

# Congress of the United States

## Washington, DC 20515

The Honorable Debra A. Haaland  
Secretary  
U.S. Department of the Interior  
1849 C Street N.W.  
Washington, D.C. 20240

May 7, 2021

Dear Secretary Haaland:

We write to express deep concern with a series of actions taken by the previous administration concerning legal obligations under the Central Valley Project Improvement Act (CVPIA), including legal memoranda written by former Secretary Bernhardt and agency staff during the final days of the Trump administration. The four enclosed memoranda advance a false and unlawful declaration that many of the environmental restoration and mitigation actions required under the CVPIA have been completed. Completing these required actions would trigger significant funding cuts to the Central Valley Project Restoration Fund – a key funding source for numerous activities that help mitigate the environmental impacts of the Central Valley Project and help restore and recover California’s imperiled fish and wildlife. We strongly urge you to withdraw and replace these legally deficient memoranda and explicitly affirm the clear and ongoing legal obligations that remain under the CVPIA.

The CVPIA was signed into law by President George H.W. Bush in 1992 to mitigate many of the damaging environmental effects of the Central Valley Project (CVP), one of the world’s largest network of dams, reservoirs, canals and other facilities extending 400 miles through central California. The CVPIA formally established fish and wildlife purposes as an official project purpose of the CVP on par with other project purposes like water supply, and it mandated a number of fish, wildlife and habitat mitigation and restoration actions. The CVPIA also established the Central Valley Project Restoration Fund (Restoration Fund) to receive annual payments of up to \$30 million (1992 dollars) from contractors that receive water and power from the CVP to help fund the fish and wildlife mitigation and restoration activities required under section 3406 of the CVPIA.<sup>1</sup> Under section 3407(d)(2)(A) of the CVPIA, the Interior Secretary cannot lower the ceiling for Restoration Fund collections from water and power contractors until the fish and wildlife mitigation and restoration actions required under section 3406 of the Act are completed.

The Trump administration memoranda inaccurately assert that these required actions are largely complete, as discussed below. Completing these mandated actions would require the Interior Secretary to cut the annual ceiling for Restoration Fund collections by 50 percent.<sup>2</sup> Such a cut would not only delay the completion of the CVPIA’s restoration and mitigation objectives, it could render achieving some of them impossible, and result in further degraded habitat and fish and

---

<sup>1</sup> P.L. 102-575, § 3407(d)(2)(A) establishes a ceiling of \$30,000,000 (October 1992 price levels) on the Secretary’s mandated collections. The present annual value reflected in the Bureau of Reclamation’s Fiscal Year 2021 budget justification is approximately \$56 million, (online at [https://www.usbr.gov/budget/2021/FY\\_2021\\_Budget\\_Justifications.pdf](https://www.usbr.gov/budget/2021/FY_2021_Budget_Justifications.pdf)).

<sup>2</sup> P.L. 102-575, § 3407

wildlife species viability across California. More specifically, reduced collections will greatly impact ongoing efforts to recover and restore anadromous fish and wildlife and cause great harm to California wildlife refuges, which is also described in further detail below.

*CVPIA Actions to Mitigate Impacts to Wildlife Refuge are Incomplete, and Reductions in CVPIA Funding Would Significantly Impact Migratory Birds, Endangered Species, and Other Native Fish and Wildlife:*

The Central Valley of California is home to multiple state and federally-designated wildlife refuges that provide valuable wetland habitat for migratory birds and other species. Section 3406 of the CVPIA requires the Bureau of Reclamation (Reclamation) to provide “firm water supplies of suitable quality” to 19 wetland habitat areas to restore habitat losses caused by the CVP for millions of birds migrating across the Pacific Flyway, as well as related habitat for other fish and wildlife. These required water supply deliveries are referred to as Level 2 refuge water supplies (422,251 acre-feet per year except in critically dry years) and Incremental Level 4 supplies (133,264 acre-feet per year of additional water beyond Level 2).<sup>3</sup> Section 3406(d)(5) of the CVPIA also directs the Interior Secretary to construct or acquire water infrastructure necessary to deliver these mandated water supplies to designated wildlife refuges.<sup>4</sup>

To date, many of these CVPIA mandates for refuges remain incomplete. For example, many refuges still lack water delivery infrastructure that Congress specifically directed the Interior Secretary to construct or acquire in order to deliver full CVPIA refuge water supplies.<sup>5</sup> For other refuges, the Refuge Water Supply Program has not acquired sufficient firm water supplies to make full deliveries (in particular, for Level 4 supplies).<sup>6</sup> The Trump administration memoranda acknowledge that the mandated refuge actions under section 3406 of the CVPIA are incomplete.<sup>7</sup> However, the memoranda simultaneously introduce a new legal theory claiming that Congress meant to exclude some of the mandates under section 3407(d)(2)(A).

Section 3407(d)(2)(A) of the CVPIA states that Reclamation cannot reduce Restoration Fund collections until “the completion of the fish, wildlife, and habitat mitigation and restoration actions mandated under section 3406 of this title.” The Trump administration memoranda erroneously suggest that the requirement in section 3407 actually excludes the required delivery of Level 4 refuge water supplies, despite the fact that Level 4 deliveries are explicitly mandated in section 3406.<sup>8</sup> The memoranda maintains this position by stating that Level 4 deliveries could be considered a mandated “enhancement” action, which would be separate and distinct from the “mitigation and restoration” actions that section 3407 says must be completed before Restoration Fund collections can be reduced.<sup>9</sup> This novel interpretation is contrary to the plain language of the statute and years of agency interpretations of the CVPIA, and it largely rests on a cited definition

---

<sup>3</sup> P.L. 102-575, § 3406(d)

<sup>4</sup> P.L. 102-575, § 3406(d)(5)

<sup>5</sup> California Department of Fish and Wildlife, Refuge Water Supply Program Details, online at <https://wildlife.ca.gov/Conservation/Watersheds/Refuge-Water/Details>.

<sup>6</sup> Ibid.

<sup>7</sup> Memorandum from David Bernhardt, Secretary, Department of the Interior, to Assistant Secretary, Fish & Wildlife and Parks, and Assistant Secretary, Water & Science, Jan. 19, 2021.

<sup>8</sup> P.L. 102-575, § 3406(d)(2)

<sup>9</sup> Memorandum from Carter Brown, Associate Solicitor, Division of Water Resources, to Regional Director, California Great Basin Region, Jan. 14, 2021, page 6.

of “enhancement” from a Merriam-Webster online dictionary to characterize the Level 4 mandate as an “enhancement” action that is distinct from a “restoration and mitigation” action.<sup>10</sup> The memoranda state further that Congress meant to exclude this ostensible “enhancement” action from its requirement that all “mitigation and restoration actions” be completed before Restoration Fund collections are reduced.

Moreover, this new interpretation of congressional intent, advanced by former-Secretary Bernhardt on his last full day in office, is contrary to years of agency interpretation, including earlier Trump administration interpretations of the CVPIA. In a Trump administration analysis underlying the 2020 Central Valley Project Cost Allocation Study, Reclamation previously wrote that:

“[A] determination has been made that mitigation for the CVP has not yet been fulfilled, and therefore, there are no fish and wildlife enhancement benefits in the CVP. Accordingly, existing CVPIA actions are considered as actions to help meet fish and wildlife mitigation requirements, consequently no existing CVPIA costs should be allocated to the fish and wildlife enhancement purpose.”<sup>11</sup>

A close reading of statutory text and legislative history also make clear that Congress did not seek to separate the full Level 4 mandate from its mandate to carry out the “mitigation and restoration actions” required before Restoration Fund collections are reduced. While the Trump administration memoranda attempt to advance an overly restrictive reading of the phrase “mitigation and restoration actions”, it is clear throughout the statutory text of the CVPIA that Congress uses terms like mitigation, protection, restoration, enhancement, maintenance, and improvement in various combinations and applied relatively loosely, without formal definitions for most of these terms, because the purpose of the CVPIA is to rectify the overall harms caused by the CVP.<sup>12</sup> Further, where the Act does address the term “enhancement”, Congress describes it as an outcome that “exceeds that which existed in the absence of Central Valley Project facilities.”<sup>13</sup> The delivery of full Level 4 supplies would clearly not result in such “enhancement” conditions as described in the CVPIA. Consequently, Level 4 deliveries remain an incomplete mitigation and restoration action that must be completed before reducing Restoration Fund collections pursuant to section 3407(d)(2)(A).

*CVPIA Actions to Mitigate Impacts to Anadromous Fish Are Incomplete, and Reduction in Restoration Fund Payments Would Cause Significant Impacts to Salmon, Steelhead, and Sturgeon Species, including Endangered and Threatened Species:*

The Trump administration memoranda make similarly specious legal claims about the supposed completion of mandated mitigation and restoration actions for fish under the CVPIA. Among other mandates, CVPIA section 3406(b)(1) directs the Interior Secretary to develop and implement a program that makes “all reasonable efforts” to double the natural production of anadromous fish

---

<sup>10</sup> Memorandum from Carter Brown, Associate Solicitor, Division of Water Resources, to Regional Director, California Great Basin Region, Jan. 14, 2021, page 6.

<sup>11</sup> Bureau of Reclamation, *CVP Cost Allocation Study: Treatment of CVPIA Costs*, July 26, 2017.

<sup>12</sup> For example, CVPIA section 3406(g) requires studies to be consistent with “fish, wildlife, and habitat protection and restoration measures required by this title” and section 3407 establishes the Restoration Fund to “carry out programs, projects, plans, and habitat restoration, improvement, and acquisition provisions of this title”.

<sup>13</sup> P.L. 102-575, § 3406(b)

in Central Valley rivers and streams at levels sustainable on a long-term basis.<sup>14</sup> A Final Restoration Plan for the Anadromous Fish Restoration Program (AFRP) was developed in 2001 to achieve this directive.<sup>15</sup> At present, neither long-term sustainability nor fish doubling has occurred.

The 2001 AFRP plan identified dozens of medium and high-priority actions to recover six anadromous fish species.<sup>16</sup> The AFRP plan noted that the next step in achieving these actions would be to develop an implementation plan.<sup>17</sup> In 2008, an independent science review panel concluded that progress on the AFRP was too slow and that a comprehensive, science-based approach that explicitly linked CVPIA activities with program objectives was needed.<sup>18</sup> In 2009, Reclamation issued the CVPIA Program Activity Review (CPAR) Report, which confirmed that the AFRP was not yet implemented and almost 100 medium and high-priority actions remained incomplete.<sup>19</sup>

In 2015, the U.S. Fish and Wildlife Service (FWS) and Reclamation published a draft implementation plan for CVPIA fish programs.<sup>20</sup> The draft plan established that the list of actions in the 2001 Restoration Plan was still the benchmark for AFRP implementation, and emphasized that science-based decision making would help refine and prioritize those actions.<sup>21</sup> In September 2020, a collaborative Science Integration Team, established in accordance with the 2015 implementation plan, indicated that AFRP requirements are still not complete.<sup>22</sup> Moreover, recent data from FWS clearly show that fish populations today are even lower than when the CVPIA was signed.<sup>23</sup>

Notably, none of the Trump administration memoranda actually provide analysis to support the conclusion that the AFRP actions mandated under section 3406(b)(1) are complete.<sup>24</sup> The

---

<sup>14</sup> P.L. 102-575, § 3406(b)(1)

<sup>15</sup> U.S. Fish and Wildlife Service, *Final Restoration Plan for the Anadromous Fish Restoration Program* (Jan. 9, 2001) (online at [https://www.fws.gov/lodi/anadromous\\_fish\\_restoration/documents/20010109\\_Final\\_Restoration\\_Plan\\_for\\_the\\_AFRP.pdf](https://www.fws.gov/lodi/anadromous_fish_restoration/documents/20010109_Final_Restoration_Plan_for_the_AFRP.pdf)).

<sup>16</sup> *Ibid* at 33-104.

<sup>17</sup> *Ibid* at 14-15.

<sup>18</sup> U.S. Bureau of Reclamation and U.S. Fish and Wildlife Service, *Listen to the River: An Independent Review of the CVPIA Fisheries Program* (Dec. 2008) (online at <https://www.usbr.gov/mp/cvpia/docs-reports/docs/report-independent-review-listen-to-the-river-12-2008.pdf>).

<sup>19</sup> U.S. Bureau of Reclamation, *Central Valley Project Improvement Act Program Activity Review Report* (Aug. 25, 2009), pg. 45, (online at <https://www.usbr.gov/mp/cvpia/docs-reports/docs/report-cvpia-cpar-08-25-09.pdf>).

<sup>20</sup> U.S. Fish and Wildlife Service, *A Central Valley Project Improvement Act implementation plan for fish programs* (July 2015) (online at [www.usbr.gov/mp/cvp/docs/A-CENTRAL-VALLEY-PROJECT-IMPROVEMENT-ACT-IMPLEMENTATION-PLAN-FOR-FISH-PROGRAMS-July-22-2015-Public-Draft.pdf](http://www.usbr.gov/mp/cvp/docs/A-CENTRAL-VALLEY-PROJECT-IMPROVEMENT-ACT-IMPLEMENTATION-PLAN-FOR-FISH-PROGRAMS-July-22-2015-Public-Draft.pdf)).

<sup>21</sup> *Ibid* at 2.

<sup>22</sup> U.S. Bureau of Reclamation and U.S. Fish and Wildlife Service, *Near-term Restoration Strategy for the Central Valley Project Improvement Act Fish Resource Area FY2021–FY2025* (Sept. 14, 2020) (online at [cvpia-reference-docs.s3-us-west-2.amazonaws.com/Near-term+Restoration+Strategy++September+2020++Sec+508.pdf](https://s3-us-west-2.amazonaws.com/Near-term+Restoration+Strategy++September+2020++Sec+508.pdf)). Page 62

<sup>23</sup> The 1992-2015 average was 381,368 compared to the 1967-1991 baseline average of 497,054. U.S. Fish and Wildlife Service, *Doubling Goal Graphs based on data from the California Department of Fish & Wildlife's grandtab escapement estimates* (June 30, 2016) (online at [https://www.fws.gov/lodi/anadromous\\_fish\\_restoration/documents/Doubling\\_goal\\_graphs\\_063016.pdf](https://www.fws.gov/lodi/anadromous_fish_restoration/documents/Doubling_goal_graphs_063016.pdf)).

<sup>24</sup> Page 2 of the attached memorandum from the Reclamation Bay Delta Office states that the AFRP “remains active,” with “activities on multiple tributaries throughout the Central Valley.” It also notes that Reclamation has incorporated the AFRP’s “science-based framework for prioritizing actions,” including funding for habitat

Solicitor’s memorandum simply reasons that the statutory requirement for the Secretary to “develop and implement” a program can be considered complete, even if many of the elements of such a program have yet to be implemented.<sup>25</sup> The memoranda reason that compliance with only the specific statutory language of each mandated action is required, and that the definition of completion cannot be expanded “by mere agency identification of specific actions in furtherance of general statutory goals.”<sup>26</sup> This is contrary to the fact that Reclamation and the FWS have repeatedly stated these program goals in terms of measurable biological objectives.<sup>27</sup> Additionally, the specific statutory language of section 3406(b)(1) uses the phrase “*fully* implemented” (emphasis added) to describe the Secretary’s obligations under the AFRP and requires the Secretary to make “all reasonable efforts” to meet the fish doubling goal, which has yet to occur. Since CVPIA’s general statutory goal is to “ensure that natural production of anadromous fish will be sustainable on a long-term basis at twice their historic levels,” and in light of the statute’s clear reference to “all reasonable efforts” and “full implementation”, partial implementation of the AFRP cannot be reasonably considered an adequate basis on which to deem these actions complete.

### *Incomplete Analysis*

The Trump administration memoranda also fail to consider multiple relevant factors before arriving at its conclusions, and thus, if used as the basis for reducing Restoration Fund collections, could be reasonably deemed arbitrary, capricious, and not in accordance with the law in violation of the Administrative Procedure Act (APA).<sup>28</sup> The APA requires that a federal agency provide reasoned explanation or analysis to support its actions. Among other unsupported claims, the conclusion that the CVPIA’s mandated anadromous fish actions are complete despite the fact that numerous agency findings indicate that full implementation of the AFRP remains incomplete is plainly an arbitrary and capricious determination. The previous administration’s memoranda also contradict and fail to address many aspects of the CPAR report previously considered by the Interior Department to be important to CVPIA implementation, without providing any explanation or analysis for such reversals.

Finally, the previous administration’s memoranda fail to consider the extensive adverse effects of reduced Restoration Fund collections on the Interior Department’s ability to meet ongoing CVPIA compliance costs and other obligations, including other statutory mandates. Restoration Fund payments are used for a number of important obligations, including tribal trust responsibilities, habitat restoration, and environmental monitoring, modelling, and studies. Reclamation also relies on the CVPIA as its federal spending authority for certain Endangered Species Act (ESA) compliance activities. For example, mitigation measures set forth in the 2020 Record of Decision (ROD) for the Long-Term Coordination Operations of the CVP and State Water Project rely on

---

restoration and facility improvements, into its 2020 Record of Decision on the coordinated Long-Term Operation of the CVP and State Water Project. See Memorandum from Bureau of Reclamation Bay Delta Office to Ernest A. Conant, Jan. 15, 2021.

<sup>25</sup> Memorandum from Carter Brown, Associate Solicitor, Division of Water Resources, to Regional Director, California Great Basin Region, Jan. 14, 2021.

<sup>26</sup> *Ibid* at 5.

<sup>27</sup> For example, see the 2009 CPAR Report (pg. 19-21) and Near-term Restoration Strategy for the CVPIA Fish Resource Area: FY2021–FY2025 (pg. 16-17).

<sup>28</sup> 5 U.S.C. §706

the use of funding from the CVP Restoration Fund.<sup>29</sup> Reduced collections could mean obligations required for ESA compliance under the ROD go unmet. The memoranda fail to include any analysis of the impacts of reduced Restoration Fund collections on the Department's ability to meet its various obligations and statutory mandates.

Given the multitude of errors and deficiencies in the Trump administration memoranda, we respectfully request that the Interior Department expeditiously withdraw and replace the memoranda, explicitly affirm the Department's clear and ongoing legal obligations under the CVPIA, rescind any budget or policy changes based on these documents, and revert back to the longstanding interpretation of the CVPIA that accords with clear congressional intent.

We would also ask that you investigate and comprehensively review the Department's compliance with the legal requirements of the CVPIA, including a review of actions initiated by the previous administration. Numerous stakeholders have raised significant concerns over programmatic and financial issues associated with the previous administration's implementation of the CVPIA's environmental restoration mandates. This includes concerns about the previous administration's CVPIA cost accounting, inappropriate reductions of CVPIA repayment obligations for water and power contractors that shift hundreds of millions of dollars in environmental compliance costs to federal taxpayers, and concerns about the terms of pending water contracts under the California provisions of the Water Infrastructure Improvements for the Nation Act (WIIN Act).

The Hoopa Valley Tribe and other stakeholders have raised serious concerns about these pending WIIN Act water contracts violating the CVPIA and causing severe damage to California fishery resources, including Trinity River fishery resources that the United States holds in tribal trust and sport and commercial fisheries that federal law requires be restored to levels of abundance that existed prior to the construction of the Central Valley Project. These pending water contracts are not yet binding on the United States because they have not been validated pursuant to federal reclamation law (43 U.S.C. §511). Before finalizing such contracts, we would also respectfully request that you carefully consider and assess whether the terms of any finalized contracts fully comply with the CVPIA, tribal legal rights, and the Department's tribal trust obligations.

Thank you for your attention to these important matters.

Sincerely,



Jared Huffman  
Chair  
Subcommittee on Water, Oceans, and Wildlife



Katie Porter  
Chair  
Subcommittee on Oversight and Investigations

---

<sup>29</sup> *California Fed Bay-Delta Crosscut Fiscal Year 2021 Budget (2020)* (online at <https://www.govinfo.gov/content/pkg/BUDGET-2021-PER/pdf/BUDGET-2021-PER-8-7.pdf>).

Attachments:

- Memorandum from David Bernhardt, Secretary, Department of the Interior, to Assistant Secretary, Fish & Wildlife and Parks, and Assistant Secretary, Water & Science, Jan. 19, 2021.
- Memorandum from Bureau of Reclamation Bay Delta Office to Ernest A. Conant, Jan. 15, 2021.
- Memorandum from Carter Brown, Associate Solicitor, Division of Water Resources, to Regional Director, California Great Basin Region, Jan. 14, 2021.
- Memorandum from George Wallace, Assistant Secretary, Fish & Wildlife and Parks, and Timothy Petty, Assistant Secretary, Water & Science, to Secretary of the Interior, no date.
- Memorandum from Bureau of Reclamation Bay Delta Office to Ernest A. Conant, Jan. 15, 2021.