

July 20, 2022

Attention: Imported Water Committee

Bay-Delta Watershed Voluntary Agreements. (Presentation)

Purpose

This memo summarizes the proposed voluntary agreements (VAs) to update and implement the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay-Delta Plan).

Executive Summary

- The State Water Resources Control Board (State Board) is updating its Bay-Delta Plan, which establishes water quality objectives for designated beneficial uses of water in the San Francisco Bay/Sacramento-San Joaquin Delta (Bay-Delta) watershed and a program of implementation to meet those objectives.
- State, federal, and water agencies are negotiating VAs involving flow and habitat contributions to update and implement the Bay-Delta Plan as an alternative to the State Board's typical regulatory process, which relies solely on flow measures to meet water quality objectives.
- In March 2022, Sacramento River watershed users agreed on VA terms that they will further develop into complete and legally binding agreements to submit to the State Board for environmental review and potential regulatory approval.
- In May 2022, the Metropolitan Water District of Southern California (MWD) board expressed support for developing VAs for the State Board to consider as the Bay-Delta Plan's implementation pathway. MWD anticipates contributing \$8 to \$12 million annually toward the eight-year VAs if they are adopted by the State Board.
- Proponents say the VAs are a collaborative approach to provide new water supplies and habitat improvements, while opponents say the VAs lack transparency and fail to provide adequate flows to protect the Bay-Delta ecosystem.

Background

The Bay-Delta is an important estuary that provides an essential water source for major users to the south and west. As competition over water supply between in-basin and export users grew, in 1978, the State Board adopted the Bay-Delta Plan to establish water quality objectives for designated beneficial uses of water in the Bay-Delta watershed and an implementation program to meet those objectives. The State Board may implement the objectives by regulating existing water rights, imposing regulatory measures to protect water quality, and making recommendations to other entities for complementary actions like habitat restoration and fisheries management. State Board regulations and decisions can affect the availability of water for Bay-Delta exporters, including State Water Project (SWP) contractors like MWD. Currently, many of the Bay-Delta Plan's water quality objectives are achieved through flow requirements;

the SWP and Central Valley Project (CVP) are the main sources of these flows.¹ Though the federal Clean Water Act requires review and appropriate updates to water quality standards every three years, there have only been five versions of the Bay-Delta Plan adopted in 44 years. The Bay-Delta Plan was amended in 1991 and 1995, with minor changes in 2006. The current Bay-Delta Plan update is being complete through two separate amendment processes: one for the San Joaquin River and the other for the Sacramento River and Delta watersheds.

In December 2018, the State Board adopted amendments related to lower San Joaquin River flows and southern Delta salinity—the first phase of the Bay-Delta Plan update. Some of the flow objectives would be implemented by requiring the maintenance of 40% of unimpaired flows in the winter and spring, with an allowed adaptive range between 30% and 50% of unimpaired flows. Unimpaired flow is defined as the natural water production of a river basin without any upstream diversions, storage, exports, or imports. The new requirements are estimated to result in a 12% to 16% reduction on average in surface water diversions² compared to the baseline under the 2006 Bay-Delta Plan and 2008 and 2009 biological opinions that formerly governed coordinated long-term operations of the SWP and CVP.³ (The biological opinions were updated in 2019 and subsequently challenged in court by the State of California and other groups over allegations that they reduce protections for listed species and were adopted without adequate consideration of environmental impacts.) State Board analysis estimated these additional flows would generally increase Delta inflows relative to baseline conditions and could result in an estimated average increase in exports of 76,000 acre-feet (AF) annually to the SWP and CVP service areas combined and increased Delta outflow of more than 200,000 AF annually.

The State Board is also developing Bay-Delta Plan updates for the Sacramento River and Delta eastside tributaries, as well as Delta outflows and interior flows, in a second phase based on a July 2018 framework. Initially, this update indicated that State Board staff would recommend unimpaired flows in an adaptive range of 45% to 65%, with a starting point of 55%.⁴ The analysis suggested that “benefits consistently occur at flow of 55% unimpaired flow and higher, and are absent or very modest at 45% of unimpaired flow and lower.” The framework estimated

¹ The California Department of Water Resources and U.S. Bureau of Reclamation agreed to assume responsibility for meeting Sacramento River flow objectives in the 1995 Bay-Delta Plan: <https://bit.ly/3sOxc7>

² The environmental review resulted in findings that estimated unimpaired flow objectives would be achieved by 12%, 14%, and 16% average surface water diversion reductions on the Stanislaus, Tuolumne, and Merced Rivers, respectively: <https://bit.ly/3NCOGGc>

³ The Bay-Delta Plan governs water quality objectives in the Bay-Delta watershed broadly, and obligations to meet these objectives may impact the ability of the SWP and CVP to export. The biological opinions more narrowly regulate coordinated long-term operations of the SWP and CVP based on the projects’ impacts on federal Endangered Species Act-listed species. The SWP is also governed by a California Endangered Species Act incidental take permit, which typically relies on the same operating conditions as the biological opinions; due to environmental concerns over the 2019 biological opinions, the state adopted separate operating rules for the first time in 2020. Both SWP and CVP operations are also governed by the Coordinated Operation Agreement between the Department of Water Resources and U.S. Bureau of Reclamation, which establishes how the projects share water quality and environmental obligations imposed by regulatory agencies. Elements of the VAs, such as export restrictions, could be used to meet required project operating conditions within these other regulatory structures.

⁴ The July 2018 framework for the Sacramento/Delta update to the Bay-Delta Plan is found here: <https://bit.ly/3yjSTu0>

that at 55% of unimpaired flows, water diversions, including by SWP contractors, would be reduced by 2 million AF per year on average, or a 17% reduction compared to the baseline under the 2008/2009 biological opinions and 2006 Bay-Delta Plan. When compared to the 2019 biological opinions as a baseline, the unimpaired flow requirements would likely result in an even greater reduction in diversions.

Congruently to the State Board's update process, various stakeholders, the United States Bureau of Reclamation (Reclamation), and state agencies have been negotiating development of VAs that can implement the Bay-Delta Plan amendments and achieve their objectives without relying solely on unimpaired flows. The State Board's adopted San Joaquin plan amendments expressed support for stakeholders to continue developing VAs for consideration as part of implementing the Bay-Delta Plan objectives. The State Board's proposed Sacramento/Delta framework's implementation program allowed VAs with nonflow measures like habitat restoration to achieve lower unimpaired flow requirements, so long as those measures provided the same level of protection as 55% unimpaired flows.

In May 2017, then-Governor Brown issued "Principles for Voluntary Agreements" that could serve as a "program of implementation" for the objectives in the Bay-Delta Plan while avoiding a water rights proceeding and resolving disputes among different parties in the Bay-Delta watershed. In December 2018, leaders from the California Department of Fish and Wildlife and Department of Water Resources presented a framework for proposed VAs resulting from a negotiation process between the two agencies, the California Natural Resources Agency, Reclamation, water suppliers, and other stakeholders. The state agencies followed up with a planning agreement and detailed project description in March 2019. Governor Newsom released an updated framework for the VAs in February 2020 with additional funding, habitat, and flow commitments, and included them as a priority in his July 2020 Water Resilience Portfolio.

The State's litigation against the federal government over the 2019 biological opinions put pressure on the VA negotiations, stalling the progress. However, on January 20, 2021, President Biden issued an Executive Order calling for a review of several environmental rules and regulations issued during the Trump Administration, including the biological opinions. On September 30, 2021, Reclamation requested review of the biological opinions to meet the requirements of the Executive Order and "voluntarily reconcile" SWP and CVP operations, which will likely result in changes to the biological opinions in 2024. The state and federal governments have since agreed to an interim operating plan, the court has stayed the litigation, and VA negotiations have resumed.

Discussion

On October 20, 2021, the California Environmental Protection Agency and California Natural Resources Agency wrote to users of the Lower San Joaquin River and its tributaries indicating the VA proposals by those water agencies "have fallen short of needed flow and habitat improvements," so the State Board would be asked to resume implementing the San Joaquin flow objectives established in 2018.⁵ The state continued negotiating with Sacramento River

⁵ The state agencies' letter to users on the San Joaquin tributaries is found here: <https://bit.ly/3rIGqfl>

water users and SWP/CVP exporters to advance VAs with those users, while continuing to assume flow contributions from the Lower San Joaquin River and its tributaries as part of the Sacramento River VA.

Figure 1. San Joaquin Bay-Delta Plan Amendment Progress



Sacramento Basin User Memorandum of Understanding

In March 2022, the Sacramento basin parties negotiating the VAs—including state agencies, Reclamation, and MWD—signed a Memorandum of Understanding (MOU) advancing a term sheet for the agreements.⁶ (Attachment 1 contains a list of signatories, proponents, and opponents.) Signatories represent about two-thirds of the Bay-Delta watershed. The term sheet proposes up to 825,000 AF of additional flows above existing regulatory conditions (based on the 2019 biological opinions, which may be modified as described above to require additional flows; by comparison, the 2020 VA framework proposed up to 912,000 AF of flows based on the 2008/2009 biological opinions). The state and water users will produce these new flows through year-to-year and long-term water purchases from various users; voluntary fallowing; and reduced diversions, including up to 175,000 AF of reduced exports from SWP and CVP users and up to an additional 30,000 AF from SWP users only. In addition, approximately 25% of these proposed flows would come from water users on the Lower San Joaquin River and tributaries, which have not signed onto the MOU. The term sheet also includes about 47,000 acres of habitat restoration, a governance program to direct activities, and a science program that will help provide for adaptive management. If executed by the State Board, the VAs would remain in place for 8 years. At year 6, the State Board would begin evaluating and determining an implementation pathway for VA parties after year 8, including renewing, modifying, or ending the VAs.

The VA MOU identifies the need for an estimated \$2.9 billion in funding for implementation over the 8-year period, including \$668 million from water users, \$740 from federal taxpayers, and \$1.5 billion from state taxpayers.⁷ MWD estimates its annual funding contribution will range from \$8 million to \$12 million based on about a \$10 per AF charge on Bay-Delta exports.⁸ The MOU indicates an agreement to advance the proposed terms to the signatories' boards for

⁶ The March 29, 2022, “MOU Advancing a Term Sheet for the Voluntary Agreements to Update and Implement the Bay-Delta Water Quality Control Plan, and Other Related Actions” is found here: <https://bit.ly/3NzaLFI>

⁷ State funding includes Proposition 68, Proposition 1, California Department of Water Resources habitat restoration, and California Natural Resources Agency water resilience funds. Federal funding includes Central Valley Project Improvement Act and habitat funding.

⁸ The actual costs are estimated to be \$2.6 billion. Funding sources are higher due to inclusion of federal funding for habitat restoration.

consideration and leaves open the option for other non-participants to offer additional contributions and sign onto the MOU later.

Figure 2. Sacramento/Delta Bay-Delta Plan Amendment Progress



Support for VAs

Proponents argue the VAs are a collaborative approach to watershed management that could provide new water supplies and habitat improvements to improve ecosystem and fisheries health and protect the reliability of water supply for various water users. The flows added under the voluntary agreements would likely have a lower impact on SWP exports than those required under the State Board’s flow requirements as proposed through the regular update process. The VAs would also result in many Bay-Delta watershed parties agreeing to make contributions toward the VA terms, thereby eliminating potential litigation by water districts over responsibility to meet the Bay-Delta Plan objectives.

Criticism of VAs

The VA negotiation process has been criticized by groups like Restore the Delta for excluding conservation, environmental justice, fishing, and tribal interests and other members of the public.⁹ Some non-governmental organizations also criticized the early VA framework for double-counting habitat restoration¹⁰ and funding that was already required or planned under California EcoRestore (of which the State Water Project contractors are funding about half, or \$400 million¹¹) or the 2008/2009 biological opinions. Contrary to VA proponents, some VA opponents believe the State Board has the authority to require habitat restoration without VAs, pointing out that the State Board has required habitat restoration as a mitigation measure in other water rights proceedings, such as Water Rights Decision 1631 (Mono Lake).

The Natural Resources Defense Council (NRDC) argues the VA proposal provides about one quarter of the flows the State Board previously identified as needed in the Bay-Delta watershed through its 2018 Phase 1 plan amendments and Phase 2 framework, many of which are short-term and will be obtained with taxpayer dollars.¹² Since much of the habitat restoration will also be funded through taxes, many of which have already been committed, NRDC argues the state should complete the projects regardless of the VAs. NRDC also argues the agreements

⁹ Restore the Delta’s April 20, 2022, letter to MWD expressing their concerns about the voluntary agreements is found here: <https://bit.ly/3MozH2u>

¹⁰ A comparison of habitat restoration actions in the 2019 voluntary agreement proposal with existing requirements is found here: <https://on.nrdc.org/3wyc02n>

¹¹ California EcoRestore was initiated in 2015 and aims to restore over 30,000 acres of Delta habitat for an estimated \$750-950 million. Through 2020, about \$500 million was invested in EcoRestore projects.

¹² NRDC Director of California River Restoration Obegi wrote several blog posts analyzing and commenting on the VAs: <https://www.nrdc.org/experts/doug-obegi>

undermine the Public Trust Doctrine by subsidizing large irrigation districts and industrial agriculture's mitigation obligations.

Additionally, the MOU's term sheet proposes new flow contributions from the San Joaquin River basin, but the state ended VA negotiations with San Joaquin tributary users. That the state may require unimpaired flows from some users who are not party to the VAs while purchasing water from others that are party to the VAs, in addition to the other criticisms, may lead to lawsuits against the VAs.

On May 24, 2022, a coalition of California tribes and Delta-based environmental justice organizations filed a "Petition for Rulemaking" with the State Board. The petition indicates that the VAs are inadequate in protecting beneficial uses. Rather than rely on VAs, the petition asks the State Board to immediately review and revise Bay-Delta water quality standards, engage affected tribes and Delta communities in consultation, revise beneficial uses in the Bay-Delta to increase equity, and initiate a rulemaking to regulate existing water rights "and limit water diversions and exports to levels consistent with the revised water quality standards."¹³ Among other criticisms, the petition says the VAs are framed as an implementation program but would in fact "constrain the revised water quality standards themselves" around VA party commitments, rather than "statutory factors that must guide adoption of water quality objectives." The State Board has 30 days to schedule a hearing or deny the petition in writing.

MWD May Action

On May 10, the MWD board unanimously expressed support for developing the VA approach as an alternative in the Bay-Delta Plan update.¹⁴ Several members of the public and board members expressed concern over environmental impacts of the VAs and a lack of transparency and public input—including from tribes, Delta communities, and environmental groups—during VA development. However, MWD's General Manager assured the board that he would bring these stakeholders into the process as the parties develop VA details and their governance structure. During MWD's April 26 VA workshop, State Water Contractors General Manager Pierre said the VA signatories were discussing "early actions" to implement the VAs prior to State Board action; when asked, MWD staff said it does not anticipate providing VA funding in fiscal years 2023 and 2024.

Next Steps

The signatories will submit the term sheet to the State Board so it can consider and analyze the VAs as a pathway to update and implement the objectives of the Bay-Delta Plan, and the State Board will prepare an environmental document assessing the agreements as an alternative and go through a scientific review and public approval process. The timeline for submittal and review is unclear, though it could take at least a year before the State Board decides on a program of implementation. Environmental review and regulatory approvals are required before the VAs

¹³ The May 24, 2022, Petition for Rulemaking to Review and Revise Bay-Delta Water Quality Standards is found here: <https://bit.ly/3GgshvY>

¹⁴ For more information on the MWD board's discussion about the VAs, see the memo *Metropolitan Water District Delegates' Report* starting on page 1 of the Water Authority's May 2022 supplemental board packet, found here: <https://bit.ly/3NyupSj>

may be executed, and some specific measures will also require project-specific environmental review. While the State Board is considering the VAs, the MOU parties, including MWD, will continue planning for implementation of actions, developing the agreements in a proposed complete and legally binding form, and working to resolve litigation related to the Bay-Delta Plan and SWP/CVP operating rules.

The State Board's public process may result in a conclusion that the VAs do not meet the Bay-Delta Plan's water quality objectives, in which case the State Board may rely on regulation of unimpaired flows to implement the Bay-Delta Plan update. This outcome would likely reduce SWP exports compared to current conditions and conditions under the proposed VAs. MWD may want to consider the role VAs play in the Integrated Water Resources Plan One Water Implementation Plan and addressing supply gaps in MWD's SWP exclusive areas.

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Attachments:

Attachment 1 – Voluntary Agreement Signatories, Proponents, and Opponents

Voluntary Agreement Signatories, Proponents, and Opponents

March 2022 Signatories

Signatories to the March 2022 Memorandum of Understanding advancing terms for voluntary agreements include:

- California Department of Fish and Wildlife
- California Department of Water Resources
- California Environmental Protection Agency
- California Natural Resources Agency
- U.S. Bureau of Reclamation – California-Great Basin Region
- Garden Highway Mutual Water Company
- Glenn-Colusa Irrigation District
- Kern County Water Agency
- Metropolitan Water District of Southern California
- Regional Water Authority
- River Garden Farms
- State Water Contractors, Inc.
- Sutter Mutual Water Company
- Western Canal Water District
- Westlands Water District
- Yuba Water Agency

Other Proponents

In addition to the signatories, proponents include:

- Association of California Water Agencies
- California Farm Water Coalition
- Other water agencies
- Other business associations

Opponents

Voluntary Agreement opponents include:

- California Coastkeeper Alliance
- Defenders of Wildlife
- Earthjustice
- Golden State Salmon Association
- Little Manila Rising
- Natural Resources Defense Council
- Pacific Coast Federation of Fishermen's Associations
- Planning and Conservation League
- Restore the Delta
- Save California Salmon
- Shingle Springs Band of Miwok Indians
- Sierra Club California
- Winnemem Wintu Tribe
- Other fishing groups, conservation groups, and environmental justice organizations