservoir project, specifically effects on the Limitrophe Division of the Colorado River. An understanding of groundwater in the region is important to analyzing the Drop 2 Reservoir Project effects. This understanding can only improve the cognizance of issues in the Drop 2 Reservoir NEPA process and facilitate informed discussion of issues. This approach to an active education of interested public on relevant issues is consistent with DM 516.

57. In any event, I did not disclose the document itself, but only the fact that it was being reviewed on the state level and would soon be open to public review. Ms. Pitt would not have been able to actually access the document unless and until it *was* public. It is impossible to understand why there would be an objection to this type of communication, unless it is based on a policy of "If they don't know what to look for, they can't ask for it," which was expressed to me in my August 3, 2006 interrogation, and is also evidenced by McCloskey's response to my attorneys. I did not follow such a policy because it would have been contrary to my NEPA responsibilities as defined by written agency direction. My job description, department policy and relevant federal regulation say nothing about controlling, restricting, hiding, obscuring, or denying factual information and its availability to the public in the course of NEPA analysis and public involvement. DM 516 and policy memos call for an active and early inclusion of interested public in Reclamation projects and plans.

58. The Yuma Valley Groundwater Management Plan of YAO should have been given proper NEPA analysis, including public scoping. The project was, instead, given a Categorical Exclusion (CE) in violation of Department NEPA policy (DM 516) and applicable federal law. Little surprise that after that, YAO wanted to keep it secret from the public. The project may alter groundwater levels in the area to a degree that affects wetlands and riparian vegetation in the Limitrophe Division of the Colorado River. Endangered species are involved, and there was no Section 7 ESA consultation. The CE is defended by a 160 page rationale: sufficient testimony to the inadequacy of a CE for this purpose.

59. In preparing a CE for this extensive project, Reclamation erred in its NEPA obligations to fully and appropriately analyze environmental impacts. YAO continues to try to control the availability of information about this project to the public, because it realizes that a CE is not legally sufficient and was applied incorrectly. YAO also realizes that it chose to ignore Endangered Species Act consultation requirements illegally regarding this project. YAO seeks to avoid further mention of this project, in order to avoid the rigorous analysis necessary for cumulative effects analysis for the Drop 2 Reservoir Project.

60. **MSCP and Wetland Mitigation --E-mail # 9**

Your letter states:

> On February 16, 2006, you emailed Ms. Pitt and advised her saying, "you should look into the current thrust to have the MSCP (Section l0a and 7, ESA) also apply to Section

> 404 CWA mitigation throughout the LCR. Under the guise of `double mitigation.' So while the YAO was pursuing a course of action that you were entrusted in your agency position for working towards its success, you were advising the ED on ways to subvert or halt the proposed action. [Letter at 2]

You do not identify what in this communication is "administratively controlled" or "nonpublic" information.

61. The Multi-Species Conservation Program is a sweeping program of endangered species habitat restoration in three western states with multiple agencies pursuant to Sections 7 and 10.a. of the ESA. The plan and attendant EIS took years to finalize in a public process (http://www.usbr.gov/lc/lcrmscp/publications/eireis2004.html).

62. The MSCP as Wetland Mitigation Bank is a back-door attempt to get COE to accept wetlands created under the MSCP (ESA) as mitigation under the CWA on a 1:1 ratio for Reclamation projects. That is, wetlands which were to be created under the MSCP would also be counted as mitigation under the CWA, i.e. "double mitigation." It is being pursued **out of the public view** and would affect the entire Colorado River downstream of Davis Dam**.** Because this project of Reclamation and COE will affect the environment, it is subject to the NEPA process under both agency's policies and regulation. Pursuing a non-public, closed process in developing this "policy" is in violation of DM 516 and NEPA law.

63. My comment to ED was advising that two federal agencies were discussing a plan that was not disclosed or analyzed under the MSCP; that they may have an interest in this action. Because this application of the MSCP was not the purpose of the MSCP, but a new federal action, it is subject to the early and open involvement of the public under NEPA.

64. I fail to see how my informing ED about this plan, which under COE regulations regarding Wetland Mitigation Banks has a public involvement component, is subversive or in any way halts the discussion between COE and Reclamation. What is the harm claimed here?

65. Accordingly, this is a protected communication under the whistleblower provisions regarding actual or potential violations of law, rule or regulation.

66. Moreover, I see no attempt to subvert or halt anything in this communication; in fact I had proposed and outlined a lawful means of accomplishing the same end at least a year prior. In July 2004, I wrote a description of a lawful process to develop a Lower Colorado River Wetland Mitigation Bank under CWA Section 404 regulations (and COE guidance) using elements of the MSCP as bank. My proposal was circulated to management staff in Yuma and MSCP staff in Boulder City.

67. **H.R. 3691 – E-mail #7.**

Your letter states:

> On March 24, 2006, you advised Ms. Pitt to look at H.R. 3691, pending legislation to amend the Central Valley Project Improvement Act, and specifically pointed her to Section 10 of that legislation. The nature and purpose of this correspondence was wholly outside of your position, for the benefit of an organization that is at odds with Reclamation on many Central Valley issues. [Letter at 2]

H.R. 3691 is outlined below (from http://thomas.loc.gov/):

> **H.R. 3691**
> **To amend the Central Valley Project Improvement Act to provide for improved water management and conservation, and for other purposes. (Introduced in House)**
>
> **SEC. 10. ALL-AMERICAN CANAL, CALIFORNIA; LAGUNA DAM, ARIZONA.**
> (a) Project Authorization- The Secretary of the Interior, acting through the Commissioner of the Bureau of Reclamation, is authorized to construct new off-stream regulatory storage near the All-American Canal in California and to remove sediment behind Laguna Dam, Arizona.
>
> (b) Cost Sharing- The Federal share of the cost of activities authorized under this section shall be 100 percent.
>
> (c) Authorization of Appropriations- There is authorized to be appropriated such sums as may be necessary to carry out this section.

This is public record information and clearly relates to the Drop 2 Reservoir Project and Laguna Restoration Project; projects ED had expressed interest in during the Public Involvement phase of NEPA. Sharing project information, including authorization and funding information (required in EA), is consistent with DM 516.

68. How is information about pending legislation "administratively controlled?" Since when did it become illegal to share public information with an organization "that is at odds with Reclamation on many Central Valley issues?" I am sure that many others in Reclamation pointed out this legislation to other interests, primarily water users and those who benefit from public water projects. Is information such as this, clearly related to YAO projects, only to be shared with interests favored by management? Is that the nature of "administratively controlled?" If so, how am I to know what is administratively controlled or not? What is the direction from management and how can I avoid running afoul of this unknown proscription?

69. If I am to exercise broad discretion in my duties to coordinate NEPA activities for YAO projects, should I be told that pending legislation regarding these projects is a forbidden topic of discussion with the public? The suggestion is absurd, given my job duties, the public posting of the proposed legislation, and its clear relationship to two of the federal projects undergoing NEPA analysis and public involvement at YAO.

70. **USFWS Contact – E-mail # 4**

Your letter states:

> On April 13, 2006, you emailed Ms. Carol Beardmore, your ex-wife at the Fish and Wildlife Service regarding the controversial Drop 2 Reservoir. You state: "FYI, I will soon be giving talk to this group. Remind me to get you a low altitude (helicopter) video of the Colo. R. in US and Mx (border area) shows current wetland and riparian and perennial and ephemeral reaches." [Letter at 2]

With all due respect, this rather paranoid view of this innocent sharing of harmless information with a professional colleague speaks volumes of the attitude of YAO Reclamation toward other agencies, even within DOI.

DM 516 § 1.2 states: " *E. **To consult, coordinate, and cooperate with other Federal agencies"***

DM 516 § 5 states: "*B. Other Departmental Activities.*

*(1) Technical assistance, advice, data, and **information useful in restoring, maintaining, and enhancing the quality of the environment will be made available to other Federal agencies;** State, local, and Indian tribal governments; institutions; and other entities as appropriate."*

71. Ms. Beardmore administers a DOI program of grants to private organizations and individuals to enhance and restore southwestern riparian habitats (http://www.sonoranjv.org/) in the U.S. and Mexico to benefit migratory birds. The Colorado River in Mexico and the U.S. is of interest to the group and this raw video footage at low altitude shows the riparian and wetland habitats along the river.

72. How do you define coordination and cooperation? As I see this, it is merely professional cooperation among agencies. Is it the context of a planned talk with interest groups about the "Controversial" Drop 2 Reservoir that makes this "administratively controlled" information? The suggestion that this is "administratively controlled" by any definition is absurd, Drop 2 Reservoir is open to public involvement even by YAO's restrictive definition and certainly under a variety of laws, including NEPA, Clean Air Act, Clean Water Act, and many others.

73. **USFWS Contact – E-mail # 2**

Your letter states:

> On April 25, 2006, you emailed Ms. Leslie Fitzpatrick, a regulatory official with the Fish and Wildlife Service, and attached an internal agency memo regarding an Environmental Assessment for the Border Patrol. Reclamation's position was that it will not mitigate for difference of opinion to management officials within your chain of command, you shared information with an organization that has regulatory control over Reclamation such that it has hindered the efficiency of the Service in accomplishing its work. You were aware that your email was inappropriate as evidenced by your statement, "Please don't identify the source of this information." [Letter at 2]

You do not identify which, if any, information in this communication is “administratively controlled” or nonpublic.

74. There is nothing in this communication to suggest I disagree with the position of the Regional Office staff who reviewed the Border Patrol EA. In the Multi-Species Conservation Program (http://www.usbr.gov/LC/lcrmscp/index.html) it states that existing habitats in this area (e.g. Limitrophe Division) will be maintained in their existing habitat type and cover. As I say in my e-mail to Ms. Fitzpatrick, it seems this position is at odds with that statement in the MSCP. I was requesting an interpretation. I had inquired earlier how USFWS interpreted the language regarding habitat in the Limitrophe Division floodplain, which was targeted for clearing by Border Patrol for a "free-fire zone". I wanted her interpretation of the statement in the MSCP. The issue was relevant to the biological impact analysis for the Drop 2 Reservoir project, which would affect the Limitrophe Division and its habitats. Leslie was the USFWS lead regarding the MSCP and other ESA matters in my area of responsibility and we had a collegial relationship, typified by short e-mails on occasion. This is communication is entirely within my position description duties and my authority.

75. I asked not to be identified because, as is here obvious, cooperative relationships, including open dialog with other federal agency staff, is viewed by YAO as subversive and prohibited.

76. **Yuma Desalting Plant (YDP) Operation and MODE – E-mail # 6**

Your letter states:

> On May 4, 2006, you emailed Ms. Pitt and shared non public agency information that was internal to the YAO. You state, "FYI, Management has decided to 1/8 capacity startup of YDP for 90 day period. Plan operation by March 2007. Management has instructed that no NEPA or other compliance will be done, despite recommendations. Look for the lack of NPDES permit, no or inadequate NEPA (CE), etc. Also, there is a planned `outage' for MODE (salinity canal) in Feb. 2007 for repair. That would mean MODE diversion to River - no NPDES permit for that." [Letter at 3]

This is a protected communication under the whistleblower provisions regarding actual or potential violations of law, rule or regulation and this is a disclosure of a "substantial and specific danger to public health or safety" 5 U.S.C. 2303(b)(8)(A)(ii).

77. For a number of reasons, I believed that YAO management intended to pursue inadequate NEPA review for the YDP project, against department policy (DM 516) and 40 CFR §§ 1500-1508. I also believed that appropriate permitting under the Clean Water Act (NPDES) was going to be avoided. Other requirements related to safety and notification of storage of hazardous materials in hazardous quantities under the Clean Air Act were also likely to be ignored, all potentially posing a danger to public health and safety. See, 40 C.F.R. Part 68. With regard to the MODE outage, I believed that a required NPDES permit would not be obtained. My reasonable belief concerning these matters is evidenced by the following:

78. **Desalting Plant**

YDP is also the location of the Yuma Area Office, a workplace for over 250 federal and private sector employees. YDP is an aged, moth-balled, large-scale reverse-osmosis plant. The 1986 vintage structure was never run at design capacity and is of antiquated technology. The plant is run at a very low level to provide for domestic water at the facility and for research purposes. There are several state and federal permits maintained to operate the facility. The facility was fined by EPA in 2004 for a variety of regulatory violations and problems.

Yuma Desalting Plant pays fine for EPA violation
BY MICHELLE VOLKMANN
Yuma Daily Sun Dec 31, 2004

> Nine months after an inspection by the U.S. Environmental Protection Agency found incomplete records about the response plan to accidental chemical releases at the Yuma Desalting Plant, the fine has been paid.
>
> On Thursday, the EPA announced that the Bureau of Reclamation paid its reduced fine of $7,500 for failing to maintain a chemical risk management plan for chlorine at the Yuma Desalting Plant, 7301 Calle Agua Salada.
>
> The violations for "minor deficiencies" have already been corrected, said Jack Simes, the bureau's Yuma area external coordination group manager.
>
> "As part of the compliance, records indicate that the training is being conducted," Simes said. "During the inspection not all the records were current at that time."
>
> Under EPA's regulations, all facilities using hazardous substances above a certain quantity must develop a chemical risk management plan.

For the chemical chlorine, if the facility has more than 2,500 pounds of it, it must have the proper documents to show its risk management plan.

"When you exceed that threshold you must have a chemical risk plan," Simes said. "That's what draws the need for this plan."

The desalting plant had 4,000 pounds of chlorine on the site during its inspection in March, but it did not have the records showing that employees were properly trained to handle any accidental chemical releases.

Employees know how to respond, Simes said.

“The people had the training," he said. "We did not have all of the components (written on the plan.)”

The plan must include an assessment of the potential effects of an accidental release, history of accidents over the past five years and employee training. It must also have an emergency response program that outlines procedures for informing the public and response agencies, such as the police and fire departments, in the event of an accident, according to the EPA.

Since the plant acted quickly to fix the violation, the EPA reduced its penalty.

The maximum fee is $27,000 per day per violation, said EPA spokeswoman Laura Gentile.

The desalting plant, which has no other recent EPA violations, was built to collect and treat drainage water from farms east of Yuma. However, it has not been operated because of high cost. At the same facility there is a research and development center that continues to work on the desalting process.

Chlorine is used to kill bacteria and purify water.

Gentile said exposure to low concentrations of chlorine can cause intense coughing and breathing problems. Long-term exposure to chlorine can lead to chronic bronchitis.

79. The plant is not operated in a safe manner and has serious design and maintenance flaws. In 2005 there was an estimated 5,000 gallon (73,600 lbs) release of concentrated sulfuric acid from a tank at the site. The spill was not detected for days. This was reported (as required by law) after much argument with YAO management. The tank's designed containment structure, which failed, has still not been repaired since the spill. I personally observed a release of caustic soda ash (Sodium Hydroxide) from a storage silo during loading by a supply truck in 2005. The white powder, which can burn skin, was blowing freely over the plant and nearby parking area early one morning. In April and May 2006 there were several sewage overflows inside the office building, the result of on-going refit of some of the plumbing tied to the plant. These present a health hazard to the staff present.

80. Yuma is in a zone 5 seismic risk zone, the highest hazard rating available, and the plant and all other buildings at YAO are listed by Reclamation as in need of seismic retrofit. (http://www.usbr.gov/ssle/seismicsafety/NHQ%20Activities%20lc.pdf).
Seismic retrofit priority for the YDP is number 12 on Reclamation's list and work has not begun on other nearby buildings of higher priority.

81. Because chlorine gas is used in the YDP water treatment process, there are regular spill drills held at YDP. During drills, employees move to the 2nd floor offices and assemble in designated rooms and are to stuff towels under the closed door. These drills are to prepare for the event of a toxic chlorine spill. Startup of the plant in any quantity will require large volumes of chlorine gas stored at the site. Given the plant's demonstrated disregard for safety and proper reporting of hazardous chemicals, I expect that there would be violations of law and safe industrial practice threatening human life. I also believe that management intends to avoid reporting requirements for chlorine, in part because they have redirected the HAZMAT team and put them outside of the information loop. Lack of adequate seismic precautions, such as those yet-to-be implemented

under the Nonstructural Hazards Mitigation Implementation Plan, also increases the likelihood of a hazardous release.

82. My supervisor, Thayer Broili, prepared a clear and concise analysis of the permitting needs of the YDP Operation Startup and circulated it to YAO management and his staff (Jan-Apr. 2006). There was no action or decision from management in response, despite the fact that there was little time to implement the necessary NEPA and permit process. Appropriate permitting and NEPA for the plant start-up would take at least a year, based on the most qualified assessments of the Environmental Compliance and HAZMAT staff at YAO. As of May 2006, I was not aware of any NEPA or permitting action undertaken in support of the planned start up. My group would have that responsibility and it hadn't been assigned. We had been hearing about this proposal for some time and questions about it to Resource Management Director, Cindy Hoeft, went unanswered.

83. An EA or EIS for the original plant is well over 20 years old. Plant processes have been changed and local conditions have changed. The use of a Categorical Exclusion for the proposed startup is not supportable under DM 516. When I left YAO, the talk was that a CE would be adequate. Given that startup would be a major industrial undertaking, that numerous permits are required, that plant processes have changed from those covered by a 25 year old EIS or EA, and that start-up involves major issues of public health and safety, a CE is out of the question. The group responsible for YDP start up (the Desalting Group--administratively in the Area Manager's office) had successfully circumvented our group. An important multi-year contract to hire an operator to run the YDP was not sent to the group for review, contrary to usual practice. Elements of the contract included compliance monitoring, hazardous waste management, reporting, and response to emergencies. The Desalt Group was withholding information and avoiding peer review and appeared to have senior management's blessing in this.

84. MODE Outage

Shortly before leaving YAO I heard that there was a planned maintenance outage in the MODE, a Reclamation facility. I asked maintenance staff about it and they said it would be repaired in Feb. 2007, requiring a diversion of its flow. The MODE, a concrete lined canal, carries salty agricultural drain water derived from the irrigated areas in Yuma and the region (and industrial effluent) into Mexico. Its purpose is to prevent salty water from entering the Colorado River and altering the salinity (treaty requirements to Mexico). The MODE flow is substantial and can't be regulated. If MODE flows were diverted to the Colorado River a discharge permit would be required (NPDES CWA). These permits take quite some time (over a year) to obtain and have a public notice and review requirement. My group would have been responsible for obtaining such permits and there was no such activity. ADEQ staff say no application for any such permit has been made. (Pers. Comm. Sept. 22, 2006).

85. Given YAO's past performance with regard to these matters, and the lack of evidence of any steps toward compliance with permitting and other legal requirements, as well as the inadequate timeframe in which to complete such compliance, Ms. McCloskey's claim that there is to be compliance is not credible. (Letter, p. 3). What is the evidence that compliance is being pursued? In any event, my communication is protected even if I was wrong about the potential illegality and safety hazard, or if they do not come to pass as I anticipated. 5 U.S.C. 2302(b)(8) protects from retaliation an employee who discloses information which the employee ***"reasonably believes evidences"*** a violation of any law, rule or regulation or danger to health and safety (emphasis supplied). The matters I have outlined here provide a strong basis for a reasonable belief.

86. **Seismic Condition YDP – E-mail # 5**

Your letter states:

> Shortly after the preceding email, you again emailed Ms. Pitt and forwarded her an internal agency memo regarding the seismic reports for the Yuma desalting plant, advising Ms. Pitt to question whether the desalting plant meets seismic standards. Based on your advice, Ms. Pitt then began questioning YAO regarding seismic stability of the plant which impacted productivity and efficiency while the office spent time responding to these questions that in the end had no merit. This unauthorized release of an internal management memo was subversive in nature and hindered the accomplishment of agency work. [Letter at 3]

This is a protected communication under the whistleblower provisions, regarding **a substantial and specific danger to public health or safety.** As with the previous e-mail, this disclosure is related to the safety and legal operation of the industrial facility YDP. The seismic hazard rating, and present lack of correction, are public information, available on Reclamation's Website (dated Feb. 25, 2005). According to that website: " The Mission of Reclamation's Building Seismic Safety Program is to assess the seismic safety of Reclamation-owned and -leased buildings and to **mitigate unacceptable seismic risks** in those buildings [emphasis added]." Thus, per Reclamation, there is an unacceptable seismic risk at the YDP-- how is that consistent with ramp-up of a major water treatment operation complete with hazardous materials in hazardous quantities?

87. How was the release of public information concerning seismic hazards "subversive in nature?" Letter at 3. You say that Ms. Pitt's questions about the seismic stability of the plant "impacted productivity and efficiency" of the YAO office, and that in the end those questions "had no merit." *Id.* What is wrong with responding to questions from the public concerning public safety, whether or not they have merit? And what is the evidence that they "had no merit?"

88. **U.S. Army Corps of Engineers – E-mail #3**

Your letter states:

> Later that same day on May 4, 2006, you emailed Marjorie Blaine, an official with the Corps of Engineers, and inappropriately shared non-public, administratively controlled information as well as your opinions that were not founded in fact. Ms. Blaine is part of the review process that grants or declines permits which allow Reclamation to complete mission goals and projects. In this email you state: "I appreciate your vigilance of the Yuma Area Office, it is a group intent on subverting regulation, especially environmental. Examples: Laguna - the 3:1 cut is known to settle to 6:1 or so slope due to the sandy material. That area is not taken into account in impacts. Conscious decision to obscure this in application. You should verify if dredging meets description (Imperial, Laguna, etc.), there is overdredging in depth and perhaps extent in most cases. Art Pipkin is still behind trying to do the worst for wetlands on the river." In recognition that you understand your email to be inappropriate, you tell Ms. Blaine "Keep the above confidential as to source." You then ask her about a previous disclosure that you made to

her regarding an alleged IID violation, saying "Art P. swore in a meeting to `get the one who reported it. ' [Letter at 3]

It is not apparent exactly what information in this communication is claimed to be non-public and administratively controlled and why. In any event, this is a protected communication under the whistleblower provisions regarding actual or potential violations of law, regulation, and agency policy.

89. **The following facts supported my reasonable belief that I was disclosing a violation or law, rule or regulation:**

Based on several Laguna Restoration Project Management meetings I attended, my review of the draft Section 404 Clean Water Act permit application, and comments from staff at YAO, I believed that Reclamation was going to understate or ignore many of the likely impacts to wetlands in their Section 404 (b)(1) analysis accompanying the permit application. A specific example is provided in the cited e-mail above. Simply put, once the dredge cut is made the sediment settles due to wave action to a slope angle (angle of repose) dependent on the substrate particle size, thereby eating into the shoreline of the dredged cut (wetlands in this case).

90. During one Laguna Restoration Project Management meeting (in meeting room 146--date not remembered) with Reclamation Staff, including the chief of the dredging unit, Doug Lancaster, I asked "to what grade (slope) cut sediment in this area settles to?" Doug said "6 or 7:1" based on his recent experience dredging in nearby Imperial Reservoir and he had just completed dredging the adjacent Laguna Settling Basin (same kind of sediment). Kim Garvey reported out of the meeting that the decision was to state in the EA and Section 404 application that the cut would be 3:1. I had prepared a table showing the lateral extent of expected impact at the anticipated cut depth at Laguna Reservoir.

91. By not discussing this known condition in the application, Reclamation was purposely ignoring predictable detrimental effects on wetlands, the regulatory jurisdiction of the U.S. Army Corps of Engineers. They were thus falsifying a federal application, a violation of 18 USC Sect. 1001, and counter to department policy. Similarly, the superficial or incomplete analysis in the NEPA document is contrary to DM 516 and NEPA.

92. The draft EA (http://www.usbr.gov/lc/yuma/environmental_docs/laguna/EA_part1.pdf) continues the fraud, outlining a 3:1 dredge cut in Section 2.1 and estimating the impact area of wetlands (EA table 3.1) without regard for wave erosion effects on the newly cut shoreline and settling of the slope to an angle of repose less than 3:1.

93. **Laguna Restoration EA p. 3-29 states:**

> As noted above, the proposed action would include the creation of approximately 116.6 acres of new open water and fringing wetlands habitat. An increase in open water habitat may induce additional erosion potential, resulting from increase wave action (resulting from larger surface area of open water and increased recreational opportunities in the area). **No data exists to determine if additional surface area and/or increased recreational use of the area would substantially increase wave action** and result in adverse effects on fringe communities.

It is not true that increases in the open water depth and fetch (*e.g.*, width of open water available for wind action) can't be analyzed to estimate wave height and energy, there are formulas for calculating that, for example in the U.S. Army Corps of Engineers Shoreline Protection Manual. Common sense says that a shallow river channel of about 400 ft. width will have lesser waves than a 117 acre, 13 ft. deep lake of width near 5,000 ft.

94. Art Pipkin had made numerous open comments about his intent to direct dredging into the old river channel (jurisdictional wetlands) at Laguna Reservoir even without Section 404 CWA Permits. There were comments from the dredge crew that Imperial Reservoir was being over-dredged (depth of cut greater than designed or submitted in drawings) to increase sediment storage capacity. YAO's record of violation of Clean Water Act compliance is public record.

95. In most such communications with COE I requested confidentiality, because I feared retaliation from YAO management. Seems my fears were justified.

96. **U.S. Army Corps of Engineers (2) -- E-mail # 3**

Your letter states:

> In Ms. Blaine's response to your email she states "Thanks for the info on Laguna. As with IID, I will not divulge any info." She then goes on to say that, in fact, there had been no violation at IID because "a previous Corps project manager told them that they did not need permits to dredge there." Your communication to Ms. Blaine regarding the lID violation was not only untrue (because in fact, there was no violation), it was speculative opinion on your part. Your willful maligning of the Yuma office and Mr. Pipkin, the Assistant Area Manager, has damaged its ability to get the required permits in order to carry out the Laguna project. In fact, the project has now been delayed by 4 months, with the Corps citing the same issues that you opined about. [Letter at 3]

My communication concerning the “IID violation” concerns actual or potential violations of law, rule or regulation and is protected under the whistleblower provisions. The communication is protected regardless of whether it has damaged the Yuma office’s ability to get the permit. In fact it appears from your statement that I raised legitimate concerns which the Corps agreed with and is proceeding to address.

97. You state that my communication regarding the IID violation was untrue, “because, in fact, there was no violation.” However, at the time, and based on information available, I and others (e.g. COE regulatory staff) had a reasonable belief of violation of law, based on the following:

98. On or about June 18, 2005, I observed that extensive areas of wetland habitat in the California Channel downstream of the Imperial Dam had been cleared and dredged by land-based heavy equipment. The channel is the Colorado River and is in YAO's Imperial Dam project area. The channel is jurisdictional waters of the U.S. I photographed the setting and evidence of recent earthwork below the mean high water mark that removed emergent wetland (e.g. cattail marsh). I had photographed the wetlands here in May, 2004. I provided the photographs and my observations to the Regulatory office of COE. I also showed the area to several staff of California Department of Fish and Game.

99. Based on the fact that this area was YAO jurisdiction, and that my group had not applied for any Section 404 Clean Water Act Permits and none suitable were in force, I concluded this was an illegal removal of special aquatic sites under the CWA, Section 404. I am qualified by training

and experience to make such a judgment. I also inquired at YAO and found that Imperial Irrigation District staff had performed the removal, with Reclamation staff knowledge. I provided this information to COE also.

100. Shortly after that, COE Regulatory Branch issued a Notice of Violation (NOV) to Imperial Irrigation District (IID). One or the other agencies provided a copy to YAO. It appears that after investigation, COE decide not to pursue enforcement, however there had been a clear violation. An exercise of enforcement discretion is not evidence, and certainly not proof, that there was no violation.

101. On August 22, 2005 in meeting Room 258 at YAO to plan for a phone call to Ms. Marjorie Blaine, COE, Art Pipkin opened the meeting with a verbal lament about being personally named in a NOV from COE of several years prior. He also stated that IID had been served with an NOV in the California Sluiceway (channel). He said that "King (IID environmental staff) is looking to find out who did this." My notes of the meeting show that others present and witness were: Cindy Hoeft; Scott Tincher, P.E.; Kim Garvey; Billy Solomon; Julian DeSantiago and Mark Curney. During this period, COE staff were openly and maliciously maligned by several high officials at YAO; the use of the pejorative "Bitch" was not uncommon.

102. You claim that the Corps will not give Reclamation the permits it needs, because it does not trust Reclamation, and that an unhealthy relationship between the Corps and Reclamation managers has been created ”which damage will take a long time to repair.” This circumstance is attributed to my disclosures and expression of contrary opinions outside the agency. Letter at 5. Again, my communications would not lose protection if they caused the Corps to distrust the Yuma office. However, there are more plausible reasons for the poor relationship with the Corps, and blaming others and illegally persecuting a scapegoat is not going to help solve them.

103. YAO's inability to obtain CWA permits from COE is due to:

- past violations under Section 404, CWA.
- Senior YAO management's stubborn refusal to accept another agency's jurisdiction in its area of operation (e.g. Colorado River in CA and AZ).
- A failure to recognize and accept clear regulatory requirements (and Executive Orders) to first avoid, then minimize, then mitigate for impacts to wetlands

104. A credible, honest analysis of impacts and appropriate project alternative development consistent with the well established wetland avoidance, minimization and mitigation guidance from COE will result in successful permitting.

105. **ANTEON Report[8] -- E-mail #10**

Your letter states:

> On May 8, 2006, you emailed Ms. Pitt with the ED organization, to inform her of the existence of a planning document that was not in the public domain, which you felt would be of value to the ED. You write: "A blueprint exists for long range plans for the LC and Gila Rivers. Art Pipkin was a primary author as a consultant to Reclamation

[8] Bob Brose, Bob Strand, Art Pipkin, Betsy Thompson. 2000. Lower Colorado and Gila River Work Program Assessment 10 year schedule FY 2000. Final Report (June 13, 2000) to Bureau of Reclamation, Yuma Area Office. Anteon Corporation.

(while employed by Reclamation? - an illegal conflict of interest). Bob Brose was also an author. The report is referred to as the Anteon Report (the firm that contracted it). If you can, you should FOIA it, it is cited as the guide for future river projects on the LC. It is embarrassingly illiterate document even for government! It is cited here as the planning blueprint for the river and many projects in the future budget are taken directly from the document." You then give the exact title page citation with author names, date and other information relevant to assist ED in making the FOIA request. Shortly after *your* email, Ms. Pitt did in fact present a FOIA request for this document as you had advised her to do. [Letter at 4]

This report is not secret or "administratively controlled" information. There is nothing written on the ANTEON report cover, title page, or anywhere else on the document words such as: "internal use only", "not for public distribution", "Restricted", "Secret", "Attorney Client Privileged", or any such warning. None who provided me the report said anything about it being restricted, classified, not for distribution, or warned me in any way that the report should not be viewed as any other 5-year old government report. As a final government report and planning document, it was in the "public domain."

106. Moreover, I did not actually provide the report, but only suggested that Ms. Pitt make a request for it under FOIA. If the document were not legitimately public information, the FOIA request would be denied, and she would not get the report. If it is available under FOIA, there can be nothing wrong with her receipt of it.

107. This is also a communication regarding actual or potential violations of law, rule or regulation protected under the whistleblower provisions because the report is a planning document which was prepared without public input by authors with a conflict of interest.

108. The ANTEON report, completed in 2000, lays out the ten-year program for bank armoring, channelization, new levee construction, and massive in-channel diversion structures for the Colorado River in the YAO jurisdiction (CA, AZ and some Nevada). These projects will have tremendous individual and cumulative effects on environmental quality as defined by CEQ. The report is cited as justification in budget planning documents at YAO for up to ten years of planned river modification. Within YAO, citing the report as justification for planned projects seems to be adequate to justify massive federal funding. Several of the projects in the report have been implemented, and many others are on the drawing board. Thus, the report is a **planning document** for YAO - Reclamation actions on the Colorado River. The report was prepared contrary to department policy, Executive Orders, and regulation (**DM 516,** Executive Orders 11514 and 11991, NEPA requirements 42 U.S.C. 4321-434740, and CEQ implementing regulations CFR 1500-1508). See, DM516 part 1.2 ; 1.3 E (1) and (2).

109. The document and planning process had no public input. It had no federal or state agency input. In fact, it is regarded as secret by YAO, to be kept from the public, yet it affects public resources, the environment and is a regularly used planning document within YAO. During my interrogation, Sterling Egan practically shouted that: **"if they (e.g. NGOs) don't know what to ask for, they can't FOIA it."**

110. Similar planning documents for other federal agencies include Forest Plans (USDA Forest Service) and Resource Management Plans (BLM). These planning documents have extensive public scoping and involvement under the same regulations and policies that YAO - Reclamation here ignores. These planning documents of other agencies are available to the public, and these agencies make extensive efforts to publish these plans.

111. The argument will be made by YAO that each individual project envisioned in the report will undergo NEPA analysis and public involvement. This forestalls a rigorous examination of viable alternatives (DM 516), because it begins with the premise that the project is needed, based on the ANTEON Report. Alternatives that eliminate or modify the project are not available, because the project was already selected in a secret, closed process contrary to DM 516.

112. At YAO, challenging or being suspected of challenging the proposed projects and justification in the ANTEON report is certain to result in reassignment. I have seen at least one case of a knowledgeable hydraulic engineer being shunted to other duties due to being too direct or open in questioning the *mantra* of the ANTEON Report

113. **Clear Conflict of Interest**

This communication also evidences a violation of law because two of the authors of the ANTEON Report had an illegal conflict of interest.

114. These two authors were senior staff at the Yuma Area Office immediately prior to 2000 when the report was written by them as contractors to Reclamation. Art Pipkin and Bob Brose retired from Reclamation, and then almost immediately went to work as consultant contractors working for YAO. Art Pipkin was in charge of the YAO dredging operation, including earthwork crews. Bob Brose was a Civil Engineer, and designer of river control structures. This is clearly a violation of 18 U.S.C. § 207**,** which states:

> **Restrictions on former officers, employees, and elected officials of the executive and legislative branches** (a) RESTRICTIONS ON ALL OFFICERS AND EMPLOYEES OF THE EXECUTIVE BRANCH AND CERTAIN OTHER AGENCIES.— (1) PERMANEN T RESTRICTIONS ON REPRESENTAT ION ON PARTICULAR MATTERS .—Any person who is an officer or employee (including any special Government employee) of the executive branch of the United States (including any independent agency of the United States), or of the District of Columbia, and who, **after the termination of his or her service or employment with the United States** or the District of Columbia, **knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States** or the District of Columbia, on behalf of any other person (except the United States or the District of Columbia) in connection with a particular matter— (A) in which the United States or the District of Columbia is a party or has a direct and substantial interest, **(B) in which the person participated personally and substantially as such officer or employee**, and (C) which involved a specific party or specific parties at the time of such participation, **shall be punished as provided in section 216 of this title.**
>
> (2) TWO-YEAR RESTRICTIONS CONCERNING PARTICULAR MATTERS UNDER OFFICIAL RESPONSIBILITY.—Any person subject to the restrictions contained in paragraph (1) who, **within 2 years after the termination of his or her service or employment with the United States or the District of Columbia, knowingly makes,** with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States or the District of Columbia, on behalf of any other
> person (except the United States or the District of Columbia), in connection with a particular matter— (A) in which the United States or the District of Columbia is a party or

has a direct and substantial interest**, (B) which such person knows or reasonably should know was actually pending under his or her official responsibility as such officer or employee within a period of 1 year before the termination of his or her service or employment with the United States or the District of Columbia,** and (C) which involved a specific party or specific parties at the time it was so pending, shall be punished as provided in section 216 of this title. [emphases added]

115. Art Pipkin was re-hired by YAO-Reclamation as Assistant Area Manager in 2000 or 2001, and immediately placed in charge of dredging, river maintenance and river control: the very work and projects that he wrote of as a consultant contractor. In writing the report for a plan that will later be executed by his office, he insures that work that justifies his existence continues on the Colorado River. The document is self-serving and perhaps not in the best interest of government.

116. **Purported Statement to McCloskey:**

Your letter states:

> On May 17, 2006, you attended a meeting with Ms. McCloskey to make a presentation to the basin states. While traveling to the meeting, you advised Ms. McCloskey that ED had given Reclamation notice of their intent to sue via a letter from Ms. Pitt July 12, 2005. Then, in your agency role as the Environmental Protection Specialist, you advised Ms. McCloskey that she should interpret that letter as a notice of intent to sue for all legal purposes. The issue referred to was the Drop 2 Reservoir. [Letter at 4]

This statement is not factually correct. I did not tell Ms. McCloskey that ED had written a notice of intent to sue. ED had not sent a 60-day notice of Intent to Sue, as is required in all such actions against a federal agency. Instead, my conversation with Ms. McCloskey concerned the topic of the presentation to the Basin States: that we had concluded a **"May Affect"** under ESA for the Drop 2 Reservoir Project's operational effects on the Limitrophe Division (see below). I told her that, because ED had written in response to the public scoping, they were assured of "standing" in any legal proceeding under NEPA. Further, that should we (YAO) not do a credible job of analyzing the ESA issue, or appear to try to minimize the issue, we would likely end up in court under the Administrative Procedure Act (e.g. NEPA claim) hinging on ESA compliance; one of the specific issues raised by ED. Ms. McCloskey seemed concerned over making a presentation to ED and other groups similar to the one we were making that day, planned for June 2006.

117. While my attorneys requested all notes, recordings or other evidence documenting or confirming the contents of my conversation with Ms. McCloskey on May 17, 2006, none were provided.

118. **Basin States Meeting May 17, 2006 – E-mail # 1**

Your letter states:

> With your understanding of ED's intent to pursue litigation, just one week later on May 24, 2006, you knowingly wrote to Ms. Pitt and shared information that you knew was pertinent to the Drop 2 Reservoir issue. You wrote: "FYI, Basin states and MWD are questioning our conclusion of `May affect, unlikely to adversely affect' species in Lower CR. Badgering Reclamation to change to `no affect.' These groups get interim reports and consultant products that support the NEPA, well ahead of public view. Group violates

> Federal Advisory Committee rules. You need to `discover' this on your own, though minutes or agenda of these meetings should reflect Reclamation attendance." [Letter at 4]

You have not explained which information in this e-mail was non-public information not authorized to be disclosed or why. As noted above, we were not in litigation with ED at the time; it had not filed a notice of intent to sue and the possibility of a suit was speculation at that point. ED has not filed suite on the Drop 2 Reservoir Project, as far as I know. Indeed, that would be premature as the agency has not published any NEPA decision.

119. Moreover, this is a protected communication under the whistleblower provisions regarding actual or potential violations of law, rule or regulation. I had a reasonable belief that the substance of this communication disclosed a violation of the Endangered Species Act (ESA) for the following reasons:

120. Prior to the Basin States meeting, I had met several times with the Regional Director, his staff, and senior management staff at YAO, including Ms. McCloskey, to review environmental issues in the Drop 2 Reservoir Project. At the latest of those, we discussed the **"may affect"** ESA determination we had come to regarding Drop 2 Reservoir operational effects on the Limitrophe Division of the Colorado River. An agency determination of **"may affect"** triggers Section 7 ESA consultation with USFWS. I was the senior (and only) biologist at YAO at the time and was the key NEPA lead for the project. I had formally requested permission from the Regional Office to initiate Section 7 consultation, required by established protocol. The request is a form, which I had prepared and forwarded through my supervisor to the Regional Office. The Regional Office Deputy Regional Director, Larry Walkoviak replied to the request by e-mail to me, authorizing initiation of Section 7 ESA consultation for this project. On or about May 7-16, 2006, I made a phone call to Ms. Leslie Fitzpatrick, USFWS to initiate the process, leaving a phone message I was assembling information necessary for writing a Biological Assessment for the Section 7 ESA consultation when I transferred to the Albuquerque Area Office.

121. From December 2005 through May 2006, I and YAO's hydrologist, Bill Greer, had spent considerable time analyzing information and observations on the Limitrophe Division. He modeled groundwater levels in the riparian areas that would be affected by the project, and the model predicted a drop in groundwater elevation in a portion of the area. In the desert, riparian vegetation can only exist where groundwater is near the surface (within 8 ft for cottonwood and willow--lit.). I concluded that riparian and wetland vegetation, supporting endangered species, **may be affected** by the project. We had not yet determined the extent of that effect, needing more study. That conclusion was based on the "best available scientific information", the required standard of ESA determinations.

50 CFR 402.15 states:

> (d) *Responsibility to provide best scientific and commercial data available.* The **Federal agency** requesting formal consultation shall provide the Service with the best scientific and commercial data available or which can be obtained during the consultation for an adequate review of the effects that an action may have upon listed species or critical habitat. This information may include the results of studies or surveys conducted by the Federal agency or the designated non-Federal representative. The Federal agency shall provide any applicant with the opportunity to submit information for consideration during the consultation.

122. The "**may affect"** threshold in ESA is a low one: that any measurable effect, positive or negative, is a "**may affect"** and subject to Section 7 of the ESA. There was concern and consternation expressed by YAO management staff at that conclusion.

123. Section 7 consultation under ESA is reserved for federal agencies:

50 CFR § 404.2 Definitions:

Formal consultation is a process between the Service and the Federal agency that commences with the Federal agency's written request for consultation under section 7(a)(2) of the Act and concludes with the Service's issuance of the biological opinion under section 7(b)(3) of the Act.

50 CFR § 402.14 Formal consultation:

(a) *Requirement for formal consultation.* Each **Federal agency** shall review its actions at the earliest possible time to **determine whether any action may affect listed species or critical habitat**. If such a determination is made, formal consultation is required, except as noted in paragraph (b) of this section. The Director may request a **Federal agency** to enter into consultation if he identifies any action of that agency that may affect listed species or critical habitat and for which there has been no consultation. When such a request is made, the Director shall forward to the **Federal agency** a written explanation of the basis for the request.

(b) *Exceptions.* (1) A **Federal agency** need not initiate formal consultation if, as a result of the preparation of a biological assessment under §402.12 or as a result of informal consultation with the Service under §402.13, the **Federal agency** determines, **with the written concurrence of the Director, that the proposed action is not likely to adversely affect any listed species or critical habitat.**

124. At the May 2006 meeting, Nevada had clearly stated that they believed the ESA conclusion should be a **"No Affect"** without benefit of any analysis or data, except the presentation we had just made. At the meeting, Regional Director Bob Johnson told Nevada he would set up a meeting with their staff, consultants, and our staff to review the analysis. It was clear that Nevada was going to make every attempt possible to change Reclamation's position in this matter. A representative of the Metropolitan Water District (Los Angeles, CA) had also expressed a desire to review Reclamation's analysis and conclusions in this matter in an e-mail to Russ Reichelt, P.E. Drop 2 Project manager, YAO. I believe this is a potential violation of Section 7 ESA because:

- The agency's decision, already made and vetted, was reversed by the state of Nevada at the basin states meeting in May 2006, and subsequent meetings.
- That Reclamation is allowing non-federal entities to unduly influence its determination, bowing to political pressure. Reclamation has not designated a non-federal partner in the consultation pursuant to 50 CFR §402.08.
- Nevada's conclusion is not made based on the best available scientific information.
- Reclamation's presentation to NGOs, in July 2006 referenced no conclusions on Drop 2 Project effects under ESA, evidencing the effect of Nevada's influence.

125. I also reasonably believed that my communication evidenced a violation of the Federal Advisory Committee Act. (FACA) Reclamation officials have established and utilized an advisory group for the Drop 2 Reservoir Project consisting of members and consultants of the Basin States, Metropolitan Water District, Imperial Irrigation District, and others. The group is composed solely of water interests. Reclamation continuously informs this group, often through a shared contract consultant (Brown and Caldwell), on the Drop 2 Reservoir Project. Reclamation officials consult with, take recommendations from, and act on recommendations from this Advisory Committee. Reclamation has not complied with the notice requirements of the FACA in using this group. [5 U.S.C sec, 9.] I believe that Reclamation is in violation of the requirements of the FACA, and said so in the communication cited above.

126. Contrast the open, frequent and collaborative communication between Reclamation officials and water- interests in developing and refining information regarding Drop 2 Reservoir Project with the secretive, controlling and trivial communications with the NGOs (e.g. C. Hoeft's Aug 31, 2006 statement *Id*). This lop-sided practice, favoring development interests and discounting and marginalizing conservation groups (NGOs), in the NEPA process for Drop 2 Reservoir Project is inconsistent with agency direction, regulation and policy, especially NEPA and DM 516.

127. Involving Nevada and MWD, and perhaps others, in the Section 7 ESA decision and consultation determination in the Drop 2 Reservoir Project is in violation of ESA (50 CFR), FACA (5 U.S.C.), NEPA, and DM 516.

128. **Alleged Unauthorized Disclosures**

Your letter states:

> The above emails were unauthorized disclosures of agency information which you had received in the course of your official duties with the agency. Your unauthorized disclosures were done on government time and using government equipment and resources to the detriment of the Yuma Area Office and to the detriment of the efficiency of government service. [Letter at 5]

As shown in the previous pages, these so-called "unauthorized disclosures" are of several types:

- Routine cooperation with colleagues in other federal agencies
- Sharing of project information and related material under NEPA
- Protected Disclosures involving wrong-doing, illegal activities, and actual or potential violations of regulation, department policy and Executive Orders

129. My understanding is that information gathered at taxpayer expense, and not specifically restricted by legislation, or the nine specified restricted classes in FOIA, is to be made freely available to the public.

130. In the materials you sent my attorneys, you also included the regulation at 5 C.F.R. § 2635.703 concerning the use of nonpublic information. Presumably, even though it is not cited in your letter, you are claiming that I have violated this regulation. You have not identified exactly which information I disclosed is “nonpublic” and why. As explained above, much of the information disclosed in the e-mails was public and appropriate to disclose in the course of my job duties. Even if some of the information was “nonpublic” within the meaning of section 2635.703, the regulation cannot “permit the use of personnel actions against employees in reprisal for lawful disclosures of information made by such employees on the reasonable belief that the

information thus disclosed evidences a violation of law, rule or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." See Letter from my attorneys, n. 2.

131. All of my communications were either unquestionably public information, appropriate communications with other federal agency officials, or are protected by the whistleblower provisions. As described above, e-mail numbers 1, 3, 5, 6, 8, 9 and 10 were protected whistleblower communications. E-mail #2 was an appropriate communication with another federal agency, even assuming the material was not releasable to the public at large. E-mail numbers 4 and 7, the video of the lower Colorado River and the pending legislation, are unquestionably public information.

132. Because my disclosures were of public information, appropriate in the course of my job duties, and/or protected by the whistleblower provisions, it is irrelevant whether they were detrimental to the Yuma Office or to the "efficiency of government service." Letter, p. 5. They were proper disclosures in any event. Besides, this argument is made at the expense of performing government work in a legal manner, as is clearly mandated by the American public. Certainly, it appears to be more efficient to keep projects secret by using CE's for major federal projects, or those with significant effects on the environment. Destroying wetlands without the inconvenience of having to apply for an Army Corps of Engineers permit is certainly "efficient," but is it legal? Certainly it is less efficient to involve the range of views, often opposed, that was clearly envisioned in the NEPA laws.

133. **Conformance to Agency Policies and Ethical Standards**

You claim that I have violated 43 CFR 20.502, requiring employees to carry out the announced policies and programs of the Department and to obey proper requests and directions of supervisors. Letter at 5 – 6. The key words in 43 CFR citation are "lawful" and "proper." It requires an employee to comply with "lawful" regulations and obey the "proper" requests of supervisors. The regulation is consistent with the statutory whistleblower provisions, which prohibit adverse personnel actions in response to an employee's failure to conform to agency policies which are unlawful or pose a threat to public safety or health.

134. You also claim I have violated 43 CFR 20.501, setting standards for the conduct of federal employees and requiring compliance with federal statutes, Executive Orders, ethics regulations and Department regulations. You have not specified how I violated this provision. I believe I am more aware of applicable federal statutes, regulations and policy than those I work under. Certainly so regarding ESA, CWA, NEPA and related regulation. My observation is that YAO Management has a culture of defiance of lawful authority when it comes to environmental laws. The numerous instances cite above are but a few examples of which I am aware.

135. **Office of Inspector General (OIG).**

Your claim that the "OIG reinforced to the agency that these disclosures constituted a serious breach to the agency" is totally unsupported, and in fact contradicted by the documentation you have provided. Letter at 6. My attorneys requested all documents concerning the OIG investigation. Only one document supplied in response came from the Office of Inspector General. This was a July 18, 2006 letter to the Bureau of Reclamation which merely states that "[t]he matter is forwarded for your review and any action deemed appropriate." There is nothing about a serious breach to the agency or anything along those lines. The letter takes no position on

whether administrative action would be appropriate, but only forwards the matter "for any action deemed appropriate."

136. Although you state in your letter, and told me at the time of my interrogation, that the OIG had declined criminal prosecution, you did not supply any documents reflecting that decision. It is fair to assume, however, that OIG declined criminal prosecution because there was no evidence of criminal wrongdoing. It is also possible that OIG materials which were not supplied contain further exculpatory information concerning the lack of wrongdoing on my part.

137. **Interrogation.**

Your letter accuses me of being "uncooperative, evasive, misleading and dishonest" in my responses during this interrogation. Letter at 7. This claim is supported only by the interrogators' own notes of the meeting, which are not accurate.

> The AAO then requested that a formal administrative investigation be conducted by the Human Resources Division. This was done on August 3, 2006. Mr. Sterling Egan, Chief of Employee and Labor Relations, conducted the investigation while I sat in and participated in the process. The three of us met on August 3, 2006, for an interview. I introduced Mr. Egan and explained to you that he was here to conduct an investigation, and I then gave you a direct order that you were to answer questions completely and honestly and participate fully in the process. I asked if you understood my directive, and you replied that you did.
>
> Mr. Egan then presented to you a written notice of administrative investigation and had you read through it completely. He then went through each paragraph with you and had you initial the paragraphs after they had been verbally explained to you. After explaining the meaning and purpose of each paragraph, Mr. Egan then asked if you understood what was expected of you, and you replied that you did. You then signed the notice acknowledging your understanding of it.
> Mr. Egan also informed you that criminal prosecution in this matter had been waived, thus converting the matter exclusively into an administrative investigation. You were specifically notified of your obligation as a federal employee to cooperate during an investigation. [Letter at 7]

138. At 9:30 AM on Aug. 3, 2006, I was summoned to Art Val Verde's office where I was introduced to Mr. Sterling Egan. I was immediately escorted upstairs to the Social Security Office, accompanied by an armed Wackenhut guard, Art and Sterling. We entered a small room, about 9 ft. x 7 ft., with a desk, P.C. and monitor, and a few chairs. The room appeared used for paper storage by Social Security Administration. The door was closed, leaving the guard outside. I was nervous and shaken by the setting and body language of these men.

139. I was questioned by Mr. Eagan until well after 12:30 pm; for over 3 hours with no breaks. Mr. Egan began a broad line of questioning, occasionally referring to file folder he had in front of him. The first questions concerned a recent credit card purchase in Albuquerque that I explained was for government business. He then asked me what environmental or regulatory agencies and agency staff I knew, and how had I come to know them. That one took a while because I have been involved with many agencies in my career. I listed all of them, and people I could remember. I have a poor memory, or rather recall. It is at times difficult to recall the exact name of a person, even though I can picture their face or recall when I last talked to them. Eagan also asked about my interaction with agency staff in AZ that I had worked with at YAO. After some

time at this, Mr. Egan switched to "Environmental Organizations." Again, which ones? Again, a long list.

140. He then asked me who I knew in these organizations, their names and the nature of my relationship with them. I had never been questioned in such a way about my affiliations, and was alarmed and shocked at this behavior. This was at least an hour or more into the interrogation, my head still hurt and I was nervous. I had trouble recalling some of the names of people or their affiliations. I did the best I could to answer truthfully and completely.
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141. Mr. Egan then began to ask me what communications I had had with these individuals, ultimately focusing on AZ. At this time I said that "if this was concerning something that happened at YAO, shouldn't I have a union representative present?" This because Yuma Employees are in a bargaining unit, and I recalled that if you were involved with anything that may result in an unfavorable evaluation or discipline, you were entitled to a union representative present. Sterling dismissed this, saying that I was an employee of AAO, and that I was no longer in a bargaining unit.

142. As questions resumed, I explained the communications I had with ED, and others. There were so many it was difficult to recall exactly what, and Mr. Egan didn't provide any direction as to exactly what he was interested in, though it was clear by now that he had some things of interest in the folder. Art was occasionally jotting down notes. I was concerned that he seemed to be writing only in response to Sterling's questions, and made few notes on my replies.

143. Questions were asked about what information I had given to regulators: U.S. Army Corps of Engineers, US Fish and Wildlife Service, California Game and Fish Department, AZ Game and Fish Department, EPA, ADEQ, California Department of Environmental Quality…the list went on.

144. Mr. Egan occasionally referred to some of the documents in his folder to refresh my memory. If he had the subject e-mails in his folder, why not just show them to me and ask if I wrote them? When he was specific, I did not deny anything. I wasn't able to recall, instantly, a number of instances from 6 months ago. This should not be grounds for a charge of failure to co-operate in an investigation.

145. At some point there was a bizarre line of questions regarding the "secret agenda of environmental groups" did I know anything about these? Stunned at the suggestion, I said no. With prompting about what I did know, I managed to state that as far as I knew these groups were interested and dedicated to conservation of nature, protection of species and habitat. He pressed with "what do I know about their agendas besides that they state on their websites, something more…". The questions implied a conspiracy among them. I said I didn't know of any agenda besides those they advertise on websites and in the press.
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146. During the entire 3 hour interrogation, I was not offered any breaks for water or the bathroom. Art's position between me and the door was somewhat intimidating to my movement, as was the presence of a guard outside the door. The air of the interrogation did not suggest that I could even ask for a break.

147. At the conclusion on the questioning, Sterling stated that he was finished; that now he would turn over the write-up to Art. He said that I would be informed at some time about the proposed decision. I asked about the range of possible action. Sterling said anything from nothing to dismissal. Mr. Egan said he thought this had gone well and that I was cooperative.

They told me to get what I needed out of the office right now, and to leave the building. I was on administrative leave until further notice. Art took my government-issued cell phone and my government credit card.

148. In response to the specific allegations in your letter regarding the interrogation, I state the following:

A. You claim that I ***admitted*** **I knew of my obligation to express your concerns or differences with my supervisor.** I did express those concerns many times within the chain-of-command, as cited above. There were some cases where I feared that if I expressed concern, that I would suffer retaliation, certainly in the case of illegal or suspected illegal behavior. The remarks of C. Hoeft, *id.* regarding her "suspicion" that I had sabotaged the Palo Verde Training Structure indicate the pervasive suspicion under which environmental professionals worked at YAO. The interview confirms my statement regarding fear of reprisals from superiors. The illegal and unjustified firing of my wife, Cherie Wahl from her position at YAO is clear retaliation.

B. **You claim that I admitted that I was aware that information I was sharing with ED was related to an issue that ED had threatened litigation, thereby assisting ED's position in the potential lawsuit.** Those were the interrogator's words. ED had not threatened litigation in this instance, but their scoping letter on Drop 2 Reservoir Project was widely believed to indicate a potential for litigation. My communications with them were in the capacity of an interested party in the NEPA process. The fact is they are not in litigation with Reclamation.

C. **You claim that I admitted that I was aware of a specific process for making internal documents part of the public domain and that the information I passed had not gone through that process and was not public.** I said I was aware of a process for making internal documents public domain. All "documents" referred to above <u>are</u> in the public domain, despite the claim of "administratively restricted."

D. **You claim that I said I had my own reasons for passing unauthorized information to these groups and would not answer as to what those reasons were.** At the time, I feared that saying "protected disclosures" would further anger the interrogators resulting in further badgering.

E. **You claim I denied advising any environmental groups to FOIA a specific document.** I could not remember using the exact word "FOIA" in the e-mail in question, however on further prompting from Mr. Egan, with the e-mail in front of him, I agreed that I had used that language. This is not denial or lack of cooperation.

F. **You claim I denied having any contact with these groups outside of my government email, though I directed Ms. Pitt to email my MSN account.** None of these persons mentioned above in e-mails, with the exception of my ex-wife, have ever contacted me by my MSN email account. You may subpoena such records if you like, under an appropriate legal venue.

G. **You claim I denied having "passed any information" to my ex-wife.** I did not "pass any information" to my ex-wife. I merely informed her about raw video footage of the Lower Colorado River showing wetland areas of professional interest to her. I forgot to give her the video CD as stated. Regardless, had I done so, it would be entirely appropriate within Department Policy.

149. **Record of Service.**

Your letter states:

> I do not find your 2-'/2 years of service or your past work record as mitigating, nor do I find other mitigating circumstances that would warrant a less severe penalty. [Letter at 9]

I have an excellent record of government service, evidenced by two annual performance evaluations performed at YAO. My latest one rates my overall performance as **"Superior."** I advanced from salary level 1 to 3 in the GS-12 grade in two years. I received two STAR Awards; monetary awards for exceptional contributions toward agency efforts. For a short time at YAO I was improving the relationship with regulatory agencies based on honesty, openness and a cooperative attitude. I had an excellent knowledge of the relevant regulations and a proven record of successful permitting. Uncomfortable with that, YAO management resorted to their old ways at the first hint of controversy: don't ask, don't tell, and keep the NEPA and regulatory compliance obscure, below-the-radar and out of the public eye. Best yet, ignore it if you can.

150. For reasons stated above, I believe this proposed action is retaliation for whistleblowing: exposing illegal activities of the YAO management in a number of areas. Remove the covered disclosures under 5 U.S.C. § 2302(b)(8) from this list of allegations against the YAO and you are left with nothing that rises to an offense even worthy of a 3-day suspension or a letter to the file, let alone a removal from office.

151. Clearly, my protected disclosures are the major factor in the proposed personnel action. I believe the participating officials include: Jim Cherry, YAO Area Manager; Jennifer McCloskey, YAO Deputy Area Manager, Art Pipkin, YAO Assistant Area Manager; and Jim Johnson, Lower Colorado Regional Director. The agency is looking for a scapegoat, perhaps to protect those responsible from blame for not getting their projects advanced. My refusal to subvert agency policy, executive orders, and state and federal environmental regulations as an expedient to get projects approved, or to prepare sham agency documents in lieu of substantive, sufficient and defensible environmental compliance and permits is the real issue here.

152. Management officials at the YAO took an active part in preparing the Reclamation letter proposing removal. This is confirmed by statements made by Art Valverde and Sterling Egan. Because of their clear involvement in this illegal personnel action they should also be subject to discipline for retaliation. I believe these individuals and those who have assisted them in their efforts to fire me as retaliation should be disciplined as provided in law.

I affirm under penalty of perjury that the foregoing statement is true and correct to the best of my knowledge and belief.

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REX WAHL

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DATE