

## **SUMMARY**

H.R. 1837 (Nunes) makes changes to the Central Valley Project Improvement Act of 1992 (CVPIA), repeals and replaces the San Joaquin River Restoration Settlement Act, and codify provisions of the 1994 Bay-Delta Accord. The changes proposed in H.R. 1837 re-prioritize water supply and ease restrictions thereto, and roll back some existing fish and wildlife protection and restoration requirements.

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## **SPECIFIC PROVISIONS**

This bill would enact the San Joaquin Valley Water Reliability Act (the Act). Specifically, the bill would do the following:

1. Amend the CVPIA to:
  - a. Declare as a purpose of the CVPIA, to replace the 800,000 acre feet of water annually dedicated to fish and wildlife restoration by 2016 and at the lowest reasonable cost;
  - b. Prioritize native species (salmon, steelhead and sturgeon) and remove striped bass and American shad from the definition of anadromous fish for the purposes of implementation of the CVPIA.
  - c. Delete the existing prohibition against issuance of new water contracts until specific fish and wildlife restoration activities occur, and instead would allow for successive, 40 year renewals of existing long-term water contracts;
  - d. Prohibits the imposition of charges for more than the water actually delivered;
  - e. Ease water transfer requirements and provides for expedited review of such transfers to aid the ability of water districts to transfer water to balance supply;
  - f. Eliminate the tiered pricing scheme for water that is currently imposed by the CVPIA;
  - g. Delete the California Department of Fish and Game from, and to add both the National Marine Fisheries Service and the United States Geological Survey to, the entities that assist the Secretary in determining reasonable stream flow requirements;
  - h. Allow all water flows that have previously been used for fish, wildlife and habitat restoration, to be reused to by agricultural, municipal and industrial to meet contractual obligations of the Secretary;
  - i. In years where forecasted water deliveries on March 15 are below 75 percent of the contractual amount, reduce the amount of water available for fish, wildlife and habitat restoration by 25 percent;
  - j. Declare that undertaking fish, wildlife and restoration actions in accordance with the Act constitutes compliance by the Secretary, of mitigation, protection, restoration and enhancement requirements of the Central Valley Project Authorization Act;

- k. Reduce the amount of funds available from the Central Valley Project Restoration Fund (Restoration Fund) for habitat restoration, improvement and acquisition from 67 percent to a maximum of 50 percent;
  - l. Prohibit the Secretary from requiring donations to the Restoration Fund as condition of storage or conveyance of non-CVP water or water intended solely for groundwater recharge;
  - m. Create the Restoration Fund Advisory Board (consisting of four CVP agricultural users, three CVP municipal / industrial users, three CVP power contractors, and two at the discretion of the Secretary) to make recommendations to the Secretary regarding priorities for spending from the Restoration Fund;
  - n. Expand the authority of the Secretary to enter into conveyance or storage contracts with private entities;
  - o. Suspend the existing requirement that 800,000 acre feet of water be available for fish, wildlife and habitat restoration under the CVPIA if the Secretary fails to implement a plan to identify an amount of water available for use in meeting CVP contract requirements that is equal to the amount of water dedicated to fish and wildlife;
  - p. Declare that all requirements of the Endangered Species Act (ESA) shall be deemed to be met for conservation of the species listed in the ESA, if the CVP and the California State Water Project (SWP) operate their facilities in consistent with the Principles for Agreement of the Bay-Delta Accord;
  - q. Direct the Secretaries of the Interior and Commerce to issue biological opinions for operations of the CVP and SWP that are no more restrictive than the Bay-Delta Accord;
  - r. Prohibit the State of California or entities or local governments therein from adopting or enforcing protections for species listed under the ESA that are more restrictive than those in the Bay-Delta Accord;
  - s. Void any California law that restricts the taking of nonnative species that prey upon native species that are found in the Sacramento-San Joaquin Rivers Delta;
  - t. Ensure that the Act does not affect any California law to protect area of origin or pre-1914 water rights; and
  - u. Authorize the Secretary to provide currently-available surface storage funding to local joint powers authorities.
2. Repeal the San Joaquin River Restoration Settlement Act, terminating salmon restoration activities on the San Joaquin River, and instead establishes the San Joaquin River Habitat Restoration program. Specific provisions include:
- a. Preemption of State law that is more restrictive than what is added by H.R. 1837;
  - b. Repeal of the San Joaquin River Settlement and prohibition of the Secretary to implement any action of the settlement;

- c. Declaration that compliance with the San Joaquin River Habitat program activities constitute compliance with (1) CVPIA requirements to develop a plan to address fish and wildlife issues, and (2) California law that requires minimum flows past dams for fisheries;
  - d. Establishment of a minimum flow rate of 50 cubic feet per second below Friant Dam;
  - e. Direction to the Secretary to, after October 2012, limit restoration flows in years when unimpaired runoff at Friant Dam is less than 400,000 acre feet;
  - f. Establishment of the San Joaquin River Fishery Restoration Fund to receive funds previously deposited into the San Joaquin River Restoration Fund; and
  - g. Prohibition against the Secretary distinguishing naturally-spawned fish from hatchery-spawned fish in making determinations relating to ESA protections for anadromous species.
3. Allow the Secretary to convert specific long-term CVP contracts under to Reclamation Project Act of 1939 to contracts under the same Act with different terms and conditions. Specifically, it:
    - a. Authorizes contractors to forward pay their capital construction cost;
    - b. Allows the conversion from a “water service contract” to a “repayment contract”; and
    - c. Waives “full cost pricing” and “acreage limitation” for participating contractors.
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### **SUMMARY OF AUTHOR’S PURPOSE**

According to the author, environmental statutes and related litigation that has been aimed at protecting species and Delta water quality have led to serious water conflicts in California. The most vocal and recent controversy has involved litigation and federal plans on protecting Delta smelt. Additionally, the CVPIA was enacted while California was experiencing the effects of a long-term drought. Many of the provisions in the Act were aimed at conserving water, increasing the use of water transfers, and providing additional water for fish and wildlife purposes. Environmental organizations, some recreationalists, and some urban water users viewed the changes as environmentally sound while many farmers viewed many of the CVPIA provisions as unduly restrictive, punitive, and costly.

The Act is intended to promote water policies that facilitate the delivery of the California’s abundant supply of water, as well as support the implementation of an economically feasible and environmentally sustainable river restoration on the San Joaquin River. The bill is described as “a comprehensive regional solution to government-imposed water shortages.”

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## **SUMMARY OF STATE AND FEDERAL AGENCY COMMENTS**

### **California Secretary for Natural Resources, John Laird:**

- H.R. 1837 would “enshrine into law” the 1994 Bay-Delta Accord that created the CalFed process. However, many things have changed since 1994. Ultimately, it is better understood now that the Delta is unsustainable in its current form – a view that was not universally shared in 1994.
- H.R. 1837 would overturn a century old precedent in water law: Congress should not preempt the right of states to manage their own water under state water rights law. If this bill passes, no state will be safe from congressional interference in their water rights laws.
- H.R. 1837 would overturn the San Joaquin River Restoration Act, which has resolved an extremely divisive controversy in a way that was supported by all sides. By overturning the Act, this bill would almost certainly send that controversy back to court.
- At this point, the Bay Delta Conservation Plan (BDCP) is the best hope water users have of constructing a facility to transport water to the state and federal water pumps. H.R. 1837 would change assumptions being used by BDCP, and would result in delays that would prevent efforts to address water supply reliability in a timely manner.

### **Secretary of the Interior, Ken Salazar:**

- H.R. 1837 would hinder, if not spell the end of, the effort to provide a secure water supply and restore the Bay-Delta environment doing so the bill would destroy the cooperative and productive partnership that has developed between California and federal agencies over the course of several federal and state administrations.
- H.R. 1837 would repeal the San Joaquin River Restoration Settlement Act, which would not only undo the valuable restoration work committed to by all the settling parties, but would create uncertainty for stakeholders and pave the way for years of court battles.
- H.R. 1837 would undermine State water laws, dismantling bipartisan and broad-based planning processes, and discarding a productive settlement in favor of continued contentiousness and litigation.

### **U.S. Bureau of Reclamation Commissioner, Michael Connor:**

H.R. 1837 does not represent a balanced approach, the U.S. Department of the Interior opposes the bill for the specific reasons below:

- Many of the provisions of H.R. 1837 will hinder restoration of the Bay-Delta, inappropriately preempt California’s efforts to develop a comprehensive set of solutions to its water and environmental problems, and severely limit the use of science in evaluating and responding to the environmental decline of the Delta.
- H.R. 1837 would substantially set back, if not destroy, the cooperative relationship that has been developed between California and federal agencies.
- Several aspects to H.R. 1837 would be problematic to implement, conflict with existing legal obligations, law and/or policy, and create significant uncertainty for Reclamation and the water community.
- The provisions of H.R. 1837 are in direct conflict with the collaborative BDCP effort that has been under way since 2006 to develop a long-term plan to achieve the co-equal goals of restoring the ecological health of the Bay-Delta and providing reliable water supplies.

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## **BACKGROUND – STATE AND FEDERAL PROGRAMS, LAWS**

### **California Water Systems**

California's water storage and delivery system is a combination of two projects called the Central Valley Project (CVP), authorized by the government in 1935 and the State Water Project (SWP) authorized by the State in 1960. Water from both the CVP and SWP is delivered to central and southern portions of the State. The water delivered to areas south of the Sacramento – San Joaquin River Delta is conveyed through two pumping facilities near Tracy, California, one operated by the U.S. Bureau of Reclamation and one operated by the California Department of Water Resources.

### **The Central Valley Project Improvement Act of 1992**

[Public Law 102-575 ([http://www.usbr.gov/mp/cvpia/title\\_34/public\\_law\\_complete.html](http://www.usbr.gov/mp/cvpia/title_34/public_law_complete.html))]

The CVPIA was enacted in 1992. Its purposes are to:

- Protect, restore, and enhance fish, wildlife, and associated habitats in the Central Valley and Trinity River basins of California;
- Address impacts of the CVP on fish, wildlife and associated habitats, and improve the operational flexibility of the CVP;
- Increase water-related benefits provided by the CVP to the State of California through expanded use of voluntary water transfers and improved water conservation;
- Contribute to the State of California's interim and long-term efforts to protect the San Francisco Bay/Sacramento-San Joaquin Delta Estuary; and
- Achieve a reasonable balance among competing demands for use of CVP water, including the requirements of fish and wildlife, agricultural, municipal and industrial and power contractors.

### **The Bay-Delta Accord of 1994**

In 1994, the state and federal agreement on Bay-Delta environmental protection (Bay-Delta Accord) was signed. 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 Accord. In December of 1997, state and federal representatives agreed to extend the Accord an additional year in order to allow CalFed sufficient time to complete its work toward a comprehensive solution for the estuary.

The Accord established interim Bay-Delta standards supported by both state and federal governments and allowed the federal government to return primary control over Bay-Delta water management to the state. It committed water users to provide money and water to improve the Bay-Delta ecosystem, and in return guaranteed a three-year reprieve from additional species protection requirements.

The agreement also gave life to a long-term planning process aimed at finding comprehensive solutions to environmental and water supply problems in the Bay-Delta. That process, known as the CALFED Bay-Delta Program, is a collaborative, state/federal effort that will ultimately identify a package of projects and programs needed to restore the Bay-Delta's ecosystem and improve water supply reliability and water quality.

## **The San Joaquin River Restoration Program**

[Title X of Public Law 111-11 (<http://www.gpo.gov/fdsys/pkg/PLAW-111publ11/pdf/PLAW-111publ11.pdf>)]

The SJRRP is a direct result of a Settlement reached in September 2006 on an 18-year lawsuit to provide sufficient fish habitat in the San Joaquin River below Friant Dam near Fresno, California, by the U.S. Departments of the Interior and Commerce, the Natural Resources Defense Council, and the Friant Water Users Authority. The Settlement received Federal court approval in October 2006. Federal legislation was re-introduced in 2007 to authorize Federal agencies to implement the Settlement.

The Settlement is based on two goals:

**Restoration:** To restore and maintain fish populations in "good condition" in the main stem of the San Joaquin River below Friant Dam to the confluence of the Merced River, including naturally reproducing and self-sustaining populations of salmon and other fish.

**Water Management:** To reduce or avoid adverse water supply impacts to all of the Friant Division long-term contractors that may result from the Interim Flows and Restoration Flows provided for in the Settlement.

## **SUMMARY**

H.R. 1251 (Costa) deems the Endangered Species Act of 1973 (ESA) requirements relating to Central Valley Project (CVP) and the California State Water Project (SWP) operations to be satisfied if they are implementing specific actions and other specific mandates are carried out with regard to river flows. H.R. 1251 also requires specific programs and actions that are intended to protect species, including the establishment of a hatchery, implementation of a habitat program, and installation of fish barriers. Finally, the bill preempts any state law that restricts the operation of the Projects in a manner that is more restrictive than this Act.

## **SPECIFIC PROVISIONS**

The More Water for Our Valley Act would:

1. Declare requirements of the ESA relating to operations of the CVP and the SWP to be satisfied with regard to the species and their critical habitat covered by the biological opinions for the operations of such Projects issued by the United States Fish and Wildlife Service and the National Marine Fisheries Service if:
  - The alternatives described in that portion of the biological opinion entitled “Reasonable and Prudent Alternatives” are implemented; and
  - The Secretary of the Interior and the Secretary of Commerce carry out flow and pumping operation mandates established by this Act with respect to reverse flow in the Old and Middle Rivers between December 1 and June 30, export rates between April 1 and May 31 are not reduced pursuant to the biological opinions, and monthly average intrusion of salinity between September 1 and November 30 does not move further east than 74km from the Golden Gate.
2. Authorize the Secretary of the Interior to modify such mandates upon recommendations of the National Research Council Committee on sustainable Water and Environmental Management in the California Bay-Delta if such modifications would:
  - Provide greater benefits to the species covered by such biological opinions; and
  - Not reduce the water delivery capability of the CVP or the SWP more than their delivery capability allowed under such mandates.
3. Require the Secretaries to:
  - Establish a fish hatchery program or refuge to preserve and restore the delta smelt in collaboration with the governor of California;
  - Implement a habitat program under which each Secretary shall identify, prioritize, and implement key ecosystem restoration and fish passage projects in the ecosystem of, and on tributaries to, the California Bay-Delta to help ensure the viability of at-risk species and threatened or endangered species; and
  - Install the Head of Old River barrier during the April-May pulse flow.
4. Preempt any state law that authorizes the imposition of restrictions on the operation of the Projects in a manner that is more restrictive than this Act.
5. Terminate this Act on March 1, 2015.

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## **SUMMARY OF AUTHOR'S PURPOSE**

According to the author, the purpose of this legislation is to allow needed flexibility for California's water policy, and asserts that passing this commonsense legislation will bring over 500,000 acre feet of water to Valley farmers and farm communities. This legislation would, for four years, provide (1) congressional direction with regard to what constitutes compliance with the Endangered Species Act, (2) restore operational flexibility for California water projects, and (3) provide reasonable protection to threatened species.

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### **Endangered Species Act of 1973**

(<http://www.nmfs.noaa.gov/pr/pdfs/laws/esa.pdf>)

Through federal action and by encouraging the establishment of state programs, the 1973 ESA provided for the conservation of ecosystems upon which threatened and endangered species of fish, wildlife, and plants depend. Specifically, the ESA:

- Authorizes the determination and listing of species as endangered and threatened;
- Prohibits unauthorized taking, possession, sale, and transport of endangered species;
- Provides authority to acquire land for the conservation of listed species, using land and water conservation funds;
- Authorizes establishment of cooperative agreements and grants-in-aid to states that establish and maintain active and adequate programs for endangered and threatened wildlife and plants;
- Authorizes the assessment of civil and criminal penalties for violating the Act or regulations; and
- Authorizes the payment of rewards to anyone furnishing information leading to arrest and conviction for any violation of the Act or any regulation issued thereunder.

### **Biological Opinions for operations of the CVP and the SWP**

In 2008 and 2009 the United States Fish and Wildlife Service and the National Marine Fisheries Service respectively issued biological opinions relating to impacts of operations of the CVP and SWP on specific species. The biological opinions identified reasonable and prudent alternatives that are expected to avoid the likelihood of jeopardy to the species. Lawsuits have been filed against both biological opinions, those suits were consolidated in 2009, and final rulings have not been issued.

## **SUMMARY**

Energy and Water Development and Related Agencies Appropriations Act would make appropriations for energy and water development and related agencies for FY2012 totaling approximately \$30.6 billion.

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## **COMMENTS / BACKGROUND**

This bill includes funding for both energy and water development projects. The Department of Water Resources is primarily interested in funding for the 23 California water-related projects proposed for funding in the President's Budget. The FY 2011 appropriations bill did not include line-item appropriations for projects, leaving that at the discretion of the U.S. Army Corps of Engineers (Corps).

The FY 2012 appropriations bill does include project-specific appropriations, but also leaves blocks of funding available to the Corps for Investigations and Construction totaling approximately \$1.7 billion. At this point it is believed that 22 of the 23 California projects proposed by President Obama's Budget are included in the House's appropriations bill – the exception being \$8 million proposed for the Hamilton City Flood Damage Reduction & ecosystem. Restoration Study. This project is a "new start," most of which have been rejected by the House bill.

Final mark-up of the bill should be available within a matter of days and is being reviewed by DWR legal staff.

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## **NOTED AMENDMENT**

An amendment was inserted into the appropriations bill to rescind the remaining balance of the San Joaquin River Restoration Fund, for use to implement the San Joaquin River Settlement Agreement. Here is the specific amendment:

SEC. 203. Of the funds deposited in the San Joaquin River Restoration Fund in accordance with subparagraphs (A), (B), and (C) of section 10009(c)(1) of Public Law 111–11, all unobligated balances remaining from prior fiscal years are hereby permanently rescinded.

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