

Planning Agreement
Proposing Project Description and Procedures for the Finalization
Of the Voluntary Agreements to Update and Implement
the Bay-Delta Water Quality Control Plan

This “Planning Agreement Proposing Project Description and Procedures for the Finalization of the Voluntary Agreements to Update and Implement the Bay-Delta Water Quality Control Plan” (Planning Agreement) is entered into on March 1, 2019 by and among the signatories hereto (collectively, Parties and singularly, Party).

Recitals

A. The State Water Resources Control Board (State Water Board) and the nine regional water quality control boards administer the Porter-Cologne Water Quality Control Act (Wat. Code, § 13000 *et seq.*) (Porter-Cologne Act) to achieve an effective water quality control program for the state and are responsible for the regulation of activities and factors that may affect the quality of the waters of the state.

B. The State Water Board is authorized to adopt a water quality control plan in accordance with the provisions of Water Code sections 13240 through 13244, insofar as they are applicable (Wat. Code, § 13170).

C. The State Water Board has adopted a Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay-Delta Plan). It first adopted the plan in 1978, amending it in 1995 and 2006. In 2006, it began a proceeding to update the plan.

D. The Bay-Delta Plan designates beneficial uses of the waters of the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay-Delta watershed), establishes water quality objectives for the protection of those beneficial uses, and establishes a program of implementation to implement those objectives.

E. In May 2017 then-Governor Edmund G. Brown, Jr. issued “Principles for Voluntary Agreements” (Agreement Principles), stating in relevant part: “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 regarding water management in the Sacramento-San Joaquin-Bay-Delta Watershed.”

F. In accordance with the Agreement Principles, interested parties including CDFW, CDWR, the California Natural Resources Agency (CNRA), the U.S. Bureau of Reclamation, municipal and agricultural water suppliers, and other stakeholders undertook extensive efforts in 2017 and 2018 to negotiate the principles of Voluntary Agreements.

G. In July 2018, the State Water Board issued a Framework document for potential amendments to the Bay-Delta Plan.

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H. On December 12, 2018, the Directors of CDFW and CDWR appeared before the State Water Board and presented the results of the Voluntary Agreement negotiation process to date. Specifically, the Directors presented a “Framework Proposal for Voluntary Agreements to Update and Implement the Bay-Delta Water Quality Control Plan” (Agreement Framework). Appendix 1 to the Agreement Framework contained term sheets regarding terms of Voluntary Agreements for the Sacramento River, Feather River, Yuba River, American River, Mokelumne River, Tuolumne River, Friant Division of the Central Valley Project, and Delta.

I. On December 12, 2018, the State Water Board adopted Resolution No. 2018-0059 to update the 2006 Bay-Delta Plan. First, it amended the water quality objectives for the protection of fish and wildlife beneficial uses in the Lower San Joaquin River (LSJR) and its three eastside tributaries, the Stanislaus, Tuolumne, and Merced Rivers, and agricultural beneficial uses in the southern Delta. It also amended the program of implementation for those objectives. It approved and adopted the Substitute Environmental Document (SED) for the Lower San Joaquin River (Phase 1). Looking ahead, Ordering paragraph 7 of Resolution No. 2018-0059 states:

The State Water Board directs staff to provide appropriate technical and regulatory information to assist the California Natural Resources Agency in completing a Delta watershed-wide agreement, including potential flow and non-flow measures for the Tuolumne River, and associated analyses no later than March 1, 2019. State Water Board staff shall incorporate the Delta watershed-wide agreement, including potential amendments to implement agreements related to the Tuolumne River, as an alternative for a future, comprehensive Bay-Delta Plan update that addresses the reasonable protection of beneficial uses across the Delta watershed, with the goal that comprehensive amendments to the Bay-Delta Plan across the Delta watershed may be presented to the State Water Board for consideration as early as possible after December 1, 2019.

J. The Parties desire to enter into this Planning Agreement for the purpose of proposing: (1) a project description, (2) the process by which the Parties recommend the State Water Board analyze that project description, and (3) the process for developing appropriate terms for, and subsequent implementation of, Voluntary Agreements, in accordance with the State Water Board’s directive quoted in Recital H above as well as the Agreement Framework.

K. The Parties intend to present agreements that the State Water Board can adopt as updates to the Bay-Delta Plan.

Agreements

1. Overall

a. Through this Planning Agreement, the Parties commit to: (1) submit the “Project Description” for a Delta watershed-wide agreement (Appendix A hereto), to the State Water Board for consideration and analysis, as provided in Resolution 2018-0059; (2) undertake a process to assist the State Water Board in its analysis of the Project Description; and (3) use best efforts to develop appropriate terms for Voluntary Agreements for submittal to the State Water Board by December 1, 2019.

b. Through this Planning Agreement, the Parties reserve judgment whether they each will sign or otherwise support the Voluntary Agreements. They do not commit to any actions described in the Project Description. They will decide whether or not to commit to take these actions after the State Water Board adopts a SED to update the Bay-Delta Plan consistent with Resolution 2018-0059 (Comprehensive SED). This Planning Agreement is not subject to the California Environmental Quality Act (CEQA), consistent with CEQA Guidelines section 15004.

c. This Planning Agreement will be effective on March 1, 2019. An entity may sign this agreement and become a Party after this date. The Planning Agreement will terminate on the earlier of: (1) a decision by the State Water Board to certify the Comprehensive SED and update the Bay-Delta Plan, or (2) March 31, 2020.

2. Organizing Principles of the Project Description

The Parties base the Project Description on the organizing principles stated below. The Parties will use these principles to develop appropriate terms for and finalize the Voluntary Agreements.

a. In the Bay-Delta watershed, a comprehensive approach to management of habitat, flow and other factors is required to protect native fish and wildlife species, while concurrently protecting water supply reliability, consistent with the legal requirement of providing reasonable protection for all beneficial uses. To date, the Bay-Delta Plan has only imposed flow requirements, but has not required measures to directly address other factors including invasive species, ocean and tidal conditions, physical modifications of channels and wetlands, and activation of floodplains.

b. Implementation of the Voluntary Agreements will result in water quality conditions that support (i) the viability of native fishes in the Bay-Delta watershed and (ii) achievement of related objectives in the Bay-Delta Plan, as may be amended.

c. The Voluntary Agreements will include governance requirements and procedures. They will also include a science program, which will specify proposed biological and environmental outcomes; methods to monitor, evaluate, and report whether implementation is

succeeding in achieving those outcomes; and procedures to adjust the science program under specified terms.

d. The Voluntary Agreements will specify the Parties' obligations to provide water and to take other actions to contribute to the implementation of the Bay-Delta Plan's water quality objectives for protection of fish and wildlife beneficial uses.

e. The Voluntary Agreements will be enforceable under terms to be specified, consistent with the State Water Board's responsibilities and legal authority. As the State Water Board found in Resolution 2018-0059 (Finding 21), Voluntary Agreements may expedite implementation of objectives in the Bay-Delta Plan.

(1). Historically, the State Water Board has relied on its water right authority and water right proceedings as the predominant mechanism to implement flow-related objectives in the Bay-Delta Plan. This regulatory approach generates significant tension with water users, is lengthy and may result in litigation leading to further conflict and uncertainty.

(2). The Voluntary Agreements will be implemented without mandatory reliance on water right proceedings, achieving the statutory objective of reasonable protection of beneficial uses without some of the negatives of the traditional regulatory approach.

f. Each Voluntary Agreement will have a minimum 15-year term.

3. **Further Processes**

a. **Voluntary Agreements**

(1). The Parties will organize further discussions pursuant to the "VSA Discussion Structure" (Appendix B), including the Plenary Stakeholder Forum and workgroups.

(2). By June 30, 2019, the Parties will use best efforts to develop proposed resolutions of critical-path issues related to: (i) nexus of Voluntary Agreements with Bay-Delta Plan, as may be amended, and (ii) implementation, enforcement and assurances, and termination or renewal of Voluntary Agreements. The issues will include, but are not limited to, the following:

- (i). What amendments to the Bay-Delta Plan, if any, are appropriate for implementation of the Voluntary Agreements;
- (ii). How the Voluntary Agreements would fit within an updated Bay-Delta Plan and achieve the purposes stated in Section 1.2 of the Project Description;

- (iii). How to protect the flows released under the Voluntary Agreements as necessary to achieve intended outcomes, and how to address the impacts of diversions by non-settling third parties;
- (iv). How to enforce the terms and conditions of the Voluntary Agreements, to the extent incorporated into the updated Bay-Delta Plan, including remedies for failure to implement agreed-upon flow and non-flow measures;
- (v). How the State Water Board could provide assurances related to any water-quality or water-right actions against Parties beyond those described in the Voluntary Agreements, and associated rights of termination or withdrawal;
- (vi). The relationship between the Voluntary Agreements and existing regulatory requirements;
- (vii). Whether the Project Description will be modified and if so, how and when.

(3). By June 30, 2019, the Parties will refine the elements of the Project Description related to governance and science program.

b. CEQA

(1). The Parties respectfully propose the following schedule and procedures for the purpose of assisting the State Water Board as it undertakes to update the Bay-Delta Plan consistent with Resolution 2018-0059:

- (i). **March 1, 2019** – The Parties ask the State Water Board to include the Project Description (Appendix A hereto) as the proposed project or an alternative for the Comprehensive SED.
- (ii). **August 1, 2019** – Following submittal of the Project Description, the Parties will undertake further analyses of the benefits and other effects of the Project Description on aquatic resources. The Parties will undertake these analyses in coordination with the State Water Board.
- (iii). **September 1, 2019** - The Parties will ask the State Water Board to circulate a draft Comprehensive SED as soon as possible after this date.
- (iv). **December 1, 2019** – The Parties will request that the State Water Board consider adoption of the Comprehensive SED and proposed

amendments to the Bay-Delta Plan consistent with the Voluntary Agreements, as soon as possible after this date.

(2). The Parties recognize that State Water Board will be the CEQA lead agency in preparation of the Comprehensive SED. Further, the Parties propose that CDFW, CDWR, and other public agency Parties will participate as CEQA responsible agencies in such preparation. The Parties expect that the Comprehensive SED will include at least programmatic environmental review of all elements of the Voluntary Agreements. Public agency Parties proposing to implement the actions described in the Voluntary Agreements will be responsible for project-level environmental review. The Parties recognize that execution of Voluntary Agreements will not occur until required CEQA analysis has been completed.

(3). Nothing in this section is intended to constrain the independent authority of the State Water Board.

4. **General Provisions**

a. **Amendment**. This Planning Agreement may be amended only by a written amendment executed by all Parties.

b. **Successors and Assigns**. The rights and duties of the Parties may not be assigned or delegated without the advance written consent of all Parties and any attempt to assign or delegate such rights or duties in contravention of this paragraph will be null and void.

c. **Notice**. Any notice or instrument required to be given or delivered under this Planning Agreement may be made by: (i) depositing the same in any United States Post Office, postage prepaid, and will be deemed to have been received at the expiration of 5 days after its deposit in the United States Post Office; (ii) transmission by electronic mail to the addressee; or (iii) personal delivery to the addresses of the Party to whom the notice is directed that is in Appendix C hereto.

d. **Counterparts**. This Planning Agreement may be executed in separate counterparts, each of which when so executed and delivered will be an original. All such counterparts will together constitute but one and the same instrument.

e. **Severability**. If one or more clauses, sentences, paragraphs or provisions of this Planning Agreement is held to be unlawful, invalid or unenforceable, it is hereby agreed by the Parties that the remainder of the Planning Agreement will not be affected thereby. Such clauses, sentences, paragraphs or provisions will be deemed reformed so as to be lawful, valid and enforced to the maximum extent possible.

f. **Headings**. The paragraph headings used in this Planning Agreement are intended for convenience only and will not be used in interpreting this agreement or in determining any of the rights or obligations of the Parties.

g. Construction and Interpretation. This Planning Agreement has been arrived at through negotiation and each of the Parties has had a full and fair opportunity to revise the terms of this agreement. As a result, the normal rule of construction that any ambiguities are to be resolved against the drafting party will not apply in the construction or interpretation of this agreement.

h. Entire Agreement. This Planning Agreement constitutes the entire agreement of the Parties and supersedes all prior agreements and understandings, written or oral.

CALIFORNIA DEPARTMENT OF WATER
RESOURCES

By Karla Nemeth
Karla Nemeth, Director

Dated: 3/1/19

CALIFORNIA DEPARTMENT OF FISH
AND WILDLIFE

By: CH Bonham
Charlton H. Bonham, Director

Dated: 3/1/2019