



Legislative Bulletin February 5, 2013

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H.R. 3964 - San Joaquin Valley Water Reliability Act and Amendments

H.R. 3964 - San Joaquin Valley Water Reliability Act (Valadao, R-CA)

Order of Business: H.R. 3964 is expected to come to the House floor on Wednesday, February 5, 2014, under a structured rule, H.Res. 472. This is a combined rule for both H.R. 3964 and H.R. 2954. The rule can be [viewed here](#).

With respect to H.R. 3964, the rule provides for its consideration in the Committee of the Whole House on the state of the Union. The rule waives all points of order against the bill, and provides for one hour of equally divided general debate. After general debate, the bill shall be considered for amendment under the five-minute rule. The rule makes in order those amendments that are summarized below in this document. The rule waives all points of order against the amendments. After amendment debate, the Committee shall rise and report the bill to the House. At that time, any Member may demand a separate vote in the House on any amendment that was adopted in the Committee of the Whole. The previous question shall be considered as ordered, and the rule provides for one motion to recommit with or without instructions.

Summary: H.R. 3964 seeks to correct a man-made drought in California that has been created by environmental lawsuits resulting from the Endangered Species Act.

The legislation amends the purposes of the Central Valley Project Improvement Act (CVPIA) to ensure that water dedicated to fish and wildlife is replaced and available to Central Valley Project water contractors by December 31, 2018.¹

H.R. 3964 also amends the CVPIA definition of “anadromous fish” to include native stock of salmon and sturgeon, and exclude non-native American shad and striped bass.² The legislation also directs the Secretary of the Interior (when requested by the contractor) to renew any long-term repayment or water contract from the Central Valley Project (CVP) on a 40 year term. The current term is reported to be 25 years for these

¹ The Central Valley Project Improvement Act (CVPIA) was included as Title XXXIV of H.R. 429 in the 102nd Congress. This became law on October 30, 1992.

² An “anadromous fish” is one that spends most of its life at sea and travels to fresh water to spawn.

contracts. Additionally, the Secretary is only allowed to charge for water that is actually delivered by the CVP.

The legislation further amends CVPIA to state that water transfers and arrangements for Central Valley Project water, that could have been conducted prior to the enactment of CVPIA, may occur and are not subject to CVPIA.

Restoration Fund – H.R. 1837 prohibits the Secretary from requiring donations to the CVP Restoration Fund as a condition to contract for storage or conveyance of non-CVP water. According to the Bureau of Reclamation, this fund was established with the goal of providing funding from project beneficiaries for habitat restoration, improvement and acquisition, and other fish and wildlife restoration activities in the CVP area.³ The Secretary is required to annually submit a plan to Congress for the expenditure of all funds deposited in the Restoration Fund during the preceding fiscal year.

Fee Cap – Beginning on October 1, 2015, the legislation sets a fee cap of \$4 per megawatt-hour for CVP power that is sold to power contractors.

Advisory Board – H.R. 1837 establishes a Restoration Fund Advisory Board composed of 12 members. The members will be selected by the Secretary for four-year terms. The Board shall make recommendations to the Secretary regarding priorities and spending levels for programs authorized by CVPIA. By December 31, 2015, and annually thereafter, the board will transmit their recommendations to the Secretary and to Congress.

The legislation authorizes the Secretary to enter into water storage/carriage/delivery contracts with any federal agency, California water user or water agency, state agency, or private organization. The Secretary is prohibited from charging rates that exceed the amount required to recover the reasonable costs incurred.

The legislation directs the Secretary to implement a plan, by September 30, 2018, to replace the 800,000 acre-foot of water that is dedicated to fish and wildlife.

Bay-Delta Accord – The legislation mandates that the CVP and the State Water Project (SWP) be operated in a manner that is consistent with the “Principles for Agreement on the Bay-Delta Standards Between the State of California and the Federal Government.” This agreement is commonly known as the Bay-Delta Accord.⁴ According to the legislation, if the Central Valley Project and the State Water Project are operated in a manner that’s consistent with that Bay-Delta Accord, then they will be considered to have complied with all requirements of the Endangered Species Act. The legislation prohibits

³ [http://www.usbr.gov/budget/2007/CVPRF%20\(Restoration%20fund\)/CVPRF_07.pdf](http://www.usbr.gov/budget/2007/CVPRF%20(Restoration%20fund)/CVPRF_07.pdf)

⁴ The Principles for Agreement on the Bay-Delta Standards Between the State of California and the Federal Government was signed on December 15, 1994 by the Secretary of the California Resources Agency, the U.S. Secretary of the Interior, the California Secretary for the Environmental Protection Agency, the U.S. Secretary of the Interior, and the Administrator for the Environmental Protection Agency. http://www.calwater.ca.gov/Admin_Record/G-000143.pdf

any federal department and the state of California from imposing on, or restricting, any valid water right.

The legislation also removes the “take limit” on certain non-native fish that prey upon native fish species that occupy the Sacramento and San Joaquin Rivers or the Sacramento-San Joaquin Rivers Delta. These non-native fish are preying on the native-fish (like the endangered delta smelt), so by removing the take limit this legislation allows for more non-native fish to be caught.

H.R. 1837 prohibits the Secretary’s of Interior and Commerce from distinguishing between natural-spawned and hatchery-spawned of a species when making determinations under the Endangered Species Act, relating to any anadromous fish present in the Sacramento and San Joaquin Rivers.

The legislation expands the authorized service area of the Central Valley Project to include the Kettleman City Community Services District. The Secretary is authorized to enter into a long-term contract in the District for the delivery of up to 900 acre-feet of CVP water for municipal and industrial use. In the event of hydrologic circumstances that cause reductions in water flow, the Secretary may reduce deliveries by up to 25%. Any infrastructure related-costs that are needed to include the District into the CVP coverage area will not be the responsibility for the federal government.

The legislation states that the filing of a Notice of Determination or a Notice of Exemption that was prepared pursuant to the California Environmental Quality Act will be considered to met the requirements of the National Environmental Policy Act.

Warren Act Contracts: The legislation directs the Secretary to offer the Oakdale Irrigation District and the South San Joaquin Irrigation District a contact enabling them to impound and store up to 200,000 acre-feet of their Stanislaus River water rights in the New Melones Reservoir in accordance with the Warren Act⁵. Additionally, the Secretary shall develop and offer the Calaveras County Water District a contact enabling them to impound and store up to 100,000 acre-feet of their water rights in the New Melones Reservoir in accordance with the Warren Act. These contract is subject to the determination that it will not result in any redirected adverse water supply or fiscal impacts to any Central Valley Project contractor. These contacts must be at least for 10 years and include other terms that the districts must follow.

Pilot Program to Protect Native Anadromous Fish in the Stanislaus River: The legislation directs the Bureau of Reclamation to jointly develop and conduct a pilot non-native predator fish removal program to remove non-native striped bass, smallmouth bass, largemouth bass, black bass, and other non-native predator fish from the Stanislaus River. This program is authorized for seven years and shall be completely funded by the Oakdale Irrigation District and the South San Joaquin Irrigation District. Those districts are also responsible for the management of the pilot program, but the Bureau of

⁵ The Warren Act became law on February 21, 1911, and refers to the storage and transportation of water for irrigation districts.

Reclamation has the right to assign an employee to be present for all activities performed in the field. Data received from the pilot program will be posted on the Bureau's website on a monthly basis. By no later than June 30 of the year after the completion of the program, the Commissioner and districts shall jointly publish a peer reviewed report that discusses their findings and conclusions, synthesizes the data collected and makes recommendations for further study and action.

By no later than 180 days after the Districts file an application with the Secretary of Interior or the Secretary of Commerce, the Secretary shall issue all necessary scientific research and species enhancement permits under the Endangered Species Act. Any application not approved within 180 days shall be deemed to be approved. The legislation states that the National Environmental Policy Act (NEPA) shall not apply. The legislation also preempts any restriction under California law that limits the catch, take, or harvest of any non-native or introduced aquatic or terrestrial species that preys on anadromous fish in the Stanislaus River. These provisions shall expire after seven years after the implementation of the pilot program.

San Joaquin River Restoration: The legislation repeals the San Joaquin River Settlement, and repeals all references relating the implementation of the Settlement.⁶ The legislation makes technical corrections to P.L. 111-11.⁷ The intent behind these changes is to change the purpose of P.L. 111-11 to end the settlement and replace it with a warm water fishery restoration. The intent is to save water for local farmers while creating a viable fishery. P.L. 111-11 is further amended by removing language that implements the Settlement, and allows the Secretary to use the power of eminent domain.

Beginning on March 1, 2015, the Secretary is directed to modify Friant Dam operations to release "Restoration Flows," except in any Critical Water Year. These flows are to improve the fishery in the San Joaquin River below Friant Dam and upstream of Gravelly Ford.

Repayments of Construction Costs: The legislation directs the Secretary, at the request of a water contractor, to convert long-term contracts into shorter-term repayment contracts. These shorter term contracts shall allow for the expedited repayment of certain construction costs that the contractors owe to the federal government from the allocated construction of Central Valley Project.

Bay-Delta Watershed Water Rights Preservation and Protection: The legislation directs the Secretary of the Interior to adhere to state water rights law governing water rights priorities by honoring water rights senior to those belonging to the Central Valley Project. The legislation also directs the Secretary to adhere to and honor water rights that exist under California Water Code.

⁶ This settlement was filed in federal court of the Eastern District of California. The Sierra Club, and others, initiated the lawsuit in order to maintain certain salmon populations. [Citizens Against Government Waste](#) called it "Extreme Makeover: San Joaquin River ... Watch your wallets."

⁷ The Omnibus Public Land Management Act of 2009 passed the House on February 25, 2009, by a [roll-call vote of 245-178](#).

Precedent: Section 501 of the bill declares that nothing in this legislation shall serve as precedent for any other state. The legislation states that the operations between the Central Valley Project and the State Water Project require assertion of Federal supremacy to protect existing water rights throughout the system and these circumstances are unique to California.

Recent Proclamation by Governor Brown: The legislation states that it does not in any way affect the Proclamation of State Emergency and associated Executive orders issued by Governor Edmund G. Brown, Jr., on January 17, 2014.

State Preemption: Some opponents may argue that the bill preempts California water law. However, there is an argument that it does not. Since 1986, at the request of the state of California and by federal law, the Central Valley Project and the State Water Project are required to operate in coordination with one another. At that time, the state of California relinquished its rights to water produced by the federal project.

California requested and initiated this Accord. Therefore, state compliance with the accord is not state preemption, the state is simply being held to a prior agreement.

Additional Information: The Central Valley Project (CVP) was authorized by the federal government in 1935. The federal government stepped in during the Great Depression to finance and construct the CVP, which is currently managed by the Bureau of Reclamation under the Department of the Interior. The CVP is a series of canals and reservoirs that transfer water from the north to the south. The state of California manages the State Water Project. This is another series of canals and reservoirs. Since 1986, at the request of California, the two projects work together to transfer from the north to the south.

Environmentalists have repeatedly sued, under the Endangered Species Act (ESA), to save a 3 inch fish, known as the Delta smelt which is listed as endangered.

Environmentalists claim that the CVP and SWP water pumps in the Sacramento-San Joaquin Delta Rivers are the main cause for the smelt decline. However, others blame the smelt decline on the presence of non-native fish species that prey on the smelt, as well as chemical discharges into the rivers. According to the sponsor, “hundreds of millions of taxpayer and ratepayer dollars have been spent to investigate the specific causes of smelt declines and to protect the species from the operation of the pumps.”

In order to save the fish, environmentalists have been successful at diverting water resources that would have otherwise gone south. These resources have been pumped into the Pacific Ocean and this has caused a devastating man-made drought. Much more background information can be found using the links below.

Amendments Made In Order:

Napolitano (D-CA): The amendment requires that water delivery contracts include an interest charge. This interest charge shall be on the basis of average market yields. The text of the amendment can be [viewed here](#).

Matsui (D-CA): The underlying bill requires that the Central Valley Project provide an additional 800,000 acre-feet to water contactors by September 30, 2018. This amendment removes the force of that language. The amendment sponsor may claim that this additional 800,000 acre-feet to water contactors may result in loss of life to fish. This highlights the center of the debate within the legislation, i.e. should water resources be used for fish or for people. The text of the amendment can be [viewed here](#).

Bera (D-CA), McNerney (D-CA), Thompson (D-CA), Matsui (D-CA), Garamendi (D-CA), Swalwell (D-CA): The amendment states that this legislation shall have no harmful effect on the quality, quantity, or safety of drinking water supplies for residents of the five Delta Counties (Contra Costa, Sacramento, San Joaquin, Solano, and Yolo Counties). The text of the amendment can be [viewed here](#).

Capps (D-CA): Within one year of enactment, the amendment requires the Comptroller General to submit a report to Congress on the resiliency and adaptability of all Bureau of Reclamation projects and facilities in California to any ongoing or forecasted changes to the quality, quantity, or reliability of water resources. The amendment requires this study to include recommendations on how to strengthen the resiliency and adaptability of the Bureau's projects and facilities in California. The text of the amendment can be [viewed here](#).

DeFazio (D-OR), Huffman (D-CA), DelBene (D-WA), Speier (D-CA), Thompson (D-CA): The amendment states that the recent Proclamation of State Emergency and associated Executive Order issued by Governor Edmund G. Brown Jr, on January 17, 2014, be considered a request by the Governor for purposes of section 312(a) of the Magnuson-Stevens Fishery Conservation and Management Act.

This would have the effect of enacting section 312 of the Magnuson-Stevens Act, which authorizes the Secretary to make sums available to be used by the state to restore the fishery. The text of the amendment can be [viewed here](#).

Huffman (D-CA): The amendment states that the act shall not interfere with the State of California's Delta and water management reform and funding bills for 2009. This includes state legislation regarding the state's water bond initiative, a statewide groundwater monitoring program or a statewide groundwater conservation program. The text of the amendment can be [viewed here](#).

The sponsor may claim that the bill preempts state law. However, since 1986, at the request of the state of California and by federal law, the Central Valley Project and the State Water Project are required to operate in coordination with one another. At that

time, the state of California relinquished its rights to water produced by the federal project. California requested and initiated this Accord. Therefore, state compliance with the accord is not state preemption, the state is simply being held to a prior agreement.

McNerney (D-CA): The amendment states that the legislation shall not take effect until the Secretary of Interior determines that the legislation shall not have a harmful effect on water quality or water availability for agricultural producers in the five Delta Counties (Contra Costa, Sacramento, San Joaquin, Solano, and Yolo Counties). The text of the amendment can be [viewed here](#).

Peters (D-CA): The amendment states that the legislation shall not adversely affect any community's water supply or water budget for future years, taking into account predicted dry years. The text of the amendment can be [viewed here](#).

Similar Legislation: Similar legislation, H.R. 1837, passed the House of Representatives on February 29, 2012, by a [roll call vote of 246-175-1](#). The RSC Legislative Bulletin for H.R. 1837 can be [viewed here](#).

Outside Groups: The following national organizations have expressed support for passage of H.R. 3964:

- Americans for Limited Government
- National Taxpayers Union

Committee Action: H.R. 3964 was introduced on January 29, 2014, and was referred to the House Natural Resources Committee. The committee took no action on the bill.

Administration Position: The Administration strongly opposes H.R. 3964. The Statement of Administration Policy can be [viewed here](#).

Cost to Taxpayers: A CBO score for H.R. 3964 is unavailable. However, a CBO score for H.R. 1837 from the 112th Congress estimated H.R. 1837 would increase offsetting receipts (a credit against direct spending) by \$254 million and decrease revenues by \$33 million over the 2013-2022 period. CBO's report can be [viewed here](#).

Does the Bill Expand the Size and Scope of the Federal Government?: H.R. 3964 makes several amendments to existing federal law in order to streamline and expedite the flow of water from Northern California to areas in the south. This is arguably a reduction in the size and scope of the federal government.

Section 106 establishes a Restoration Fund Advisory Board, detailed above. This provision, taken alone, is arguably an increase in the size and scope of the federal government. The legislation does not authorize for appropriation any additional spending for this Advisory Board.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: A House Report detailing new state-government, local-government, or private-sector mandates is unavailable. However, according to [House Report 112-403](#), similar legislation, H.R. 1837, “would impose intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) by preempting state laws and requiring or prohibiting some activities related to water management and wildlife preservation.” The House Report also states: “The legislation contains no private-sector mandates.”

Does the Bill Comply with House Rules Regarding Earmarks/Limited Tax Benefits/Limited Tariff Benefits?: The legislation contains no earmarks, limited tax benefits, or limited tariff benefits.

Constitutional Authority: According the sponsor, “Congress has the power to enact this legislation pursuant to the following: Clauses 1, 3, and 18 of section 8 and clause 7 of section 9 of article I, of the Constitution of the United States.” Rep. Valadao’s statement can be [viewed here](#).

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