ENVIRONMENTAL DEFENSE FUND

10/26/84

COMMENTS OF

ENVIRONMENTAL DEFENSE FUND

AND NATIONAL WILDLIFE FEDERATION

ON THE

PROPOSED GENERAL POWER MARKETING CRITERIA AND

ALLOCATION CRITERIA,

COLORADO RIVER STORAGE PROJECT (CRSP), COLLBRAN,

PROVO RIVER, AND RIO GRANDE PROJECTS, WESTERN AREA POWER

ADMINISTRATION (WAPA), DEPARTMENT OF ENERGY (DOE).

ENVIRONMENTAL DEFENSE FUND, INC.

James Martin, Attorney
1405 Arapohoe
Boulder, Colorado 80302

David Marcus, Economist
Thomas J. Graff, Senior Attorney
2606 Dwight Way
Berkeley, California 94704

NATIONAL WILDLIFE FEDERATION

Chris Meyer
Fleming Law Building
Boulder, Colorado 80309

October 26, 1984

Mark Silverman
Acting Area Manager
Salt Lake City Area Office
Western Area Power Administration
Salt Lake City, Utah 84147

Re: Revised Proposed General Power Marketing Criteria and Allocation Criteria

Dear Mr. Silverman:

On September 4, 1984, the Salt Lake City Area Office of the Western Area Power Administration (Western) published revised proposed general power marketing and allocation criteria for the Colorado River Storage Project and the Collbran, Provo River, and Rio Grande Projects. 49 Fed. Reg. 34900-34956. The Environmental Defense Fund (EDF) and the National Wildlife Federation (NWF) hereby submit these supplemental comments pursuant to that Federal Register notice.

These comments focus on two related issues surrounding Western's compliance with the National Environmental Policy Act (NEPA), 42 U.S.C. section 4321 et seq. First, we repeatedly have urged Western to prepare an environmental impact statement in conjunction with development of these allocation and marketing criteria. For example, we made that recommendation in joint comments submitted on November 15, 1983, and the National Wildlife Federation addressed this issue in a separate letter dated October 4, 1983. We reiterate once again our firm conviction that Western's development of allocation and marketing

criteria is a major federal action significantly affecting the quality of the human environment. Consequently, an EIS must be prepared to assess the environmental consequences of this agency action.

Second, EPA requires that documentation of the environmental consequences of proposed actions be initiated early in the decisionmaking process. The purpose of that requirement is to assure that both agency decisionmakers and members of the public are informed of the full spectrum of environmental impacts that will result from a proposed action. Western's decision to prepare an EA or EIS after the comment period on the proposed allocation and marketing criteria has closed suggests that the NEPA documentation will be used to justify decisions already made rather than to inform the agency of the consequences of its decisions.

In addition, specific comments on Western's "Revised Proposed General Power Marketing Criteria and Allocation Criteria" have been included. These comments identify examples of Western's deferral of environmental analysis until an unacceptably late point in the reallocation process, and address other points as well.

EDF and NWF look forward to receiving your response to these comments.

Sincerely yours,

Environmental Defense Fund

James Martin, Attorney
1405 Arapahoe
Boulder, CO 80302

David Marcus, Economist
Tom Graff, Senior Attorney
2606 Dwight Way
Berkeley, CA 94704

National Wildlife Federation

Chris Meyer
Fleming Law Building
Boulder, CO 80309

by: David Marcus
Tom Graff
James Martin
Chris Meyer

A. Western's Proposed Allocation and Marketing Criteria Are A Major Federal Action Significantly Affecting the Quality of the Human Environment

Section 102 of NEPA, 42 U.S.C. section 4332(2)(c), mandates the preparation of an EIS for all "major federal actions significantly affecting the quality of the human environment." "The statutory phrase `actions significantly affecting the quality of the environment' is intentionally broad, reflecting the Act's attempt to promote an across-the-board adjustment in federal agency decision making so as to make the quality of the environment a concern of every federal agency." Scientists' Institute for Public Information, Inc. v. Atomic Energy Comm'n., 481 F.2d 1079, 1088 (D.C. Cir. 1973). See Andrus v. Sierra Club, 442 U.S. 347, 350 (1979).

In our previous letters, comments, and oral conversations with Western representatives we have outlined the kinds of environmental impacts that will result from adoption of allocation and marketing criteria for the Colorado River Storage Project and other hydroelectric facilities within the Salt Lake City Area Office's jurisdiction. For example, the proposed criteria reflect a decision to operate the hydroelectric system

to maximize capacity sales, which will result in periodic maximum system releases of water from reservoirs with consequent impacts on downstream riverine and aquatic ecosystems. In the case of Glen Canyon Dam, the tidal effect of daily and seasonal peaking operations affect the riverine ecosystem of one of the nation's premier national parks--the Grand Canyon. System operations at Flaming Gorge will significantly affect the ecological balance of the Green River in Dinosaur National Monument. Western's action also involves distinct policy choices concerning development of conservation and renewable energy resources throughout the region. And decisions to offer customers options for purchase of non-federal energy and capacity likely will stimulate electricity consumption with significant secondary impacts such as increased air pollution caused by thermal generating plants.

In short, the formulation of allocation and marketing criteria for the Colorado River Storage Project and the Collbran, Provo, and Rio Grande Projects manifestly entails significant impacts to the human environment. Western is required by NEPA to prepare an EIS evaluating those impacts and examining alternatives.

The decision in Forelaws on Board v. Johnson, No. 82-7319, slip op. (9th Cir. Sept. 25, 1984), lends substantial weight to this conclusion. In that case, the Bonneville Power Administration refused to prepare an EIS for long-term power contracts for its preference and non-preference customers. The Ninth Circuit Court of Appeals encountered little difficulty in finding that the environmental impacts associated with execution of long-term power contracts are significant. For example, the court noted that several commenters suggested incentives for conservation that could have been included in power sale contracts. Id. at 8. Although BPA included some conservation measures in the final contracts, they were "fewer and weaker than those proposed by several public groups." In addition, the court noted the effect of BPA's actions on regional energy plans.

We have enclosed a copy of the opinion in Forelaws on Board v. Johnson, since that decision provides compelling evidence of Western's obligation to prepare an EIS in conjunction with proposed post-1989 allocation and marketing criteria. 1/ We strongly urge Western not to delay this necessary study any longer.

B. An EIS Must Be Prepared at the Earliest Possible Time

The implementing regulations promulgated by the Council on Environmental Quality make clear that agencies "shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts." 40 C.F.R. 1501.2 (emphasis added). That prescription is in keeping with the Supreme Court's decisions pointing out that the thrust of section 102(2)(c) is to integrate environmental concerns into agency decisionmaking. Weinberger v. Catholic Action of Hawaii, 454 U.S. 149 (1981).

If NEPA documentation is to serve a meaningful role in guiding the agency and informing the public, an EIS must be developed "as close as possible to the time the agency is developing or is presented with a proposal." 40 C.F.R. 1502.5. The CEQ regulations require that an EIS be developed early enough so that it can contribute to informed and reasoned decisionmaking and "will not be used to rationalize or justify decisions already made." 40 C.F.R. 1502.5. To effectuate that goal, a draft EIS must accompany a proposal rule. Id. at 1502.5(d). 2/ The courts

also have repeatedly recognized that the filing of an EIS must precede rather than follow federal agency action, Cady v. Morton, 527 F.2d 786, 794 & n.4 (9th Cir. 1975), so the agency can consider environmental issues in determining whether the actions they contemplate should be undertaken. Id. at 793-94. 3/

In order to fulfill the purposes of NEPA, and to provide the agency and the public with full disclosure of the environmental consequences of the proposed criteria, we again urge Western to immediately commence preparation of an EIS. Any other course of action would amount to an attempt to "[lock] the barn door after the horses are stolen." Lathan v. Volpe, 350 F. Supp. 262, 266 (W.D. Wash. 1971), aff'd in part and rev'd in part on other grounds, 455 F.2d 1111 (9th Cir. 1972).

C. Comments on Specific Items in Western's "Revised Proposed General Power Marketing Criteria and Allocation Criteria"

[All page references are to the double-spaced, 164-page version of the revised criteria issued in Golden, Colorado on August 24, 1984, which was subsequently reprinted in the Federal Register of September 4, 1984]

1. Pp. 7-8: Western indicates that allottees will have at least 6 months to consider contract offers, even if contract offers are not made until March 30, 1987, a two year extension from the August 1983 proposed criteria.

   This means that Western has some 29 months before its own, self-imposed, deadline for contract offers, ample time in which to prepare an EIS.

2. P. 27: Western quotes Congressman Swift of Washington, in debate on the Boxer amendment regarding Hoover Dam post-1987 reallocation, to support a claim that Congress has rejected changes to preference policy.

   The quoted statement does not support any such claim. Congressman Swift's comments referred to his disinclination to change preference policy "on the floor [of the House]

with an amendment...." He said that if preference policy is to be changed then "let us hold hearings and understand it." That kind of public process is precisely what EDF and NWF are calling for in our repeated requests for an EIS. Congressional rejection of the Boxer amendment by no means constitutes rejection of any future study of any action which might change the interpretation of law from that currently favored by Western.

3. P. 28: Western cites Congressman Udall as expressing the view that the Boxer amendment would, if passed, be extended to other areas of the country. It then cites the defeat of the Boxer amendment, apparently to show that the entire House shared Congressman Udall's view.

In fact, the Boxer amendment did not apply to any other areas of the country. The fact that it was defeated cannot be taken by Western as evidence that Congress has rejected once and for all any examination of modifications to preference policy in any part of the country for any purpose.

4. P.30: WAPA again refers to Congressman Swift, and asserts that the process for any changes in preference policy is "the introduction of new legislation, not an administrative change in contravention of congressional desires."

EDP and NWF totally fail to see how Western can draw this conclusion from the fact that several proposed amendments to the Hoover reallocation act were rejected by Congress. Those amendments were proposed "new legislation;" they were not "administrative change." If anything, the argument advanced by Congressman Swift is that Congress should consider change only when there is an evidentiary record for it, and administrative agencies such as Western are just the place where evidence should be developed as to the effects of possible new policies. If Congress had decided, after Western had examined the issue in depth through the EIS process, to reject any changes to post-1987 Hoover allocations, that might have had precedential value for the current proceeding. But Western cannot claim that because Congress refused to adopt the Boxer amendment without such a hearing record, therefore Western need not even examine similar issues for the post-1989 CRSP reallocation.

5. Pp. 39-40: Western once again refers to the defeat of the Boxer amendment as a "re-affirmation" of a "national policy."

EDF and NWF once again point out that the Boxer amendment applied only to the Hoover reallocation, and that a principal argument used against the Boxer amendment was the lack of a detailed record on which to decide. Western cannot use the defeat of the Boxer amendment as a cloak to defend its unwillingness to consider suggestions by commenters with whom it does not agree. The EIS process exists precisely to give an opportunity for reasoned choices among alternatives whose consequences have been studied in detail.

6. P. 43: Referring to a legislative directive that federal power rates should be set to encourage "the widest possible diversified use of electrical energy," Western concludes that "since the relationship of demand to price is an inverse one, the lowest price will naturally encourage the most widespread use."

Western has confused "wide" use with "high" use. Low prices lead to high consumption. They need not lead to wide consumption at all. In fact it is UP&L which is proposing

to widen the use of CRSP power by enlarging the set of allottees. Western, as previously pointed out in EDF and NWF comments, is proposing to continue policies which provide anti-conservation incentives for high electricity consumption.

7. P. 45: Western claims it has no authority "to even study the possibility of selling Federal power at a market price." It bases this contention on the fiscal year 1984 Energy and Water Development Appropriation Act.

Even if Western is banned from studying market-pricing of Federal power, several of the alternatives whose study EDF and NWF have previously argued for are not covered by any such ban. For example, making conservation and renewable resource development an allocation criterion does not involve price at all. Similarly, UP&L's suggestion of awarding allocations based on bids would introduce a market component into the allocation process, and would allow power sales themselves to still be made on a cost-based (i.e. non-market) basis. This would be arguably within the bounds of any Congressional ban which still exists.

Moreover, if Western's real concern is with marketing to UP&L, it could restrict the allowable bidders to only those entities which meet its definition of preference customers. Selling allocation rights would be consistent with the Reagan Administration's call for reliance on market forces when possible, and would also be consistent with Western's position that Congress wants actual sales of federal energy and power to be made at cost.

Whether or not Western actually adopts such a policy, it cannot ignore the NEPA requirement that it examine alternatives by blithely citing alleged Congressional bans on studying one particular way of pricing Federal hydroprojects.

8. P. 54: Western admits that it has intentionally restricted the amounts of power available for new customers to levels which "are probably not sufficient to encourage entities without distribution systems to acquire a system in order to qualify for a share of the available Federal power."

This would appear to violate the directive, touted elsewhere by Western, that it promote the wide use of Federal power. See the following comment.

9. P. 54: Western says that there is no "cause" to withdraw power from existing customers.

Western ignores Section 5 of the Flood Control Act of 1944, which it cited itself earlier (p. 43), requiring power sales "to encourage the most widespread use." Withdrawing power from existing customers at a level sufficient to encourage the formation of new preference utilities would lead to wider use (i.e., use by more customers than presently) of SLCA resources.

EDF and NWF do not necessarily endorse larger withdrawals from existing customers for the purpose of serving new customers. We merely point out that Western's decision to intentionally allocate only a very small fraction of post-1989 energy and capacity to new customers contradicts its previous position that it is required to maximize the wideness of use of the resources it markets. An EIS is the proper place to address different alternatives for post-1989 allocations, and their differing effects on various parties as well as the environment.

10. P. 54: Western asserts that it would be "unduly disruptive economically" to significantly change current allottees' allocations.

Western does not provide any documentation for this assertion. Allottees have known since the day they signed their contracts that those contracts would expire in 1991. They have received formal notice with this document that their allocations may be decreased or even eliminated in 1989. Western concedes later (p. 58) that "existing preference customers have no vested interest in Federal power." Western appears nevertheless to be creating a vested assurance that, rights or not, existing allottees will be protected. How can Western grant a greater weight to a nonexistent right than to such real criteria as energy conservation, development of renewable resources, and widening the use of Federal power? Once again, this is the sort of tradeoff (between preference for existing allottees and other allocation criteria) which should be discussed in an EIS.

11. P. 58: Western again asserts that reducing allocations to current contractors would inflict "undue economic hardship."

From an economic point of view, the economic penalty suffered by a contractor which had its allocation reduced would be exactly equal to the economic benefit received by whoever received the reallocated power and energy. Western seems to think it is appropriate to deny the economic benefits of Federal power to utilities with active conservation programs if they are not already allottees, but not appropriate to take away those benefits from utilities which encourage profligate use, as long as they are current allottees. EDF and NWF maintain that not changing allocations is itself a form of allocation, which benefits some utilities and hurts others. Using historical allocations as an allocation criterion, and the primary one at that, cannot be justified by claims of undue hardship to those utilities which have already benefited from decades of low-cost Federal energy and power.

12. P. 69: Western cites examples provided by UP&L of activities financed by municipal benefits out of the economic gains resulting from access to hydropower allocations.

These examples reinforce the point made in previous EDF and NWF comments, that there are significant environmental impacts associated with Western's allocation choices. By allocating to one region versus another, to cities versus coops, etc., Western may be enabling the construction of environmentally damaging projects which would otherwise not have been built.

13. P. 72: Western asserts that an historic factor in power allocations has been compliance with the "resale article."

When has Western ever reduced or eliminated an allocation for any utility based on that utility's noncompliance with the resale article?

14. Pp. 76-7: Western discusses an amendment to the Hoover Powerplant Act of 1984 introduced by Congressman Udall, and uses passage of this amendment as its reason for provisionally rejecting the EDF and NWF call for conservation to be an allocation criterion.

Western's position is inappropriate. Congressman Udall's amendment did not forbid the use of other methods of conservation, such as those proposed by EDF and NWF in our previous comments to Western. Western tacitly admits as much when it says it is interested in receiving further public comment on the issue.

15. P. 77: Western says that it has requested an "independent contractor" to prepare an environmental report on the proposed marketing criteria.

Who is this contractor? How does this action comport with NEPA, which requires public scoping sessions for EISs? This would be the first notice EDF and NWF have received that Western does indeed intend to prepare an environmental impact statement on the proposed criteria, except the backhand nature of the reference suggests that whatever Western means by an "environmental report" is not the same as the NEPA requirements for an environmental impact statement.

16. P. 103: Responding to complaints by EDF and NWF that blending the rates of the Collbran and Rio Grande Projects in with the CRSP will result in a subsidy, encouraging the wasteful consumption of electricity, Western asserts that it is unconvinced "but will not make a final decision until its environmental review is completed."

Again (see comment above), what "environmental review?" Where are the public scoping sessions? Where is the opportunity for public review of a draft? Why is Western reaching decisions on most issues now, and deferring others until the same time as "environmental review," thus making it impossible for that "review" to affect the conclusions reached? Where is the public notice or schedule for the review, and who are the reviewers? Western's specific contention on p. 103 that its conservation article will prevent unwise consumption caused by implementation of blended rates is ridiculous. Implementation of blended rates for the Rio Grande Project would reduce electricity costs for that project by over 50 percent. Does Western so disbelieve in market forces that it denies that a 50+ percent price reduction will affect consumption? (Cf. Western's own reliance on price elasticity, p. 43, to defend its marketing policies.)

17. P. 111: Western refers to the "requirements of a detailed evaluation of the environmental impacts, if any....."

Western appears to be trying to have it both ways. It excuses its lack of quantification of allocation changes by alluding to the time required to do environmental review, but still refuses to admit that there is any environmental impact associated with its post-1989 allocation choices. If Western had begun the EIS process a year ago, when EDF and NWF requested it to do so, it would not be in this position today. If by "detailed evaluation of environmental impacts," Western is referring to the Environmental Assessment (EA) currently scheduled for completion in November 1984, then EDF and NWF point out that an EA is not a detailed evaluation, but the legally required minimum evaluation used to determine whether there is a large enough environmental impact associated with a decision to merit preparation of an EIS. For the post-1989 reallocation, if Western was truly in doubt as to the existence of significant environmental differences among its choices, it should have done an EA in 1981-2 at the start of the process, not in late 1984 at the end.

18. Pp. 133-4: Western describes the operation of the CRSS model, and its inclusion of downstream water release constraints.

This is precisely the sort of modeling which should have been done with environmental considerations in mind. For example, was the CRSS model run taking into effect different release regimes which have been proposed for Glen Canyon Dam, or did it consider the only constraints on Glen Canyon Dam releases to be the Colorado River Compact requirements? Did the CRSS model even take into account the current 31,500 cfs maximum limit on Glen Canyon Dam releases? Since Table A-1 only deals with weather variability, the apparent answer is that the CRSS model did not consider options involving human choices at Glen Canyon Dam. Thus, Western has no way of quantifying what the energy costs, if any, would be from marketing amounts of CRSP energy which took into effect generation changes resulting from environmental mitigation.

19. P. 142: After several times affirming its intention to only purchase firming power and energy on a pass-through basis, Western introduces the caveat "unless the customers and other interested members of the public advise Western that

a blended rate is preferable."

EDF and NWF reiterate our opposition to the use of blended rates for non-Federal resources purchased by Western. Use of blended rates for purchases, which are primarily from powerplants fueled by polluting fossil fuel sources, disguises the true costs of those plants and removes the price incentive for conservation which would otherwise exist.

20. P. 144: Western asserts its legal authority to market energy "which is available half the time."

EDF and NWF's previous comments addressed our contention that Western does not have the legal right to enter into contracts which involve systematically selling energy and capacity from non-Federal sources. We point out here simply that Western has misstated what it proposes to do. Western's actual proposal is to sell not only an amount of energy equal to its mean generation, but an additional 400 gwh per year. Thus Western would be explicitly marketing non-Federal energy in most years.

Moreover, because of the asymmetrical nature of wet and dry years (the wettest years are farther from average than the driest years), even if Western did not choose the Option With Purchases, in 6 years out of 10 actual runoff

would be inadequate to generate the "mean" level of energy calculated by Western (see Table A-2). When Western refers to "half the time" on p. 144, it is not accurately characterizing its own proposal.

21. P. 149: In its summary and conclusion, Western states that "these amounts may be affected by the evaluation of environmental impacts."

While EDF and NWF applaud this acknowledgement that environmental considerations can affect allocations (we believe they not only can, but should), we point out once again that Western still has made no commitment to even prepare an EIS, let alone act to incorporate environmental mitigation into its allocation criteria.

FOOTNOTES

1/ The revised proposed criteria make abundantly clear that the Administrator has substantial discretion in developing both allocation and marketing criteria, and contract terms. In exercising that discretion, the Administrator must consider not only conservation of energy and development of renewable energy resources, but also impacts to natural resources. Section 105 of NEPA specifies that the Act's policies are "supplementary to those set forth in existing authorizations of Federal agencies." 42 U.S.C. section 4335. See, e.g., Public Service Co. of New Hampshire v. United States Nuclear Regulatory Comm'n., 582 F.2d 77 (1st Cir.), cert. denied, 439 U.S. 1046 (1978)(upholding NRC decision to condition license on selection of specific transmission line route). The Department of Energy Organization Act, 42 U.S.C. sections 7112, 7152(a)(1)(E), and the Fish and Wildlife Coordination Act, 16 U.S.C. section 662(a), also authorize the Administrator to formulate criteria and contract terms for protection of the environment and conservation of energy.

2/ Since the purpose of an EA is to determine whether an EIS is necessary, 40 C.F.R. 1501.4, logically an EA must be completed early enough in the process to permit the agency to prepare an EIS to accompany proposed rules if the EA concludes that a proposed action is likely to cause significant impacts to the quality of the environment.

3/ In addition, when a proposal involves "unresolved conflicts concerning alternative uses of available resources, NEPA requires federal agencies to "study, develop and describe" alternatives to the proposed action even if an EIS is not required. 42 U.S.C. section 4332(2)(E); Trinity Episcopal School Corp. v. Romney, 523 F.2d 88, 93 (2d Cir. 1975); Environmental Defense Fund v. Corps of Engineers, 492 F.2d 1123, 1135 (4th Cir. 1974).