



## Back Room Bay-Delta Voluntary Agreement Scheme is Inequitable, Exclusionary, Inadequate and Lacks a Scientific Foundation

On March 29, 2022, a group of water districts, state agencies, and the Bureau of Reclamation released a memorandum of understanding (MOU) to reach a Bay-Delta [“voluntary agreement”](#) (VA). The VA scheme is intended to replace existing standards and circumvent efforts by the State Water Resources Control Board (State Board) to increase protections for the Bay-Delta and Central Valley rivers, and strengthen other environmental requirements in the Board’s Bay-Delta Water Quality Control Plan. The Bay-Delta is in crisis, as demonstrated by the risk of multiple fish extinctions, declining economically valuable salmon runs, harm to tribal lifeways, the explosive growth of harmful algae blooms in the Delta and more.

**The VA proposal is incomplete, unenforceable, inequitable, inadequate, and lacks a scientific foundation. The process has excluded most of the parties affected by declining Bay-Delta conditions. It is not a scientifically credible effort to respond to the crisis in the vast Bay-Delta ecosystem or California’s long history of inequitable water policies. After more than a decade of water district promises of a Bay-Delta agreement, it is clear that the VA process has failed.** It now represents little more than an attempt to delay action by the State Board to improve conditions in the Bay-Delta and Central Valley Rivers. **It is time for the State Board to finish updating, and to implement, the Bay-Delta Water Quality Control Plan.** The many flaws in the VA process are described in more detail below.

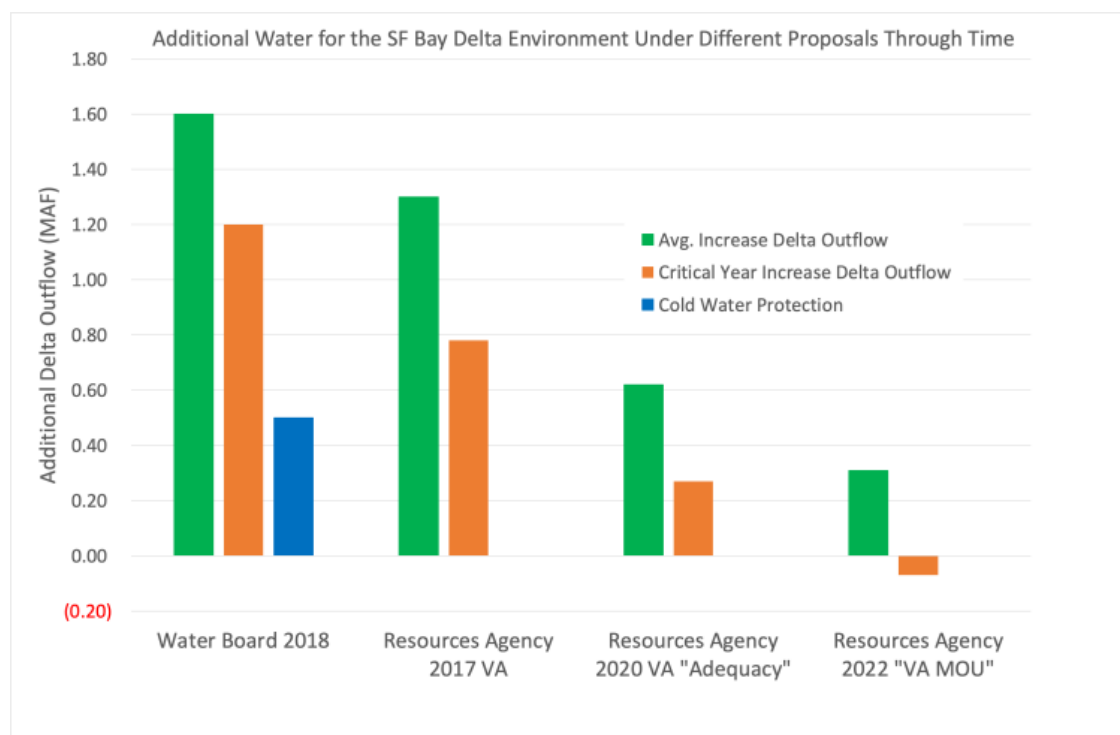
**Inequity in Both Process and Substance:** To call the March VA MOU a breakthrough on Bay-Delta issues is absurd. The secret negotiations that led to this VA proposal excluded many critical stakeholders, including tribal, environmental justice, environmental, and fishing interests. It also excluded Delta communities. These groups represent those hit the hardest by inadequate environmental protection requirements. In fact, the current document is not supported by any environmental, environmental justice, fishing, or tribal advocacy group or

tribe, located in the Bay-Delta watershed. The VA scheme represents a power grab by a small group of privileged water interests that chose to exclude the perspectives of others.

The VA approach doubles down on California's inequitable water rights system, which is based on a long history of discrimination, genocide, and a disregard for environmental health. For example, the outline entirely excludes issues that are of critical concern to environmental justice and tribal interests, such as temperature protections for salmon runs and action to reduce harmful algae blooms.

**Inadequate Proposed Water Flows, Exacerbated by Adoption of the Trump Biological Opinions as a Foundation:** At the heart of the VA proposal is an entirely inadequate proposal for freshwater flows to protect ecosystem health, disadvantaged communities, commercial and recreational fishing, and tribal values. The scheme would provide inadequate water to protect the environment in all year types. This problem is most obvious in dry years in which the ecosystem suffers the greatest damage. In the driest years, the MOU proposes far less water for the Bay-Delta and Central Valley rivers than was required in 2018, before the Trump Administration gutted ESA protections. In these years, the outline represents a step backward.

The graphic below, prepared by [San Francisco Baykeeper](#) compares multiple VA proposals using a single baseline to allow an "apples to apples" comparison. It shows the proposed rollback in critically dry year protections and reveals that the VA scheme would provide a small fraction of the water for the environment that the State Board proposed in its 2018 Framework. It also shows that the current VA proposal is far worse than two previous VA frameworks.



The 2022 VA MOU adopts the Trump Bay-Delta ESA Biological Opinions (BOs) as the “baseline” - the foundation for this agreement. This was not the case in the February 2020 VA outline. This decision dramatically reduces protections for the environment, as shown in the graphic above. Paradoxically, the State of California has successfully sued to overturn the Trump BOs and federal agencies have begun the process of replacing these science-free operating rules.

**Interfering with New, Science-Based Federal Biological Opinions:** One VA signatory, the Westlands Water District (WWD), is already using the VA MOU as leverage to block new science-based Bay-Delta ESA BOs. At an April 22 [Westlands board meeting](#), WWD General Manager Tom Birmingham stated that:

“The operations that are assumed in the voluntary agreements include 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, there won’t be a voluntary agreement.”

It is important to note that Trump Bay-Delta BOs were written while David Bernhardt, a former lobbyist for Westlands, was in charge of federal water policy in California.

**Endless State Board Delays:** The state and water districts claim that a VA will lead to rapid updating and implementation of antiquated 1995 Bay-Delta water quality standards. But the effort to reach a negotiated agreement is more than 10 years old. Similar VA outlines were released in February of 2020 and December of 2018. Despite this decade of secret meetings, the recent agreement to reach a VA is incomplete, non-binding, and fatally flawed. Many of the water districts that would need to contribute to the final VA have not signed the MOU.

**Smoke and Mirrors – Not New Water, Habitat, or Funds:** The VA framework inaccurately counts existing ecosystem water and funding for habitat restoration as “new” contributions. For example, it counts existing state funds and CVPIA Restoration Fund dollars as contributions of this negotiated agreement. In fact, restoration activity from these existing funds will continue with or without a Bay-Delta VA. Further, the outline counts as VA contributions the environmental water anticipated from storage projects under consideration by the California Water Commission. Again, these projects were underway well before the VA MOU was developed and are unrelated to it.

**No Biologically-Based Targets:** The framework includes no meaningful biological targets to measure success or failure. In fact, the outline would delay the State’s existing salmon doubling requirement until 2050 – long after this agreement would terminate. Without biologically-based metrics, adaptive management would be impossible, leading to the risk that the program could be declared a success even if the ecosystem and species continue to stagnate.

**Failure to Learn from Past Experience:** The VA relies on voluntary purchases of environmental water and proposes to manage that “block of water” to deliver environmental benefits. However, the VA process has not incorporated lessons from similar past efforts. For example:

- The Central Valley Project Improvement Act's Level 4 refuge water supply program has not yet purchased legally required water 20 years after the legal deadline.
- The 2000 CALFED Environmental Water Account's block of water cost taxpayers nearly \$100 million and failed to deliver environmental benefits.
- The VA framework fails to address the many "baseline" and accounting issues that plagued the CVPIA's 3406(b)(2) environmental block of water.

This failure to learn from past experience, combined with the lack of a credible enforcement program (see discussion below), reveal a major risk that the overall program and the enforcement component could both fail. (See the Defenders of Wildlife [Building Blocks](#) paper for a complete discussion of the lessons learned from past block of water programs.)

**Undermining Credible Science:** The VA proposal does not have a credible scientific foundation. It ignores high water temperatures resulting from reservoir management practices that kill the majority of salmon eggs. It relies on habitat restoration as a substitute for river flows despite the lack of evidence to support such a trade. Indeed, the state has provided no modeling of the biological outcome of the proposed VA. The state's analysis of the 2018 VA proposal (which promised more water than the current VA MOU) showed it would fail to protect water quality or fish and wildlife.

In addition, the outline proposes to undermine the ability of regulators to use the best available science by giving water agencies more control. Water districts have referred to this as a "collaborative" approach. However, this approach has already failed in "collaborative science" efforts related to the Bay-Delta BOs. Unfortunately, many VA participants have for years ignored and undermined the wealth of peer reviewed science regarding the need for a large increase in environmental flows. This fox should not be put in charge of the henhouse.

**No Enforcement:** The VA scheme lacks a credible approach to enforcement, in the event that promised water and habitat restoration fail to materialize, or in the event that the program proves ineffective. In fact, serious evaluation of the program would not begin until year six of the VA's 8-year life span.

**No Post-VA Strategy:** The VA MOU does not include a credible proposal for a regulatory strategy to replace the VA promptly in the event that it fails. In fact, the VA proposal would allow this inadequate scheme to be extended by as much as another seven years, beyond the originally 8-year term.

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