

THE BAY-DELTA PLAN UPDATE

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TOPICS TO BE COVERED

- Bay-Delta Plan Update Process
- Voluntary Agreements Framework MOU
- NDWA 1998 MOU
- Arguments for a new MOU for Phase II Bay-Delta Plan Update
- Conclusions

THE BAY-DELTA PLAN UPDATE PROCESS

Bay-Delta Plan Update Process

- SWRCB is authorized to adopt water quality control plans (Wat. Code § 13170).
- First water quality control plan for Bay-Delta adopted in 1978, amended in 1995 and 2006.
- In 2006, SWRCB began proceeding to update current Bay-Delta Plan.

2018 Bay-Delta Plan (Phase I)

- › SWRCB Resolution 2018-0059
- › Amended water quality objectives (WQOs) for protection of fish and wildlife beneficial uses in the Lower San Joaquin River (LSJR);
- › WQOs require affected parties to "[m]aintain 40% of unimpaired flow, with an adaptive range between 30% - 50% . . ."
- › Amended program of implementation for those objectives and adopted Substitute Environmental Document for LSJR
- › On July 15, 2022, the SWRCB issued a CEQA Notice of Preparation (NOP) for the proposed regulation to implement Phase I of the Bay-Delta Plan

SWRCB Resolution 2018-0059

- Directed staff "to provide appropriate technical and regulatory information to assist the California Natural Resources Agency in completing a Delta watershed-wide agreement, . . ." (emphasis added)

Unimpaired Flow (UIF)

Resolution 2018-0059 requires affected parties to "[m]aintain 40% of unimpaired flow, with an allowed adaptive range between 30% - 50%, inclusive, from each of the Stanislaus, Tuolumne, and Merced Rivers from February through June."

(Bay-Delta Plan, Appendix K, p. 18).

Litigation Challenging Res. 2018-0059

Twelve cases have been filed in state court challenging Resolution 2018-0059 and related actions, eleven of which have been coordinated (coordination of *U.S. v. SWRCB* pending). One case is pending in federal court, also styled *U.S. v. SWRCB*. The two *U.S. v. SWRCB* cases are largely duplicative.

Bay-Delta Plan Phase I Implementation

- SWRCB has proposed to implement Phase I of the Bay-Delta Plan through regulation, rather than an adjudicative water rights proceeding.
- Intends to allocate responsibility to meet Lower San Joaquin River flow and southern Delta salinity components on all water right holders.

(2018 Bay-Delta Plan Implementation NOP, rev. August 8, 2022)

Bay-Delta Plan Phase II Development

- SWRCB will adopt a Bay-Delta Plan for the Sacramento River, Delta, and Eastside Tributaries (Phase II).
- Once adopted, SWRCB will likely implement Phase II Bay-Delta Plan through regulation that recognizes voluntary agreements.

VOLUNTARY AGREEMENTS

Gov. Brown's May 2017 Directive

“The goal is to negotiate durable and enforceable Voluntary Agreements that will be approved by applicable regulatory agencies, will represent the program of implementation for the water quality objectives for the lower San Joaquin and Sacramento Rivers and Delta, will forego an adjudicatory proceeding related to water rights, and will resolve disputes among the parties. . .” (emphasis added)

Initial Negotiations

- Extensive efforts in 2017-18 to develop a framework for VAs.
- Efforts were led by Directors of DWR and CDFW, Karla Nemeth and Chuck Bonham.
- Water user and NGO representatives participated extensively.

Gov. Newsom's State of the State Address

"We have to get past the old binaries, like farmers versus environmentalists, or North versus South. Our approach can't be 'either/or.' It must be 'yes/and. . . .' Our first task is to cross the finish line on real agreements to save the [Delta]. We must get this done – for the resilience of our mighty rivers, the stability of our agriculture sector, and the millions who depend on this water every day." (emphasis added) (Feb. 2019)

Planning Agreement

- “Planning Agreement” (3/1/19) between CDFW and CDWR describes the process for completing Voluntary Agreements.
- Since then, water users, NGOs and the “State Team” have met extensively on outstanding legal, policy and technical issues in the VA process.

2022 VA Framework MOU

Framework to implement two water quality objectives in the Bay-Delta Plan:

- (1) the existing salmon doubling objective based on 1967-1991 population baseline; and
- (2) A new narrative objective to achieve viability of native fish populations

(MOU Advancing a Term Sheet for the Voluntary Agreements to Update and Implement the Bay-Delta Water Quality Control Plan, and Other Related Actions, March 29, 2022)

2022 VA Framework MOU

- VAs will become effective upon completion of environmental review and execution of Agreements.
- VA Program will be concurrent with new ITP and BiOps.
- Framework MOU proposes an 8-year implementation program, at which time SWRCB will evaluate effectiveness of VA activities.

Key Elements of Voluntary Agreements

MOU and Appendices identify proposed:

- Flow Contributions
- Non-flow Measures
- Financing
- Science
- Governance

Flow Contributions

Appendix 1:

- Proposed new flow contributions-- additive to 1967-1991 baseline.
- + 100 TAF to Sac River outflow in D, BN, and AN years.
- Most flows in January – June
- State will acquire 65 TAF in all water year types.

Table 1a: New Contributions to Tributary Flow and Delta Outflows in Thousand Acre Feet^{1,2,3}

Source	C (15%) ⁴	D (22%)	BN (17%)	AN (14%)	W (32%)
San Joaquin River Basin					
<i>Minimum Placeholder Contributions⁵</i>	48	145	179	112	0
<i>San Joaquin Basin Portion of Gap</i>		11	2	10	
Friant	0	50	50	50	0
Sacramento River Basin⁶					
Sacramento ⁷	2	102	100	100	0
Feather	0	60	60	60	0
Yuba	0	60	60	60	0
American ⁸	30	40	10	10	0
Mokelumne	0	10	20	45	0
Putah ⁹	7	6	6	6	0
CVP/SWP Export Reduction¹⁰	0	125	125	175	0
PWA Water Purchase Program					
Fixed Price (see Table 1b)	3	63.5	84.5	99.5	27
Market Price ¹¹	0	45	45	45	0
Permanent State Water Purchases¹²	65	108	9	52	123
Year 1 New Outflow Above Baseline (Low Target)	155	825.5	750.5	824.5	150

Flow Contributions

Appendix 1:

- Flows not obtained through some sources will be obtained at market price.
- New water projects to be phased in with state funding by Year 8.

Table 1b: Supporting Details for New Flow Contributions (Table 1a) and Year 8 Water Storage

	C (15%)	D (22%)	BN (17%)	AN (14%)	W (32%)
PWA Fixed Price Water Purchase Program					
Sac Valley NOD		10	10	10	
CVP SOD		12.5	24.5	35	
WWD SOD ¹³	3	6	15	19.5	27
Add CVP SOD ¹³		5	5	5	
SWP SOD		30	30	30	
Refill (Mokelumne)¹⁴	0	9	18	13.5	0

New Water Projects (Before Year 8)¹⁵					
Chino Basin	0	50	50	0	0
Kern Fan	0	18	18	0	0
Willow Springs Conjunctive Use	0	19	29	0	0

Habitat Restoration

Appendix 2

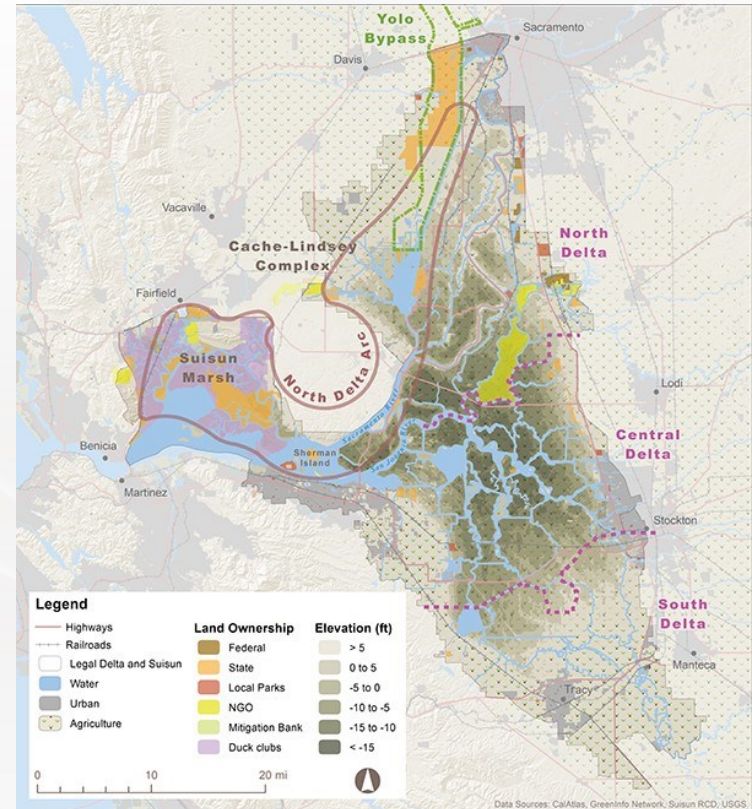
- State intends to streamline and coordinate permitting to implement restoration projects.
- Acres represent sum of habitat commitments proposed in 2019 Planning Agreement and 2020 Framework.

Area	Total Acres ⁱ
Sacramento Basin	
Sacramento	137.5 (instream), 113.5 (spawning)
Sutter Bypass, Butte Sink, and Colusa Basin	20,000 (floodplain) ⁱⁱ , 20,000 (fish food production) ⁱⁱⁱ <i>Initial Targets per funding and permitting</i>
Feather	15 (spawning), 5.25 (instream), 1,655 (floodplain) ^{iv}
Yuba ^v	50 (instream), 100 (floodplain)
American	25 (spawning), 75 (rearing)
Mokelumne	1 (instream), 25 (floodplain)
Putah	1.4 (spawning)
North Delta Arc and Suisun Marsh	5,227.5 ^{vi}

Example VA Non-flow Measure

North Delta Arc and Suisun Marsh

- 5,227.5 Acres along northern edge of the upper San Francisco Estuary from Suisun Marsh to the Yolo Bypass.
- VA MOU contemplates proposed restoration of tidal wetland and associated floodplain habitats.



Map by Amber Manfree

Other Examples of VA Non-flow Measures

- **Flood Plain Inundation (Food Production)**
 - Sac Valley – River Garden Farms Project
- **Improvements in Spawning Habitat**
 - Upper Sac River – GCID Salmonid Rearing Habitat Project
- **Improvements in Rearing Habitat**
 - Upper Sac River – River Garden Farms Refugia Project
- **Protections: Fish Straying/Entrainment**
 - Sac River – RD 108 Knights Landing Outfall Gates Project

Funding

Appendix 3

- \$ amounts are in millions.
- New funding includes party self-assessments, and new State and Federal sources.

Total VA Costs	\$2,589	Aggregated costs from Planning Agreement plus additional costs to achieve commitments per this Framework.
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Total Committed Funding	\$1,060	From PWAs, State and Federal combined
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Total of New Funding Commitments	\$1,854	
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Total Funding for VAs	\$2,914	This total exceeds VA costs above because it includes federal funding which is needed for habitat restoration.
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Metrics, Monitoring, and Outcomes

Appendix 4

- **Implementation Criteria**
 - Set metrics to ensure flow volumes and non-flow measures meet targets.
- **Habitat Suitability and Utilization Criteria**
 - Set metrics to determine if projects provide or are likely to provide habitat or food production for target species as intended.
- **Monitoring**
 - Before VA Year 0, adopt monitoring framework to test hypotheses of VA commitments in consult with fisheries agencies and SWRCB.
- **Ecological Outcomes Analysis**
 - Prior to VA Year 7, formal report will synthesize data from projects to determine whether VAs are viable to continue past Year 8.

VA Status

- MOU parties are currently working on draft agreements to implement projects.
- The SWRCB is working internally on the Substitute Environmental Document (SED) that will contain the environmental analysis for Phase II, including an analysis of impacts associated with the VA alternative.
- Specific projects will undergo separate CEQA review as needed.

VA Participation

- VA participants receive assurances on total flow obligations to implement narrative objectives.
- Flows generated by covered VA actions will be protected by SWRCB against diversions for other purposes during term of VAs.

MOU Signatories represent 2/3 of Sacramento-San Joaquin watershed:

- USBR
- CA Natural Res. Agency
- CA EPA
- DWR
- CDFW
- State Water Contractors
- Metropolitan WD
- Kern County Water Agency
- Westlands WD
- Glenn-Colusa ID
- Yuba Water Agency
- Regional Water Authority
- River Garden Farms
- Western Canal WD
- Garden Highway MWC
- Sutter MWC

VA Participation

- Non-covered parties could be subject to regulatory limitations on water use.
- SWRCB will establish conditions to require flow and other measures by persons not covered by a VA to provide reasonable protection of beneficial uses.
- NDWA would be considered a non-covered party if it does not participate.

NDWA 1981 Contract

NDWA Water Reliability

- **No Specific Quantity of Water**
 - Limited only by Reasonable and Beneficial Use
- **Place of Use**
 - Within boundaries of Agency
- **Diversion Protection**
 - DWR provide supplemental water
 - Curtailment periods – Term 91
 - Periods of Unavailability

Water Supply Assurances

- › State recognizes NDWA water users' right to divert from Delta channels
- › State shall not disturb or challenge such water rights so long as contract in effect
- › State agrees to furnish from its reservoir any water not otherwise available under the respective water rights of NDWA water users – right to legally divert SWP stored water
- › State will defend use of SWP stored water to meet contract criteria as reasonable and beneficial use

Water Quality Assurances

- **Art. 2(a)(i)** ensures “water qualities at least equal to the better of”
 - 1) Standards adopted by the SWRCB (Bay-Delta Plan)
 - 2) Criteria established by the 1981 Contract
- **Art. 8(a)(i)** provides payments are for “the assurance given that water of such quality shall be in the Delta channels for reasonable and beneficial uses on lands within the Agency, [which] shall not be disturbed or challenged by the State...”
- **Art. 8(d)** provides State will “defend affirmatively as reasonable and beneficial the water qualities established in this contract.”

DWR's Continuing Obligation

- As acknowledged in recitals of 1981 Contract, maintaining an adequate supply of good quality water for beneficial uses in the Delta is prioritized over exports under California law.

NDWA 1998 MOU

1995 Bay-Delta Plan Update

- In 1995, the SWRCB adopted a Bay-Delta Water Quality Control Plan (“Bay-Delta Plan”) Update.
- Initiated a water right hearing to implement the Bay-Delta Plan and allocate flow responsibilities among water right holders, which led to Water Rights Decision 1641 (“D-1641”).

1998 Memorandum of Understanding

- May 26, 1998, NDWA and DWR entered into the 1998 MOU.
- Carried out NDWA and DWR's joint understanding of the purpose and effect of the 1981 Contract with regard to Bay-Delta Plan obligations.

1998 Memorandum of Understanding

- MOU provided DWR would bear responsibility to meet diversion curtailment or modification obligations applicable to NDWA.
- Parties agreed that the annual payments under the 1981 Contract = full consideration for DWR meeting Bay-Delta Plan requirements.
- Effective only for the 1995 Bay-Delta Plan, expires upon adoption of new Bay-Delta Plan.

D-1641 Hearings

- DWR witness testified that the 1998 MOU was “reflective of the 1981 Contract ... recognizing the existing 20-year contractual relationship...”
- SWRCB explicitly approved 1998 MOU terms because the 1981 Contract obligated DWR to “provide the backstop for any water assigned to the parties within NDWA as specified in the [1998] MOU.”
- Courts upheld D-1641 in subsequent challenge.

A New Agreement is Needed

- The 1998 MOU was effective only for purposes of addressing obligations under the 1995 Bay-Delta Plan.
- NDWA and DWR should enter into a substantially similar agreement for the pending Phase II Bay-Delta Plan.
- The agreement may be woven into existing VA Framework.

Terms to Include

The following **Terms** are largely adapted from the 1998 MOU.

1. Any obligation to curtail or modify diversions in order to assist in achieving any flow or salinity objective of the 2022 Plan imposed upon the use of water within NDWA is entirely in the scope of the existing obligation of DWR under the 1981 Contract to provide water from State Water Project supply, subject to the limitation of reasonable and beneficial use.

Terms to Include

2. DWR shall also be responsible for impacts to water quality or water supply caused by implementation of habitat projects carried out pursuant to Biological Opinions, or alternative flow plans under Voluntary Agreements.*

*This is a new proposed term relevant to the VA Framework.

Terms to Include

3. During the term of this MOU, no party shall assert, before the SWRCB or in any court, that the other party must reduce or eliminate any direct diversions, diversions to storage or re-diversion of stored water, or release any previously stored water so long as the other party's method of use and method of diversion are reasonable under Article X, Section 2 of the California Constitution and in compliance with the 1981 Contract.

Terms to Include

4. The payments made by NDWA to DWR pursuant to the 1981 Contract constitute full and adequate consideration for the obligation of DWR described in paragraph 1 of this MOU.

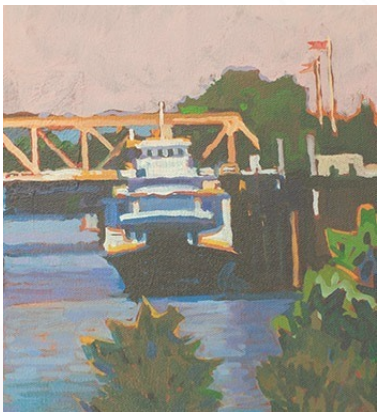
Terms to Include

5. The parties agree that the assurances contained in the 1981 Contract, including the obligation of DWR to provide water to NDWA users from State Water Project supplies, and in paragraph 1 of this is MOU, do not apply to any transfer of water outside NDWA. The parties agree that the 1981 Contract does not affect any underlying rights the water users within NDWA may have to transfer water to the extent that such a transfer would be permissible under California law in the absence of the 1981 Contract.

Important MOU Terms to Include

6. Nothing in this MOU constitutes an admission by NDWA, express or implied, that the State Water Board has authority to limit or otherwise modify any right to divert water for use within NDWA.
7. Nothing in this MOU constitutes an amendment of the 1981 Contract.

QUESTIONS?



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Thank You

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