

# FIVE GUIDING PRINCIPLES FOR *Effective* VOLUNTARY AGREEMENTS

A Case Study on VAs for Water and Habitat in  
California's Bay-Delta Watershed

JANUARY 2024

Executive Summary



# EXECUTIVE SUMMARY

California has increasingly emphasized efforts to develop voluntary agreements (VAs) with water users as a means of achieving regulatory goals in certain watersheds. In theory, a VA can combine the protectiveness of a regulatory backstop with the creativity and flexibility of a negotiated deal to produce outcomes as good as, or better than, those achievable through strict application of regulatory requirements alone. However, reality has not always measured up to this ideal. This policy paper uses the Bay-Delta watershed as a case study to inform five principles to guide the appropriate use and evaluation of VAs.

In recent years, California has placed increasing emphasis on efforts to develop voluntary agreements (VAs) with water users as a means of achieving regulatory goals in certain watersheds. VAs are negotiated agreements that establish pathways for regulated entities to meet regulatory requirements through alternative means.

In theory, a VA can combine the protectiveness of a regulatory backstop with the creativity and flexibility of a negotiated deal, and it can produce outcomes as good as, or better than, those achievable through strict application of regulatory requirements alone. VAs may be able to achieve those outcomes more quickly and without protracted conflict and litigation.

That, at least, is the ideal. In California, however, the reality has not always measured up to the ideal. The highest profile example is the pursuit of VAs to achieve biological goals in the San Francisco Bay and Sacramento-San Joaquin Delta watershed (Bay-Delta watershed), where the magnitude of water diversions has contributed to long-term ecosystem decline. Over the last decade, California's political leadership has consistently promoted VAs as a solution, often investing substantial time and effort in negotiations while relegating efforts to build a strong regulatory foundation for VAs to the back burner. However well-intentioned, one result has been the deferral of long-overdue action to update the Bay-Delta Water Quality Control Plan. After more than twelve years of the state prioritizing VA development, it is uncertain if adequate agreements, and an adequate regulatory backstop for those agreements, will emerge. Meanwhile, the state has repeatedly paused long-needed updates to flow requirements for the Bay-Delta watershed while the VA process played out.

These problems have real consequences. During the long process of prioritizing VA development, native fish populations have continued to decline, and the declines could continue under the currently proposed VA approach. Leading with VAs as a

solution for balancing human and environmental needs for water in the Bay-Delta watershed—rather than first, or simultaneously, pursuing a regulatory pathway to achieve key biological goals—is a perilous strategy that risks continued environmental degradation and legal noncompliance.

Fortunately, the state has now created some momentum on the regulatory path and is moving forward with reviewing alternatives to inform a formal regulatory proposal later this year. Among the alternatives is a memorandum of understanding that outlines potential VAs. At this time, it is unclear whether the proposed VAs are being considered as a complete substitute for new flow-based water quality standards or as an alternative implementation pathway for such standards. Additionally, many important details of the proposed VAs have yet to be fleshed out.

This policy paper is designed to help regulatory agencies, potential parties to VAs, and the interested public assess proposals for VAs and forge a viable path toward achieving critical regulatory goals.

Using the Bay-Delta watershed as a case study, we define five simple and interrelated principles to guide the appropriate use of VAs:

1. **The state must establish a strong regulatory foundation for VAs.** VAs are a potential tool for implementing regulatory requirements. VAs cannot replace—and only have meaning in the context of—regulatory standards developed in accordance with federal and state law.
2. **VAs must achieve comparable environmental outcomes to the outcomes default regulatory requirements are expected to produce.** Outcomes expected from the default implementation pathway—not the pre-implementation status quo—are the baseline against which VA adequacy should be assessed.
3. **VAs must articulate clear, specific biological goals and measures of success.**
4. **VAs and actions taken under them must be well-supported by the best available scientific information.**
5. **VAs must include robust and transparent accountability mechanisms.**

Adhering to these principles will help close the gaps between the asserted potential and the actual performance of VAs.

While these principles derive from the Bay-Delta case study, VAs are proposed and pursued in many other contexts in California and elsewhere. We therefore expect these principles to have broad relevance.

#### **REGULATION vs. VAs: A FALSE DICHOTOMY**

Regulatory requirements can provide a firm foundation for creative, win-win solutions. They can be written to explicitly allow implementation by alternative means through VAs that meet specific criteria. In this way, VAs can be encouraged while simultaneously developing a strong regulatory backstop of default requirements for those not party to a VA—and that will be triggered for VA parties if a VA fails to deliver promised outcomes.

# ABOUT THE CENTER FOR LAW, ENERGY & THE ENVIRONMENT

The Center for Law, Energy & the Environment (CLEE) channels the expertise and creativity of the Berkeley Law community into pragmatic policy solutions to environmental and energy challenges. CLEE works with government, business, and the nonprofit sector to help solve urgent problems requiring innovative, often interdisciplinary approaches. Drawing on the combined expertise of faculty, staff, and students across the University of California, Berkeley, CLEE strives to translate empirical findings into smart public policy solutions to better environmental and energy governance systems.

## AUTHORS

Felicia Marcus  
WILLIAM C. LANDRETH VISITING FELLOW, STANFORD UNIVERSITY WATER IN THE WEST PROGRAM

Nell Green Nylan  
SENIOR RESEARCH FELLOW, WHEELER WATER INSTITUTE, CENTER FOR LAW, ENERGY & THE ENVIRONMENT

Dave Owen  
HARRY D. SUNDERLAND PROFESSOR AND ASSOCIATE DEAN FOR RESEARCH, UC LAW SAN FRANCISCO

Michael Kiparsky  
DIRECTOR, WHEELER WATER INSTITUTE, CENTER FOR LAW, ENERGY & THE ENVIRONMENT

## ACKNOWLEDGEMENTS

Funding for this project was generously provided by the Water Foundation. We thank Andrew Fahlund and Holly Doremus for providing useful insights throughout multiple stages of this project. In addition, we thank the following reviewers for insights and critical comments that helped improve this piece: Gary Bobker, Jennifer Spaletta, Peter Prows, Rick Frank, Roger Peters, and Stephanie Safdi. We did not ask reviewers to endorse the paper, and our acknowledgment of their contributions should not be understood to imply that they have done so. We appreciate the candid comments that have improved the document, even where disagreements remain. The authors take full responsibility for the contents of this document, including any errors.

## DESIGN

*Template design and layout:*  
Jordan Rosenblum

*Document design and layout:*  
Odd Moxie

*Cover image:*  
Jacques Descloîtres, MODIS  
Rapid Response Team,  
NASA/GSFC

To download the full policy paper, visit [law.berkeley.edu/voluntary-agreements](http://law.berkeley.edu/voluntary-agreements).

Berkeley  
Law

---

Center for Law, Energy,  
& the Environment

Center for Law, Energy  
& the Environment  
University of California  
Berkeley School of Law  
1995 University Avenue, Suite 460  
Berkeley, CA 94704

[clee.berkeley.edu](http://clee.berkeley.edu)  
TWITTER: [@BerkeleyLawCLEE](https://twitter.com/BerkeleyLawCLEE)  
FACEBOOK: [@BerkeleyLawCLEE](https://www.facebook.com/BerkeleyLawCLEE)  
LINKEDIN: [Center for Law, Energy  
& the Environment](https://www.linkedin.com/company/center-for-law-energy-and-the-environment)