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Via Email and U.S. Mail

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Re: Comments on Update to CVPIA Accounting Guidelines

Dear Ms. Casillas and Messrs. Orvis and Walden:

INTRODUCTION

On behalf of Pacific Coast Federation of Fishermen's Associations, Institute for Fisheries Resources, North Coast Rivers Alliance, San Francisco Crab Boat Owners Association, Save California Salmon, and the Winnemem Wintu Tribe we submit the following comments in response to the Bureau of Reclamation's ("Reclamation's") request for public comment on its proposed Update to the Central Valley Project Improvement Act ("CVPIA") Accounting Guidelines, and Reclamation's plan to integrate these accounting guidelines into its 2020 Business Practice Guidelines. Please include our comments in the public record for this matter.

I. RECLAMATION HAS FAILED TO ACHIEVE THE CVPIA'S ENVIRONMENTAL RESTORATION MANDATES

In 1992 Congress passed the CVPIA, Public Law No. 102-575, 108 Stat. 4600, to reduce the adverse environmental impacts of Central Valley Project ("CVP") operations. CVPIA §§ 3402(a)-(b), 3406(b). In the over quarter-century since Congress passed the CVPIA, populations of fish species in the Bay Delta have declined precipitously. Endangered winter-run Chinook salmon, threatened spring-run Chinook salmon, threatened Central Valley steelhead, threatened

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green sturgeon, and threatened delta smelt have all been pushed to the brink of extinction by reduced freshwater flows, greater salinity, increased sedimentation, declining dissolved oxygen, rising temperature, and related degradations in water quality and flow. These tragic consequences are not limited to fish species listed as threatened or endangered under the Endangered Species Act. Fall-run and late fall-run Chinook salmon – the remaining commercially fished Chinook – have also faced population declines. When there are insufficient returning fall-run and late-fall run Chinook, the commercial and recreational Chinook salmon fisheries have been shut down as emergency measures to protect the species.

These massive species declines have occurred as Reclamation has failed to meet restoration goals and standards intended to stave off extinction, including most notably the CVPIA's salmon-doubling goal. CVPIA § 3406(b)(1) ("natural production of anadromous fish in the Central Valley rivers and streams will be sustainable, on a long-term basis, at levels not less than twice the average levels attained during the period of 1967-1991" by 2002). Reclamation has made no serious effort to meet this goal, even as the 2002 deadline came and went. And while the National Marine Fisheries Service attempted to comply with this Congressional mandate, by adopting its Final Restoration Plan for the Anadromous Fish Restoration Program ("AFRP Plan") in 2001, it likewise was unsuccessful. The AFRP Plan established objectives supposed to meet the fish doubling goal, including "improve habitat for all life stages of anadromous fish through provision of [suitable] flows . . . and improved physical habitat," "improve survival rates by reducing or eliminating entrainment of juveniles at diversions," and "improve the opportunity for adult fish to reach their spawning habitats in a timely fashion" among others. AFRP Plan, p. 5 (capitalization altered).¹ But these objectives have never been met.

Reclamation adopted a Final Programmatic Environmental Impact Statement for Implementation of the CVPIA ("CVPIA PEIS") in 1999. In it Reclamation acknowledged that its operation of the CVP had impaired fisheries through the suppression of storm flows, construction and operation of dams that prevented fish migration and removed their essential habitat, reversed flow on the San Joaquin River, the loss of riparian vegetation through the levee system, and other habitat degradations and destruction. CVPIA PEIS, pp. I-2, I-3. However, Reclamation never took the strong remedial action required to achieve the AFRP Plan's objectives, nor did its CVPIA PEIS lead to compliance with the anadromous fish-doubling goal.

Instead of doubling, anadromous fish populations have continued to plummet. In June

¹ Available at:
www.fws.gov/cno/fisheries/CAMP/Documents/Final_Restoration_Plan_for_the_AFRP.pdf (last visited September 10, 2020).

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2009, NMFS issued a Biological Opinion (“2009 NMFS BiOp”) that discussed these declines. It observed a “precipitous decline” in Sacramento winter-run Chinook in 2007 “that continued in 2008, when less than 3,000 adult fish returned to the upper Sacramento River.” 2009 NMFS BiOp, p. 81. It described how Central Valley steelhead have had “a pattern of negative growth rate since the late 1960s . . . [with] no indication that this trend has changed” since 1993. *Id.* at 109. It also described how the Southern distinct population segment (“DPS”) of North American green sturgeon had “very little production” in 2007 and 2008, and that it was “clear that the abundance of the Southern DPS of green sturgeon is declining.” *Id.* at 120.

The 2009 NMFS BiOp warned Reclamation that:

the long-term operations of the CVP and [State Water Project (“SWP”)] are likely to jeopardize the continued existence of Sacramento River winter-run Chinook Salmon, Central Valley spring-run Chinook salmon, Central Valley steelhead, Southern DPS of North American green sturgeon, and Southern Resident Killer whales. The long-term operations of the CVP and SWP are likely to destroy or adversely modify critical habitat for Sacramento River winter-run Chinook salmon, Central Valley spring-run Chinook salmon, and Central Valley steelhead.

2009 NMFS BiOp, p. 575. NMFS also warned that the “long-term operations of the CVP and SWP are likely to destroy or adversely modify proposed critical habitat for the Southern DPS of North American green sturgeon.” *Id.*

Similarly, FWS found in its December 2008 Biological Opinion (“2008 FWS BiOp”) that “the coordinated operations of the CVP and SWP, as proposed, are likely to jeopardize the continued existence of the delta smelt.” 2008 FWS BiOp, p. 276. It observed that in 2008, delta smelt had plunged to their “lowest level of abundance since monitoring began in 1967.” *Id.*

The 2009 NMFS BiOp makes clear that as much as 60 percent of the natural historical inflow to Central Valley watersheds and the Delta has been diverted for human uses. Depleted flows have contributed to “higher [water] temperatures, lower dissolved oxygen . . . levels, and decreased recruitment of gravel and large woody debris.” 2009 NMFS BiOp, p. 135. NMFS has found that “[w]ater withdrawals, for agricultural and municipal purposes, have reduced river flows and increased temperatures during the critical summer months, and in some cases, have been of a sufficient magnitude to reverse flows in the lower San Joaquin River. . . . Direct relationships exist between water temperature, water flow, and juvenile salmonid survival.” *Id.* at 136.

Reclamation issued a Record of Decision (“ROD”) for the 2016 LTO EIS, purportedly in order to implement the reasonable and prudent alternative (“RPA”) mandated by the 2009 NMFS

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BiOp and 2008 FWS BiOp. But Reclamation never took the action required to address and reverse the ongoing ecological collapse caused by Reclamation's excessive water diversions. Instead, Reclamation persisted in violating water quality standards in the Delta and allowed imperiled fish and wildlife populations to continue their downward spiral. It obstinately resisted citizen efforts to enforce Reclamation's compliance with the Clean Water Act's ("CWA's") NPDES permit program. Its recalcitrance led the Ninth Circuit Court of Appeals to rule on December 20, 2019 that all of Reclamation's excuses for not obtaining an NPDES permit for the contaminated discharges from its Grassland Bypass Project in the San Joaquin Valley were without legal merit. *Pacific Coast Federation of Fishermen's Associations v. Glaser*, 945 F.3d 1076 (9th Cir. 2019).

Consistent with the Trump Administration's shameful denial of global warming, sea level rise and the desperate plight of West Coast fisheries and the communities dependent on them, at Reclamation's behest, that Administration issued fast-tracked new biological opinions in 2019 which, due to brazen, unlawful political influence, no longer truthfully report the causes of the Delta's ongoing ecological collapse. Instead, they falsely claim the CVP's operation poses no jeopardy to these species. And, despite allowing *worse* conditions for fish and wildlife, Reclamation's Final Environmental Impact Statement for these new biological opinions continues to avoid any serious discussion of the direct and devastating impacts of these CVP contracts. The Administration's shameful course reversal improperly harms the Delta's fish and wildlife, and further hampers CVPIA restoration activities.

Instead of taking meaningful and long-overdue action to restore imperiled fish and wildlife, Reclamation has allowed restoration to become an afterthought. The CVPIA established the Central Valley Project Restoration Fund ("Restoration Fund") in order to attain the CVPIA's restoration goals. CVPIA § 3407(a). It has historically accounted for more than half of total funding for fisheries restoration, even though it has been chronically underfunded.

The CVPIA directs Reclamation to collect mitigation and restoration ("M&R") payments from water and power contractors as one source of funding for the Restoration Fund. Congress mandated that Reclamation attempt to collect funding at a level that "approximate[s] the appropriated amount" for the Restoration Fund each year, but when the amount appropriated "does not equal \$50,000,000 per year" (as adjusted from the October 1992 price level),² "on an average annual basis, the Secretary shall impose such charges . . . subject to the limitations in subsection (d) of this section, as may be required to yield . . . total collections equal to

² The Draft Accounting Guidelines clarify that 1992 amounts are adjusted using the Consumer Price Index for All Urban Consumers (CPI-U).

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\$50,000,000 per year (October 1992 price levels) on a three-year rolling average basis for each fiscal year that follows enactment of this title.” CVPIA § 3407(c)(2).

One limitation of CVPIA section 3407(d) is that the combined additional annual payments from water and power contractors “shall not exceed \$30,000,000 (October 1992 price levels) on a three-year rolling average basis.” Another is that “such additional annual payments shall be allocated so as not to exceed \$6.00 per acre-foot (October 1992 price levels) for agricultural water sold and delivered by the Central Valley Project, and \$12.00 per acre-foot (October 1992 price levels) for municipal and industrial water sold and delivered by the Central Valley Project.” *Id.* And Reclamation also must determine agricultural water users’ ability to pay, “taking into account the benefits resulting from implementation” of the CVPIA. *Id.*

It appears that Reclamation may be taking the position that the \$30,000,00 limitation of 3407(d) no longer applies, and instead that the limitation “has been reduced to 15 million (October 1992 price levels).” Draft Accounting Guidelines, Part H, section 3.d. But, for the reasons discussed above, this reduction cannot be permissible as Reclamation has not achieved section 3406’s mitigation and restoration targets, including the salmon-doubling goal. The Accounting Guidelines must be revised to correct this error.

II. THE DRAFT ACCOUNTING GUIDELINES IMPROPERLY ALLOCATE COSTS AND FAIL TO ADEQUATELY PROTECT AND FUND THE RESTORATION FUND

Reclamation’s stated purpose for updating the 1993 Interim Accounting Guidelines is to address the holding of the Federal Circuit in *Northern California Power Agency v. U.S.* that CVPIA section 3407(d) requires power contractors’ M&R payments to be “proportional” to the M&R payments made by water contractors in instances where the Reclamation uses the three-year rolling average basis for determining funding amounts. 942 F.3d 1091, 1092 (Fed. Cir. 2019) (citing CVPIA § 3407(c)(2), (d)). The Court’s holding does not determine the appropriate ratio that Reclamation must use to develop a “proportional” allocation of M&R payments. However, CVPIA section 3407(d) mandates that “[t]he amount of the mitigation and restoration payment made by Central Valley Project water and power users, taking into account all funds collected under this title, shall, to the greatest degree practicable, be assessed in the same proportion, measured over a ten-year rolling average, as water and power users’ respective allocations for repayment of the Central Valley Project.”

Thus, in response, Reclamation has updated Part H of the Draft Accounting Guidelines to mandate:

- d. Taking into account all funds collected under the title, the M&R Payment

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Obligation to be assessed and collected in a given fiscal year shall be assessed “to the greatest degree practicable” in the same proportion, measured over a ten-year rolling average, as water and power users’ respective allocation of costs assigned for repayment of the CVP.

Draft Accounting Guidelines, Part H, Section 2. Further, the Draft Accounting Guidelines state that

- b. For determining power’s M&R payment obligation apply the appropriate allocation percentage identified from the ten-year rolling average for repayment of the CVP (as described in Section 2.b. of this Part) to actual water receipts, inclusive of both discretionary and non-discretionary, using a two year lag. For example: in determining power’s payment obligation for any fiscal year (e.g., FY X), use actual water receipts from two years prior (e.g., FY X - 2). Apply the most recent allocation factors from the previous ten years, which is also in a two year lag based on timing of available data.

Draft Accounting Guidelines, Part H, Section 3.

Neither the Draft Accounting Guidelines nor Reclamation’s proportionality and true-up workshops, provide an explicit proportionality calculation or formula. In the workshops Reclamation staff indicated that Reclamation was still working out the details. All the same, Reclamation indicated that it will utilize its recent cost-allocation study to inform its calculation of the proportional share of the M&R payments that power users must pay. However, Reclamation’s cost-allocation methodology is flawed, as addressed in the January 2, 2020 letter to Reclamation from Conservation, Fishing and Tribal Comments on Bureau of Reclamation Mid-Pacific Region December 2019 Central Valley Project Final Cost Allocation Study (CAS), (available at <https://calsport.org/news/wp-content/uploads/Conservation-Fishing-and-Tribe-Cmts-RE-CVP-Cost-Allocation-Study-Burman-1-2-2020-.pdf>) which is incorporated by reference as if set out in full. By relying upon this fatally flawed cost-allocation study to determine the proportional share payments, Reclamation’s proposed Accounting Guidelines will continue to give the environment short-shrift, and wrongly confer an unlawfully enhanced economic benefit on CVP’s agricultural water users. This will dramatically under-fund the Restoration Fund in drought years, which are increasingly likely as the planet’s temperature continues to rise.³

³ Reclamation’s assurance in its August 28, 2020 presentation that Restoration Fund payments will increase, except in drought years, is an empty promise that ignores the reality of our warming planet.

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Congress authorized the Secretary to appropriate “no more than 33 percent of all funds made available to the Restoration Fund . . . to carry out the provisions of paragraphs 3406(b) (4)-(6), (10)-(18), and (20)-(22)” of the CVPIA. CVPIA § 3407(a). Congress likewise directed that “no less than 67 percent” of the funds be appropriated to “carry out the habitat restoration, improvement and acquisition (from willing sellers) provisions of this title.” *Id.* Total expenditures from the Restoration Fund between 1993-2017 were \$1,007,423,819, compared to the inflation-adjusted CVPIA goal of about \$2,000,000,000, and under the proposed Accounting Guidelines, Reclamation has projected that annual funding for the Reclamation Fund will decline by approximately \$10 million. Thus, Reclamation’s reliance upon its flawed cost-allocation will further shortchange Congressionally-mandated restoration activities, and exacerbate Reclamation’s continued failure to implement the CVPIA’s environmental goals.

In its true-up and proportionality workshop presentations, Reclamation repeatedly assured the public that while the changes in the Draft Accounting Guidelines would impact payments into the Restoration Fund, the changes would not necessarily result in decreases in expenditures for habitat and fisheries restoration activities, as all of Reclamation’s spending is dictated by Congressional appropriations in the budget. But these appropriations are influenced by Reclamation’s funding requests, and the Restoration Fund is the source for most of this funding. Thus, this assurance rings hollow.

CONCLUSION

Reclamation must correct its failures to accurately allocate the CVP’s costs, and to adequately allocate and appropriate funding for CVPIA-mandated restoration activities.

Thank you for considering our comments.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Stephan C. Volker". The signature is fluid and cursive, with the first name "Stephan" and last name "Volker" clearly distinguishable.

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