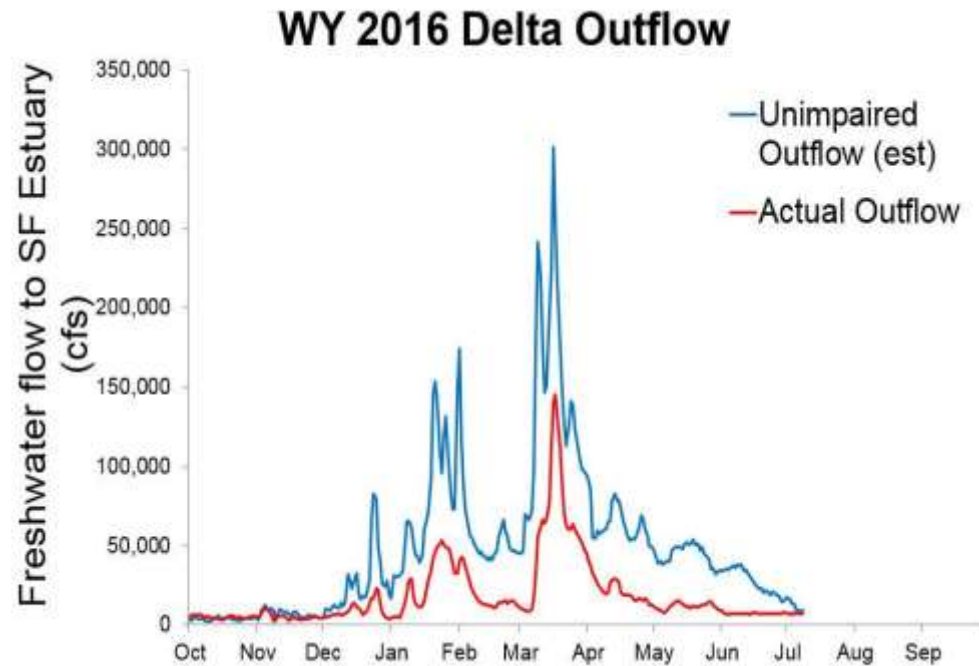

Bay-Delta Voluntary Agreements

Doug Obegi



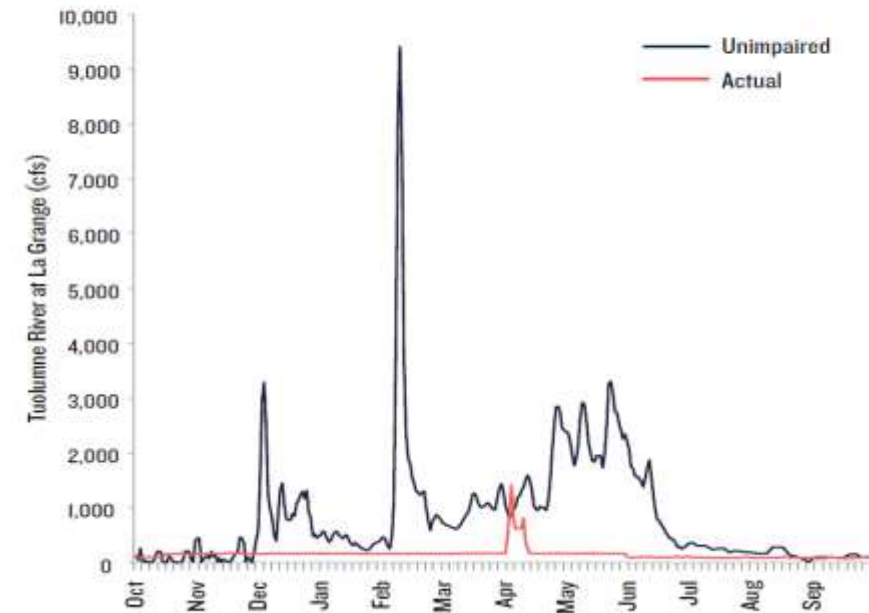
Presentation to the Board of Directors of the Metropolitan Water District of Southern California, April 26, 2022

California's Rivers Are Impaired by Unsustainable Water Diversions



Unimpaired flow is the amount of water that would flow in a river or stream, barring dams or water diversions that reduce the flow downstream.

FIGURE I. COMPARISON OF UNIMPAIRED AND ACTUAL FLOWS IN WATER YEAR 2015 ON THE TUOLUMNE RIVER



Graph courtesy of The Bay Institute (2015).

Unsustainable Water Diversions Degrade Water Quality and Devastate Native Fish Populations



Harmful algal bloom, Stockton, California, August 2020

Species Name	Federal ESA Status	State CESA Status
Winter Run Chinook Salmon	Endangered	Endangered
Spring Run Chinook Salmon	Threatened	Threatened
Central Valley Steelhead	Threatened	Not Listed
Delta Smelt	Threatened	Endangered
Longfin Smelt	Candidate for Listing (FWS decision due)	Threatened
Green Sturgeon (Southern DPS)	Threatened	Not Listed
Fall Run Chinook Salmon	Species of Concern	Not Listed

	Natural Production Annual Average Baseline (1967– 1991) Period	Natural Production Annual Average for 1992–2015 Period	Change in Average Natural Production between 1967–1991 and 1992–2015
Sacramento winter-run	54,439	6,090	-89%
Sacramento spring-run	34,374	13,385	-61%
Sacramento late-fall-run	33,941	16,175	-52%
Sacramento fall-run (main stem)	115,371	65,791	-43%
San Joaquin fall-run ¹	38,388	17,453	-55%



2022 VAs Negotiated in an Exclusionary Process...

Who's in the "Room Where it Happens"



Who's not in the room: Conservation groups, fishing organizations, Native American Tribes, Delta Communities, other interests, and the Public have been systematically excluded from the negotiating process for years.

... That Circumvents the Public's Right to Know

From: Requests_PRA@EPA
To: [Obegi, Doug](#)
Subject: Final Responses to CalEPA Public Records Act Requests Dated 7/23/21, 11/8/21
Date: Wednesday, February 2, 2022 2:51:07 PM
Attachments: [Public Records Act request for materials relating to the July 22, 2021 meeting regarding voluntary agreements.pdf](#)
[Public Records Act request for Oct. 18, 2021 VA Term Sheet.pdf](#)
[Obegi_Production.pdf](#)

Dear Mr. Obegi:

You submitted the attached Public Records Act requests – dated July 23, 2021 and November 8, 2021 – to the Office of the Secretary of the California Environmental Protection Agency (“CalEPA”) on behalf of the Natural Resources Defense Council (“NRDC”).

CalEPA has attached all nonprivileged records responsive to NRDC’s July 23, 2021 request. CalEPA has redacted or withheld records pursuant to the public interest balancing test and deliberative process privilege (Gov. Code, § 6255); the attorney-client communication and attorney work product privileges (Gov. Code, § 6254, subd. (k), incorporating Evid. Code, § 954-955; Code Civ. Proc. § 2018.030); the preliminary drafts or notes exemption (Gov. Code, § 6254 (a)); and the Governor’s Office correspondence exemption (Gov. Code, § 6254 (l)).

CalEPA has no nonprivileged records responsive to NRDC’s November 8, 2021 request for the “October 18, 2021 Draft Memorandum of Understanding Advancing a Term Sheet for the Voluntary Agreements to Update and Implement the Bay Delta Water Quality Control Plan, and Other Related Actions.” It has withheld records pursuant to the Governor’s Office correspondence exemption (Gov. Code, § 6254 (l)).

Thank you for your patience while CalEPA processed the requests.

Sincerely,
Jessica Aresca
CalEPA Public Records Act Coordinator

Confidential/Common Interest/Attorney Client Privileged/Attorney Work Product

Common Interest and Confidentiality Agreement

Various water users have been participating in the Voluntary Agreement process associated with the California State Water Resources Control Board’s amendments to the Bay-Delta Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Bay Delta Estuary (“Bay-Delta Plan”). The participating water users are referred to herein individually as a “Party” and collectively as “Parties.” These Parties desire to continue to meet and communicate over the course of 2019 to address issues related to development and implementation of voluntary agreements to support amendments to the Bay-Delta Plan for protection of fish and wildlife beneficial uses (“Voluntary Agreement Discussions”).

The issues subject to the Voluntary Agreement Discussions relate to current, pending, or anticipated legal or administrative proceedings. On advice of their respective counsel, the undersigned Parties have executed this document in furtherance of their common interests in resolving these issues related to the amendments to the Bay-Delta Plan, and/or to settle potential claims.

The Voluntary Agreement Discussions will be more productive if Parties freely share information, including information related to current, pending, or anticipated legal or administrative proceedings. All statements made by the several Parties in preparation for, or during the Voluntary Agreement Discussions will be considered privileged statements (“Communications”) subject to California Evidence Code §§ 1152 and 1154, Federal Rules of Evidence § 408, and other authorities related to confidentiality of settlement discussions. These Communications are made without prejudice to any Party’s legal position, and will be inadmissible for any purpose in any legal or administrative proceeding. Similarly, all documents that are or were exchanged by the several Parties in preparation for, or during the Voluntary Agreement Discussions (“Documents”) shall be maintained as confidential under California Evidence Code §§ 1152 and 1154, Federal Rules of Evidence § 408, and other authorities related to confidentiality of settlement discussions. These Documents are exchanged without prejudice to any Party’s legal position, and will be inadmissible for any purpose in any legal or administrative proceeding. Given the common interests of the Parties: (1) any Communications among the Parties that would otherwise qualify as attorney-client communications shall remain privileged despite disclosure to a person outside the attorney-client relationship; and (2) any Documents exchanged among attorneys of the Parties that would otherwise qualify for the attorney work product protection shall maintain that protected status despite disclosure to an attorney representing a separate Party. Communications and Documents are individually and collectively “Confidential Information.”

Confidential Information does not include, and restrictions and obligations of this Agreement do not apply to (a) information which is, or becomes, publicly known or available other than as a result of a violation of this Agreement; (b) information or document(s) jointly prepared by a Party or Parties in preparation for or during the meetings where such Parties agree in writing that the information or document(s) are not Confidential Information; and (c) information or documents disclosed by the originator with third parties so long as that information or those documents do not contain Confidential Information from another Party. For purposes of this

VA Based on Political Science, not Biological Science

State Water Resources Control Board
California Environmental Protection Agency

Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem

Prepared Pursuant to the Sacramento-San Joaquin Delta Reform Act of 2009



August 3, 2010

State Water Resources Control Board
California Environmental Protection Agency

TECHNICAL REPORT ON THE SCIENTIFIC BASIS FOR ALTERNATIVE SAN JOAQUIN RIVER FLOW AND SOUTHERN DELTA SALINITY OBJECTIVES



February 2012

Scientific Basis Report in Support of New and Modified Requirements for Inflows from the Sacramento River and its Tributaries and Eastside Tributaries to the Delta, Delta Outflows, Cold Water Habitat, and Interior Delta Flows

Prepared By:

State Water Resources Control Board
California Environmental Protection Agency
P.O. Box 100
Sacramento, CA 95812-0100

With Assistance From:

ICF
630 K Street, Suite 400
Sacramento, CA 95814



Final (2017)

Minor changes made as reflected in Errata

2022 VA Proposes Dramatically Less Water for the Environment - Less than Zero in Critical Years

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
<i>Year 1 New Outflow Above Baseline (Low Target)</i>	155	825.5	750.5	824.5	150

March 2022 VA Proposal: **307,446 acre feet** per year on average

- 2022 VA proposes to “add” water to the Trump Administration’s unlawful 2019 biological opinions, which dramatically reduced Delta outflows and weakened other environmental protections.

Preliminary Analysis: VA proposed Delta outflow compared to 2008/2009 BiOps

Wet	(71,903)
AN	723,174
BN	713,830
Dry	540,076
Critically Dry	(73,047)

VAs Assume Continuation of the Trump Administration's Unlawful Biological Opinions

“...the operations that are assumed in the voluntary agreement includes the operational flexibility incorporated into the 2019 biological opinions.... So again, if the wheels come off the bus and the new biological opinions look dramatically different, then there won't be a voluntary agreement.”

- Tom Birmingham, April 19, 2022 Meeting of the Board of Directors of the Westlands Water District

VA Fails to Protect Water Quality During Droughts

The CVP and SWP have violated minimum water quality objectives in the Delta in 5 of the last 9 years (2014, 2015, 2016, 2021, and 2022). The VA would result in continued violations of water quality objectives during droughts because it does not require that other water rights holders meet water quality objectives, which was one of the key objectives of the Bay-Delta Plan update.

Additional Delta Outflow Needed to Meet D-1641 in Critically Dry Years:

- 2014: more than 450,000 acre feet
- 2015: 910,000 acre feet
- 2021: 289,000 acre feet
- 2022: more than 616,000 acre feet (preliminary estimate for April to June)

Habitat Restoration Under the Bay-Delta Plan

- SWP and CVP are finally implementing long-overdue habitat restoration projects required as mitigation measures under existing permits, as part of EcoRestore.
- Since additional habitat restoration under the Voluntary Agreement is proposed to be funded with taxpayer dollars, this habitat restoration should also occur under the Bay-Delta Plan.

However, there is little or no scientific evidence that habitat restoration can substitute for adequate freshwater flows for many of our native fish species; as the State Water Board concluded in 2010, “flow and physical habitat interact in many ways, but they are not interchangeable.”

Preliminary Comparison of Bay-Delta Plan and VA

	Bay-Delta Plan	Proposed Voluntary Agreement
Increased Delta Outflows in the Winter and Spring	Approximately 1.6 million acre feet per year on average	Approximately 300,000 acre feet per year on average
Increased Reservoir Storage to Ensure Protective Water Temperatures for Salmon	Yes	No
San Joaquin Basin Instream Flows	40% of unimpaired flow	Less than 30% of unimpaired flow in most years
Floodplain and Other Habitat Restoration	Yes (more than 30,000 acres from existing mitigation obligations and EcoRestore)	Yes (proposes additional habitat restoration)
Protections for Endangered Species	Proposes protections similar to 2008/2009 biological opinions	Assumes continuation of the Trump Administration's biological opinions
Duration of the Plan	Permanent until periodically reviewed and amended	Temporary (8 years)

Conclusion

Proposed 2022 Voluntary Agreement:

1. Is the result of an exclusionary, illegitimate process;
2. Reinforces our inequitable water rights system, rather than reforming the system and protecting the Public Trust;
3. Assumes continuation of the Trump Administration's biological opinions;
4. Fails to provide adequate flows to restore the health of the ecosystem and the jobs and communities that depend on its health;
5. Fails to protect water quality during droughts; and,
6. Is highly uncertain and dependent on future regulatory decisions.