



Thomas Birmingham
General Manager
Westlands Water District

Testimony
Before the Subcommittee on Water and Power
Committee on Natural Resources
United States House of Representatives

H.R. 1837, the "San Joaquin Valley Water Reliability Act"
June 2, 2011

Mr. Chairman and Members of the Subcommittee, my name is Thomas W. Birmingham, and I am the General Manager of Westlands Water District ("Westlands" or "District"). Thank you for the opportunity to appear before you today to testify today on *H.R. 1837, the "San Joaquin Valley Water Reliability Act."* This legislation would amend the Central Valley Project Improvement Act ("CVPIA") and provide congressional direction concerning implementation of the Endangered Species Act ("ESA") as it pertains to the operations of the Central Valley Project ("CVP") and the California State Water Project ("SWP"). Enactment of H.R. 1837 would restore balance and flexibility to operations of the CVP and SWP, thereby restoring water supply and water supply reliability and creating thousands of jobs in one of the most economically depressed regions of the country.

As I have previously testified before the Subcommittee, Westlands is a California water district that serves irrigation water to an area of approximately 600,000 acres on the west side of the San Joaquin Valley in Fresno and Kings counties. The District averages 15 miles in width and is 70 miles long. Historically, the demand for irrigation water in Westlands was 1.4 million acre-feet per year, and that demand has been satisfied through the use of groundwater, water made available to the District from the Central Valley Project under contracts with the United States for the delivery of 1.19 million acre-feet, and annual transfers of water from other water agencies.

Westlands is one of the most fertile, productive and diversified farming regions in the nation. Rich soil, a good climate, and innovative farm management have helped make the area served by Westlands one of the most productive farming areas in the San Joaquin Valley and the nation. Westlands farmers produce over 50 commercial fiber and food crops sold for the fresh, dry, and canned or frozen food markets; domestic and export. These crops have a value in excess of \$1 billion, and they are an important factor in ensuring that American families will continue to enjoy a food supply that is abundant, safe, and affordable. However, like most regions of the arid west, the production of these crops depends on the availability of water for irrigation.

Prior to the implementation of CVPIA in 1992 and the application of the ESA to operations of the CVP at approximately the same time, the principal source of irrigation water for farmers in the District was water made available from the CVP under contracts with the United States. This source of water was highly dependable, and in all but the most critically dry years, it was adequate to meet the total demand for irrigation water in the District.

CVPIA and ESA dramatically changed the reliability and adequacy of the CVP as a source of water. Losses of water supply under CVPIA and ESA have steadily increased, becoming progressively more and more damaging. South-of-Delta CVP irrigation water service contractors, like Westlands, have gone from an average supply of 92% of the contract quantities in 1992 to 35 – 40% today. For

Westlands, this represents an average loss of approximately 675,000 acre-feet of water on an annual basis; for all south-of-Delta CVP irrigation water service contractors this represents a loss of approximately 1.1 million acre-feet. And the price paid for those losses is measured in lost jobs, diminished productivity, and higher costs of food production.

The legislation authored by Representatives Devin Nunes, Kevin McCarthy, and Jeff Denham, H.R. 1837, addresses many of the root causes of these problems as they affect us locally, regionally, in the state of California and as a nation. H.R. 1837 offers a number of well-thought out solutions that, if enacted, would benefit workers, farmers, and consumers alike. And it does so through amendments that are consistent with Congress' past efforts to reform CVP operations and to protect the environment.

In prior testimony before the Subcommittee, I have focused on the economic, environmental, and human impacts of the chronic water supply shortages caused by implementation of CVPIA and the application of ESA to the CVP. In my testimony today, I would like to focus on how H.R. 1837 would affect the implementation of these statutes.

Amendments to CVPIA

H.R. 1837 would not change the CVPIA. Rather H.R. 1837 would redeem it, restoring the original balance and purpose that Congress intended when it passed that legislation. To make it clear how the amendments to the Central Valley Project Improvement Act proposed by H.R. 1837 would affect that Act, let me review the original purposes of CVPIA. They were:

- (a) to protect, restore, and enhance fish, wildlife, and associated habitats in the Central Valley and Trinity River basins of California;
- (b) to address impacts of the Central Valley Project on fish, wildlife and associated habitats;
- (c) to improve the operational flexibility of the Central Valley Project;
- (d) to increase water-related benefits provided by the Central Valley Project to the State of California through expanded use of voluntary water transfers and improved water conservation;
- (e) to contribute to the State of California's interim and long-term efforts to protect the San Francisco Bay/Sacramento-San Joaquin Delta Estuary;
- (f) to achieve a reasonable balance among competing demands for use of Central Valley Project water, including the requirements of fish and wildlife, agricultural, municipal and industrial and power contractors.

Among the provisions of CVPIA that would be amended by H.R. 1837 is section 3406(b)(2). No other provision of CVPIA more clearly demonstrates the differences between Congress' intent when it enacted CVPIA and its actual

implementation. Nor is there another provision of CVPIA which has more dramatically affected water supply for south-of-Delta CVP agricultural water service contractors.

Directing Compliance with the 800,000 Acre-Feet Limit

Section 3406(b)(2) directed the Secretary of the Interior to “dedicate and manage annually eight hundred thousand acre-feet of Central Valley Project yield for the primary purpose of implementing the fish, wildlife, and habitat restoration purposes and measures authorized by this title; to assist the State of California in its efforts to protect the waters of the San Francisco Bay/Sacramento-San Joaquin Delta Estuary; and to help to meet such obligations as may be legally imposed upon the Central Valley Project under State or Federal law following the date of enactment of this title, including but not limited to additional obligations under the Federal Endangered Species Act.” The statute then defined the term “Central Valley Project yield” to mean “the delivery capability of the Central Valley Project during the 1928-1934 drought period after fishery, water quality, and other flow and operational requirements imposed by terms and conditions existing in licenses, permits, and other agreements pertaining to the Central Valley Project under applicable State or Federal law existing at the time of enactment of this title have been met.”

Even though section 3406(b)(2) expresses a limit of 800,000 acre-feet, the statute has been interpreted by the Department of the Interior in a manner that allows it to “dedicate and manage annually” much more CVP water, well in excess of 800,000 acre-feet, for the purposes described in section 3406(b)(2). As an example, in 2010, a year in which south-of-Delta CVP agricultural water service contractors received a 45% allocation, the Bureau of Reclamation used 1,031,200 acre-feet of CVP water for the purposes specified in section 3406(b)(2). In 2009, when south-of-Delta CVP agricultural water service contractors received only a 10% allocation, the Bureau of Reclamation used 844,200 acre-feet of CVP water for the purposes specified in section 3406(b)(2).

The existing interpretation of section 3406(b)(2), which enables Interior not to count water used for (b)(2) purposes toward the 800,000 acre-feet, results from the use of the word “primary” before the phrase “purpose of implementing the fish, wildlife, and habitat restoration purposes and measures authorized by this title; . . .” Based on this wording, Interior interpreted the statute to create a “hierarchy of purposes,” so that it does not count toward the 800,000 acre-feet water used “to protect the waters of the . . . Delta Estuary” or “to help to meet such obligations as may be legally imposed upon the Central Valley Project under State or Federal law following the date of enactment of this title, including but not limited to additional obligations under the Federal Endangered Species Act” if in Interior’s judgment water used for those purposes does not further the “primary purpose.”

Interior even has refused to credit against the 800,000 acre-feet CVP water dedicated and managed to benefit fishery resources and habitat purposes authorized by the CVPIA. For instance in June 2004, Interior dedicated CVP water to Delta outflow and San Joaquin River flow objectives that had been developed in 1994 by the Fish & Wildlife Service and other fishery agencies to benefit species of anadromous fish. However, in 2004 Interior did not count CVP water used to implement these fishery actions because in that year the Fish & Wildlife Service concluded anadromous fish would also benefit from additional flow measures on Clear Creek. If it counted the June actions toward the 800,000 acre-feet, Interior would not have sufficient water for those other measures. Stated succinctly, Interior has interpreted section 3406(b)(2) in a manner that would enable it to dedicate and manage an unlimited quantity of CVP water for the purposes described in that provision of the Act.

H.R. 1837 would amend section 3406(b)(2) to eliminate the unlimited discretion that Interior has created for itself. H.R. 1837 would require that all CVP water used for the purposes articulated by that section of the Act be counted toward the 800,000 acre-feet. H.R. 1837 would accomplish this by deleting the word “primary” and directing that “[a]ll Central Valley Project water used for the purposes specified in this paragraph shall be credited to the quantity of Central Valley Project yield dedicated and managed under this paragraph . . .”

A review of the legislative history of section 3406(b)(2) will demonstrate how this amendment would ensure that Interior’s future implementation of section 3406(b)(2) would be consistent with the intent of Congress when it enacted CVPIA.

The legislation that resulted in the enactment of section 3406(b)(2) was introduced as section 6 of H.R. 5099, on May 7, 1992. As introduced, section 6 of H.R. 5099 directed the Secretary to “assign to 1.5 million acre-feet of project yield the *primary purpose of implementing the fish, wildlife, and habitat restoration purposes and measures authorized by this Act*, except that such quantity of water shall be in addition to the water required to implement b(6) and subparagraph b(15)(A) of this section.” (H.R. 5099, 102nd Cong. (1992) (emphasis added).)

As passed by the House of Representatives, however, this section directed the Secretary to, “[u]pon enactment of this Act, and after implementing the operational changes authorized in subsection (b)(1)(B), make available project water for *the primary purpose of implementing the fish, wildlife, and habitat restoration purposes and measures authorized by this section*, except that such quantity of water shall be in addition to that required to implement subsection b(6) and subparagraph b(15)(A).” (H.R. 5099, 102nd Cong. (1992) (emphasis added).)

It is evident that as introduced and passed by the House, section 6 included the same “primary purpose” language found in section 3406(b)(2) of the enacted statute: however, section 6 did not list the other uses of water that were subsequently added to the section 3406(b)(2). The words “primary purpose,” therefore, could not have been intended by Congress to establish the “hierarchy of purposes” created by Interior’s interpretation of the statute; rather, the words “primary purpose” were intended to connote that the primary use of the water dedicated to the fish, wildlife, and habitat restoration purposes and measures authorized by the Act could be used for other authorized purposes.

Nothing in the legislative history of section 3406(b)(2) suggests a congressional intent that Interior could avoid the 800,000 acre-feet limit by creating a “hierarchy of purposes.” To the contrary, the entire legislative history indicates that Congress intended to create a fixed limit on the quantity of water that could be dedicated and managed under the Act for the purposes articulated in section 3406(b)(2).

During the floor debate in the House of Representatives on the Conference Committee report, Representative Vic Fazio stated the following concerning his understanding of the language that ultimately became law:

The bill clearly allows this so-called upfront water to serve other project purposes. The language which would have barred the conjunctive use of upfront water has been stricken.

The bill also *credits* the upfront water toward other requirements imposed on the project under the *Endangered Species Act and the requirements that we anticipate being imposed on the project under the Bay-Delta process*. The Secretary of the Interior is required, to the greatest degree practicable, to manage the fish and wildlife water in such a manner so as to avoid duplication with these other requirements.

The conference report also establishes a clear limit on the amount of water that is provided for fish and wildlife purposes pursuant to this title – 800,000 acre-feet in normal water years and 600,000 acre-feet in dry years. This is far better than the open ended, unlimited demand that would have been placed on the project pursuant to the earlier versions of Title 34. It provides certainty on this score, which is of significant benefit to both the water users and the environment.

138 Cong. Rec. H11515 (emphasis added).

In describing the Conference Committee report even the author of the legislation, Representative George Miller, used language that infers a cap and that water used for all three purposes described in section 3406(b)(2) would be credited against that cap:

The gentleman from California [Mr. Fazio] opened up a deadlocked conference with a letter suggesting changes that could be made to provide additional benefits in the fish and wildlife area, at the same time providing additional benefits in the agricultural area. As a result of that, they now say that we reserved 800,000-acre feet for fish and wildlife. They know that is the amount of water that the Bay Delta Studies and Endangered Species Act are going to require. It is a question whether we do it or the courts do it.

The gentleman from California [Mr. Fazio] took that from 1 million to 800,000.

138 Cong. Rec. 11495.

Senator Malcolm Wallop, the floor manager of the Conference Committee report, described the 800,000 acre-feet of CVP yield under section (b)(2) as “up-front water designed to deal with the requirements of the Endangered Species Act and Delta requirements while the various mitigation actions are undertaken.” 138 Cong. Rec. S. 17660 (statement of Sen. Wallop during Senate debate of CVPIA). On the floor, Senator Wallop explained the conference report as follows:

What the Senate achieved is elimination of the citizen suit provisions which kept recurring. Also missing, at long last, is the auctioning off to the highest bidder by the Federal Government of 100,000 acre feet of the State of California's water. While the CVP will be required to mitigate the fish and wildlife impacts of the project, those mitigation requirements are defined and contained within the four corners of this legislation. The 1.5 million acre feet of permanently dedicated water, which is where we started this Congress, *is now 800,000 acre feet of temporary, up-front water designed to deal with the requirements of the Endangered Species Act and delta requirements while the various mitigation actions are undertaken.*

138 Cong. Rec. S17660 (emphasis added).

In a letter to President George H. W. Bush, urging him to sign the legislation, Senator Wallop stated:

5) WATER Miller-Bradley required 1.5 million af of water as a permanent commitment for fish and wildlife. *The Conference agreed to 800,000 af, but provided that all requirements of the Endangered Species Act (330,000 af last year) and any Delta requirements would be charged against that 800,000 af.* In addition, the 800,000 af is subject to reductions in dry years as irrigation contracts are cut back, unlike Miller-Bradley. (Emphasis added).

Dedicating and Managing Yield

An additional amendment to section 3406(b)(2) proposed by H.R. 1837 that would give meaning to the words used by Congress when it enacted CVPIA in 1992 would require that Interior account for actions implemented under that provision of the law “by determining how the dedication and management of such water would affect the delivery capability of the Central Valley Project during the 1928 to 1934 drought period after fishery, water quality, and other flow and operational requirements imposed by terms and conditions existing in licenses, permits, and other agreements pertaining to the Central Valley Project under applicable State or Federal law existing on October 30, 1992, have been met.”

At the time Congress enacted section 3406(b)(2) it did not direct that the Secretary “dedicate and manage annually” CVP water; rather it directed that the Secretary “dedicated and manage annually Central Valley Project yield.” Congress then defined “Central Valley Project yield” to mean “the delivery capability of the Central Valley Project during the 1928 to 1934 drought period after fishery, water quality, and other flow and operational requirements imposed by terms and conditions existing in licenses, permits, and other agreements pertaining to the Central Valley Project under applicable State or Federal law existing on October 30, 1992, have been met.”

When Congress enacted CVPIA in 1992, the Bureau of Reclamation understood the significant difference between dedicating and managing “yield” and dedicating and managing water. Indeed, in documents prepared by Reclamation describing its view on how the Secretary should account for actions implemented pursuant to section 3406(b)(2), Reclamation wrote:

Reclamation believes that the use of the term ‘yield’ in section 3406(b)(2) has significant legal implication in defining how the 800,000 AF can be managed. Effectively, the Act limits B2 water to those

[Anadromous Fish Restoration Program] actions that could be undertaken with 800,000 AF of yield during the 1928-1934 period.

Key to proper interpretation of section 3406(b)(2) are the phrases 'delivery capability' and 'during the 1928-34 drought.' Usage of these two phrases means that Congress was dedicating the 800,000 AF from the yield of the project, not annual deliveries. 'Yield' is a term of art used by Reclamation to determine the quantity of water available to meet project demands.

* * *

Using the traditional concept of yield (which was intended by CVPIA), the following process should be used to determine how to manage the 800,000 AF. Reclamation should calculate the degree to which a particular requirement, imposed for the benefit of fish and wildlife, will theoretically reduce yield by comparing project operations with and without the obligation during the seven-year drought period. Additional measures would continue to be implemented, in order of priority, until there is a reduction in yield of 800,000 AF over the 1928-34 period. The specific set of management options that can be met using this water define the maximum obligation that can be dedicated under section 3406(b)(2). The set of management options could be changed, but only prior to the beginning of a new water year, and only after the yield analysis has been performed and shows that impacts would not exceed 800,000 AF of yield during 1928-34.

In deciding how to account for actions implemented under section 3406(b)(2), however, the Secretary of the Interior rejected Reclamation's determination. The Secretary rejected the view of the agency within Interior that had the expertise in operating the CVP. Instead, the Secretary chose to interpret section 3406(b)(2) in a manner that made "yield" synonymous with "water". H.R. 1837 would correct this misinterpretation of the Act and require that the Secretary account for the 800,000 acre-feet in a manner consistent with Reclamation's original interpretation and consistent with the words originally used by Congress.

Water Transfers and Pricing

Other sections of H.R. 1837 that would amend the CVPIA pertain to limitations on contracting and water transfers. Section 103 of the bill would amend section

3404 of the Act to provide for successive 40 year renewals of existing Central Valley Project long-term water contracts. This provision of the legislation would make water service contracts in the CVP consistent with contracts in other Reclamation projects and would facilitate long-term financing of projects to create regional water supplies. Section 104 of H.R. 1837 would, consistent with the original intent of the CVPIA, facilitate and expedite water transfers. H.R. 1837 amends section 3405(a)(2) of CVPIA to provide for an expedited review of all water transfer applications and requires that the Secretary or the pertinent contractor determine within forty-five days whether a transfer proposal is complete or specify what must be added or revised to complete the transfer proposal. This section of H.R. 1837 also provides that the contractor shall retain authority under state law to approve or condition a proposed transfer. This provision is particularly important for contractors such as Westlands that are chronically short of water.

H.R. 1837 also amends CVPIA by eliminating the tiered-pricing provisions of the Act. Under current provisions of the Act, all long-term CVP water service or repayment contracts entered into, renewed, or amended after the October 30, 1992, must provide that all project water made available to the contractor would be under a three-tiered water pricing structure, in which the first rate tier would apply to a quantity of water up to 80 percent of the contract total, the second rate tier would apply to that quantity of water over 80 percent and under 90 percent of the contract total, and the third rate tier shall apply to that quantity of water over 90 percent of the contract total.

The tiered-pricing provision was included in CVPIA to promote water conservation, but it has proved punitive. South-of-Delta CVP agricultural water service contractors have had numerous reasons to implement state-of-the-art conservation measures, absent tiered pricing. Moreover, it is rare that tiered pricing is applicable because it is rare that more than 80 percent of a contractor's contract total is made available by the CVP. The tiered pricing provisions of CVPIA have merely served to impose a greater economic burden on farmers in those rare circumstances when they receive more than an 80 percent supply.

Compliance with the Endangered Species Act

Section 108 of H.R. 1837 provides much needed guidance concerning application of the ESA to operations of the CVP and the SWP. H.R. 1837 provides that the requirements of the ESA shall be fully met for the protection and conservation of the listed species for operations of the CVP and the SWP, if the two projects are operated in a manner consistent with the "Principles for Agreement on the Bay-Delta Standards Between the State of California and the Federal Government" ("Bay-Delta Accord.").

The Bay-Delta Accord was signed on December 15, 1994, by numerous state and federal agencies, including the Department of the Interior and the

Department of Commerce, and it was intended as a state/federal agreement on Bay-Delta environmental protection. The agreement resulted from over 12 months of scientific analysis and multi-interest negotiations. In the end, a broad range of stakeholder groups including environmental organizations, business groups, and urban and agricultural water agencies from throughout California signed or supported the Bay-Delta Accord. The signing of the Bay-Delta Accord was hailed as a landmark event that ushered in a new era in California water management. It signaled a policy shift away from the divisive bickering and lawsuits of the prior two decades and an attempt to form a collaborative effort to craft a viable long-term solution for the Bay-Delta.

The Accord established interim Bay-Delta standards supported by both state and federal governments that were intended to provide the species protection required to comply with the ESA. Indeed, when the Bay-Delta Accord was signed, then Secretary of the Interior Bruce Babbitt proclaimed: "A deal is a deal, and if it turns out there is a need for additional water it will come at the expense of the federal government." Secretary Babbitt added, "[a]ny additional water necessary under any change of circumstance will be bought and paid for by the federal government," and that the Bay-Delta Accord was "a demonstration that the Endangered Species Act is workable and that it can play an important role in finding a balance between economic and environmental issues."

The Bay-Delta Accord did serve as the basis for compliance with the ESA for operations of the CVP and SWP until 2007¹, when the United States District Court for the Eastern District of California ruled, in litigation brought by a number of non-governmental organizations, that biological opinions based on the Bay-Delta Accord were not prepared in compliance with the ESA. H.R. 1837 would restore the promise made by former Secretary Babbitt that "a deal is a deal." It would not, however, prevent additional actions from being taken to protect listed species if it were determined that such actions were required. For instance, nothing in H.R. 1837 prevents the implementation of other conservation programs, including habitat restoration, to help conserve listed species. Moreover, H.R. 1837 does nothing to interfere with the Secretary's authority in CVPIA section 3406(b)(1) to re-operate the CVP for the benefit of listed species so long as the reoperation "does not conflict with fulfillment of the Secretary's remaining contractual obligations to provide Central Valley Project water for other authorized purposes." Nor does H.R. 1837 interfere with the Secretary's authority in section 3406(b)(3) to acquire water for the benefit of listed species.

¹ The 2000 CALFED Record of Decision did provide additional water for the protection of listed species in the Delta through the Environmental Water Account. However, consistent with the Bay-Delta Accord, this water was acquired by the state and federal governments at no cost to the water agencies that receive water from the CVP and SWP.

H.R. 1837 also provides congressional direction to the Secretary of Commerce concerning the treatment of hatchery fish in connection with implementation of the ESA. Generally, the Secretary of Commerce must include hatchery fish in a given population segment of salmon (ESU) being considered for listing if the level of genetic divergence of the hatchery population from the local natural population is no more than what occurs within the population segment overall. In that circumstance, the hatchery fish must be considered in determining whether the ESU should be listed. However, the Secretary may distinguish between protections for hatchery and naturally spawning fish in other ESA contexts. Section 207 eliminates what otherwise might be a false distinction by directing the Secretary to recognize hatchery-spawned species when making any determination under the ESA that relates to anadromous fish in the Sacramento and San Joaquin Rivers and their tributaries.

Oliver Wanger is the United States District Judge to whom numerous ESA cases involving the CVP and SWP have been assigned. He has observed on numerous occasions that it is up to Congress to determine how the ESA should be applied to these two major water projects, which provide water to more than 25 million Californians and millions of acres of highly productive agricultural lands and sustain the economy of the State of California. H.R. 1837 provides the congressional direction that Judge Wanger has been calling for.

Conclusion

I want to express Westlands' appreciation for the efforts of Representatives Nunes, McCarthy, Denham and other members to achieve a reasonable balance among competing uses of water and to provide important congressional direction concerning application of the ESA to operations of the CVP and SWP. I also want to express Westlands' strong support for those elements of H.R. 1837 that would amend the CVPIA and provide that direction concerning application of the ESA. I would welcome any questions from members of the Subcommittee.