

**BOARD OF DIRECTORS
SANTA CLARA VALLEY WATER DISTRICT**

RESOLUTION NO. 20-

**APPROVAL OF PROVISIONAL PARTICIPATION PERCENTAGE
AND AUTHORIZING NEGOTIATION AND EXECUTION OF A FUNDING
AGREEMENT FOR PRELIMINARY PLANNING AND DESIGN COSTS
RELATED TO A POTENTIAL DELTA CONVEYANCE PROJECT**

WHEREAS, the Santa Clara Valley Water District (Valley Water) has a long-term water supply contract with the State of California Department of Water Resources (DWR) for the delivery of State Water Project (SWP) water; and

WHEREAS, on July 21, 2017, DWR approved the California WaterFix (WaterFix) project, which was a dual conveyance project that involved two new diversion points and two tunnels moving water from the Sacramento River north of the Delta under the Delta to State Water Project and Central Valley Project (CVP) water pumping facilities in the South Delta; and

WHEREAS, the purpose of the WaterFix was to improve the reliability of SWP and CVP water for Valley Water and other contractors; and

WHEREAS, Valley Water's Board of Directors (Board) previously approved Valley Water's participation in the WaterFix, and authorized entering into a funding agreement ("2018 Gap Funding Agreement") with DWR dated August 24, 2018, to fund a share of preconstruction planning activity costs for the WaterFix; and

WHEREAS, in 2019, the Governor announced that he did not support the WaterFix, but instead supported a one tunnel conveyance project. DWR subsequently rescinded its approvals of the WaterFix and began planning for a single tunnel option; and

WHEREAS, in January 2020, DWR released a Notice of Preparation of an Environmental Impact Report pursuant to CEQA for a proposed single tunnel project with 6,000 cubic feet per second of capacity referred to as the Delta Conveyance Project (DCP), and DWR is currently conducting environmental review of that project; and

WHEREAS, DWR seeks \$340.7 million from SWP contractors to fund preliminary planning and design costs for a potential DCP (DCP Preconstruction Funding) that will occur from January 1, 2021, through December 31, 2024; and

WHEREAS, Valley Water seeks to enter into the *Agreement for the Advance or Contribution of Money to the Department of Water Resources by the Santa Clara Valley Water District for Preliminary Planning and Design Costs Related to a Potential Delta Conveyance Project* (2020 Gap Funding Agreement), of which this Resolution shall be incorporated, upon its adoption, as Exhibit B, which will commit Valley Water to provide funding commensurate with its provisional participation percentage for a portion of the DCP preconstruction activities expended from January 1, 2021, through December 31, 2022, with an option to commit additional funding to pay for DCP preconstruction activities that occur from January 1, 2023, through December 31, 2024.

NOW, THEREFORE BE IT RESOLVED by the Board of Directors of the Santa Clara Valley Water District:

1. That the Board does hereby approve a provisional participation percentage in the Delta Conveyance Project of 2.73 percent and authorize the CEO to increase Valley Water's provisional participation percentage up to a total of 3.23 percent if additional shares become available.
2. That the Chief Executive Officer is hereby authorized to negotiate and execute on behalf of the Santa Clara Valley Water District a 2020 Gap Funding Agreement substantially similar to the agreement attached hereto as Exhibit A, with a commitment to provide up to \$4,034,001 for preconstruction activities expended from January 1, 2021, through December 31, 2022, with an option to commit up to an additional \$6,972,348, upon future approval by the Board, to pay for DCP preconstruction activities that occur from January 1, 2023, through December 31, 2024.

PASSED AND ADOPTED by the Board of Directors of the Santa Clara Valley Water District by the following vote on November 17, 2020:

AYES: Directors

NOES: Directors

ABSENT: Directors

ABSTAIN: Directors

SANTA CLARA VALLEY WATER DISTRICT

NAI HSUEH
Chair, Board of Directors

ATTEST: MICHELE L. KING, CMC

Clerk, Board of Directors

EXHIBIT A COVERSHEET

DRAFT AGREEMENT FOR THE ADVANCE OR CONTRIBUTION OF MONEY TO THE DEPARTMENT OF WATER RESOURCES BY THE SANTA CLARA VALLEY WATER DISTRICT FOR THE PRELIMINARY PLANNING AND DESIGN COSTS RELATED TO A POTENTIAL DELTA CONVEYANCE PROJECT

No. of Pages: 13

**State of California
California Natural Resources Agency
DEPARTMENT OF WATER RESOURCES**

**AGREEMENT FOR
THE ADVANCE OR CONTRIBUTION OF MONEY TO
THE DEPARTMENT OF WATER RESOURCES
BY
THE SANTA CLARA VALLEY WATER DISTRICT**

**FOR PRELIMINARY PLANNING AND DESIGN COSTS RELATED TO A
POTENTIAL DELTA CONVEYANCE PROJECT**

THIS AGREEMENT is made, pursuant to the provisions of all applicable laws of the State of California, between the State of California, acting by and through its Department of Water Resources (“Department” or “DWR”), and the Santa Clara Valley Water District (“Contractor”), each herein referred to individually as a “Party” and collectively as the “Parties”.

Recitals

WHEREAS, DWR and the Contractor listed on the signature page hereto have entered into and subsequently amended a long-term water supply contract, herein referred to as a “Water Supply Contract,” providing that DWR will supply certain quantities of water to the Contractor, providing that Contractor shall make certain payments to DWR, and setting forth the terms and conditions of such supply and such payments; and

WHEREAS, the Bay Delta Conservation Plan (“BDCP”) process was initiated in 2005-2006 and the Delta Habitat Conservation and Conveyance Program (“DHCCP”) was initiated in 2008; and

WHEREAS, the Bay Delta Conservation Plan (“BDCP”) and (“DHCCP”) resulted in development of a project known as the California WaterFix (“WaterFix”); and

WHEREAS, on July 21, 2017, DWR approved the California WaterFix project; and

WHEREAS, certain Contractors have entered into that certain Joint Powers Agreement dated May 14, 2018 forming the Delta Conveyance Design and Construction Authority (“DCA”); and

WHEREAS, DWR and DCA have entered into that certain Joint Powers Agreement (“JEPA”), dated May 22, 2018, as amended and restated, and as the same has or may be further amended, wherein the DCA will provide preliminary design, planning and other preconstruction activities to

assist the environmental planning process for a potential Delta conveyance project under the supervision of DWR (the “Work” as defined in the JEPA); and

WHEREAS, Contractor previously entered into a funding agreement with DWR dated August 24, 2018 to provide a share of preconstruction planning activity costs for California WaterFix (“2018 Gap Funding Agreement”); and

WHEREAS, Contractor agreed to advance or contribute to DWR \$1,092,975 pursuant to the 2018 Gap Funding Agreement; and

WHEREAS, DWR expended \$197,354 of the \$1,092,975 Gap Funding Agreement amount towards the California WaterFix project; and

WHEREAS, on May 2, 2019, DWR rescinded its approval of the California WaterFix project and subsequently notified Contractor by letter on May 24, 2019 that DWR would not expend funds contributed under the 2018 Gap Funding Agreement to pay invoices for DCA costs incurred after May 2, 2019, absent further Contractor authorization (see Exhibit A); and

WHEREAS, DWR will return to the Contractor the remaining \$895,621 of unspent funds from the 2018 Gap Funding Agreement as reflected in a credit to Contractor’s 2021 Statement of Charges; and

WHEREAS, DWR now seeks \$340.7 million from SWP Contractors to fund the estimated costs of the preliminary planning and design costs for a potential DCP from January 1, 2021 through December 31, 2024; and

WHEREAS, Contractor desires to contribute \$_____ for Calendar Years 2021 and 2022, and to retain the sole option to contribute an additional \$_____ for Calendar Years 2023 and 2024; and

WHEREAS, Contractor’s contribution of \$_____ for Calendar Years 2021 and 2022 and optional contribution of \$_____ for Calendar Years 2023 and 2024 is consistent with its tentative _____ participation percentage in the proposed DCP; and

WHEREAS, a copy of the resolution of the Board of Directors of Contractor authorizing its Chief Executive Officer to execute this Agreement is attached hereto as Exhibit B; and

WHEREAS, a State Agency may advance or contribute funds to DWR for SWP purposes pursuant to Water Code section 11135 and (ii) DWR may accept such advanced or contributed funds and thereafter use such funds in accordance with the terms of this Agreement pursuant to Water Code section 11141.

NOW, THEREFORE, it is mutually agreed by the Parties as follows:

1. When used in this Agreement, terms defined in the Water Supply Contract (as defined herein) shall be defined by reference to the Water Supply Contractor. In addition, the following definitions shall apply:
 - a. **“Calendar Year”** means the period January 1 through December 31.
 - b. **“Contributed Funds”** means money contributed or advanced to DWR by Contractor pursuant to this Agreement. The total initial amount Contractor agrees to provide is \$_____ and is comprised of the following annual amounts of \$_____ for Calendar Year 2021, \$_____ for Calendar Year 2022, and if and when subsequently authorized by Contractor in accordance with section 5 hereof an additional \$_____ for Calendar Year 2023 and \$_____ for Calendar Year 2024, in each case to be paid to DWR in the manner described in Section 5 of this Agreement.
 - c. **“2018 Contributed Funds”** means money contributed by Contractor pursuant to the 2018 Gap Funding Agreement.
 - d. **“Contribution Payment(s)”** means the payments of Contributed Funds that Contractor agrees to provide to DWR pursuant this Agreement.
 - e. **“Contractor”** means a State Agency that is a party to a Water Supply Contract with DWR.
 - f. **“Department”** or **“DWR”** means the California Department of Water Resources.
 - g. **“Effective Date”** has the meaning ascribed to it in section 11 hereof.
 - h. **“JEPA”** means the Joint Exercise of Powers Agreement between DWR and the DCA dated May 22, 2018, as amended and restated and as may be further amended from time to time.
 - i. **“Pay-Go Charge”** means the charge included on Contractor’s Statements of Charges for the purpose of collecting Contributed Funds that Contractor agrees to advance or contribute to DWR pursuant to this Agreement.
 - j. **“Party”** or **“Parties”** means DWR, the undersigned Contractor, or all signatories to this Agreement.
 - k. **“State Agency”** has the meaning ascribed to it by Water Code section 11102.
 - l. **“SWP”** or **“State Water Project”** means the State Water Project operated by DWR. The SWP generally includes the State Water Facilities, as defined in California Water Code section 12934(d), and certain facilities authorized by the Central Valley Project Act at section 11100 *et. seq.*

m. **“Water Supply Contract”** means the long-term water supply contract, as amended and as may be amended in the future, between Contractor and DWR.

n. **“Work”** has the meaning ascribed to it in the Recitals to this Agreement.

2. Effect of Agreement. DWR and Contractor agree that this Agreement supersedes the 2018 Gap Funding Agreement, which is hereby terminated as of the Effective Date. DWR and Contractor agree that nothing in this Agreement supersedes previous funding agreements or the obligations under those funding agreements unless specifically addressed in this Agreement.
3. Purposes of Agreement. This Agreement documents Contractor’s agreement to provide Contributed Funds to DWR for the purposes set forth in Section 4, the manner of providing those funds as set forth in Section 5, and the means by which future contributions may be made.
4. Use of Funds. DWR shall use the 2018 Contributed Funds, Contributed Funds and any future Contributed Funds collected from Contractor pursuant to section 5 hereof, for the payment of DCA invoices submitted to DWR on or after October 1, 2020 for the Work done or costs incurred by DCA, or for Delta conveyance project planning work done by DWR through the Delta Conveyance Office (“DCO”) and any other purpose consistent with the JEPA, as the same has been, and may be, amended from time to time. DWR will not use funds provided under this Agreement for the activities described in the Mitigated Negative Declaration entitled “Soil Investigations for Data Collection in the Delta” adopted by DWR on July 9, 2020.
5. Charge Procedure. Contractor shall pay its Pay-Go Charge on the date(s) and in the amount(s) set forth on the revised Statement of Charges for 2021, and subsequent Statements of Charges issued to Contractor by DWR. The annual amounts will be paid in twelve monthly installments. Contractor may agree, without amending this Agreement, to advance additional funds after the Effective Date, including the optional additional contribution of funds for calendar years 2023 and 2024 described in section 1(b) hereof, which shall be considered Contributed Funds, by delivery to DWR of a letter in substantially the form attached hereto as Exhibit C, which letter shall specify the amount to be advanced or contributed, whether the payments will be in the form of one or more lump sums or in 12 equal installments, and together with such other information the Parties deem necessary or desirable to effectuate the advance or contribution. A copy of the resolution, or other Board authorization, of Contractor’s Board of Directors approving the subject contribution shall be enclosed with the letter. Upon receipt of a contribution letter DWR shall indicate its agreement by returning a counter signed copy of the letter to Contractor. The agreed upon advance or contribution shall thereafter be included in Contractor’s Statement of Charges or a revised Statement of Charges, as appropriate. The charge shall be designated by reference to the year in which the charge is to begin, followed, if there be

more than one such subsequent advance or contribution in a year by a dash and an integer followed by the words Pay-Go Charge.

6. Limitation. With respect to the Work and the DCA, nothing in this Agreement imposes any duty or obligation either expressly or by implication on DWR other than the duty to use 2018 Contributed Funds and other Contributed Funds to pay the undisputed portion of DCA invoices submitted to DWR during the term of this Agreement in accordance with the terms of this Agreement and the JEPA if, as and when Contributed Funds have been received by DWR under this Agreement and other similar agreements or arrangements with other Contractors for purposes substantially the same as those described herein and is available for the payment thereof.
7. Reporting. DWR, through its DCO and in coordination with its State Water Project Analysis Office (SWPAO), shall annually prepare a report summarizing the advances or contributions received, and expenditures made pursuant to, this Agreement. The first such report shall be completed not later than March 31, 2021 and thereafter not later than March 31 of each subsequent year. Contractor may request in writing a summary of the advances, contributions, and expenditures at any time during the term of this Agreement and DWR shall provide such within thirty (30) days of such written request.
8. Status of Project. Contractor recognizes that the funds contributed pursuant to this Agreement are for the planning activities in support of DWR's environmental review and permitting process, including but not limited to the Work, for a potential Delta conveyance project. The advance or contribution of Contributed Funds is not contingent on, or in exchange for, DWR's agreement to exercise its discretion in future to approve a Delta conveyance project.
9. Unspent Funds. Upon termination of this Agreement, it is the intent of the Parties that any unspent Contributed Funds remaining after payment of all costs for which the funds were contributed will be returned to Contractor as a credit on Contractor's Statement of Charges in proportion to its percentage share of advances or contributions made by all Contractors that entered into Agreements similar to this Agreement.
10. Reimbursement of Contributed Funds. If a Delta conveyance project is approved by DWR and is implemented it is the intent of the Parties hereto that the Contributed Funds spent in accordance with this Agreement and the 2018 Gap Funding Agreement be reimbursed or credited to Contractor according to the relative amount each such Contractor paid pursuant to this Agreement and the 2018 Gap Funding Agreement, upon the issuance and sale of revenue bonds by either the Department or a Joint Powers Authority established, whichever occurs earlier, for the purpose of, among other things, funding a future Delta conveyance facility. The Department shall be under no obligation to issue and sell bonds for the purpose(s) described in the foregoing sentence or to undertake any reimbursement or credit as so described, unless a determination is first made by DWR in its sole discretion that such issuance and sale of revenue bonds, such reimbursement, or such credit as applicable is consistent with applicable law, applicable judicial rulings, and applicable contractual obligations of DWR, and the Parties have negotiated and executed such further agreements

as may be necessary to accomplish such credit or reimbursement on terms acceptable to DWR.

11. Effective Date and Term. This Agreement shall become effective on the date the last Party hereto signs the Agreement as set forth on the signature page(s) hereto (“Effective Date”) and shall continue in effect until terminated in writing by the Parties. The Parties obligations under Section 10 shall survive termination of this Agreement.
12. Invoices, Notices or Other Communications. All invoices, notices, or other communications required under this Agreement will be in writing, and will be deemed to have been duly given upon the date of service, if: (i) served personally on the Party to whom notice is to be given; (ii) sent by electronic mail, and the Party to whom notice is to be given confirms receipt; or (iii) on the third day after mailing, if mailed to the Party to whom invoice, notice or other communication is directed, by first-class mail, postage prepaid, and properly addressed to the designated representative(s) of the Party set forth below.

DWR: Pedro Villalobos
Chief, State Water Project Analysis Office
Department of Water Resources
1416 Ninth Street, Room 1620
Post Office Box 94236
Sacramento, California 94236-0001

Copy to
Anthony Meyers
Executive Director, Delta Conveyance Office
Department of Water Resources
901 P Street, Room 413
Sacramento, California 94236-0001

Copy to
Christopher Martin
Office of the Chief Counsel
Department of Water Resources
1416 Ninth Street, Room 1620
Post Office Box 94236
Sacramento, California 94236-0001

Contractor:

Rick L. Callender, Esq.
Chief Executive Officer
Santa Clara Valley Water District
5750 Almaden Expressway

San Jose, CA 95118

Copy to:
District Counsel
Office of the District Counsel
5750 Almaden Expressway
San Jose, CA 95118

13. No Delegation of Authority. Nothing in this Agreement constitutes a delegation by any Party of its existing authority to make any decision it is mandated to make. Nothing in this Agreement shall limit DWR's final decision-making authority at the time of consideration of future Delta conveyance facility related approvals. All provisions of this Agreement are intended to be, and shall to the extent reasonable be interpreted to be, consistent with all applicable provisions of State and federal law. The undersigned recognize that the Parties are public agencies and have specific statutory responsibilities, and that actions of these public agencies must be consistent with applicable procedural and substantive requirements of State and federal law. Nothing in this Agreement is intended to, nor will have the effect of, constraining or limiting any public agency in carrying out its statutory responsibilities or requiring an agency to take any action inconsistent with applicable law. Nothing in this Agreement constitutes an admission by any Party as to the proper interpretation of any provision of law, nor will it have the effect of, waiving or limiting any public entity's rights and remedies under applicable law except as expressly provided elsewhere in this Agreement. Execution of this Agreement does not constitute pre-approval of any project or preferred project alternative, or waive or otherwise abridge responsible trustee duties required, or discretion authorized or granted by, State and federal law.
14. Waiver. As of the Effective Date, Contractor hereby forever and unconditionally waives and releases and discharges and covenants not to sue or otherwise institute or cause to be instituted or in any way participate in any proceedings, processes or actions against DWR with respect to any and all claims, demands, costs, liabilities, objections, rights, damages, expenses, and actions and causes of action of every nature, whether in law or equity, known or unknown, or suspected or unsuspected, which Contractor ever had or now has against DWR in connection with or arising from the use of funds contributed under the 2018 Gap Funding Agreement.
15. Amendment. Except as otherwise set forth above, this Agreement may only be amended or modified by a subsequent written agreement approved and executed by both Parties.
16. Applicable Law. This Agreement will be construed under and will be deemed to be governed by the laws of the United States and the State of California.
17. Integration. This Agreement constitutes the sole, final, complete, exclusive and integrated expression and statement of the terms of this Agreement among the Parties concerning the subject matter, and supersedes all prior negotiations, representations or agreement, either oral or written, that may be related to the subject matter of this Agreement.

18. Counterparts. This Agreement may be executed in counterparts, each of which shall constitute an original, but all of which shall constitute one and the same agreement. Each signing Party shall have received a copy of the signature page signed by every other Party.

Exhibits attached and incorporated herein:

Exhibit A Letter from DWR dated May 21, 2019

Exhibit B Board Resolution

Exhibit C Form of Letter Regarding Future Contributions

DRAFT

IN WITNESS WHEREOF, the Parties hereto, by their authorized representatives, have executed this Agreement on the date(s) set forth below.

Approved as to Legal Form
and Sufficiency

State of California
Department of Water Resources

Spencer Kenner, Chief Counsel

Karla A. Nemeth,
Director

Date

Date

Approved as to Legal Form
and Sufficiency

Santa Clara Valley Water District

Signature

Signature

Anthony T. Fulcher,
Sr. Assistant District Counsel

Rick L. Callender, Esq.,
Chief Executive Officer

Date

Date

Exhibit A

Letter from DWR to Contractor

DRAFT

Exhibit C

Form of Contribution Letter

[date]
[address]

Re: Contribution or Advance of Money for Delta Conveyance Planning Activities

Dear Mr. Villalobos:

This letter is sent pursuant to section 5 of the Agreement for the Advance of Contribution of Money to the Department of Water Resources for Preliminary Planning and Design Costs Related to a Potential Delta Conveyance Project dated _____, 2020 between Department of Water Resources and the [agency] ("Funding Agreement").

On [date] the Board of Directors of [agency] approved the contribution or advance of \$[amount] to the Department for use in accordance with the terms of the Funding Agreement. A copy of the Board's resolution is enclosed with this letter. The contribution or advance will be collected from [agency] in [a lump sum][equal monthly installments] by inclusion of a charge [on its Statement of Charges for [year]][on a revised Statement of Charges for [year] that Department will issue to [agency]]. The charge shall be referred to as the [year] Pay-go Charge. As provided by section 5 of the Agreement the contribution or advance described herein will be subject to the terms and conditions of the Agreement.

Please confirm your agreement to the foregoing by countersigning in the space provided below and returning an original copy of this letter agreement to [agency] at [address].

[signature blocks for agency and Department]

Enclosure(s)

cc:

Exhibit B

Resolution of the Board of Directors of Contractor

TO BE INSERTED ONCE EXECUTED

DRAFT

DEPARTMENT OF WATER RESOURCES

1416 NINTH STREET, P.O. BOX 942836
SACRAMENTO, CA 94236-0001
(916) 653-5791



May 24, 2019

Ms. Norma J. Camacho
Chief Executive Officer
Santa Clara Valley Water District
5750 Almaden Expressway
San Jose, California 95118

Subject: Use of Contributed Funds following Director Nemeth's
May 2, 2019 Announcement

Dear Ms. Camacho:

This letter is to notify the Santa Clara Valley Water District (the Contractor) of changes regarding the use of funds contributed to the Department of Water Resources (DWR) pursuant to the Agreement for the Advance or Contribution of Money to the Department of Water Resources, executed on November 6, 2018, between DWR and Agency (Agreement). Pursuant to the Agreement, the Santa Clara Valley Water District agreed to contribute funds for the payment of WaterFix related preconstruction costs incurred by the Delta Conveyance Design and Construction Authority (Authority).

On May 2, 2019, DWR issued a notice to Contractors informing all State Water Project Contractors of Director of Water Resources Nemeth's rescission of DWR's approval of WaterFix (see attached Notice). As a result of the actions described in the Notice, funds contributed pursuant to the Agreement will not be used by DWR to pay costs incurred by Authority after May 2, 2019, absent further authorization by the Contractor.

The Contractor should continue making remaining payments, if any, required by the Agreement and contained in the most recent Statement of Charges sent issued to the Contractor. Appropriate adjustments to the Contractor's Statement of Charges will be made by DWR in accordance with normal SWP billing practices.

If you have any questions regarding this letter or any of the matters referenced herein, please contact Hong Lin, my Advisor, at (916) 651-0762 or by e-mail at Hong.Lin@water.ca.gov.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Gary Lippner'.

Gary Lippner, Deputy Director
Delta Conveyance

Enclosure: May 2, 2019 Notice to State Water Project Contractors

cc: Cindy Kao, Imported Water Unit Manager, Santa Clara Valley Water District
Christopher Martin, Office of Chief Counsel, DWR
Pedro Villalobos, State Water Project Analysis Office, DWR

Attachment 18
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