

CA Save Our Streams Council



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Mr. Wilson Orvis
Deputy Regional (Acting) Director
Business Services, MP-11 0
Bureau of Reclamation Mid-Pacific Region
2800 Cottage Way
Sacramento, CA 95825
E-mail WORVIS@usbr.gov

Heather Casillas
Division Chief - Program Management
CVPIA Program Manager
BDO-300, 801 I Street, Suite 140
Sacramento, CA 95814
E-mail hcasillas@usbr.gov

Via U.S. MAIL and E-mail

Re: Comments on Revised Central Valley Project Improvement Act (CVPIA) Financial Guidelines & Request for Written Comments on Interim Guidelines for the (CVPIA) and Draft Business Practice Guidelines (BPG) for CVPIA Receipts, Program Accounting, Cost Allocation and Cost Recovery¹

¹ Reclamation modernizing Central Valley Project Improvement Act accounting procedures
<https://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=71963>

We have reviewed the Revised CVPIA Financial Guidelines (Guidelines) and participated in related workshops. The proposed Guidelines and how they will be applied raise fundamental problems that must be addressed before they are adopted and implemented:

1. There is universal agreement that the fisheries restoration objectives and refuge objectives of CVPIA have not been effectively met by historical and current restoration strategies and funding levels (see following result from Office of Management and Budget review).
2. The Restoration Fund is depended upon and has historically accounted for more than half of total funding for fisheries restoration, yet has rarely been funded at the full level of \$50 million 1992 dollars (approximately \$93 million 2020 dollars).
3. Reclamation estimates, by comparing historical funding to the Restoration Fund to what would result from the proposed revised Guidelines, that average annual funding of the Restoration Fund would decline about \$10 million and the decline will be greater if the frequency of drought years increases as expected.
4. The inescapable conclusion is that the proposed Guidelines will further weaken an already failing and inadequate effort to restore fisheries, river restoration, and refuges as required by the CVPIA.
5. To meet the statutory requirements of CVPIA, the need is clear: improved strategy, improved management, and substantially higher funding.
6. Because of the far-reaching impacts of the proposed Guidelines, this discretionary major federal action requires a full EIS that fully evaluates the impacts of the guidelines and, importantly, proposes and evaluates alternatives.

Each of these points is expanded below along with addition related matters.

2006 Review of CVPIA by Office of Management and Budget (OMB)—selected excerpts

The Office of Management and Budget (OMB) evaluated the progress of the CVPIA program in 2006. OMB had concerns that stemmed in part from the disparity between the Congressional requirement to “double by 2002” anadromous fisheries impacted by the Central Valley Project (CVP) , and the current status of Central Valley anadromous fish populations. OMB questioned the lack of measurable performance goals for program implementation, especially goals that could relate to factors within the control of the agencies in program implementation.

OMB recommended that the agencies undertake a comprehensive program review, including an independent science review. In 2008, Reclamation and the [U.S. Fish and Wildlife] Service organized this independent review in response to the OMB critique, seeking to address four objectives:

- *Improve the effectiveness and efficiency of programs and implementation actions to achieve the fish restoration goals of the Act;*
- *Enhance the agencies’ ability to learn from and optimize program actions;*
- *Improve the transparency and accountability of the fish restoration programs to management, stakeholders, and the public; and*
- *By achieving the first three objectives, enhance public understanding and support for the program and continuing restoration activities.*

In 1992 Congress directed the Department of Interior to develop and implement a program that makes “all reasonable efforts” to ensure and sustain on a long-term basis a doubling of the number of naturally produced anadromous fish in Central Valley rivers and streams by 2002.

Doubling did not happen by the legislative goal of 2002, or by 2008, nor is it likely to ever occur unless renewed commitments and improvements are made to the CVPIA program. What we do know is that while a few small populations of chinook salmon have shown apparent gains, on the whole the Central Valley's naturally produced anadromous fish populations stayed relatively even or declined from 1992-2005. Recent surveys have indicated that over the last several years, fall-run chinook populations have collapsed.it is also far from clear that the agencies have done what is possible and necessary to improve freshwater conditions to help these species weather environmental variability, halt their decline and begin rebuilding in a sustainable way. A number of the most serious impediments to survival and recovery are not being effectively addressed, especially in terms of the overall design and operation of the Central Valley Project system. ... Federal courts have recently invalidated as inadequate federal plans to address the requirements of these species under the federal Endangered Species Act. The Interior Department, at the highest department and agency levels, needs to rethink the entire approach to the CVPIA anadromous fish restoration program. There needs to be an overarching, discretely and comprehensively organized and staffed Anadromous Fish Restoration Program, led by one official highly placed in the agency that has the funding and implementation responsibility. ... This may sound obvious, but it is not the way the agencies are organized now to implement the CVPIA. ... The agencies should develop a more expansive view of the authorities at their disposal to address the problems, especially with regard to water management and project operations. The agencies have followed a more restrictive view of their authorities than appears legally necessary or appropriate to the seriousness of the mission – certainly the federal courts believe the agencies have more tools at their calling. Reclamation in particular needs to embrace this mission with equal zeal to its core mission of water supply and find a way to bring these two missions into balance and improve ecological conditions in a highly managed river system. To be successful, Reclamation will need to revitalize its mission working both with its agency partners and with its contractor partners who have a fundamental economic stake in helping Reclamation be successful in integrating anadromous fish improvements as a baseline program cost of delivering water. ... In redesigning the program plan, the agencies must do a fundamentally better job addressing the problems at the system-wide scale.

The program effectively ignores the larger system problems that inhibit the natural production of anadromous fish:

- *headwaters dams that have taken away most of the spawning and rearing capacity in the valley;*
- *highly regulated flows and diversions completely out of balance with natural flow regimes to which these species are adapted;*
- *rivers levied and channeled and disconnected from floodplains to such an extent that natural river habitats and rearing conditions are largely absent; and*
- *environmentally degraded conditions for fish in the Delta due to water exports, degraded water quality, entrainment, and predation that are a significant source of poorly addressed mortality.*

The agencies need to fully use their authorities to understand and address the system problems, or ask Congress for additional authorities and guidance.²

² https://www.usbr.gov/mp/cvpia/docs_reports/indep_review/FisheriesReport12_12_08.pdf

The proposed (CVPIA) Financial Guidelines and Interim Guidelines for the (CVPIA) Business Practice Guidelines (BPG), if adopted, will perpetuate the environmental degradation caused by the CVP and fail to address the Congressionally mandated obligations of the water and power contractors.

Historical Funding Shortfalls will be Exacerbated by Proposed Guidelines³

The CVPIA Restoration Fund (RF) has historically accounted for more than half of total funding for fisheries restoration, yet has rarely been funded at the full level of \$50 million 1992 dollars (approximately \$93 million 2020 dollars).

Data provided by Reclamation show that total expenditures from the RF during 1993-2017 were \$1,007,423,819, compared to the inflation-adjusted CVPIA goal of about \$2,000,000,000. Thus, the CVPIA goal for the RF, the largest single source of funding for fisheries restoration, was only 50% achieved.

Reclamation estimates, by comparing historical funding to the RF to what would result from the revised Guidelines, that average annual funding of the Restoration Fund would decline about \$10 million under the proposed modifications.. Ten years of actual and draft proposed estimates for 2010 to 2020 indicate an average annual funding of the RF of \$54,336,084 per year, compared to 44,571,451 for the proposed Guidelines.

Conclusions and Related Issues

The inescapable conclusion is that the proposed Guidelines will further weaken an already inadequately funded and failing effort to restore fisheries, wetlands and refuges as required by the CVPIA. The changes to CVPIA § 3407 are discretionary and a major federal action and thus, require a full environmental review and EIS in accordance with the National Environmental Policy Act (NEPA). The proposed changes to reimbursable cost allocations violate CVPIA §3406. Congress established these cost allocations and these changes to reimbursable costs are not authorized.

Alternative approaches to the financial guidelines, which enhance the CVPIA RF rather than diminish it, need to be developed and analyzed. The impacts of the reduced funding and staffing resulting from the proposed Guidelines need to be disclosed and addressed. The range of tools and authority available to Fishery Agencies (Commerce's National Marine Fisheries Service & Interior's Fish and Wildlife Service) along with Reclamation to address this funding shortfall is required. Moreover, the analysis needs to disclose and analyze impacts to achieving the Congressionally mandated obligations contained in CVPIA §3406 along with other provisions of existing law.

There are three major programs that are wholly reimbursable by water and power contractors without limitation: Section 3406 (b) (1), (b) (23) and (d) (1). These Congressionally mandated obligations include funds for the Anadromous Fish Restoration Program, Habitat Restoration program, Trinity Restoration Program, and mandated water deliveries for fisheries and refuges. Many of additional obligations set forth under Section 3406 are also partially reimbursable. The proposed changes in revenue collection should not be used to evade the statutory obligations of the water and power contractors by adopting some new allocation whereby 14% would be allocated to the federal taxpayer. The proposal to reclassify reimbursable activities to non-reimbursable activities will only exacerbate impacts and funding shortfalls. Further this arbitrary action is counter to the CVPIA statutory cost

³ See the 1993 Guidelines Redline version USBR draft provided August 10, 2020 and virtual workshop materials provided August 21, 2020 and August 25, 2020.

allocations set forth by Congress. Congress made clear that the reimbursable designations in the CVPIA were intended as cost allocations to the water and power contractors and stated as such.⁴

A closely related issue is Reclamation's proposal to use the January 2020 Cost Allocation Study (CAS) methodology with regard to some of the cost allocations, which even further compounds funding shortfalls and arbitrarily assigns more costs to the federal taxpayer. The undersigned groups have commented extensively on the faulty assumptions⁵ that assist water and power contractors to evade the reimbursable costs of the CVP and will arbitrarily compound the lack of revenues needed to mitigate and restore fish and wildlife as required under the CVPIA. The CAS methods, along with this proportional proposal to reduce restoration funding, further enables water and power contractors to evade their obligation to restore rivers which the CVP has tapped for water supply and electrical energy, damaging rivers by lowering flows, raising temperatures, modifying channels, and destroying habitat. The projects have adversely impacted the estuary and, through all of these impacts, devastated fishery resources. The mitigation and restoration costs associated with this damage need to be borne by these extractive interests. Any formula must account for these devastating impacts and values.

Further compounding this shift in allocated costs from the contractors to the public, the proposed Guidelines create yet another cost allocation formula to further evade reimbursable costs from 2013 forward. The CVPIA, however, does not authorize Reclamation to arbitrarily make its own cost allocations. The statute clearly sets forth statutorily the cost allocations. Under Reclamation's proposal they plan to allocate statutorily prescribed reimbursable activities to non-reimbursable federal purposes. We can find no authority for such an arbitrary action and none was provided despite repeated requests.

In our view, any true-up or 'modernization' scheme ought to include an explicit "per acre-foot" charge for mitigation and restoration costs as an O&M rate component or water rate augmentation that would be set out in the CVP rate books. Further, the signatories to this letter and others have argued with regard to

⁴ See for example CVPIA section 3406(b)(4) that costs "shall be allocated among project water and power users..." or CVPIA Section 3408(b) notes that certain costs "shall, if reimbursable, be repaid..."

⁵ To reduce costs to water and power contractors Reclamation grossly overstated surface water supplies available and understated groundwater usage under without the CVP scenario among other flaws, thus minimizing benefits and the resulting costs allocated to water and power contractors. Further without authority removed distribution canals and delivery from the cost allocations. See: <http://calsport.org/news/wp-content/uploads/Conservation-Fishing-and-Tribe-Cmts-RE-CVP-Cost-Allocation-Study-Burman-1-2-2020-.pdf>

<http://calsport.org/news/wp-content/uploads/Final-USBR-Cost-Allocation-Methodology-Cmt-Letter-6-4-2014-IFR-Coalition....pdf>

<http://calsport.org/news/wp-content/uploads/PCL-et.-al.-Cmts-Re-Draft-CVP-Cost-Allocation-Study-April-2019.highlight....pdf>

<http://calsport.org/news/wp-content/uploads/PCL-IFR-Coalition-CVP-Cost-Allocation-Completion-October-2019-Cmts.pdf>

the permanent WIIN Act water repayment contracts⁶, pursuant to CVPIA §3404(c)(2), these financial obligations should be specifically incorporated in the new CVPIA conversion contracts.⁷

These permanent water conversion contracts, along with the proposed changes to restoration funding, clearly are designed to limit water contractors' exposure to meeting the cost of the environmental restoration purposes of the CVPIA. This is unacceptable and thwarts the goals of CVPIA. In the case of the largest CVP permanent water contract for Westlands Water District, where Reclamation claims to annually allocate roughly two times the average water used by all of Los Angeles, this is done in several ways: (1) evading the specific incorporation of the obligation required by §3404(c)(2); (2) referring only to the RF obligation in the contract; and (3) adding Article 37, which is a blanket authorization for WWD to seek to repudiate that obligation in any forum in which it arises. All of this is counter to the CVPIA authority contained in §3406 (b)(1&23) and to some varying degree b(2-22). History has demonstrated that payments in excess of those to the RF: (1) are required of CVP contractors; and (2) have indeed been charged. Moreover, any changes need to explicitly state that these charges include any Endangered Species Act or Clean Water Act compliance costs that are fully reimbursable. We note that CVP ESA consultations assumed compliance and funding for *"other CVP-related, non-CVPIA actions benefiting fish, wildlife, and associated habitats and related effects of interim contract renewals will continue with at least current funding levels."*⁸ Finally, any reduction to the RF must clearly generate water and power charges to meet these reimbursable obligations. To avoid confusion, Reclamation needs to make the obligations clear in both the "true up" process and the permanent water contracts.

In addition, we urge Reclamation to use its authority to adopt additional mitigation and restoration charges for use of CVP conveyance facilities under Warren Act contracts. These pollution impacts are likely to impact low income residents, endangered species, and potentially cause additional subsidence and long term canal costs.⁹ Drainage costs and additional land retirement costs, along with the environmental impacts of the continued irrigation of the toxic soils within the San Luis Unit, need to be

⁶ WIIN Act § 4011

⁷ <http://calsport.org/news/wp-content/uploads/Environmental-Advocate-Comment-Letter-Re-Interim-Contract-Renewal-WWD-S....pdf>

⁸ See 01-F-0027 Friant Long Term Contracts Key Assumptions (page 2-55) <https://calsport.org/news/wp-content/uploads/2001-F-0027-Formal-Consultation-on-Friant-and-Cross-Valley-Div-LTCR.pdf>

02-F-0070 CVP Interim Contract Renewals 2002-2004 (pages 1-27) See: https://www.usbr.gov/mp/cvpia/3404c/env_docs/draft_ea_fonsi/sea_dft_app_c_app_f.pdf

2012-F-0256 CVP Interim Contract Renewals for Westlands WD contracts 2012-2014 (pages 1-27)See: https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc_ID=9287

2014-F-0035 CVP Interim Contract Renewals for Westlands WD contracts 2014-2016 (page 10)See: https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc_ID=16935

⁹ See https://calsport.org/news/wp-content/uploads/Env-Advocate-8_20_2020-Cmts-Re-DEA-for-WWD-Pump-in-SLC_Cal-Aqueduct-EA-....pdf

added, addressed, and disclosed.¹⁰ Failure will only further impact fish and wildlife resources including anadromous fish and water fowl in the Pacific Flyway.

Proportionality for the power contractors should not be calculated using a single year of water payments on a two-year lag. The result would upend the Restoration Fund during dry periods and make Reclamation unable to comply with the CVPIA environmental mandates. One solution would be to assess power contractors a set fee each year as a proportion of the \$30 million fee collection cap. Alternatively, the CVPIA defines proportionality on a 10-year rolling average basis. Reclamation could use that method to calculate power's share, using the past 10 years of water payments rather than one single year.

Changing the allocation of operation and maintenance costs from historic construction allocations to instead allocating these expenditures based upon the assumptions from the final CAS will also further exacerbate funding shortfalls to meet CVPIA obligations. As noted, the assumptions in the CAS shift millions of dollars from the water and power contractors due to faulty assumptions and non-transparent calculations. Further compounding these arbitrary changes, Reclamation is proposing yet another 'new methodology' where the proportion between water and power will be fixed as of 2013 unless new facilities are constructed that provide "new benefits" to the CVP. Using a "placeholder" to describe this new approach which would further reduce Restoration Fund receipts. The public is left in the dark as to what costs Reclamation will classify as reimbursable or non-reimbursable under this new as yet to be determined guideline.

We oppose the reclassification of reimbursable activities. As discussed above, the authority for this arbitrary action has not been provided or disclosed. CVP costs to implement Biological Opinions are reimbursable – whether funded through the RF or not. If RF collections are reduced, these activities should be excluded from the RF and charged as reimbursable activities. We also oppose the removal of tributary streams identified as critical to anadromous fish habitat mitigation and restoration from reimbursable CVP costs.¹¹ We oppose the proportionality constraints of no mid-year adjustment, no end of the year reconciliation, and the lack of stability for advance planning for the various CVPIA programs.

¹⁰ See “Comments on Tentative Waste Discharge Requirements (WDRs) for Surface Water Discharges from the Grassland Bypass Project in Merced and Fresno Counties” to Ashley Peters, Central Valley Regional Water Quality Control Board from PCFFA et al [22 Conservation, Fishery, Tribal and Community Organizations] <http://www.restorethedelta.org/wp-content/uploads/Fishing-Conservation-Grps-Cmt-Ltr-CV-RWQCB-WDRs-for-Federal-SLD-Grassland-Drainers-Discharge-11-6-19-.pdf>

¹¹ See <https://www.fisheries.noaa.gov/resource/document/biological-opinion-and-conference-opinion-long-term-operations-central-valley> & https://www.fws.gov/sfbaydelta/documents/SWP-CVP_OPs_BO_12-15_final_OCR.pdf & <https://calsport.org/dev/8-11-09.htm> *Slight increases in outflow (above normal and wet years only) and requirements to create 8,000 acres of habitat (with speculative results) do not equal full mitigation.* And RPA requirements not met including: Creating 3,500 acres of managed wetlands, restoring 17,500+ acres of floodplain, restoring 9,000 acres of tidal and sub-tidal habitat, restoring 1,000+ acres of aquatic, riparian and upland habitat, completing 5 fish passage improvement projects and creating 35,000 feet of riparian habitat. Further see pgs 659 to 669 near-term fish passage and long-term fish passage assumptions and RPA requirements. The majority of these actions have not been completed.

To be successful, a dependable and predictable source of funding was envisioned by Congress by establishing both the funding mechanisms contained in §3407 and §3406, along with other provisions of Reclamation law. The restoration contemplated by §3406 (b) (1) and (b) (23) do not have funding caps. The funding needs to be driven by the statutory objectives that are required to be achieved, as strongly recommended in the OMB review. As noted, these charges need to be assessed in each repayment contract and are subject to 100% reimbursability.

Our bottom-line recommendation is that Reclamation withdraw the proposed Guidelines and related “true-up” plans and proportionality plans. Instead, and before taking such actions, a complete environmental analysis and range of alternatives is needed along with complete disclosure of the calculated credits and impacts before proceeding. This analysis must include fish and wildlife agencies, who are equal partners in CVPIA, but have not been consulted regarding the proposed reductions. Moreover, only a limited number of water and power contractors were invited to comment on the "CVPIA True-Up and draft Business Practice Guidelines (BPG) provided by Reclamation on November 21, 2019." We appreciate Reclamation providing a copy of the power and water contractor comments, but note that none of the undersigned were provided notice of the opportunity to comment. This bias could be remedied by providing the public with a complete EIS analyzing the proposed reductions and changes in allocations for the CVPIA and the CVPIA RF. We believe this approach can be taken after the remanded case *NCPA v United States* determines what the limitation is upon Reclamation's ability to collect payments to the RF from power contractors. Acting prematurely by adopting formulas and guidelines that are "placeholders" without proper analysis and disclosure of the impacts will only further muddy the federal case. This will increase liability exposure for federal taxpayers and likely will invite even further litigation and costs to taxpayers.

Thank you for considering these comments. Please make sure the undersigned are included in any future USBR actions with regard to CVPIA as well as, CVP contract renewals and/or conversion of CVP contracts pursuant to Section 4011 of the WIIN Act. If you have any questions please contact John Buse, Senior Counsel Senior Attorney, Center for Biological Diversity, 1411 K St. NW, Washington, D.C. 20005 jbuse@biologicaldiversity.org.



Jonas Minton
Senior Water Policy Advisor
[Planning and Conservation League](http://PlanningandConservationLeague.org)
jminton@pcl.org



John Buse
Senior Counsel
Center for Biological Diversity
jbuse@biologicaldiversity.org



Caleen Sisk
Chief and Spiritual Leader of the
[Winnemem Wintu Tribe](http://WinnememWintuTribe.com)
caleenwintu@gmail.com



Kathryn Phillips
Director
Sierra Club California
kathryn.phillips@sierraclub.org



Bill Jennings
Chairman Executive Director
California Sportfishing Protection Alliance
deltakeep@me.com



Carolee Krieger
Executive Director
California Water Impact Network
caroleekrieger7@gmail.com



Frank Egger
President
North Coast Rivers Alliance
fegger@pacbell.net



Dr. C. Mark Rockwell, D.C.
President & Conservation VP,
Northern California Council, Fly Fishers Int.
mrockwell1945@gmail.com



Conner Everts
Executive Director
Environmental Water Caucus
Southern California Watershed Alliance
[Environmental Water Caucus](http://EnvironmentalWaterCaucus.com)
connere@gmail.com



Stephen Green
President
Save the American River Association
gsg444@sbcglobal.net



Barbara Vlamis,
Executive Director
AquAlliance
barbarav@aqualliance.net



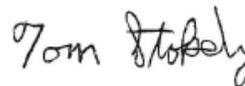
Ron Stork
Senior Policy Advocate
Friends of the River
rstork@friendsoftheriver.org



Gerald Neuburger
Representative
Delta Fly Fishers.
gneuburg@gmail.com



Barbara Barrigan-Parrilla
Director
Restore the Delta
Barbara@restorethedelta.org



Tom Stokely
Director
Save California Salmon
tgstoked@gmail.com



Lloyd G. Carter
President, Board of Directors
California Save Our Streams Council
lcarter0i@comcast.net

