

CVP Cost Allocation Study Consideration Paper: Allocation of Mitigation Costs

Date

May 15, 2015

Purpose of Paper

This paper provides a historical context of the allocation and recovery of mitigation costs associated with operation of the Central Valley Project (CVP) and makes recommendations for allocating such costs in the Final CVP Cost Allocation Study (CAS).

Background

Mitigation is broadly defined as project-related activities to avoid, minimize or compensate for the adverse effects of project construction and operations on affected resources (i.e., environmental, archeological, or cultural). Mitigation costs may include, but are not limited to, costs necessary to comply with documentation and coordination requirements of the National Environmental Policy Act (42 U.S.C. 4321 et seq.); Endangered Species Act (ESA) (16 U.S.C. 1531 et seq.); Clean Water Act (33 U.S.C. 1251 et seq.); Clean Air Act (42 U.S.C. 7401 et seq.); National Historic Preservation Act (16 U.S.C. 470 et seq.); Native American Graves Protection and Repatriation Act (25 U.S.C. 3001 et seq.); as well as Tribal trust and consultation responsibilities and other applicable resources management legislation, regulations, or executive orders.

An example of environmental mitigation is the construction of a fish hatchery located below a dam that blocks fish passage to spawning areas upstream of the dam. Mitigation can also take the form of changes in project operations, such as increasing river flows, to minimize adverse impacts on fisheries. More generally, within the CVP, mitigation costs are commonly associated with four types of activities: (1) restoration projects and programs identified and authorized by the Central Valley Project Improvement Act (CVPIA), which includes water deliveries to Central Valley wildlife refuges; (2) other mitigation programs and/or facilities that are not authorized under the CVPIA; (3) reservoir releases to augment fish flows mandated by the reasonable and prudent alternatives in the

biological opinions prepared by the U.S. Fish and Wildlife Service and the National Oceanic and Atmospheric Administration; and (4) reservoir releases to meet Delta water quality standards established by the California State Water Resources Control Board. Repayment of mitigation costs are generally governed by the Fish and Wildlife Coordination Act, as amended. However, in certain circumstances, repayment of these costs is mandated by other specific legislation, either directly or through interpretation.

The current practice in the CVP is to allocate mitigation costs as follows: first, in accordance with specific legislative direction, where provided; second, directly to the authorized reimbursable purposes of the project (i.e., water and power), through the rate setting process. In the absence of any clear legislative guidance, the Mid-Pacific (MP) region has generally allocated mitigation costs to the water supply and power purposes under the theory that there is no clear directive requiring such costs to be non-reimbursable and allocated to the taxpayer.

Congress has provided specific legislative direction for allocating and assigning repayment of costs associated with the Safety of Dams (SOD) program, as well as many costs of the Central Valley Project Improvement Act (CVPIA). In P.L. 98-404, The Reclamation Safety of Dams Act Amendments of 1984 dated August 28, 1984, Congress directed that 15 percent of SOD program costs shall be allocated to the authorized purposes of the structure. Current Reclamation policy and practice has interpreted the language of P.L. 98-404 to mean that Congress intended 15 percent of SOD program costs to be repaid by water and power users.

A similar case can be made regarding language in the CVPIA. Where Congress clearly specified a certain percentage of CVPIA costs to be a non-reimbursable Federal expenditure, Reclamation currently treats that amount as non-reimbursable. However, where Congress did not clearly state a percentage of costs to be non-reimbursable, they are treated as reimbursable costs to be repaid by water and power users.

Review of Reclamation policy has indicated that there is additional guidance on the allocation of mitigation costs that differs from current practice. Reclamation Manual (RM) Policy, Allocation of Operations, Maintenance and Replacement Costs (PEC P07) defines joint costs to include “costs of compliance with the Endangered Species Act of 1973 as amended, and other requirements necessary for delivering water, as they are considered a ‘cost of doing business’ properly allocable to all project purposes.” RM Directive and Standard (D&S) Implementing Cost Sharing Authorities for Recreation and Fish and Wildlife Enhancement Facilities (LND 01-01) provides consistent support for the principle that mitigation costs “are to be distributed among all project purposes, the same as other project costs”.

The Fish and Wildlife Conservation Act dated August 14, 1946, (60 Stat. 1080) and Public Law (P.L.) 85-624 dated August 12, 1958 identified fish and wildlife mitigation costs as being non-reimbursable. P.L. 89-72, Federal Water Project

Recreation Act, dated July 9, 1965 repealed the non-reimbursable provision for mitigation costs, while maintaining only fish and wildlife enhancement costs as non-reimbursable. Consequently, fish and wildlife mitigation activities that were authorized and implemented between 1946 and 1965 are treated as non-reimbursable costs, and mitigation activities implemented after 1965 are considered reimbursable. In terms of water quality, P.L. 99-546, Coordinated Operations, dated October 27, 1986 states “the costs associated with providing Central Valley project water supplies for the purpose of salinity control and for complying with State water quality standards identified [D-1485] shall be allocated among the project purposes and shall be reimbursed in accordance with existing Reclamation law and policy.”

Currently, the costs of complying with water quality standards (D-1485) and providing in-stream flows identified in the reasonable and prudent alternatives in the biological opinions are included, implicitly, as a cost of the water supply purpose. In other words, the water storage requirements (and associated costs) required to meet D-1485 standards and provide in-stream flows are included as part of the CVP water supply along with those needed to deliver irrigation, M&I, and refuge water.

Recommendation

The process used to allocate mitigation costs for the final CVP cost allocation should be revised slightly to better align with overall Reclamation policy, where possible. Where Congress has clearly specified a certain percentage of costs as reimbursable, Reclamation should continue to allocate such costs to reimbursable purposes for repayment by water and power users. However, where clear legislative direction regarding the reimbursability of project costs is not provided, such costs should be allocated among all project purposes, in accordance with current Reclamation policy described in PEC P07 and LND 01-01. Assigning all fish and wildlife mitigation costs to water and power users for repayment is inconsistent with existing Reclamation policy. Revising the allocation to conform with Reclamation policy would allocate some mitigation costs to all project purposes, thus reducing mitigation costs allocated to water and power. It is recommended that the allocation of costs associated with meeting D-1485 and the reasonable and prudent alternative actions in the biological opinions, as well as any other mitigation costs without Congressionally pre-determined repayment provisions, be brought into alignment with Reclamation policy, namely PEC P07.