

# *AquAlliance v. United States Bureau of Reclamation: The Impact of Withholding Information from the Public*

## INTRODUCTION

In *AquAlliance v. United States Bureau of Reclamation*, the United States Court of Appeals for the District of Columbia Circuit upheld the United States Bureau of Reclamation's (Bureau) decision to withhold information about the construction and location of water wells from Freedom of Information Act (FOIA) requests.<sup>1</sup> However, the court did not overturn the District Court's ruling required the agency to disclose the names and addresses of various water transfer program participants.<sup>2</sup>

The data withheld in these FOIA requests, including a groundwater well's location, construction, and depth, help the public assess the environmental impacts associated with water transfer programs utilizing groundwater substitution. By withholding this information, the Bureau did not allow the public to independently assess the cumulative impacts of a proposed water transfer program, nor verify the Bureau's environmental impact findings in the project's National Environmental Protection Act (NEPA) documents. Without this information, concerned citizens have two options: (1) accept the agency's explanation regarding why this information is unnecessary to assess the environmental impacts, or (2) legally challenge the agency for using an inadequate model in its Environmental Assessment (EA), without any guarantee that the environmental effects will be considered.

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1. *AquAlliance v. U.S. Bureau of Reclamation (AquAlliance II)*, 2017 WL 1842507, at \*4 (D.C.C.A 2017).

2. *AquAlliance v. U.S. Bureau of Reclamation*, 139 F. Supp. 3d 203, 214 (D.D.C. 2015). "[W]ater transfer" refers to a "change in the place of use, point of diversion or purpose of use to a new location" within or outside the watershed of origin. CAL. DEP'T OF WATER RES., WATER TRANSFERS AND THE DELTA PLAN 2 (2015). Water transfers are key to the operation of the Central Valley Project (CVP) in dry years. By using groundwater or leaving their cropland idle, water rights holders can sell their annual federal allotment of water through water transfers to water users who are facing cutbacks. See Carolyn Whetzel, *Lawsuit Seeks to Block Water Transfers South of Sacramento-San Joaquin Delta*, 45 Env't Rep. (BNA) 1850 (2014).

## I. BACKGROUND

*A. Managing California's Water Supply in 2014*

In 2014, Governor Jerry Brown declared a state of emergency for California due to “extremely dry” water conditions.<sup>3</sup> The Bureau, the federal administrative agency charged with managing, developing, and protecting water “in the interest of the American public”<sup>4</sup> predicted it could only deliver 40 percent of its water contract totals.<sup>5</sup> As a result of the “significantly reduced water supplies,” the Bureau needed to create new water contracts to meet California’s water demands.<sup>6</sup> Specifically, the San Luis & Delta-Mendota Water Authority needed water for irrigation to prevent the long term impacts of permanent crop deaths.<sup>7</sup> To address this problem, the Bureau considered “whether it should approve and facilitate water transfers between willing sellers and buyers.”<sup>8</sup> Under this approach, the Bureau would facilitate water transfers from water sellers and contractors north of the Delta<sup>9</sup> to buyers downstream of the Delta using either the Central Valley Project, State Water Project facilities, or both.<sup>10</sup>

Sellers would make water available to transfer through “groundwater substitution, cropland idling, or crop shifting.”<sup>11</sup> Groundwater substitution transfers occur when surface water is made available for transfer because water

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3. U.S. DEP’T OF THE INTERIOR BUREAU OF RECLAMATION & SAN LUIS & DELTA-MENDOTA WATER AUTH., REVISED ENVIRONMENTAL ASSESSMENT/INITIAL STUDY: 2014 SAN LUIS & DELTA-MENDOTA WATER AUTHORITY WATER TRANSFERS 1-4 (2014) [hereinafter 2014 REVISED ENVIRONMENTAL ASSESSMENT].

4. *About Us - Mission/Vision*, BUREAU OF RECLAMATION, <https://www.usbr.gov/main/about/mission.html> (last visited Jan. 9, 2017).

5. 2014 REVISED ENVIRONMENTAL ASSESSMENT, *supra* note 3, at 2-1.

6. *Id.* at 1-4.

7. *Id.* The SLDMWA “consists of water agencies representing approximately 2,100,000 acres of 29 federal and exchange water service contractors within the western San Joaquin Valley, San Benito and Santa Clara counties.” *Learn More: About Us*, SAN LUIS & DELTA-MENDOTA WATER AUTHORITY, <http://www.sldmwa.org/learn-more/about-us/> (last visited Mar. 15, 2017).

8. 2014 REVISED ENVIRONMENTAL ASSESSMENT, *supra* note 3, at 1-2–1-3.

9. The Delta of the Sacramento and San Joaquin Rivers is a major collection point for water in California and provides a valuable habitat for species, supports agricultural and recreational activities, and is the focal point for water distribution throughout the state. CAL. DEP’T OF WATER RES., SACRAMENTO-SAN JOAQUIN DELTA OVERVIEW 2 (2007).

10. 2014 REVISED ENVIRONMENTAL ASSESSMENT, *supra* note 3, at 1-1. The Central Valley Project (CVP) is one of the world’s largest water storage and transport systems. It is operated by the Bureau and includes twenty-two reservoirs with a combined storage of eleven million acre-feet of water. The Project has long-term water contracts with more than 250 water contractors in 29 of 58 counties in California. *California State Water Project and the Central Valley Project*, CAL. DEP’T OF WATER RESOURCES, <http://www.water.ca.gov/swp/cvp.cfm> (last visited Mar. 15, 2017). The California Department of Water Resources operates the State Water Project—a water storage and delivery system that distributes water to twenty-nine urban and agricultural water suppliers in California, making deliveries to two-thirds of California’s population. *See id.*

11. 2014 REVISED ENVIRONMENTAL ASSESSMENT, *supra* note 3, at 2-4. The Bureau must still approve each water transfer request individually. *Id.*

sellers reduce their need for surface water by pumping groundwater.<sup>12</sup> Cropland idling occurs when crops are not planted on lands that would have otherwise been used for agriculture.<sup>13</sup> Crop shifting is when farmers shift from more water-intensive crops to less water-intensive crops in order to “make water available for transfer.”<sup>14</sup>

### *B. The Bureau’s Involvement in Water Transfers*

These proposed transfers would have required approval from the Bureau, and therefore necessitated compliance with NEPA.<sup>15</sup> NEPA was the first major environmental law enacted in the United States, and helps make the environmental review process more accurate and transparent by increasing citizen involvement.<sup>16</sup> NEPA procedures are triggered when a federal agency proposes to take action.<sup>17</sup> If the project is not categorically excluded from analysis under NEPA, the agency will initially create either an EA or an Environmental Impact Statement (EIS).<sup>18</sup> When an EA is drafted, an agency only has to involve the public to the extent practicable for preparing the EA.<sup>19</sup> On the other hand, an EIS has at least a forty-five day comment period.<sup>20</sup>

In accordance with NEPA processes, the Bureau released an EA/Initial Study analyzing the potential effects of the proposed water transfers.<sup>21</sup> The EA concluded that this project would have a “[l]ess [t]han [s]ignificant [i]mpact” or “[n]o [i]mpact” on hydrology and water quality,<sup>22</sup> even though some of the project’s potential impacts included “short term declines in local groundwater levels” and impacts on groundwater quality.<sup>23</sup> After the EA was available for

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12. *Id.* at 2-8.

13. *Id.* at 2-9.

14. *Id.* at 2-9–2-10.

15. *Id.* at 1-1.

16. COUNCIL ON ENVTL. QUALITY, A CITIZEN’S GUIDE TO THE NEPA: HAVING YOUR VOICE HEARD 2 (2007), [https://energy.gov/sites/prod/files/nepapub/nepa\\_documents/RedDont/G-CEQ-CitizensGuide.pdf](https://energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-CitizensGuide.pdf).

17. *Id.* at 4.

18. *Id.* at 11. “The purpose of an EA is to determine the significance of the environmental effects and to look at alternative means to achieve the agency’s objectives.” *Id.* An EIS is required if a proposed major federal action would significantly affect the quality of the human environment. 42 U.S.C. § 4332(C) (2012).

19. CEQ NEPA Regulations, 40 C.F.R. § 1501.4(b) (2017).

20. COUNCIL ON ENVTL. QUALITY, *supra* note 16, at 16.

21. See 2014 REVISED ENVIRONMENTAL ASSESSMENT, *supra* note 3, at 1-1.

22. *Id.* at 3-38–3-39.

23. *Id.* at 3-42, 3-56.

public comment,<sup>24</sup> the Bureau made a finding of no significant impact for the proposed project.<sup>25</sup>

### C. *AquAlliance's FOIA Requests*

AquAlliance, a nonprofit organization dedicated to defending northern California's waters and challenging threats to the health of the northern Sacramento River Watershed,<sup>26</sup> reviewed the EA after it was released and was concerned that it did not properly assess the cumulative environmental impacts of the proposed water transfers.<sup>27</sup> The organization then submitted two FOIA requests to the Bureau seeking additional information about groundwater wells proposed to be used in the Water Transfer Program.<sup>28</sup> First, AquAlliance requested all documents and communications regarding the actual water transferred in 2013.<sup>29</sup> Six months later, AquAlliance requested all application documents that were submitted to the Bureau by water sellers seeking to be part of the 2014 Water Transfer Program.<sup>30</sup>

### D. *The Bureau's Response to the Requests*

In response to these requests, the Bureau reviewed its public drives and water operations recordkeeping system, but by June 16, 2014, the Bureau still had not made "full determinations and disclosures."<sup>31</sup> Subsequently, AquAlliance filed a lawsuit challenging the "dilatatory nature" of the disclosures and arguing that the Bureau had violated its statutory deadline.<sup>32</sup>

Finally, the Bureau released redacted records, citing three FOIA exemption categories that make some records not releasable in order to protect against harm to the government or private interests.<sup>33</sup> The Bureau redacted water well completion, construction, and physical location data under

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24. See Press Release, U.S. Dep't of the Interior Bureau of Reclamation, Reclamation Releases Draft Environmental Document on San Luis & Delta-Mendota Water Authority CVP Water Transfers, (Mar. 13, 2014), <https://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=46246>.

25. U.S. DEP'T OF THE INTERIOR BUREAU OF RECLAMATION, FINDING OF NO SIGNIFICANT IMPACT: 2014 SAN LUIS & DELTA-MENDOTA WATER AUTHORITY WATER TRANSFER, FONSI 14-10-MP (2014), [https://www.usbr.gov/mp/nepa/documentShow.cfm?Doc\\_ID=17244](https://www.usbr.gov/mp/nepa/documentShow.cfm?Doc_ID=17244).

26. *AquAlliance v. U.S. Bureau of Reclamation*, 139 F. Supp. 3d 203, 205 (D.D.C. 2015).

27. See Press Release, AquAlliance, Lawsuits Filed to Protect North State Farms, Fish and Communities (June 11, 2014), <http://www.aqualliance.net/ground-water-issues/lawsuit-filed-to-protect-north-state-farms-fish-and-communities/>.

28. *AquAlliance*, 139 F. Supp. 3d at 205.

29. *Id.* at 206.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*; see also U.S. DEP'T OF JUSTICE, *Frequently Asked Questions*, FOIA.GOV, <https://www.foia.gov/faq.html> (last visited Jan. 8, 2017) ("Congress established nine exemptions from disclosure for certain categories of information to protect against certain harms, such as invasion of personal privacy, or harm to law enforcement investigations.").

Exemptions 9 and 4.<sup>34</sup> Exemption 9 permits agencies to withhold “geological and geophysical information and data, including maps, concerning wells,”<sup>35</sup> while Exemption 4 permits agencies to withhold “trade secrets and commercial or financial information obtained from a person and [that is] privileged or confidential.”<sup>36</sup> Also, the Bureau redacted the names and addresses of some of the private well owners and participants in water transfer programs or real water determinations under Exemption 6 because individuals’ privacy interests outweighed any public interest in the information’s release.<sup>37</sup> Exemption 6 allows agencies to withhold “personnel and medical files” if disclosure would constitute a clear “unwarranted invasion of personal privacy.”<sup>38</sup>

#### E. *AquAlliance v. United States Bureau of Reclamation*

*AquAlliance* contested the Bureau’s withholdings under Exemptions 9, 4, and 6.<sup>39</sup> First, *AquAlliance* argued Exemption 9 did not apply to water “well construction, location, and depth” information because it only applied to oil wells, and because well data was not the type of “technical or scientific data” Exemption 9 protects.<sup>40</sup> Second, *AquAlliance* argued Exemption 4 did not apply to water well construction and depth data for two reasons: (1) this information would not cause competitive harm; and (2) water well owners participating in water transfers disclosed this information to the Bureau in order to obtain water transfer permits.<sup>41</sup> Finally, *AquAlliance* argued Exemption 6 did not apply to the names and addresses of well owners and permit applicants, because privacy issues were not implicated by this “commercial” information and the public interest outweighed any potential privacy interests.<sup>42</sup>

#### F. *The District Court’s Holding*

The District Court partially rejected *AquAlliance*’s reasoning and held that the Bureau could withhold water well location, construction, and depth information under Exemption 9, but could not withhold information under Exemption 6.<sup>43</sup> The court reasoned that Exemption 9 covers water wells because the text of Exemption 9 makes no distinction between types of wells.<sup>44</sup> The court rejected *AquAlliance*’s use of “legislative history” showing that oil and gas were the subjects Congress sought to address when exempting well

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34. *AquAlliance*, 139 F. Supp. 3d at 206.

35. 5 U.S.C. § 552(b)(9) (2012).

36. *Id.* § 552(b)(4).

37. *AquAlliance*, 139 F. Supp. 3d at 206.

38. § 552(b)(6).

39. *AquAlliance*, 139 F. Supp. 3d at 207.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 211–12, 214.

44. *Id.* at 209–10.

data from FOIA disclosures.<sup>45</sup> Further, the court concluded that the plain language of Exemption 9 permitted the Bureau to redact maps and construction details revealing a well's geological and geophysical information; Exemption 9 protects general "geological and geophysical" information, not just "geological and geophysical information" that reveals "proprietary technical or scientific secrets."<sup>46</sup>

The court declined to decide whether Exemption 4 applied to water well location, construction, and depth information since the Bureau could withhold this data under Exemption 9.<sup>47</sup> The court held that Exemption 6 did not permit the Bureau to redact the names and addresses of various water transfer program participants and real water determinations because AquaAlliance had demonstrated that the "public interest in disclosure outweigh[ed] the limited privacy interests here."<sup>48</sup>

### G. The Circuit Court's Holding

On appeal, the D.C. Circuit Court upheld the District Court's holding on Exemption 9, holding that depth and location of wells qualifies as "geological and geophysical information."<sup>49</sup> The court interpreted Exemption 9 based on its plain-text meaning, and rejected AquaAlliance's argument that information should only qualify as "geological and geophysical" if it "(i) is technical or scientific, and (ii) would bestow a competitive advantage on the person who receives it."<sup>50</sup> The court rejected this argument stating that "geological and geophysical" is not ambiguous, and that nothing in the House nor the Senate Report contains reference to scientific technicalities or competitive disadvantage.<sup>51</sup>

Additionally, the court reject AquaAlliance's argument that Exemption 9 was only meant to apply to oil and gas wells, reasoning that geological and geophysical information can have significant value to economic competitors.<sup>52</sup> The court did not find a House Report discussing Exemption 9's purpose as protecting oil and gas companies from competitors convincing because legislative history is only used to illuminate ambiguous text in FOIA.<sup>53</sup> Furthermore, the court rejected this argument because Congress used the words "concerning wells," without any such "adjectival limitation."<sup>54</sup> Therefore, the

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45. *Id.* at 210.

46. *Id.* at 211.

47. *Id.* at 211–12.

48. *Id.* at 214.

49. *AquaAlliance v. U.S. Bureau of Reclamation (AquaAlliance II)*, 2017 WL 1842507, at \*2 (D.C.C.A. 2017).

50. *Id.* at \*3.

51. *Id.*

52. *Id.*

53. *AquaAlliance II*, 2017 WL 1842507, at \*3.

54. *Id.*

court upheld the Bureau's withholding of water well location and depth information under Exemption 9.<sup>55</sup>

## II. ANALYSIS

The construction, location, and depth of water wells is vital information that allows the public to independently assess the environmental impacts of a water transfer. Without this information, the public either has to (1) accept an EA's environmental impact analysis and findings, or (2) challenge the agency's actions legally without factual data proving the agency acted in an arbitrary and capricious manner by not properly assessing the environmental impacts of the water transfer program.

### A. Importance of Water Well Construction, Location, and Depth Data

Each type of water well has unique construction characteristics that cause different environment impacts.<sup>56</sup> The difference in the location of these water wells also leads to different environmental impacts.<sup>57</sup> If the public knew how deep, what type, and the location of water wells that would be used in a water transfer program, they could assess if the EA properly considered each well's unique environmental impact.<sup>58</sup> Specifically, this data could be used to comment on the plan's lack of mitigation for a certain water well's higher potential for contaminating an aquifer in dry years.<sup>59</sup> Similarly, if the public had knowledge of well locations, then the public could see the distance between groundwater substitution wells and water features, vegetation and wildlife areas, critical surface structures, and other land features that could be impacted by increased groundwater pumping. Likewise, the public could comment on the plan's lack of mitigation for a certain water well's higher potential to impact local land and water features.

### B. Impact of Withholding this Information

When this important information is inaccessible through FOIA and not available in EAs, the public cannot independently evaluate the environmental impact of a water transfer program, nor make public comments showing that a specific environmental impact was not properly considered by the EA.

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55. *Id.* at \*4.

56. *See generally*, Roger M. Waller, *Ground Water and the Rural Homeowner*, U.S. GEOLOGICAL SURV., [https://pubs.usgs.gov/gip/gw\\_ruralhomeowner/](https://pubs.usgs.gov/gip/gw_ruralhomeowner/) (last updated Nov. 30, 2016) (describing several methods for constructing water wells).

57. *See generally id.* (describing various unknown hazards that are location specific).

58. *Cf. id.* (suggesting that rural homeowners obtain information about their property including environmental considerations before drilling for water).

59. For example, a "dug well" is a shallow well without a continuous casing making it susceptible to contamination from nearby surface sources and to drying out during periods of drought. Similarly, a "driven well" can only tap shallow water, which can easily be contaminated. *Id.*

Therefore, the public can only make a comment highlighting the EA's inadequacy because pertinent information was not assessed, preventing the environmental impacts from being properly known and evaluated. Even though a comment of this nature could force the agency to consider this information, the potential impact of this comment is limited because the agency could respond to the comment and explain why the information does not need to be incorporated into the document's model.<sup>60</sup> The agency also need not reply to a vague comment if it would require a "lengthy reiteration of its methodology."<sup>61</sup> Ultimately, the public will either have to accept the agency's EA findings, or legally challenge the agency for violating NEPA procedures without access to specific evidence proving the agency's decision not to assess the information was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>62</sup> Unfortunately, a legal challenge is a costly endeavor that may not result in consideration of environmental impacts because courts are not "empowered to substitute [their] judgment for that of the agency."<sup>63</sup>

#### CONCLUSION

Disclosing water well construction and location data allows the public to independently assess the environmental impacts of a water transfer program. Without this information, the public will unlikely be able to prove an EA overlooked a specific negative impact. Therefore, legal challenges to the agency's action will have to be based on expert testimony highlighting the inadequacy of the model. Public claims based on this evidence will likely be unsuccessful because when specialists express conflicting views, "an agency [has] discretion to rely on the reasonable opinions of its own qualified experts even if . . . a court might find contrary views more persuasive."<sup>64</sup> Ultimately, if this information is exempt from FOIA, the "veil of administrative secrecy"<sup>65</sup> cannot be pierced and since legal challenges will likely be unsuccessful, the public must trust agencies to properly assess a project's environmental impact. Trusting an agency's EA findings may allow the agency to divert less resources and time to the NEPA process;<sup>66</sup> however, it could also prevent foreseeable and

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60. See CEQ NEPA Regulations, 40 C.F.R. § 1503.4(a)(5).

61. Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18,034 (Mar. 23, 1981).

62. 5 U.S.C. § 706(2)(A) (2012).

63. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

64. Marsh v. Oregon Nat. Res. Council, 490 U.S. 360, 378 (1989).

65. AquAlliance v. U.S. Bureau of Reclamation, 139 F. Supp. 3d 203, 208 (D.D.C. 2015) (quoting U.S. Dep't of State v. Ray, 502 U.S. 164, 173 (1991)).

66. See AUDREY BIXLER ET AL., ADMINISTRATIVE AND JUDICIAL REVIEW OF NEPA DECISIONS: RISK FACTORS AND RISK MINIMIZING STRATEGIES FOR THE FOREST SERVICE 1–2 (2016).

**We welcome responses to this In Brief. If you are interested in submitting a response for our online journal, *Ecology Law Currents*, please contact [cse.elq@law.berkeley.edu](mailto:cse.elq@law.berkeley.edu). Responses to articles may be viewed at our website, <http://www.ecologylawquarterly.org>.**

negative environmental impacts from being considered or fully disclosed to the public.

*Taylor Wetzel*

