



March 6, 2007

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Subject: Central Valley Project Improvement Act (CVPIA) Program Activities Review (PAR)

Dear Kirk:

Kirk

NCPA appreciated the opportunity to work with your agencies throughout the PAR process. The PAR process arose from a directive by Department of the Interior (DOI) Assistant Secretary Mark Limbaugh to determine whether the Secretary should invoke Section 3407 of the CVPIA, which would reduce annual contractor contributions into the CVPIA Restoration Fund. Our goals for the PAR process were to define completion criteria for each activity contained in Section 3406, specify which activities have been completed, and detail precisely what actions are necessary to achieve completion for any activities deemed to be incomplete. It was our expectation that those efforts would, indeed, result in a clear enunciation of such completion criteria.

In determining completion criteria, it is imperative to rely on the language contained in the CVPIA. The PAR review process was too focused on agency documents developed since enactment, rather than focusing on what the CVPIA actually stipulated.

We believe the PAR process produced two key issues that need to be decided by you on a regional basis, with the review and approval by top DOI officials. Those are determinations as to the intent of Sections 3406 (b) (1) and 3406 (b) (23).

Anadromous Fish Recovery Program (b)(1)

Section 3406(b) (1) creates the underlying anadromous fish recovery program and establishes a framework for the other activities in Section 3406. It directs the Secretary to:

“...develop within three years of enactment and implement a program that makes all reasonable efforts to ensure that, by the year 2002, natural production of anadromous fish in 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.”

The *reasonable effort* language recognizes that available resources on an annual basis are limited and need to be applied judiciously, and that actual doubling of fish levels, while a laudable target, may not be achievable. The reasonable effort language also dictates that it is not necessary to actually double fishery numbers to trigger Section 3407. We further believe that “by the year 2002” was placed in

the Act to define the length of time it was intended to make the reasonable effort to double the fishery.

Like Section (b) (1), many other sections within Section 3406 include the directive to "develop and implement" a program. *Implementation* means putting a developed program into operation; implementation does not require that every element included in the developed plan be completed. Programs like (b)(1) will be ongoing into the foreseeable future, and are unlikely to be suspended based on any completion criteria; instead they will be adapted and improved, with new elements added as appropriate. But once such programs have been developed and put into implementation, they are complete for purposes of triggering Section 3407.

Trinity River Flow Requirements (b)(23)

The other key issue is Section 3406 (b) (23), a prime example of the need to focus on the language of the Act. Because the section references tribal trust issues and pre-existing authorizations, some have suggested that this section authorizes the Trinity River Restoration Program. But the language of Section 3406(b)(23) is specifically limited to directing that certain steps be taken to determine and implement flow levels in the Trinity River. Clearly, for purposes of Section 3407, the specific directives contained in Section (b) (23) have all been completed. The flow level has been determined, the Hoopa Tribe and the DOI Secretary have agreed on it, and it is being implemented. NCPA supports restoration of the Trinity River, including adequate funding, but we do not think Section (b) (23) requires anything other than the determination and implementation of flow levels.

Other Issues of Concern

There are several other issues associated with the CVPIA that require your resolution.

- It has been nearly 15 years since the CVPIA was enacted, and almost a billion dollars has been spent. We appreciate the agencies' efforts at this time to firmly define completion and establish firm goals to guide the mitigation effort in the future.
- There is a growing trend to earmark CVPIA dollars for a particular project rather than spending dollars for projects that yield the highest CVPIA environmental benefit. Restoration Fund dollars have even supported environmental programs that are not authorized by Section 3406. Use of Restoration Fund dollars for non-CVPIA environmental projects raises issues regarding how contractors will be credited for the spending of their contributions.
- The CVPIA specifies three funding sources to pay for each of the Section 3406 activities: the State of California, Federal Water and Related Resources appropriations, and the CVPIA Restoration Fund. Funding from the State has declined to zero, and the Water and Related Resources appropriations are significantly less than was intended by the CVPIA, as detailed in the individual provisions of Section 3406. Many of the provisions provide for a 37.5% federal share. The Restoration Fund has become the primary funding source for the CVPIA, as almost 80% of the funding has come from the CVP water and power users in recent years.

There are two additional, more specific issues regarding this cost allocation. First, we believe water and power contractors should receive credit for activities we funded even though the CVPIA allocates all of the cost responsibility to the State or to the Water and Related Resource appropriations (e.g. (b)(12) Clear Creek, (d)(2) Refuge Water). Second, if none of the costs of a specific activity are allocated to the Restoration Fund, it is our contention that the activity should be considered complete for the purpose of invoking the Section 3407 reduction in contributions to the Restoration fund.

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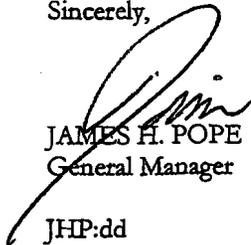
- Some entities cite the decline of pelagic organisms in the Delta or the lack of achieving actual doubling of all species of salmon populations as reasons that a reduction in water and power contributions to the CVPIA Restoration Fund should not occur. Those statements do not reflect the actual language of the CVPIA. As we have discovered since passage of the CVPIA, fisheries are a very complex issue whose sphere of influence is impacted by a myriad of other industries. The shipping and recreation industries have introduced new plant and animal species in California that greatly impact the environment. Ocean currents and variable temperatures have a significant impact on fisheries, as do the use of pesticides, global warming and the associated rising tides, the fishing industry, and a host of other products and users.

While we are willing to pay our share to improve the fishery environment, we do not believe it was the intent of the CVPIA that we pay for all of the environmental impacts caused by other industries. Associated programs have not evolved to the point where contributions are received from all potential sources that impact the Northern California fishery environment. Instead, the Restoration Fund appears to be viewed by others as a source of funding for a variety of environmental projects, even those that are not identified in the CVPIA.

NCPA strongly supports efforts to accomplish the environmental activities spelled out in Section 3406. We anticipate that many of these programs will be necessary far into the future, and we anticipate continuing to make contributions of millions of dollars annually to the Restoration Fund, even with the implementation of the reduction contemplated in Section 3407. However, we believe a realistic assessment of completion criteria shows that invoking the reduction contemplated in Section 3407 is warranted.

Thank you for your continuing dialog on these issues. We look forward to continued collaboration to ensure sound and successful implementation of the CVPIA.

Sincerely,



JAMES H. POPE
General Manager

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