



Folsom City Council Staff Report

MEETING DATE:	3/9/2021
AGENDA SECTION:	Consent Calendar
SUBJECT:	Resolution No. 10592 – A Resolution Authorizing the City Manager to Execute a Common Interest and Cost Share Agreement for Coordinated Participation on Bay-Delta Water Quality Control Plan Amendments
FROM:	Environmental and Water Resources Department

RECOMMENDATION / CITY COUNCIL ACTION

The Environmental and Water Resources Department recommends the City Council pass and adopt Resolution No. 10592 - A Resolution Authorizing the City Manager to Execute a Common Interest and Cost Share Agreement for Coordinated Participation on Bay-Delta Water Quality Control Plan Amendments.

BACKGROUND / ISSUE

The City has been working with the Cities of Roseville and Sacramento along with San Juan Water District, Sacramento Suburban Water District, Placer County Water Agency, Sacramento County Water Agency, and El Dorado Irrigation District, collectively known as the “American River Water Agencies” to complete a new operating plan for the American River. This work was completed under a joint defense agreement (JDA) to maintain confidentiality over their collective efforts and to coordinate funding for those efforts. On February 13, 2018, City Council approved Resolution No. 10080 for Amendment No. 3 to the JDA, which is the current agreement in place.

As discussed in Resolution No. 10593, the American River Water Agencies are seeking to coordinate regional efforts through a Regional Water Authority (RWA) Major Projects Management Service Program Agreement (Program). This RWA Program will help support member agency efforts to participate in various regulatory and administrative processes jointly and cooperatively, including the Bay-Delta Water Quality Control Plan (WQCP) and other

environmental and regulatory matters that affect the surface water supplies in the region. This RWA Program will include agencies that are not currently covered under the JDA.

The Parties desire to provide the technical basis to enable their respective counsel to provide informed legal advice to the respective and to identify and pursue appropriate approaches to protect American River water supplies and water rights, by jointly pursuing technical work to, among other things, provide comment on the Bay-Delta WQCP amendments. The Parties share a common interest in achieving all of the above. In addition to the agencies that are currently covered under the JDA, additional regional water agencies have an interest in coordinating efforts and share costs in order to protect American River region water rights and water supplies in the development of any amendments to the Bay-Delta WQCP. The Common Interest and Cost Share Agreement will include all interested American River parties and will supersede the JDA. Upon full execution of this agreement, the JDA will be terminated.

POLICY / RULE

In accordance with Chapter 2.02 of the Folsom Municipal Code, all powers of the City shall be vested in the City Council and the City Council shall provide for the exercise thereof and for the performance of all duties and obligations imposed on the City by law.

ANALYSIS

The American River Water Agencies, along with the Water Forum, have determined that the key element of this effort is a Modified Flow Management Standard (MFMS), a package of modified minimum instream flow requirements and carryover storage targets for Folsom Reservoir. The MFMS has been determined to be sufficient to protect the co-equal goals of American River stakeholders: protection of the lower American River ecosystem and the long-term water supply reliability of the Sacramento region. The MFMS operating plan has been refined to be protective of the region's goals while also protecting the Sacramento River and the Bay Delta.

One of the upcoming proceeding is the update of the Bay Delta Water Quality Control Plan. In this proceeding, the State Water Resources Control Board will consider adopting new streamflow requirements for the Delta that apply to all water-right holders in the Central Valley, including the City. The American River Water Agencies plan to include the MFMS in that proceeding as sufficiently protective of environmental resources and water supplies in the Sacramento region. Further technical work will be necessary to include the MFMS in this proceeding.

The SWRCB's development of amendments to the Bay-Delta WQCP may result in adversarial quasi-legislative or quasi-judicial administrative proceedings, litigation in state or federal courts or both. The Parties desire to provide the technical basis to enable their counsel to provide informed legal advice to the respective Parties and to enable the Parties to identify and pursue appropriate approaches to protect American River water supplies and water rights, by jointly pursuing technical work to, among other things, provide comment on the Bay-Delta

WQCP amendments. The Parties share a common interest in achieving all the above. Through this Common Interest Agreement, the American River Water Agencies and RWA desire to:

- Acknowledge and affirm their common interest to cooperate and coordinate efforts to protect American River water rights and water supplies as part of the SWRCB's Bay-Delta WQCP amendment process.
- Establish cost-sharing arrangements for related consultant work and expenses.
- Provide for the management of the cooperative and coordinated effort contemplated by this Agreement.

The American River Water Agencies and RWA desire, based on their common interests, to cooperate, coordinate, and share information related to the SWRCB's WQCP update process, while continuing to preserve, to the fullest extent possible, the protections of the attorney-client privilege, work product privilege, common-interest doctrine, deliberative process privilege, executive privilege, or any other privilege or protection existing under state or federal law. The Common Interest and Cost Share Agreement identifies the management of the coordinate effort, the cost sharing arrangement, the make-up of the Steering Committee, and communications and sharing of work products.

Staff recommends the City Council authorize the City Manager to execute a Common Interest and Cost Share Agreement for Coordinated Participation on Bay-Delta Water Quality Control Plan Amendments for a not to exceed fee of \$56,000.

FINANCIAL IMPACT

The City's cost share for the Common Interest and Cost Share Agreement for Coordinated Participation on Bay-Delta Water Quality Control Plan Amendments is \$56,000, which is 11.2% of the total not to exceed amount of \$500,000 for all water agencies. Funding for this work is budgeted and available in the Water Operating Fund (Fund 520) in FY 2020-21.

ENVIRONMENTAL REVIEW

Execution of this agreement is not considered a project and therefore not subject to CEQA.

ATTACHMENTS

1. Resolution No. 10592 - A Resolution Authorizing the City Manager to Execute a Common Interest and Cost Share Agreement for Coordinated Participation on Bay-Delta Water Quality Control Plan Amendments
2. Common Interest and Cost Share Agreement for Coordinated Participation: Bay-Delta Water Quality Control Plan Amendments

Submitted,

Marcus Yasutake, Director
ENVIRONMENTAL AND WATER RESOURCES DEPARTMENT

ATTACHMENT 1

RESOLUTION NO. 10592

A RESOLUTION AUTHORIZING THE CITY MANAGER TO EXECUTE A COMMON INTEREST AND COST SHARE AGREEMENT FOR COORDINATED PARTICIPATION ON BAY-DELTA WATER QUALITY CONTROL PLAN AMENDMENTS

WHEREAS, the City, as part of the American River Water Agencies, began preparations for several regulatory proceedings regarding the Bay Delta Water Quality Control Plan; and

WHEREAS, the American River Water Agencies collaborated and funded the necessary technical work to complete a new operating plan, the Modified Flow Management Standard, for the American River, to protect their water rights and water supplies; and

WHEREAS, the American River Water Agencies wish to fund the preparation and necessary testimony for the regulatory proceedings regarding the Bay Delta Water Quality Control Plan; and

WHEREAS, the American River Water Agencies desire to provide the technical basis to enable their counsel to provide informed legal advice to the respective Parties and to enable the agencies to identify and pursue appropriate approaches to protect American River water supplies and water rights; and

WHEREAS, the funds have been budgeted and are available in the Water Operating Fund (Fund 520) in FY 2020-21; and

WHEREAS, the American River Water Agencies are seeking to coordinate regional efforts through a Common Interest and Cost-Share Agreement and the agreement will be in a form acceptable to the City Attorney:

NOW, THEREFORE, BE IT RESOLVED that the City Council of the City of Folsom Authorizes the City Manager to Execute a Common Interest and Cost Share Agreement for Coordinated Participation on Bay-Delta Water Quality Control Plan Amendments for a not to exceed fee of \$56,000.

PASSED AND ADOPTED this 9th day of March 2021, by the following roll-call vote:

AYES: Councilmember(s):
NOES: Councilmember(s):
ABSENT: Councilmember(s):
ABSTAIN: Councilmember(s):

Michael D. Kozlowski, MAYOR

ATTEST:

Christa Freemantle, CITY CLERK

ATTACHMENT 2

**COMMON INTEREST and COST-SHARE AGREEMENT
for COORDINATED PARTICIPATION:**

BAY-DELTA WATER QUALITY CONTROL PLAN AMENDMENTS

This Common Interest and Cost-Share Agreement (Agreement) is entered into by and among the Carmichael Water District, City of Folsom, City of Roseville, City of Sacramento, El Dorado Irrigation District, Golden State Water Company, Placer County Water Agency, Regional Water Authority, Sacramento County Water Agency, Sacramento Suburban Water District, and San Juan Water District, and made effective on the date the last of the aforementioned parties signs this Agreement.

RECITALS

A. The Carmichael Water District, City of Folsom, City of Roseville, City of Sacramento, El Dorado Irrigation District, Golden State Water Company, Placer County Water Agency, Sacramento County Water Agency, Sacramento Suburban Water District, and San Juan Water District, individually a “Water Purveyor Party” and collectively the “Water Purveyor Parties”, are water purveyors who desire to cooperate, coordinate efforts and share costs in order to protect American River region water rights and water supplies in the State Water Resources Control Board’s (“SWRCB”) development of amendments to the Bay-Delta Water Quality Control Plan (“WQCP”) for the Sacramento River watershed and implementation of any such amendments. The SWRCB’s development of amendments to the Bay-Delta WQCP may result in adversarial quasi-legislative or quasi-judicial administrative proceedings, litigation in state or federal courts or both. The Parties desire to provide the technical basis to enable their counsel to provide informed legal advice to the respective Parties and to enable the Parties to identify and pursue appropriate approaches to protect American River water supplies and water rights, by jointly pursuing technical work to, among other things, provide comment on the Bay-Delta WQCP amendments. The Parties share a common interest in achieving all of the above.

B. The Regional Water Authority (“RWA”) is a joint powers authority formed for the purposes, among others, of serving and representing American River regional water supply interests in protecting and enhancing the reliability, availability, affordability, and quality of water resources in the American River region.

C. Through this Agreement, the Water Purveyor Parties and RWA desire to: (i) acknowledge and affirm their common interest to cooperate and coordinate efforts to protect American River water rights and water supplies as part of the SWRCB's Bay-Delta WQCP amendment process; (ii) establish cost-sharing arrangements for related consultant work and expenses; and (iii) provide for the management of the cooperative and coordinated effort contemplated by this Agreement.

D. The Water Purveyor Parties and RWA desire, based on their common interests, to cooperate, coordinate, and share information related to the SWRCB's WQCP update process, while continuing to preserve, to the fullest extent possible, the protections of the attorney-client privilege, work product privilege, common-interest doctrine, deliberative process privilege, executive privilege, or any other privilege or protection existing under state or federal law.

AGREEMENT

NOW, THEREFORE, in consideration of the above recitals, and the mutual covenants and conditions contained herein, the Water Purveyor Parties and RWA agree as follows:

1. Management of Coordinated Effort. The Water Purveyor Parties desire to have RWA serve as the project manager for this coordinated effort. RWA agrees to act as the project manager for this coordinated effort, provided that RWA is reimbursed for its cost in acting as project manager. All costs for RWA's role as project manager will be funded through RWA's Major Projects Management Services Program. As provided in Paragraph 2(a), all Water Purveyor Parties participating in this coordinated effort must also be a party to Major Projects Management Services Program Agreement.

2. Cost-Sharing.

(a) Cost Sharing for RWA's Project Management Services. RWA has established the Major Projects Management Services Program pursuant to which individual RWA members can agree to pay certain sums in return for RWA providing certain project management services. At all times that a Water Purveyor Party is participating in the coordinated efforts contemplated by this Agreement, that Water Purveyor Party shall also be a party to the Major Projects Management Services Program Agreement. In the event a Water Purveyor Party fails or ceases to be a party to the Major Projects Management Services

Program Agreement, that Water Purveyor Party will be deemed to have withdrawn from this Agreement pursuant to Paragraph 5.

(b) Cost Sharing for Consultant Work. The Water Purveyor Parties desire to share in the costs of consultant work that will be required as part of the Parties' activities related to the Bay-Delta WQCP update process. The total obligation of the Water Purveyor Parties to fund the consultants' work on matters contemplated by this Agreement shall not exceed \$500,000 without written amendment to this Agreement. The Water Purveyor Parties' respective percentage shares of the costs and fees for consultant work under this Agreement are set forth in Exhibit A to this Agreement. RWA shall not be responsible for any consultant costs under this Agreement.

3. Steering Committee: Retention and Direction of Consultants.

(a) Steering Committee. The Water Purveyor Parties will each appoint a representative to a Steering Committee, which will make decisions for the Water Purveyor Parties concerning work by consultants under this Agreement and provide direction to RWA in managing the coordinated effort. The Steering Committee will also make decisions on matters related to executing strategy and policy matters. The Steering Committee generally will meet at least once a month during this Agreement's term. Unless specifically provided otherwise herein, an affirmative vote by 2/3 of all members of the Steering Committee shall be required for all decisions contemplated by this Agreement. The Steering Committee may vote by e-mail provided that all Steering Committee members are included in the circulation list for those e-mails.

(b) Retention, Direction and Compensation of Consultants. The Water Purveyor Parties will jointly authorize one or more of the Water Purveyor Parties' legal counsel to retain consultants to perform scopes of work as approved by the Steering Committee, subject to applicable law for the confidentiality and protection of the work performed and work products produced by consultants. Retention of a consultant under this Agreement by a Water Purveyor Party or its counsel will not prevent that consultant from performing work for another Water Purveyor Party or RWA on matters not included in scopes of work authorized under this Agreement. The Water Purveyor Parties, and not their legal counsel, collectively will be responsible for compensating consultants retained under this Agreement according to their respective shares as set forth in Exhibit A.

(c) Management of Consultants' Work. RWA will manage all work by consultants under the direction of the Steering Committee. RWA will ensure that its communications with consultants comply with this Agreement's confidentiality arrangements. Provided that RWA's manager of the Major Projects Management Services Program and all Water Purveyor Parties' legal counsel are included on the relevant communications, Steering Committee members may have direct contact with consultants and consultants may circulate information and drafts directly to Steering Committee members.

4. Cost-Sharing Upon Addition of Parties. A new Water Purveyor Party may be added to this Agreement with: (i) approval by all members of the Steering Committee, and (ii) a written commitment by the new Water Purveyor Party to pay its proportionate share of all of the consultants' costs and fees incurred for the applicable scope or scopes of work by consultants, including work already performed under the applicable scope or scopes of work. Upon the addition of a new Water Purveyor Party to the Agreement, that new Water Purveyor Party's share, and the shares of the pre-existing Water Purveyor Parties, of any costs and fees incurred in relation to the applicable scope or scopes of work will be as determined by the Steering Committee prior to the new Water Purveyor Party's admission into this Agreement.

5. Withdrawal, Removal, and Cost-Sharing.

(a) Withdrawal. Any Water Purveyor Party may withdraw from this Agreement at any time; provided, however, in the event that a Water Purveyor Party withdraws after the Steering Committee has authorized consultants to proceed with certain scopes of work and related task orders, the withdrawing Water Purveyor Party shall remain obligated for payment of its proportionate share of the costs for such authorized work completed as of the date of the Water Purveyor Party's withdrawal. Written notice of withdrawal shall be sent to all members of the Steering Committee. A withdrawing Water Purveyor Party shall not receive any Joint Defense Materials (as defined in Section 8) produced after the date of its written notice of withdrawal, whether or not those Joint Defense Materials reflect consultant work performed before the date of that written notice of withdrawal.

(b) Removal. A Water Purveyor Party may be removed from this Agreement at any time by a three-fourths (3/4) vote of the remaining Water Purveyor Parties; provided, however, in the event that a Water Purveyor Party is removed from this Agreement after the

Steering Committee has authorized consultants to proceed with certain scopes of work and related task orders, the removed Water Purveyor Party shall remain obligated for payment of its proportionate share of the costs for such authorized work completed as of the date of the Water Purveyor Party's removal. A removed Water Purveyor Party shall not receive any Joint Defense Materials (as defined in Section 8) produced after the date of its removal, whether or not those Joint Defense Materials reflect consultant work performed before the date of that removal.

6. Term. This Agreement shall remain in effect until either of the following events occurs: (a) a majority of the Parties withdraw from the Agreement; or (b) the Steering Committee votes, by a two-thirds majority, to terminate this Agreement.

7. Billing Procedures. For all approved scopes of work by consultants under this Agreement, RWA will have the responsibility for collecting and managing each Water Purveyor Party's contribution of funds to pay for that work; processing invoices submitted by the consultants pursuant to the approved scopes of work and budgets; preparing invoices to the Water Purveyor Parties based on the shares specified in Exhibit A or any future cost-sharing allocation approved by the Water Purveyor Parties; and for maintaining an accurate accounting of this administration of funds. The Water Purveyor Parties will make payments on invoices presented by RWA within 30 days of the date of the specific invoice.

8. Privileged and Confidential Communications.

(a) For purposes of this Agreement, "Joint Defense Materials" includes, but is not limited to, all communications (including communications related to the above-referenced proceedings made prior to the execution of this Agreement), factual materials, mental impressions, legal analyses, theories or strategies, memoranda, reports, notes, emails or any other communications or documents that are protected from disclosure by the attorney-client privilege, work product privilege, deliberative process privilege, executive privilege, common-interest doctrine joint prosecution/defense doctrine, privileges regarding mediation or settlement communications, or any other privilege or protection existing under state or federal law, and that are exchanged among the Water Purveyor Parties, RWA, and/or their respective counsel in connection with their cooperative efforts related to the matters described in this Agreement's recitals.

(b) The Water Purveyor Parties and RWA will maintain as confidential all Joint Defense Materials. Disclosure of Joint Defense Materials shall be limited to the Water Purveyor Parties and their employees and contractors as well as any counsel and consultants retained by the Water Purveyor Parties, or on behalf of the Water Purveyor Parties, for the purpose of maintaining a joint defense with respect to the matters described in this Agreement's recitals. RWA, as a public entity separate from its members, shall maintain as confidential all Joint Defense Materials within RWA as a separate public entity. Joint Defense Materials shall not be made available to RWA members that are not party to this Agreement.

(c) Any Joint Defense Materials shared or transmitted by or between Water Purveyor Parties and/or RWA should be clearly designated with the label "CONFIDENTIAL: JOINT DEFENSE MATERIALS" or a substantially similar label referencing "joint defense." However, the failure to include such designation shall not preclude such materials from being afforded the protections of this Agreement, and shall not be construed to constitute a waiver of any privilege or other protection.

(d) Each Water Purveyor Party and RWA shall take all appropriate measures to ensure that any person who is granted access to Joint Defense Materials is familiar with the terms of this Agreement and complies with those terms.

(e) Except where required by the order of a court of competent jurisdiction, or by the prior written consent of the remaining Water Purveyor Parties, neither a Water Purveyor Party nor RWA will disclose to non-Parties any Joint Defense Materials that it has received from another Water Purveyor Party or RWA.

(f) Each Water Purveyor Party and/or RWA shall notify the party that generated any Joint Defense Materials and all remaining Water Purveyor Parties of any request to disclose the Joint Defense Materials to any non-Party (whether pursuant to the California Public Records Act or other authority), or of any proceeding before any court, administrative agency, or tribunal to compel the disclosure of such Joint Defense Materials, as soon as practicable after receipt of such request or the initiation of such proceeding. If a Water Purveyor Party or RWA becomes subject to any judicial or administrative order to compel release of Joint Defense Materials, that Water Purveyor Party or RWA shall promptly notify the party that generated the materials and all remaining Water Purveyor Parties. The purpose

of these notifications is to provide the party that generated the Joint Defense Materials or any remaining Water Purveyor Party an opportunity to take such steps as they may deem appropriate to protect the Joint Defense Materials.

(g) The sharing of Joint Defense Materials among the Water Purveyor Parties and/or RWA is not intended to and will not constitute a waiver of any privilege or other protection of confidentiality, including but not limited to the attorney-client privilege, work product privilege, common-interest doctrine, deliberative process privilege, executive privilege, privileges relating to mediation or settlement communications, or any other privilege or protection existing under state or federal law.

(h) Execution of this Agreement constitutes the mutual agreement of the Water Purveyor Parties and RWA that any sharing of Joint Defense Materials among themselves is, pursuant to Evidence Code section 912, subdivision (d), and other applicable authorities, reasonably necessary for the accomplishment of the Water Purveyor Parties' and RWA's common purposes as described in this Agreement. Any sharing of Joint Defense Materials among the Water Purveyor Parties and/or RWA is in reliance on this Agreement and the protections that arise from the parties' common interests related to the matters described in Recital B to this Agreement.

(i) If a Water Purveyor Party or RWA withdraws from this Agreement, the provisions of this Agreement shall continue to apply to the Joint Defense Materials that the party received or sent during the time period when that party was a party to this Agreement, including without limitation the duty to maintain those materials' confidentiality under Section 8(b).

(j) If this Agreement is terminated for any reason, the Joint Defense Materials shared pursuant to this Agreement shall remain subject to all privileges cited herein and any other applicable confidentiality protections.

9. Attorney-Client Relationships. The Water Purveyor Parties and RWA are represented by their respective legal counsel in connection with the above-referenced proceedings. A party's legal counsel will not have an attorney-client relationship with any other party to this Agreement as a result of that legal counsel's participation in discussions and actions related to the parties' cooperative efforts on the above-described proceedings.

Similarly, no legal counsel will have a duty of loyalty or confidentiality to any other Water Purveyor Party or RWA other than that legal counsel's specific client(s), and consequently, no Water Purveyor Party may seek to disqualify the legal counsel for another Water Purveyor Party as a result of the legal counsel's participation in discussions and actions related to the parties' cooperative efforts under this Agreement.

10. Representations. The individuals signing this Agreement in a representative capacity warrant that they have the authority to do so on behalf of the entity or entities they represent, and further agree that as representatives of the entity or entities that they respectively represent, they themselves are bound by all terms of this Agreement.

11. Entire Agreement. This Agreement and any later-approved amendments or exhibits constitute the entire agreement of the parties with respect to the subject matter of this Agreement and supersede any prior oral or written agreement, understanding, or representation relating to the subject matter of this Agreement.

12. Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original irrespective of the date of the execution, and said executed counterparts shall together constitute one and the same Agreement. Further, facsimile or .PDF copies of signatures shall be as effective as original signatures for evidencing execution of this Agreement. To ensure that each party has a full copy of this Agreement, upon a party's initial execution of this Agreement, that party shall transmit a copy of its signature to its legal counsel, who shall transmit copies of that copy to all other legal counsel under this Agreement.

13. Notices. All notices and other communications required to be given to a party under the terms of this Agreement (a) shall be in writing; (b) shall be personally delivered, sent via first class mail, or transmitted by facsimile or email with confirmation of receipt; and (c) shall be directed to such party at the address, facsimile number or email address specified below, or at such other address, facsimile number or email address as such party may hereafter designate by notice in accordance with this Section.

IN WITNESS WHEREOF, the Parties hereto have executed this Common Interest and Cost-Share Agreement for Coordinated Participation: Bay-Delta Water Quality Control Plan Amendments.

EXHIBT A

Cost Allocation

Water Purveyor	Percent
Carmichael Water District	3.9%
City of Folsom	11.2%
City of Roseville	11.2%
City of Sacramento	11.2%
El Dorado Irrigation District	11.2%
Golden State Water Company	6.5%
Placer County Water Agency	11.2%
Sacramento County Water Agency	11.2%
Sacramento Suburban Water District	11.2%
San Juan Water District	11.2%