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@ 2.28.21

Table 1
Balance Sheet
February 28, 2021 and February 29, 2020
(Proprietary Fund Only)

	<u>2/28/2021</u>	<u>2/29/2020</u>	<u>Variance</u>
Current Assets	\$ 10,324,804	\$ 9,906,776	\$ 418,028
Noncurrent Assets	<u>\$ 17,458,501</u>	<u>\$ 8,408,743</u>	<u>\$ 9,049,758</u>
Total Assets	\$ 27,783,305	\$ 18,359,409	\$ 9,467,786
Current Liabilities	\$ 5,970,328	\$ 10,732,190	\$ (4,761,862)
Noncurrent Liabilities	<u>\$ 12,546,654</u>	<u>\$ 642,133</u>	<u>\$ 11,904,521</u>
Total Liabilities	\$ 18,516,982	\$ 11,374,323	\$ 7,142,659
Net Assets:			
Invested in Capital Assets	\$ 1,120,293	\$ 639,925	\$ 480,368
Reserved for ADLP Loan Repayment	\$ -	\$ 347,046	\$ (347,046)
Reserved for Rate Stabilization	\$ 1,648,233	\$ 1,129,223	\$ 519,010
Reserved for Capital Repayment	\$ 2,713	\$ 1,216,087	\$ (1,213,374)
Unreserved	<u>\$ 6,495,083</u>	<u>\$ 3,608,915</u>	<u>\$ 2,886,168</u>
Total Net Position	\$ 9,266,323	\$ 6,941,196	\$ 2,325,127
Total Liabilities and Net Position	<u>\$ 27,783,305</u>	<u>\$ 18,315,519</u>	<u>\$ 9,467,786</u>

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Balance Sheet Analysis as of May 31, 2021

Account	Account Name	Balance @ 05/31/2021	Reconciliation Notes
1100	Oak Valley - Checking	\$ 539,066.23	Cash on Hand
1150	Oak Valley - Savings	\$ 42,823.69	Cash on Hand
1080	Petty Cash Housebank	\$ 200.00	Cash on Hand
1220	Contract Water	\$ 46,299.07	Water Customer Accounts Receivable
1425	A/R Other	\$ 1,340,227.44	BOR FY '20 Construction Rate Overpmt, SJRECWA DPCR Cost Share Reimbursement, SJVDA Watershed Coalition Program Costs, and WWD Settlement Transfer
1431	Def Outflow of Res. - GASB 68	\$ 121,527.00	5.31.21 Per CalPERS Plan Net Changes (Pension Plan)
1432	Def Outflow of Res. - GASB 75	\$ 12,204.00	5.31.21 Per CalPERS Plan Net Changes (OPEB)
1450	Prepaid Water/B of R	\$ 2,063,604.90	BOR Contract Prepayments Including Contract Conversion CVP Construction Overpayment
1452	Prepaid BOR TPUD Assessment	\$ 56,565.01	TPUD overpayment BOR FY 14 - FY 19 and TPUD Assessment collected against 2020 CVP water deliveries @ \$.12 cents/AF for application towards FY '21 obligation.
1453	Prepaid Water/SLDMWA	\$ 370,467.93	SLDMWA O&M Prepayments
1454	Prepaid Water/Other Sources	\$ (1,177,956.64)	Prepaid Cost of Additional Supplies
1455	Prepaid Expenses	\$ 228,976.28	Total of various expenses that have been prepaid for future months, including items such as insurance, maintenance contracts on office equipment, and dues & subscriptions. Expenses are transferred to the income statement in the appropriate month. A detailed listing is available.
1458	Prepaid Bureau Capital Rate	\$ 106,967.42	Remaining portion of Intertie Financing Contribution to be credited against total Capital Repayment obligation included in Bureau rates, thereby reducing the rate that would otherwise be paid, once the project is deemed complete and put into service.
1461	Prepaid CVP Construction Cost	\$ 12,091,982.00	Contract Conversion CVP Construction Payoff
1460	Prepaid BOR PUE	\$ 1,972.32	Prepaid PUE Deposit - WA Cont 18-WC-20-5248
1532	LPL Financial/Money Market	\$ 8,208,105.98	General Fund Investments \$ 7,829,573.16
1534	LPL Financial/CD's	\$ 2,271,496.25	Rate Stabilization Fund Investments \$ 2,647,315.63
1575	Investment Interest Receivable	\$ 3,451.00	CVP Capital Fund \$ 2,713.44
1405	Meters	\$ 255,591.66	Investment Interest Receivable
1410	Office Equipment	\$ 164,069.28	Installed plus uninstalled inventory - 40 yr depreciation
1411	Landscaping	\$ 81,990.34	5 to 7 year depreciation
1412	Tools	\$ 14,392.32	15 year depreciation
1413	Building	\$ 1,275,850.01	5 year depreciation
1414	Land	\$ 35,409.00	40 year depreciation on Office Building
1415	Vehicles	\$ 109,437.45	30 Year Depreciation on Metal Maintenance Building
1420	Accumulated Depreciation	\$ (797,380.67)	No Depreciation
	Total Assets	\$ 27,467,339.27	5 year depreciation
			Total Depreciation accumulated

Balance Sheet Analysis as of May 31, 2021

Account	Account Name	Balance @ 05/31/2021	Reconciliation Notes
2000	Accounts Payable	\$ 493,286.47	Total payables as of 05/31/2021. Misc. operating expenses plus current invoices payable to PID Transfer - \$180K, SLDWA - 191K.
2077	NVRRWP Customer Prepayment	\$ 1,831,916.25	Fiduciary obligation for cash holdings for NVRRWP Participants
2544	CVP Constr Cost Prepmt-Customer	\$ 1,656,000.00	Contract Conversion Construction Costs Customer Prepayments
2545	CoBank Loan Payable	\$ 9,902,800.65	CVP Contract Conversion CoBank Loan
2450	Net Pension Liability - GASB 68	\$ 698,501.00	CalPERS Plan Actuarial Liability as of 05.31.21
2451	Net OPEB Liability - GASB 75	\$ (205,935.00)	OPEB Trust Actuarial Liability/(Asset) as of 05.31.21
2699	A/L Other	\$ 189,822.71	Miscellaneous YTD Accruals, Contract Conversion Loan and Prior Year Costs Associated with AEWSD Exchange
2750	Compensated Absences Payable	\$ 107,439.36	Accrued amounts payable for vacation and sick time. Will be paid out per employee handbook policy.
2900	Unearned Income	\$ 700,000.00	Prepaid SLWD Sale Revenue
2910	Unearned Interest Income	\$ 3,624.90	Unearned Interest Income - General Fund
	Total Liabilities	\$ 15,377,456.34	
3500	Prior Period Adjustment	\$ (276,486.65)	Prior Year Adjustments to Net with Retained Earnings
3900	Retained Earnings	\$ 9,541,754.11	Accumulated District earnings
	Net Income	\$ 2,824,615.47	Current year Net Income May 31, 2021 Income Statement
	Total Equity	\$ 12,089,882.93	
	Total Liabilities & Equity	\$ 27,467,339.27	

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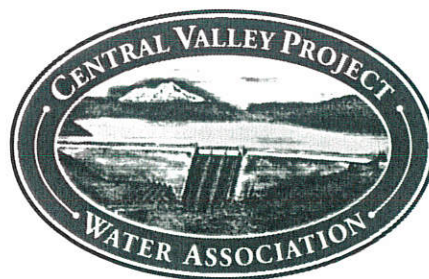
Account	SWWP Fund	Balance @ 05/31/2021	Reconciliation Notes
1130	Oak Valley - SWPP Checking	\$ 25,030.08	Cash on Hand
1275	SWP Program Cost Receivable	\$ -	SWPP Contract
1540	OVCB/SWPP CD	\$ 102,273.37	SWPP Fund
	Total SWPP Assets	\$ 127,303.45	
2152	SWPP Management Account	\$ 127,303.45	Fiduciary obligation for cash holdings for SWPP Participants
	Total SWPP Liabilities	\$ 127,303.45	
	Total SWPP Fund	\$ -	

Account	NVRRWP Fund	Balance @ 05/31/2021	Reconciliation Notes
1140	Oak Valley - NVRRWP Checking	\$ 5,092.04	Cash on Hand
1532	LPL Financial/Money Market	\$ 5,141,791.38	
1534	LPL Financial/CD's	\$ 14,031,656.02	RWSP/NVRRWP Fund \$ 24,375,710.70
1536	LPL Financial/Local-Municipal Bonds	\$ 2,799,550.30	
1538	LPL Financial/Gov't. Securities	\$ 2,402,713.00	
1576	Investment Interest Receivable	\$ 31,850.00	Investment Interest Receivable NVRRWP
	Total NVRRWP Assets	\$ 24,412,652.74	
2540	USBR RWSP Prepaid Cost	\$ 24,373,987.54	Fiduciary obligation for NVRRWP Prepays
2911	Unearned Interest Income	\$ 38,665.20	Unearned Interest Income - NVRRWP
	Total NVRRWP Liabilities	\$ 24,412,652.74	
	Total NVRRWP Fund	\$ (0.00)	

Account	RWSP-CNRA Fund	Balance @ 05/31/2021	Reconciliation Notes
1145	Oak Valley-RWSP-CNRA Checking	\$ 5,528.75	Cash on Hand
1532	LPL Financial/Money Market	\$ 246,032.30	
1534	LPL Financial/CD's	\$ 5,014,462.30	RWSP-CNRA Fund \$ 26,660,334.60
1536	LPL Financial/Local-Municipal Bonds	\$ 13,819,580.55	
1538	LPL Financial/Gov't. Securities	\$ 7,580,259.45	
1577	Investment Interest Receivable	\$ 73,054.00	Investment Interest Receivable RWSP-CNRA
	Total RWSP-CNRA Assets	\$ 26,738,917.35	
2541	USBR RWSP-CNRA Prepaid Cost	\$ 26,404,836.31	Fiduciary obligation for RWSP-CNRA Prepays
2912	Unearned Interest Income	\$ 334,081.04	Unearned Interest Income - RWSP-CNRA
	Total RWSP-CNRA Liabilities	\$ 26,738,917.35	
	Total RWSP-CNRA Fund	\$ (0.00)	

\$ (0.00)

X. C.



July 1, 2020

The Honorable Camille Calimlim Touton
Deputy Commissioner, External and Intergovernmental Affairs
Bureau of Reclamation
1849 C Street NW
Washington DC 20240-0001

Dear Deputy Commissioner Touton:

While we confront an incredibly challenging water year, there is an opportunity to continue forward progress on an issue affecting the water, power, and environmental beneficiaries of the Central Valley Project (CVP) by adopting the fall 2020 updates to the Business Practice Guidelines for Central Valley Project Improvement Act (CVPIA) Receipts, Program Accounting, Cost Allocation and Cost Recovery (the “updated Business Practice Guidelines”).

The Central Valley Project Water Association (CVPWA) represents over 80 water and power contractors and has a long history of working with Reclamation to collaboratively resolve complex issues related to CVP accounting, administration, and management. Since passage of the CVPIA in 1992, CVP water and power contractors have contributed over \$1.2 billion to the Restoration Fund to achieve the law’s goals. CVPWA members have been committed to the updated Business Practice Guidelines since public engagement began with the Obama Administration in 2015. Regional Director Ernest Conant stated, “[t]he revisions to the CVPIA Guidelines represent a considerable amount of time and effort... The consistent engagement, feedback, and work that our water and power customers have put into this endeavor is very much appreciated by Reclamation.”¹

¹Reclamation modernizing Central Valley Project Improvement Act accounting procedures
https://www.usbr.gov/newsroom/#!/news-release/545?field_story_archive=California-Great%20Basin®ion=California-Great%20Basin

The updated Business Practice Guidelines were generally agreed to be a reasonable and fair compromise by all water and power stakeholders. The updated Business Practice Guidelines resolve accounting treatment of costs under CVPIA by clarifying topics in reimbursability, cost allocation, and cost recovery. Due to the current delay in implementation of the updated Business Practice Guidelines, the California Great-Basin Region has been unable to complete the CVPIA “true-up,” a process that has been underway for years to reconcile historic account balances and calculate future liability. This financial uncertainty impacts not only CVP water and power users, but others that rely on CVPIA authorities.

We understand concerns have been recently raised that the updated Business Practice Guidelines may result in a “shifting of debt” to taxpayers or a “windfall” to water and power contractors and otherwise jeopardize the activities funded by the CVPIA. These assertions are simply incorrect. The updated Business Practice Guidelines do not change the annual Restoration Fund revenues or result in refunds to water and power contractors. Except for the changes to calculation of power mitigation and restoration charges from *Northern California Power Authority v. United States*², the updated Business Practice Guidelines do not (1) alter the Restoration Fund collections from CVP water and power contractors, nor (2) imperil future mitigation, restoration, and enhancement activities funded by contractors under the CVPIA. Under the updated Business Practice Guidelines, the surcharges paid by CVP water and power contractors, as required by Federal law, will continue to be collected in the same manner as they have for the last 30 years.

We appreciate Reclamation’s transparent and fair process over the last six years and the ample opportunities for all stakeholders to contribute which spanned dozens of public meetings, virtual and public workshops, extended comment periods, and presentations to OMB.³ The technical accounting principles within the updated Business Practice Guidelines were developed through a successful collaboration between Reclamation and engaged stakeholders and merit adoption by Reclamation.

For questions, please contact me at (916) 448-1638 or kkasberg@cvpwater.org.

Sincerely,

Kevin Kasberg
Executive Director, Central Valley Project Water Association

Cc via e-mail: Ernest Conant, Regional Director, Interior Region 10: California-Great Basin
Michelle Williams, Assistant Regional Director, Interior 10: California-Great Basin

² 942 F.3d 1091, reh’g denied (2019).

³OMB Review <https://www.reginfo.gov/public/do/eom12866SearchResults?pubId=&rin=1006-ZA02&viewRule=true>



United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

Attorney-Client Communication. DO NOT DISCLOSE.

MEMORANDUM

JAN 14 2021

To: Regional Director, California-Great Basin Region

From: Associate Solicitor, Division of Water Resources *C. R. Brown*

Subject: Interpretation of Central Valley Project Improvement Act Sections 3406 and 3407

The 1992 Central Valley Project Improvement Act ("CVPIA" or "the Act") put forth a framework to "protect, restore, and enhance fish, wildlife, and associated habitats in the Central Valley and Trinity River basins of California."¹ In support of these ends, the CVPIA amended the 1937 CVP authorizing statute,² which required operation of the CVP according to a hierarchy of purposes: "first, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses; and, third, for power." The CVPIA added "fish and wildlife mitigation, protection and restoration" as secondary project purposes,³ and "fish and wildlife enhancement" as a tertiary project purpose.⁴

The CVPIA also mandated multiple specific programs and activities to serve these purposes, primarily in section 3406 of the Act. To fund mitigation, protection, restoration, and enhancement actions, the Act created the CVP Restoration Fund,⁵ with annual appropriations "up to \$50,000,000 per year (October 1992 price levels)"⁶ and equal contributions from project water and power beneficiaries.⁷ If annual appropriations fall short of \$50 million, the CVPIA obligates the Secretary to collect payments from project beneficiaries to the extent of the shortfall, but not to "exceed \$30,000,000 (October 1992 price levels) on a three-year rolling average basis."⁸ In section 3407(d)(2)(A), the Act reduces those funding levels, however, "upon completion of the fish, wildlife, and habitat mitigation and restoration actions mandated under section 3406." For the \$50 million annual funding goal, the Act provides that "the Secretary shall reduce" that amount "to \$35,000,000 per year (October 1992 price levels)."⁹ It accordingly provides also that

¹ Pub. L. No. 102-575, § 3402(a) (Oct. 30, 1992).

² Rivers and Harbors Act of 1937, 75 Cong. Ch. 832, § 2, 50 Stat. 844, 850 (Aug. 26, 1937).

³ CVPIA § 3406(a)(1).

⁴ *Id.* § 3406(a)(2).

⁵ *Id.* § 3407(a).

⁶ *Id.* § 3407(b).

⁷ *Id.* § 3407(c)(2).

⁸ *Id.* § 3407(d)(2)(A).

⁹ *Id.*

the Secretary "shall reduce" the water and power users' "annual mitigation and restoration payment ceiling ... to \$15,000,000 (October 1992 price levels)."

In its effort to administer the CVPIA and ensure compliance with its statutory obligations, the Bureau of Reclamation posed to the Office of the Solicitor the following four questions concerning interpretation of the Act.

- Are chronologically indeterminate (i.e., ongoing) actions required under section 3406 precluded from being considered complete within the meaning of section 3407(d)(2)(A)?
- Where section 3406 requires the Secretary to "develop and implement" a program, does "completion" occur under section 3407(d)(2)(A) when a program has been developed and implemented, or only when every element in such a program has been implemented?
- Does section 3406(b)(15) require construction of a *permanent* barrier?
- Are the level 4 refuge water supplies required under section 3406(d)(2) "mitigation and restoration" or "enhancement"?

This memorandum answers these questions.

I. Chronologically indeterminate section 3406 actions may be considered complete within the meaning of section 3407(d)(2)(A) notwithstanding their ongoing nature.

The factual condition precedent to the Secretary's obligation to reduce the Restoration Fund target and the associated contributions ceiling is "completion of the fish, wildlife, and habitat mitigation and restoration actions mandated under section 3406."¹⁰ Although the term "completion" is not defined in the CVPIA,¹¹ its meaning can be discerned by reference to each of "the fish, wildlife, and habitat mitigation and restoration *actions* mandated under section 3406."

Some of those actions are temporally discrete construction activities. For example, section 3406(b)(6) requires the Secretary to "[i]nstall ... a structural temperature control device at Shasta Dam." Similarly, 3406(b)(11) requires the Secretary to "modify the Keswick Dam Fish Trap" and to "modify the basin below the Keswick Dam spillway." These activities would reasonably be considered complete when, for example, the temperature control device has been installed, or the fish trap or spillway basin modified. In each case, the measure of completion under section 3407(d)(2)(A) is the specific "action[]" mandated under section 3406"¹²; i.e., in the foregoing examples, installation or modification.

In other instances, section 3406 requires ongoing actions, often changes to CVP operations. Section 3406(b)(6), to use a preceding example, also requires the Secretary to "operate" the temperature control device and to "implement modifications as needed to assist in

¹⁰ *Id.*

¹¹ *See generally id.* § 3403.

¹² *Id.* § 3407(d)(2)(A).

the Secretary's efforts to control water temperatures." Sections 3406(b)(7) ("[m]eet flow standards and objectives and diversion limits") and (b)(8) ("[m]ake use of short pulses of increased water flows to increase the survival of migrating anadromous fish") likewise require ongoing, annual project operations. Unlike discrete construction activities, these ongoing actions present no clear chronological terminus.

Nevertheless, the analysis remains the same for the two classes of activities, because they are subject to the same statutory standard under section 3407(d)(2)(A)—has the Secretary taken the specific *actions* required under section 3406? If, for example, the Secretary has taken the action that section 3406(b)(6) calls for—to *operate* the temperature control device—that action is complete within the meaning of section 3407(d)(2)(A). So too if the Secretary has *implemented modifications, made use of short pulses of increased water, or met flow standards*, each representing the specific action section 3406 requires the Secretary to take. To reach a contrary conclusion requires either reading an ongoing action exception into section 3407(d)(2)(A) or rendering its object impossible to achieve because perpetual actions are never complete.

When Reclamation and the Fish and Wildlife Service last comprehensively reviewed the status of section 3406 activities,¹³ they took the former approach. Characterizing ongoing activities as "annual" and others as "time certain,"¹⁴ the agencies concluded that completion must be "based on the completion of all 'time certain' programs, and a showing of some level of ability to continue carrying out 'annual' programs."¹⁵ The agencies did not apply this novel, some-level-of-ability-to-continue-carrying-out standard. Instead, they "assume[d] that funding would continue to be available for [some] annual components," while concluding that funding for others "should be considered in the decision for funding reduction."¹⁶ It left undefined what consideration should be given, except to say it should not be a "determinative factor."¹⁷

The trouble with this interpretation is that section 3407(d)(2)(A) bears no such complexity or ambiguity. It simply says "completion of the fish, wildlife, and habitat mitigation and restoration actions mandated under section 3406." It does not distinguish between annual actions and time certain ones. Nor does it command some undefined assurance of funding for annual actions before completion can occur, because the CVPIA provides that assurance via the second tier funding levels described in section 3407(d)(2)(A). Rather than stray so far from the statutory text, the better grounded interpretation of completion means implementation of the specific actions required under section 3406, each of which can readily be identified in the statutory text, including those that are ongoing in nature.

¹³ Bureau of Reclamation & U.S. Fish & Wildlife Service, Central Valley Project Improvement Act Program Activity Review Report (Aug. 25, 2009) (hereinafter "CPAR"), *available at* https://www.usbr.gov/mp/cvpia/docs_reports/docs/2009_Final%20CPAR%20Report%208-25-09.pdf.

¹⁴ *Id.* at 43.

¹⁵ *Id.* at 44.

¹⁶ *Id.* at 55.

¹⁷ *Id.* at 55.

II. Where section 3406 requires the agency to “develop and implement” a program, “completion” occurs under section 3407(d)(2)(A) when the program has been developed and implemented.

Section 3406 requires in multiple instances that the Secretary “develop” and “implement” a “program.” Examples include 3406(b)(1), which requires the Secretary to “[d]evelop ... and *implement* a program which makes all reasonable efforts” to support restoration of salmon populations. Others include the obligations to: “[d]evelop and implement a program to eliminate” fish losses caused by project flow fluctuations, section 3406(b)(9); “[d]evelop and implement a continuing program” to restore spawning gravel the Project caused to be lost, section 3406(b)(13); and other slight variations, such as “[e]stablish ... a comprehensive program to monitor fish and wildlife resources,” section 3406(b)(16).

For these actions, like ongoing ones, the statutory term “completion” must be defined by reference to the specific text describing the actions required by section 3406. Where the statute requires the Secretary to “develop” and “implement” a “program,” completion occurs under section 3407(d)(2)(A) when the Secretary has done just that—developed and implemented a program. A “program” means generally “a plan or system under which action may be taken toward a goal.”¹⁸ To “develop” a program is to set it forth; make it manifest; to create or produce it.¹⁹ And to “implement” a program is to carry it out; provide instruments for it.²⁰ Accordingly, where section 3406 requires development and implementation of a program, completion occurs under section 3407(d)(2)(A) when the Secretary has set forth and carried out a system or plan for taking actions toward the specified goal.

The 2009 CVPIA activity review evaluated completion under section 3407(d)(2)(A) based on whether a section 3406 action is an “outcome” or “output” action, in addition to the annual/time certain distinction described above.²¹ The review concluded the “output” actions to include those section 3406 actions that “describe[] a specific action to be accomplished.”²² It characterized the program actions as “outcome” provisions that “lack[] specificity as to the actions to be accomplished,” unless “the agencies have identified specific actions to achieve the goal,” in which case “outcome” actions would instead be treated as “output” actions.²³

Using these constructs, the 2009 review concluded that the actions required under sections 3406(b)(9), (13), and (16), for example, are “annual” and thus consideration of completion under section 3407(d)(2)(A) to be “N/A.”²⁴ For section the section 3406(b)(1) fish restoration program, the report viewed it as both “Time Certain” and “Annual”; both “Outcome” and “Output” in type; and both “Incomplete” and “Annual.”²⁵ Based on these considerations, it

¹⁸ Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary> (last visited Dec. 8, 2020).

¹⁹ *Id.*

²⁰ *Id.*

²¹ CPAR at 44.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 48-50.

²⁵ *Id.* at 45.

viewed the program in some respects to be outside the scope of 3407(d)(2)(A) and in others to be incomplete because 98 of the 128 actions identified in the program remained themselves to be completed.

Both conclusions were inconsistent with the statute. As explained above, section 3407(d)(2)(A) does not distinguish between annual and time certain actions; it requires completion of all "fish, wildlife, and habitat mitigation and restoration actions mandated under section 3406," irrespective of chronology. Nor does it create categories of outcome and output activities, or allow an expansion of the prerequisites to section 3407(d)(2)(A) by mere agency identification of specific actions in furtherance of general statutory goals. Each of these interpretive constructs distracts from the straightforward focus of the statute—"completion of the fish, wildlife, and habitat mitigation and restoration actions mandated under section 3406." Where section 3406 requires development and implementation of a program, nothing more or less than the specific actions of development and implementation is required to be considered complete within the meaning of section 3407(d)(2)(A).

III. Section 3406(b)(15) does not require construction of a permanent barrier.

Section 3406(b)(15) requires the Secretary to take the following actions:

Construct, in cooperation with the State of California and in consultation with local interests, a barrier at the head of Old River in the Sacramento-San Joaquin Delta to be operated on a seasonal basis to increase the survival of young out migrating salmon that are diverted from the San Joaquin River to Central Valley Project and State Water Project pumping plants and in a manner that does not significantly impair the ability of local entities to divert water.

Nothing in this statutory text says the barrier must be permanent. Rather, it requires simply construction of "a barrier." In the absence of such limiting language, the statute should not be construed to require a permanent barrier, even though it could allow it. Indeed, the statutory requirement to operate the barrier on a seasonal, rather than annual, basis, coupled with the general notion of "a" barrier, suggests a non-permanent falls entirely within the bounds of the statute. This interpretation finds support also in the requirements to cooperate with the State and to consult with local interests in carrying out the action, both of which suggest the CVPIA did not intend too specific a solution, instead prescribing only seasonal operation and the objective of increasing outmigrating salmon survival.

IV. The level 4 refuge water supplies required under section 3406(d)(2) may be understood as "enhancement," not "mitigation and restoration."

The CVPIA added to the CVP authorizing statute's hierarchy of project purposes "fish and wildlife mitigation, protection and restoration" at the second tier²⁶ and "fish and wildlife

²⁶ CVPIA § 3406(a)(1).

enhancement” at the third.²⁷ Although section 3406 supports both tiers of project purposes,²⁸ section 3407(d)(2)(A) focuses only on completion of actions supporting the secondary purpose, the “mitigation and restoration actions.” Presumably, therefore, completion under section 3407(d)(2) relates to a subset of section 3406 activities.

Section 3406(d) provides for the delivery of water to Central Valley wildlife refuges at two different supply levels emanating from a 1989 report.²⁹ The “Level 2” supplies required under section 3406(d)(1) equal the “current average annual water supply” for each refuge at the time of the 1989 report.³⁰ The “Level 4” supplies under section 3406(d)(2), by contrast, represent the “supply for optimum habitat management.”³¹ Level 4 supplies exceed what the report characterized as Level 3, the amount required for “full use of existing [refuge] development.”³² The Act required delivery of the Level 2 supplies upon enactment,³³ while providing for long-term, incremental implementation of Level 4 deliveries and only through “voluntary measures.”³⁴

The Act does not itself characterize Level 2 or Level 4 as mitigation, restoration, or enhancement. Nevertheless, the 1989 water supply report, which the CVPIA incorporates expressly,³⁵ supports the conclusion that Level 4 may reasonably be considered “enhancement” because it exceeds even the amount required for “full use of existing development” (i.e., Level 3). This notion of providing water supply in excess of existing conditions parallels the common meaning of “enhancement” (“to increase or improve”),³⁶ in this case beyond the supplies necessary for existing development. It also tracks the longer term implementation period provide for Level 4 in section 3406(d)(2), ostensibly because enhancement was not as immediate a need as mitigation and restoration.

²⁷ *Id.* § 3406(a)(2).

²⁸ *See id.* § 3406(b)(1) (providing that “the programs and activities authorized by this section shall, when fully implemented, be deemed to meet the mitigation, protection, restoration, and enhancement purposes established by subsection 3406(a)”).

²⁹ *See id.* § 3403(j); *see also* U.S. Dept. of the Interior, Bureau of Reclamation, *Report on Refuge Water Supply Investigations* (March 1989). The Act also incorporated delivery quantities from another study concerning the San Joaquin basin not relevant to the question at hand.

³⁰ *Id.* at 1; *see also* Table II-2.

³¹ *Id.* at 1.

³² *Id.*

³³ CVPIA § 3406(d)(1).

³⁴ *Id.* § 3406(d)(2).

³⁵ *Id.* § 3403(j).

³⁶ Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary> (last visited Dec. 8, 2020).



United States Department of the Interior
OFFICE OF THE SOLICITOR
Washington, D.C. 20240

June 11, 2021

Memorandum

To: Ernest Conant
Regional Director, California-Great Basin Region
Bureau of Reclamation

From: Daniel Cordalis, Deputy Solicitor for Water Resources
Office of the Solicitor

Subject: January 14, 2021, Solicitor's Office Memorandum Interpreting Central Valley
Project Improvement Act Sections 3406 and 3407

DANIEL
CORDALIS

Digitally signed by
DANIEL CORDALIS
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On January 14, 2021, the Associate Solicitor for the Division of Water Resources issued a memorandum entitled "Interpretation of Central Valley Project Improvement Act Sections 3406 and 3407" (Memorandum). The Memorandum, among other things, provided direction to the Bureau of Reclamation (Reclamation) on how Reclamation should analyze certain Central Valley Project Improvement Act (CVPIA) restoration activities when determining whether those activities could be declared complete pursuant to the CVPIA. I reviewed the Memorandum consistent with Executive Order 13990,¹ "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," and am now rescinding it for lack of Departmental coordination required by the 1993 CVPIA implementation agreement between Reclamation and the Fish & Wildlife Service (Service) and for being a potential impediment to achieving the purposes of the CVPIA.

Congress passed the CVPIA in 1992 and modified Central Valley Project (CVP) management by including as Reclamation management purposes the protection, restoration, and enhancement of fish, wildlife, and associated habitats in the Central Valley and Trinity River basins of California. Accordingly, CVPIA section 3406 includes specific restoration activities the Department is required to undertake to further these purposes. Under CVPIA section 3407(d)(2), the Secretary can determine whether the restoration activities in section 3406 funded by these payments are "complete." The determination is significant because if all the restoration activities are deemed complete, the Secretary must reduce the sums collected from water and power contractors that fund CVPIA restoration activities.

¹ Section 1 of Executive Order 13990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," articulates that it is national policy "to improve public health and the environment," and directs that the heads of all agencies "shall immediately review all existing regulations, orders, guidance documents, policies, and any other similar agency actions (agency actions) promulgated, issued, or adopted between January 20, 2017, and January 20, 2021, that are or may be inconsistent with, or present obstacles to, the policy set forth in section 1 of this order."

The Memorandum discussed how Reclamation should interpret whether the restoration activities were complete. Critically, the analysis in the Memorandum did not include Service input even though the Memorandum's conclusions would affect significantly the Service's implementation of CVPIA restoration activities. Moreover, the Service has joint lead authority in CVPIA implementation. Reclamation and the Service signed a CVPIA implementation agreement in 1993 that reinforced a collaborative approach to restoration efforts—particularly anadromous fish restoration—where the agencies would share decision making. The lack of coordination between Reclamation and the Service in issuing the Memorandum violated the 1993 implementation agreement.

Further, the Memorandum's explanation of what constitutes a completed restoration activity is inconsistent with the intent of the CVPIA and the Department's obligation to carry out the policies in Executive Order 13990 to "protect our environment; to ensure access to clean air and water;" and "to bolster resilience to the impacts of climate change," within the Central Valley and Trinity River basins. In its completion analysis, the Memorandum expressly rejected consideration of whether an ongoing restoration program was, and had the ability to continue, making progress toward its intended outcome. Instead, the Memorandum concluded that an ongoing program should be deemed complete after the initial development and implementation of a program (i.e., the startup of a program). This legal conclusion fails to support the fish and wildlife protection and restoration purposes expressed in CVPIA sections 3402(a) and (b). These purposes likely cannot be achieved by merely setting up the required restoration programs; some level of ongoing effort and progress toward meeting the program goals should be considered in a completion determination framework. Otherwise, funding could be reduced prematurely and impair the program's ability to meet its intended purpose.

In summary, because the Memorandum is not reflective of necessary Departmental collaboration and decision-making regarding important fish and wildlife restoration decisions affecting CVPIA implementation, I am rescinding it and directing the Division of Water Resources and the Division of Parks & Wildlife to work collaboratively and with the appropriate bureaus to determine whether additional guidance is needed. Please let me know if you have any questions or concerns about this action.

cc: Camille Touton, Deputy Commissioner
Martha Williams, Principal Deputy Director
Carter Brown, Associate Solicitor – Water Resources
Peg Romanik, Associate Solicitor – Parks and Wildlife

Hoopa Valley Tribal Council

Hoopa Valley Tribe

P.O. Box 1348 ~ Hoopa, California 95546 ~ Phone (530) 625-4211 ~ Fax (530) 625-4594



FOR IMMEDIATE RELEASE

HOOPA VALLEY TRIBE

June 22, 2021

**CONTACT: Michael Orcutt, Fisheries Director
707 499-6143**

Interior Secretary Haaland Strikes Blow for California Environmental Restoration Exposes Trump Administration Financial Scandal in Bureau of Reclamation

The Hoopa Valley Tribe hails Secretary Deb Haaland's long-sought decision to revoke her predecessor's final assault on tribal trust resources and environmental justice.

On January 19, the day before President Biden's inauguration, then-Secretary Bernhardt declared that environmental restoration of areas in California damaged by construction and operation of the government's massive Central Valley Project had been completed. That decision would have reduced or eliminated hundreds of millions of dollars in environmental restoration costs that the 1992 Central Valley Project Improvement Act required water and power contracts for CVP water to pay in exchange for the billions of dollars they have reaped from government-subsidized water and power supplies.

"This is such welcome news," said Hoopa Vice-Chairman Everett Colegrove. "We understand the vast responsibilities of the Secretary's office, and the time it took for her to deal with this issue, which is so important to us."

"The CVP has devastated the Trinity River basin and the fishery we have relied on since time immemorial," said Hoopa Fisheries Director Michael Orcutt. "For Secretary Bernhardt's decision to have stood would have made a mockery of Secretary Haaland's commitment to environmental justice, tribal property rights, her trust responsibilities, and duty to protect the federal Treasury," he added.

The Secretary's decision has exposed a deeper financial scandal that Hoopa has brought to the Secretary's attention, the Trump Administration's unlawful action to reassign to the Federal taxpayer at least \$400 million that Federal law required to be paid by CVP contractors who were Mr. Bernhardt's clients before and after his tenure as Secretary.

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“Secretary Haaland has acted just in the nick of time, but there is more she needs to do. The sweetheart deals negotiated during the Trump Administration for CVP contracts are not yet binding on the United States and need to be revised to protect the Hupa people and the Federal treasury,” said Orcutt.

“We need the Secretary to act now to protect our future. We want Secretary Haaland to take every action within her authority to ensure that a future Secretary will know he cannot dishonor the federal trust responsibility and our property rights,” said Vice-Chairman Colegrove.