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September 4, 2020

VIA U.S. MAIL AND E-MAIL

Heather Casillas
Bureau of Reclamation
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Re: Comments on CVPIA Accounting Guidelines and Policies

Dear Ms. Casillas,

Grassland Water District and Grassland Resource Conservation District (collectively, "GWD") submit these comments on the Bureau of Reclamation's ("Reclamation") proposed revisions to the Central Valley Project Improvement Act ("CVPIA") 1993 Interim Guidelines governing CVPIA accounting requirements and 2003 Guidelines for CVPIA Program Accounting and Cost Recovery. Reclamation proposes to replace the prior guidelines with new Business Practice Guidelines for CVPIA Receipts, Program Accounting, Cost Allocation and Cost Recovery ("Guidelines"). Our comments incorporate by reference GWD's comments on earlier versions of the proposed Guidelines.

The Guidelines would put in place new accounting practices that Reclamation uses to track all CVPIA-related expenditures (past and future), and would adjust future collections to the CVP Restoration Fund from water and power customers, in order to achieve proportionality between them. The Guidelines would generate a significant amount of "credits" for water and power contractors, which are be used to offset reimbursable cost obligations under the CVPIA and related environmental compliance programs, including the Endangered Species Act. In this way, the Guidelines would avoid the need for Reclamation to undertake cost recovery efforts

from contractors. The Guidelines would also result in a significant reduction in collections to the Restoration Fund from commercial power contractors, estimated at \$10 million in reduced annual collections on average, some years with much greater reductions and other years with fewer reductions.

GWD, as a refuge water supply contractor, has spent a lot of time over five years working with Reclamation and its other contractors to develop the proposed Guidelines. Despite this effort, we disagree with and object to certain changes contained in the most recent version, and for the first time we cannot support the Guidelines. We believe that Reclamation should return to the purposes it once sought to achieve, which the proposed Guidelines do not reflect.

A. CLASSIFYING REIMBURSABLE PROGRAMS AS PARTIALLY NON-REIMBURSABLE IS AN UNREASONABLE INTERPRETATION

The 1992 CVPIA is one of the most important environmental laws to affect the operation and management of the Central Valley Project. One primary purpose of the proposed Guidelines is to allocate CVPIA costs, either as non-reimbursable federal costs or as reimbursable costs paid by CVP water and power contractors. Reclamation has reviewed each section of the CVPIA and proposes that for all sections where “reimbursability” is not mentioned (is silent), those costs will be allocated across all CVP purposes in the proportions set forth in Reclamation’s 2020 Cost Allocation Study (currently 86% reimbursable and 14% non-reimbursable).

In the latest version of the Guidelines, however, Reclamation errs in proposing to classify three CVPIA sections that Congress expressly made wholly “reimbursable” in the same way, by allocating those costs across all project purposes, including non-reimbursable federal purposes. This is an abrupt departure from prior policy and practice, is inconsistent with statements made during the development of the proposed Guidelines, and does not comply with the law.

1. Background of “Wholly Reimbursable” CVPIA Programs

After enactment of the CVPIA, Reclamation adopted Interim Guidelines for Restoration Fund Payments and Charges in 1993.¹ The 1993 Interim Guidelines described how the CVPIA designates some costs as “wholly” reimbursable and others as partially reimbursable, and indicated that reimbursable costs are “assigned to the reimbursable functions, including power and water”. The 1993

¹ The 1993 Interim Guidelines are *available at*:
https://www.usbr.gov/mp/cvp/docs/cvpia_revised_interim_guidelines.pdf

Interim Guidelines required Reclamation to maintain a financial report showing the reimbursable expenditures, non-reimbursable federal expenditures, and State of California cost share under the CVPIA. Reclamation named this financial report the Expenditures, Credits, and Offsets (“ECO”) Report.

The ECO Report characterizes all cumulative CVPIA expenditures as either reimbursable by CVP contractors, non-reimbursable federal expenditures, or state cost share. In short, it keeps track of contractor payments and compares them to the reimbursable obligations set forth in the CVPIA, to determine if further cost recovery from contractors is necessary. For decades, the ECO Report listed most CVPIA programs as wholly reimbursable by water and power contractors.

In 2003, Reclamation issued Business Practice Guidelines for CVPIA Program Accounting and Cost Recovery (“2003 BPGs”).² The 2003 BPGs indicated that lengthy discussions had occurred with contractors, about the potential need for further CVPIA cost recovery above what contractors were paying into the CVP Restoration Fund. The 2003 BPGs noted that the CVPIA designates some programs “as reimbursable by project beneficiaries (contractors),” and that the “contractors’ share is fully reimbursable”. Under the 2003 BPGs, reimbursable costs are defined as “costs associated with those project purposes required by law to be repaid by project beneficiaries and therefore recovered through water and power rates (i.e., municipal and industrial water, power, and irrigation) or through repayment contracts with water users.” “There is no financial obligation by contractors beyond their statutory share(s).”

The 2003 BPGs instituted a “credits and offsets” process, by which contractors would accumulate credits for their payments into the CVP Restoration Fund, and no further cost recovery would be needed, as long as Reclamation’s spending on reimbursable CVPIA programs did not exceed the contractors’ credits. The 2003 BPGs indicated that anadromous fish restoration and refuge water supply conveyance were wholly reimbursable.

In September 2015, the CVPIA administrator gave a briefing to the CVP Financial Affairs Committee regarding CVPIA accounting and cost recovery, and a public workshop followed shortly thereafter in December 2015. A problem had arisen, because payments by contractors into the Restoration Fund had not accumulated enough surplus credits and offsets to cover Reclamation’s spending on reimbursable programs. “The use of ARRA, Bay-Delta, and Water and Related Resources funds to accomplish CVPIA projects, and continuing use of CVPIA

² The 2003 BPGs are available at: https://www.usbr.gov/mp/cvp/docs/bus_prac_guide_cvpia.pdf

authorities to meet Biological Opinions and other operational needs, will exhaust the surplus,” Reclamation explained.

Reclamation proposed to “develop a method to allocate the cost of reimbursable activities to individual water and power customers and allocate payments into the Restoration Fund as offsets to costs.” The proposal would consider those CVPIA provisions “without explicit reimbursement” language. Reclamation attached a chart to its 2015 briefing papers, which indicated that certain provisions of the CVPIA were reimbursable pursuant to existing statutory and regulatory procedures, other provisions were silent about reimbursability, and one section (the Clear Creek program) indicated that costs were to be “allocated among project purposes.” Reclamation indicated that “the sole section” that is “specifically identified as reimbursable outside of subsection 3406(b) is the Refuge Level 2 water supply and related facility construction.”

In 2017, Reclamation held a workshop and revealed that reimbursable expenditures totaled \$1.1 billion, but contractor payments fell \$194 million short of that obligation. In 2019, Reclamation held workshops and issued draft revised Guidelines proposing to address the deficiency in cost recovery. Under the 2019 proposal, for those sections of the CVPIA that were “silent” about whether costs are reimbursable or non-reimbursable, Reclamation would allocate costs to “all project purposes – including non-reimbursable purposes.” The Level 2 refuge water supply program and other programs would remain 100% reimbursable by contractors, because the CVPIA expressly indicates that those costs are reimbursable.

For the programs without reimbursability language, Reclamation would apply its new Cost Allocation Study for the CVP, which currently allocates 86% of CVP benefits to water and power contractors, and the remaining 14% to non-reimbursable federal purposes such as flood control and water quality. (The Cost Allocation Study reiterates that refuge Level 2 supplies are 100% reimbursable.) The result of allocating 14% of the costs of these silent CVPIA sections to non-reimbursable purposes erased the contractor payment deficit on the ECO Report. Instead, water and power contractors would share a \$66 million surplus credit for their past payments.

Reclamation has now proposed a further policy change that would reclassify additional CVPIA costs that Reclamation formerly considered wholly reimbursable. Instead of facing a payment deficit for reimbursable CVPIA obligations, CVP water and power contractors would enjoy a \$250 million surplus credit. Under the proposed Guidelines, three programs expressly designated as “reimbursable” in the CVPIA would instead be designated as only 86% reimbursable, and 14% of the costs

would be considered non-reimbursable federal expenditures. These three programs include the Anadromous Fish Restoration Program (“AFRP”), the Refuge Level 2 water supply program, and the Trinity River study and restoration program.

2. The AFRP, Trinity River, and Refuge Level 2 Programs Are Wholly Reimbursable By Contractors

The CVPIA authorizes and requires implementation of a number of CVP environmental programs, in dozens of subsections under section 3406. Only three of those subsections expressly state that the associated costs are wholly reimbursable:

- Section 3406(b)(1) directs Reclamation to develop a program to ensure that natural production of anadromous fish will be sustainable at specified levels (often referred to as the “fish doubling goal”), and make efforts to address other adverse impacts of the CVP. Under subsection (b)(1), Reclamation funds its Anadromous Fish Restoration Program (“AFRP”), Habitat Restoration Program, Trinity Restoration Program, Fish Science Task Force, and several other programs. The CVPIA states that the costs of these programs “shall be reimbursable pursuant to existing statutory and regulatory procedures.”
- Section 3406(b)(23) directs Reclamation to complete the Trinity River Flow Evaluation Study and implement the resulting instream fishery releases. The CVPIA states that the associated costs “shall be reimbursable as operation and maintenance expenditures pursuant to existing law.” If fish production exceeds the level of natural production that would occur, the enhancement costs “shall become credits to offset reimbursable costs” associated with the Trinity River program. In other words, contractors could receive a credit to offset their reimbursable payment obligations.
- Section 3406(d)(1) directs Reclamation to deliver the quantity of water established as “Level 2” supply to wetland habitat areas in the Central Valley. Subsection (d)(3) states that all costs associated with the Level 2 refuge water supply program “shall be reimbursable pursuant to existing law.”

Reclamation’s proposal to allocate these three program costs to all CVP purposes, including 14% to non-reimbursable purposes, is inconsistent with the plain language of the CVPIA, which specifies that those costs are reimbursable by contractors. Under longstanding federal practice, when Congress makes costs

expressly “reimbursable” they must be borne by project beneficiaries and not by the federal Treasury.

Where Congress specifies that a cost is reimbursable it must be repaid to the federal Treasury by a project’s irrigation, power, and municipal and industrial (M&I) beneficiaries, while non-reimbursable costs are borne by the United States. This is a common-sense interpretation of the phrase “reimbursable.” Past testimony submitted to Congress by the Government Accounting Office clearly describes the difference:

“Reimbursable costs are those that are repaid by the project’s beneficiaries. The costs allocated to irrigation, municipal and industrial water use, and power generation are reimbursable. Nonreimbursable costs are those that are borne by the federal government because certain purposes of the project are viewed as national in scope.”³

The text of the CVPIA reinforces this interpretation. The CVPIA repeatedly distinguishes between costs that are reimbursable, non-reimbursable, and allocated to the State of California. There are more than 40 references to reimbursable and non-reimbursable costs in the CVPIA, using a number of common phrases that align with the interpretation above.

In the very first mention of reimbursable costs, CVPIA section 3406(b)(4) states expressly that all such reimbursable costs “shall be allocated among project water and power users...” Section 3408(b) of the CVPIA also notes that certain costs “shall, if reimbursable, be repaid...” In contrast, the CVPIA consistently refers to non-reimbursable costs as “federal expenditures,” and in section 3406(g) states that non-reimbursable costs “shall be borne by the United States.” There is simply no room within this statutory language for Reclamation to allocate any share of reimbursable costs to the United States.

The CVPIA does not allow Reclamation to make its own cost allocation regarding costs that are designated as reimbursable, because the designation of reimbursability *is itself a statutory cost allocation*. The CVPIA references its

³ Testimony of Victor S. Rezendes, Government Accounting Office, Before the Subcommittee on Water and Power Resources, Committee on Resources, House of Representatives on May 6, 1997 Regarding Reclamation Law and the Allocation of Construction Costs for Federal Water Projects, pp. 3-4, available at: <https://www.gao.gov/assets/110/106884.pdf> (describing construction costs; operation and maintenance costs are treated similarly under Reclamation law).

reimbursable, non-reimbursable, and State-borne costs as “cost allocations.” In section 3406(h) the CVPIA refers to all “costs allocated to the State in this title.” Section 3406(d)(5) states that “costs shall be reimbursable pursuant to existing law in accordance with the cost allocations” set forth subsection (d)(3), which allocates Level 2 refuge water supplies as wholly reimbursable. Congress repeatedly made clear that the reimbursable designations in the CVPIA were intended as cost allocations to contractors. Reclamation cannot impose a separate and inconsistent allocation of such costs.

The CVPIA also provides multiple ways for contractors to obtain credits and offsets for their reimbursable obligations. Section 3407(b) allows for payments to the Restoration Fund to act as an offset for “water and power contractor cost share obligations that are otherwise provided for in this title.” This is clearly a reference to reimbursable costs, referring back to the general statement in section 3408(b)(4) that reimbursable costs “shall be allocated among project water and power users.” Similarly, section 3406(b)(23) allows for the limited issuance of “credits to offset reimbursable costs” associated with the Trinity River program. This authorization of credits, to be issued to contractors to offset reimbursable costs, reinforces that those costs are borne by the contractors.

Moreover, Congress clearly knows how to allocate costs to all project purposes when it wants to. CVPIA section 3406(b)(12) specifically states that costs associated with providing flows in Clear Creek “shall be allocated among project purposes.” This language stands in stark contrast to the three CVPIA sections where costs are designated as wholly “reimbursable” by water and power contractors. The plain commonsense meaning of the CVPIA must control. Reclamation’s proposal to mis-allocate reimbursable funds as non-reimbursable, along with its failure to be transparent about the full amount of funds that will be so reclassified (as discussed below), leaves Reclamation vulnerable to federal audits and investigations.⁴

Reclamation’s proposal to allocate reimbursable costs to non-reimbursable federal purposes is also an abrupt reversal of its longstanding accounting practices, the 1993 Interim Guidelines, the 2003 BPGs, previous versions of these draft Guidelines, and the 2020 CVP Cost Allocation Study, which states that Level 2 refuge water supplies are wholly reimbursable by contractors. An abrupt reversal of

⁴ See U.S. Department of Interior, Office of Inspector General Report entitled “The Bureau of Reclamation Was Not Transparent in Its Financial Participation in the Bay Delta Conservation Plan,” (2017), *available at*: https://www.doi.gov/sites/doi.gov/files/FinalAudit_BayDeltaPlan_Public.pdf

a prior interpretation is often evidence that an agency's new interpretation is unreasonable, arbitrary and capricious.⁵

3. Reclamation's Proposal Is Internally Inconsistent

Reclamation interprets every provision that is silent about reimbursability to mean that costs can be allocated to all project purposes, yet interprets the three sections with express reimbursability language in the exact same way. It is unlikely that Congress intended Reclamation to apply the same reimbursability scheme, in which Reclamation will allocate some costs to non-reimbursable purposes, to all of these programs in the same manner.

Where Congress intended for some program costs to be non-reimbursable, it clearly did so in numerous sections of the CVPIA. Many sections specifically articulate reimbursable costs (e.g. 37.5%), non-reimbursable costs (37.5%), and state costs (25%). Under the proposed Guidelines, Reclamation would allocate the reimbursable portion of those split-cost programs to contractors. It would not allocate the reimbursable portion of those programs across all project purposes. Thus, Reclamation proposes to use a different meaning of reimbursability for the three programs that Congress designated as wholly reimbursable. This is illogical.

4. Retaining the Correct Interpretation of Reimbursable Costs Will Not Undermine the Effect of the Guidelines, but Will Undermine the Environment and Strain the Federal Treasury.

According to the ECO Report, Reclamation's past expenditures on the AFRP, Trinity River, and Level 2 programs through 2017 totaled approximately \$600 million. Reclamation's proposal to classify a portion of those costs as non-reimbursable would shift millions of dollars in obligations to the federal Treasury, creating a windfall for contractors who are poised to receive hundreds of millions of dollars in additional credits under the recent draft Guidelines.

However, retaining the correct interpretation of these programs as wholly reimbursable would not result in a full shift of 14% of costs to the Treasury. This is because Reclamation separately proposes to shift many AFRP costs to the non-reimbursable category if those costs were for research, modeling, and investigations. Although such costs are presently undisclosed by Reclamation, the overall effect of correctly interpreting these three programs as wholly reimbursable will not be significant. Reclamation's draft calculation of contractor credits from 2017 to 2019

⁵ *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

shows that credits will continue to grow under Reclamation’s Guidelines. The overall effect of retaining the correct legal interpretation of “reimbursable” under the CVPIA will not defeat the purpose of avoiding CVPIA cost recovery because contractor credits will remain sufficient and will continue to grow over time.

On the other hand, the federal Treasury is under unprecedented strain, due to the economic downturn caused by the COVID-19 virus. Allocating reimbursable costs as non-reimbursable federal costs will shift more of the CVPIA obligation to the Treasury. Moreover, Reclamation has not yet achieved the anadromous fish and refuge water supply goals of the CVPIA. By classifying these programs as partially non-reimbursable, the proposed Guidelines threaten the future reliability of funding. The anadromous fish and refuge water supply programs are the keystones of the CVPIA, likely why Congress designated them as fully reimbursable. However, the Restoration Fund has never been sufficient to achieve the environmental mandates set forth by Congress. The Restoration Fund is instead proposed to be reduced as a result of power contractors’ litigation *NCPA v. United States*.

With a limited budget for all of its environmental compliance obligations, Reclamation often struggles to fund its mandated programs. If Reclamation no longer considers its AFRP, Trinity River, and refuge Level 2 programs as wholly reimbursable, it could point to reduced federal appropriations as an explanation for why the CVPIA mandates remain unfulfilled. Reimbursable mandates serve as a solid backstop to ensure that essential programs can be fully funded, without affecting the remainder of Reclamation’s budget. Without such reliability, the CVPIA’s mitigation for adverse environmental effects in California is less certain, and it could result in degraded habitat and reduced viability of sensitive species.

B. THE PROPORTIONALITY PROPOSAL IS INCONSISTENT WITH THE CVPIA

1. There Is No Precedent or Authority for Deviating from the Cost Allocation Study

In prior draft versions of the Guidelines, Reclamation stated that it would use the final cost allocation for the CVP, and in particular the repayment obligations from its recently adopted 2020 Cost Allocation Study, to allocate CVPIA obligations between water and power contractors. This is consistent with CVPIA section 3407(d)(2), which directs that the collection of payments to the Restoration Fund must be “in the same proportion as water and power users’ respective allocations for repayment of the CVP.”

Instead, Reclamation proposes a new cost allocation methodology, for years 2013 forward, which would be specific only to CVPIA costs. The new methodology would allocation costs only based on “new benefits” to the CVP. Reclamation has not adopted the new-benefits methodology for any other reclamation project or program. The methodology was designed to address a specific concern by power contractors, who are not happy with the outcome of the Cost Allocation Study.

As discussed below, this yet-to-be-completed proposal would likely result in a decrease in collections to the Restoration Fund of more than \$1 million a year. Reclamation can cite to no legal or policy authority to support its deviation from the respective allocations for repayment of the CVP that are set forth in the Cost Allocation Study, which is inconsistent with the CVPIA.

2. The 2-Year Lag Proposal Does Not Meet the CVPIA’s “Practicability” or “Ten-Year Rolling Average” Requirements

In the proposed Guidelines, Part H, Reclamation would tie the power contractors’ proportionate share of Restoration Fund payments in any given year to the payments made by water contractors two years prior. As a result, if a dry year occurs, and two years later another dry year occurs, total collections to the Restoration Fund would be extremely low. According to Reclamation’s records, water contractor payments to the Restoration Fund were only \$7 million during the drought year of 2015. Under the proposed Guidelines, the power contractors’ payments in 2017 would be based on this amount, resulting in only \$4.3 million collected from power contractors that year. If 2017 were a drought year like 2015, and water contractors paid very little due to low water allocations, the Restoration Fund would have only received only \$11.3 million in collections from water and power contractors combined. Even this estimate is high, because as discussed above, the Guidelines also propose to use a lower cost allocation percentage for power contractors.

It is not practicable to adopt a policy that would allow collections to the Restoration Fund to drop so low. Congress intended the Restoration Fund to reach \$50 million at 1992 price levels, which today equates to more than \$90 million per year. It is unreasonable for Reclamation to consider authorizing a proportionality policy that would allow for such extreme swings in funding from year to year. The proposed Guidelines could result in the collection of only 10% to 15% of the payments that Congress anticipated. This low level of funding would likely cause Reclamation to breach its contracts with refuge water suppliers, violate its trust

obligations on the Trinity River, lay off federal staff, and cancel on-the-ground contracts for habitat restoration.⁶

CVPIA section 3407(d)(2)(A) states that “proportional” payments to the Restoration Fund shall be assessed “to the greatest degree practicable.” The above-described outcomes are not practicable, and nothing in the Guidelines provides any assurance that such results will not transpire. Section 3407(d)(2)(A) also states that proportionality shall be measured “over a ten-year rolling average.” Instead of using a single year of water payments to calculate power’s proportional share, Reclamation should use a ten-year rolling average of water payments, as required by the CVPIA.

This approach would not result in additional payments by power contractors, but would ensure that the possibility of extremely low collections in any given year is greatly reduced, and likely avoided. Reclamation has provided no legitimate explanation as to why it cannot use a ten-year rolling average of water payments to calculate power’s proportionate share.

3. Reclamation Should Not Shut the Door on Creative Solutions

Reclamation has indicated that it will no longer entertain a strategy used several years ago to achieve proportionality, whereby commercial power contractors received an interim offset for its CVPIA payments through reduced capital repayment obligations, up to \$10 million per year. In cooperation with power contractors, this approach could help avoid a catastrophic loss of revenue for CVPIA implementation. Reclamation retains flexibility in how it can achieve proportionality, and it should not foreclose the use of such important tools. GWD requests that Reclamation include a statement to this effect in the Guidelines.

C. THE GUIDELINES ARE NOT COMPLETE AND ADOPTION IS PREMATURE

1. Major Elements of the Guidelines Are Still Under Development

Despite a years-long effort to engage CVP stakeholders through workshops and meetings, a number of policy items in the proposed Guidelines are entirely new, incomplete, and vaguely articulated. Reclamation has not provided adequate

⁶ The requirement to deliver Level 2 refuge water supplies is mandatory. To the extent that the proposed Guidelines cause a violation of that mandate, Reclamation risks legal liability.

information or time for GWD to understand and comment on these proposals, which will cause significant shifts in how Reclamation calculates contractor credits and how much it will reduce collections to the Restoration Fund. The lack of a completed proposal, and the use of “placeholders” and “estimates” instead of a true accounting, is misleading.

a. Reclamation Has Not Yet Finished Its Proposal for Determining the Proportion of Restoration Fund Payments by Water and Power Contractors.

What proportion of CVPIA obligations will be assigned to water and power contractors? This is one of the most important aspects of the Guidelines, affecting how Reclamation will assign credits between water and power, and what payments Reclamation is entitled to collect to the Restoration Fund. For the first time in August, Reclamation indicated that it would not use the same methodology it uses to calculate repayment of the CVP, as set forth in the 2020 Cost Allocation Study. This change comes despite the fact that Reclamation has repeatedly stated that it would use that methodology, and that CVPIA section 3407(d) states that Restoration Fund payments shall be assessed in the same proportion “as water and power users’ respective allocations for repayment of the CVP.”

Reclamation will instead use a new methodology, where the proportion between water and power will be fixed as of 2013 unless new facilities are constructed (not replaced) that provide new benefits to the CVP. Reclamation has never used this type of cost allocation methodology before. There is no information about which project features Reclamation will consider as “new” or providing “new benefits.” However, Reclamation predicts that the application of the new methodology will result in a lesser proportion of CVPIA obligations assigned to power contractors. In 2013, the power contractor’s share of CVP repayment was 34%, but by 2018 that share grew to 36%. Under the new methodology, however, unless the increased power obligation was the result of constructing new facilities that provided new benefits, the obligation would remain at 34%.

Reclamation has not yet completed its proposal to use a different cost allocation methodology, and therefore its presentation in August used a “placeholder” proportion of 36% for power contractors. Using that placeholder, Reclamation estimated an average decrease in annual collections of \$10 million, and projected that there would be roughly a 50/50 split in available credits for water and power contractors. These estimates are misleading, because the likely outcome of the newly proposed allocation methodology would be a smaller CVPIA obligation

assigned to power, with a corresponding decrease in collections and fewer credits for water.

Because of this seemingly small yet unprecedented change in the cost allocation method, collections to the Restoration Fund could decrease by over \$1 million per year. Reclamation's budget request to Congress for Fiscal Year 2021 is \$55.9 million for the Restoration Fund, based on payments that Reclamation expects to collect from water and power contractors.⁷ If power contractors are assigned only 34% of those costs, their payment to the Restoration Fund would be \$19 million, but if they are assigned 36% of the costs, their payment would be \$21.1 million. This is a significant difference.

Similarly, under the new methodology, water contractors would likely be assigned a larger proportionate share of CVPIA obligations. If the water obligation is set at 2013 levels, it would be 2% higher than 2018 levels. Again, this does not seem like a large change, but the resulting credits for water would be significantly reduced. Reclamation estimates an increased water credit of approximately \$10 million per year between 2017 and 2019. If those credits were reduced by 2%, water would lose \$200,000 in credits every year.

The proposal to deviate from the Cost Allocation Study also has long-term implications, because the CVP repayment deadline is 2030, and thus the proportionate share of Restoration Fund obligations that Reclamation assigns in upcoming years could set a lasting precedent for future collections. How Reclamation calculates that proportion is of great importance, and must be subject to a robust public review process.

Not only is Reclamation deviating from the CVPIA and its Cost Allocation Study by proposing a new methodology, it is proposing to undertake the new methodology without public oversight. The new proposal is incomplete and vague, and Reclamation should not adopt the Guidelines until this proposal and its financial implications are fully disclosed.

b. Reclamation Has Not Disclosed What Costs It Intends to Classify as Non-Reimbursable.

What CVPIA costs will Reclamation classify as reimbursable or non-reimbursable under the Guidelines? This is a primary reason why Reclamation

⁷ https://www.usbr.gov/budget/2021/FY_2021_Budget_Justifications.pdf, *General Statement*, pp. 1, 11 (all documents cited are incorporated by reference herein).

proposes to adopt the Guidelines, and once again, Reclamation cannot answer the question, because it has not yet completed or disclosed its full proposal. In August, Reclamation introduced two new concepts to be included in the Guidelines, which could drastically change the reimbursability of hundreds of millions of dollars in federal funds, but it has provided no information about what costs the new concepts would apply to, or how they would apply.

First, Reclamation intends to overlay a new “beneficiary pays” concept for programs where the CVPIA is silent about reimbursability. This concept would classify all such work done on “non-CVP facilities” and “non-CVP streams and rivers” as non-reimbursable. Reclamation would make this determination first, and would then allocate any remaining costs across all CVP purposes. Reclamation has provided no further information, and has not yet classified those costs or disclosed the corresponding reimbursable obligations or credits.

There could be significant implications from this new proposal, because Reclamation has spent (and proposes to spend) significant CVPIA funding to restore tributary streams such as Mill Creek, Battle Creek, Antelope Creek, and Deer Creek, and to restore terrestrial habitat, retire land, and purchase water for instream flows. Without any information about how Reclamation will classify these past and future expenditures, and no explanation of the legal authority for such classifications, there cannot be a meaningful understanding or opportunity for public comment.

Second, Reclamation proposes to reclassify many of its research, modeling, and investigation programs as non-reimbursable, assigning those costs to the federal Treasury by relying on different legal authorities such as Public Law 92-149, which is a 1971 law stating that investigations by Reclamation are non-reimbursable. The amount of costs Reclamation will classify in this way is still under development and thus “to be determined.” The implications could be significant. Reclamation must complete these major aspects of the Guidelines, and disclose them to stakeholders, before adopting them as new accounting policies.

2. Reclamation Is Still in Litigation With the Northern California Power Agency Regarding CVPIA Proportionality.

A proceeding to determine the amount of damages in the *NCPA v. United States* case is now on remand in the federal Court of Claims. Despite the fact that Reclamation is in settlement discussions with the power contractors to determine the amount of past damages, those discussions have not yet resulted in a settlement. The Federal Circuit simply ruled that proportionality is a limitation on

Reclamation's ability to collect payments to the Restoration Fund from power contractors. It did not decide what proportionality means, but remanded that issue to the District Court. If Reclamation adopts a new policy regarding proportionality, this could be used by NCPA as evidence regarding what proportionality means, and what damages are owed from the federal Treasury for past overpayments.

It is not appropriate to adopt a policy that establishes a potential federal liability while in active litigation, particularly absent a settlement agreement. For example, under Reclamation's proportionality proposal, the power proportion would be reduced by the policy proposals to consider only "new CVP benefits" when assigning power's proportion, rather than using the proportions set forth in the Cost Allocation Study. The Guidelines would likely increase the potential liability of the federal Treasury to repay power contractors their past payments.

3. Reclamation Should Not Adopt the Guidelines Without a True-Up.

The Guidelines will have both immediate and long-term implications for contractors and the CVPIA, implications that are necessarily tied to the ECO Report and the CVPIA true-up calculations that Reclamation has not yet finalized. The ECO Report and associated calculations of contractor credits have undergone multiple iterations, with significant changes, in the past five years. Stakeholders deserve to understand the final ECO Report and true-up calculations that Reclamation will use when administering the Guidelines.

Neither the updated ECO Report nor the calculations of contractor credits are presented as part of Reclamation's proposed action. Also, if Reclamation later decides to deviate from those calculations, a change to the Guidelines may be required, and/or a significant shift in credits could occur. In the spirit of fairness and transparency regarding how the Guidelines will be applied, Reclamation must incorporate a revised ECO Report and true-up as part of the proposed Guidelines.

4. Delaying Adoption of the Guidelines Will Not Adversely Affect Reclamation's Process for Collections to the Restoration Fund.

Reclamation estimates that it will not complete the required work on its new cost allocation proposal until early 2021 at the soonest, and will therefore need to send a mid-year adjustment to power contractors in order to true up their payment obligations. This is similar to the current accounting practice for power contractors. Because Reclamation already expects to send a mid-year adjustment in 2021, it is entirely possible to wait until Reclamation completes the "to be determined" portions of the Guidelines, before they are adopted.

D. REQUEST FOR CLARIFICATION IN THE GUIDELINES

Part H of the draft Guidelines, titled “Mitigation and Restoration Payments,” should be carefully reviewed and clarified. Section 3 of Part H is particularly difficult to understand, and in certain instances, the phrasing does not make sense. Section 3 begins by stating that Reclamation shall undertake a list of enumerated actions, but many items on the list are not actions (for example the sentences beginning with “For determining,” “The appropriated amount,” and “The rolling average limit”).

Another important clarification that must be made in Section 3 of Part H is that the \$30 million indexed cap on collections to the Restoration Fund only applies to Mitigation and Restoration payments, not to all payments collected under the CVPIA, which are intended to reach a \$50 million indexed maximum. In several places the language of the Guidelines is incorrect or unclear, for example in subsection 3(a) (referencing “water revenues” rather than water M&R payments), and subsection 3(c) (referencing “Non-Discretionary Revenues” in the context of the \$30 million cap rather than “Discretionary” M&R payments).

E. RECLAMATION MUST CONDUCT AN ENVIRONMENTAL ANALYSIS OF ITS DISCRETIONARY DECISIONS

The predicted decrease in collections to the Restoration Fund from the various approaches proposed in the Guidelines (*e.g.* the newly proposed cost allocation and the proposed 2-year lag methodology for collections), on top of already-reduced collections from power contractors under the proportionality proposal, will have a significant adverse effect on the environment. Reclamation will not be able to undertake its established level of environmental water deliveries and restoration, and it has proposed no plan to address or mitigate this inevitable negative outcome. Not only are these policy aspects of Reclamation’s proposal incomplete, unprecedented, and inconsistent with the CVPIA, but they constitute discretionary policy decisions by Reclamation that will require evaluation under federal environmental law.

In 2001, Reclamation adopted a Programmatic Environmental Impact Statement (“PEIS”) for the implementation of the CVPIA.⁸ Reclamation completed a

⁸ Portions of the 2001 PEIS for the CVPIA are *available at*: https://www.usbr.gov/mp/cvpia/docs_reports/fpeis/index.html, and Reclamation’s Record of Decision adopting the PEIS is *available at*: https://www.usbr.gov/mp/cvpia/docs_reports/docs/cvpia_rod_1-2001.pdf.

consultation with the U.S. Fish and Wildlife Service under the Fish and Wildlife Coordination Act, and was issued a Biological Opinion under the Endangered Species Act. The PEIS anticipated that Reclamation would collect the full amount of required fees under the CVPIA, and, for example, stated that refuge water deliveries constituted a mandatory legal obligation.

Reclamation's discretionary decision to reduce collections below the statutory mandate, for example by relying on a 2-year lag methodology rather than a 10-year rolling average, and allocating CVPIA costs to power contractors inconsistent with the Cost Allocation Study, are not consistent with the CVPIA implementation strategy described in the PEIS. Reclamation's classification of the AFRP, Trinity River, and Refuge Level 2 programs as partially non-reimbursable also puts Reclamation's future ability to comply with those obligations at risk. Reclamation has proposed zero measures to avoid or mitigate the adverse environmental effects from implementing its proposed Guidelines. These proposed decisions constitute changed conditions that require a renewed environmental analysis under federal law.

Thank you for considering these comments, and please feel free to contact GWD at any time to discuss how our concerns can be resolved.

Sincerely,



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