



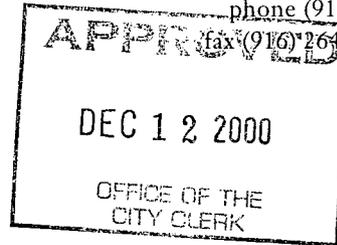
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Department of Utilities
Office of the Director

CITY OF SACRAMENTO
CALIFORNIA

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November 20, 2000



City Council
Sacramento, California

Honorable Members in Session:

AG 2000-206

SUBJECT: LOWER AMERICAN RIVER FLOW RELEASE PATTERN - AGREEMENT WITH STATE OF CALIFORNIA

LOCATION AND COUNCIL DISTRICT: City-wide

RECOMMENDATION

Staff recommends that City Council adopt the attached Resolution authorizing the City Manager to negotiate and execute an agreement with the State of California's State Water Resources Control Board (SWRCB) to fund expedited processing of a proposal for a new flow release pattern for the lower American River.

CONTACT PERSONS: Jim Sequeira, Director of Utilities, 264-1407

FOR COUNCIL MEETING OF: December 12, 2000

SUMMARY

A cornerstone of the *Water Forum* Agreement is the protection and enhancement of instream resources in the lower American River. Central to this effort is the development and regulatory approval of a more protective flow release pattern that would replace an outdated regime adopted in the late 1950s. City staff and consultants have taken the lead in working with staff from the U.S. Bureau of Reclamation (USBR) and state and federal resource agencies to develop and agree upon a proposed flow release pattern that would be applied to the lower American River - Nimbus Dam to the confluence. When this process is complete, it is anticipated that the proposal will be recommended for adoption by the SWRCB. In order to have a timely review of the proposal by the SWRCB, an agreement has been drafted for the City to provide funding and other services necessary to insure expedited processing and SWRCB consideration of the proposal.



CITY OF SACRAMENTO
DEPARTMENT
OF UTILITIES

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COMMITTEE/COMMISSION ACTION: None

BACKGROUND INFORMATION

In March 1958 the SWRCB adopted Decision 893 (D893) which imposed, among other things, certain flow requirements for the lower American River on the USBR in order to protect the fishery resources. At the time that flow standard was thought appropriate, but with more scientific data that has been collected over the years it became evident that a more protective flow management regime is desirable.

The *Water Forum* Agreement was approved by the City Council in November 1999. This agreement, which took almost eight years to negotiate, has two coequal objectives: Provide a reliable and safe water supply for the Sacramento region; and preserve the fishery, wildlife, recreational and aesthetic values of the lower American River. Although the USBR's water releases from Folsom Reservoir are legally constrained by the outdated D893, since 1996 the USBR, in consultation with federal fishery agencies, has attempted to improve water releases to the lower American River in a manner consistent with flow objectives developed under the Central Valley Project Improvement Act of 1992 (CVPIA). These are essentially the same as the flow objectives developed as part of the *Water Forum* process but are not mandatory.

An improved pattern of fishery flow releases is central to achieving the *Water Forum's* coequal objective of preserving the fishery, wildlife, recreational, and aesthetic values of the lower American River. Toward this end, City staff and consultants have taken the lead in working with staff from the USBR and state and federal resource agencies to fine tune the flow recommendations developed under the CVPIA and through the *Water Forum* effort. Once this process is complete, it is anticipated that a new flow release pattern supported by the *Water Forum* signatories, the USBR, and the various resource agencies will be recommended for consideration and adoption by the SWRCB. This proposal could be presented to the SWRCB in the form of a petition filed by the USBR, or, alternatively, could be considered by the SWRCB on its own motion, at the request of the City (acting on behalf of the *Water Forum*).

Unfortunately the process of adopting a new flow release pattern can take years because of the SWRCB staff time and environmental review required and other commitments of the SWRCB and its staff. Because this matter is central to the *Water Forum* Agreement, staff is recommending approval of an agreement with the SWRCB that would provide funding for SWRCB staff time as well as the environmental review necessary for timely SWRCB consideration of a new flow release

City Council
Agreement with SWRCB
Meeting of December 12, 2000

pattern. The agreement would become operative at the time that a proposal is submitted to the SWRCB by the City but would not apply in the event that a petition is filed by the USBR instead. Last year, the SWRCB adopted Resolution No. 99-112, directing SWRCB staff to prepare and enter into an agreement with the City to expedite processing of this effort.

City staff has developed an agreement for expedited processing with the SWRCB (copy attached) that has been approved by the SWRCB's Division of Water Rights staff and legal counsel, but which requires review by other State departments. Staff is requesting that City Council authorize the City Manager to execute the final agreement with the SWRCB when this review is completed.

FINANCIAL CONSIDERATIONS

The not-to-exceed cost for the attached agreement is \$300,000. Funding for this effort is available in current capital improvement projects (ZF41 and ZF51). External grants may be available through CALFED and other sources to help offset City costs and will be pursued.

ENVIRONMENTAL CONSIDERATIONS

This report recommends authorization of an agreement for the SWRCB to expedite its processing and consideration of a new flow release pattern that has not yet been fully developed. When a proposal is completed and presented to the SWRCB, environmental review and documentation will be required before the SWRCB, as lead agency, can take any action on the proposal, pursuant to the California Environmental Quality Act. Under the proposed agreement, the City would be responsible for the costs of performing such environmental review, at the direction of the SWRCB, within the not-to-exceed amount set forth in the agreement.

POLICY CONSIDERATIONS

The adoption of a new more protective flow release pattern for the lower American River is an integral part of the *Water Forum* Agreement.

City Council
Agreement with SWRCB
Meeting of December 12, 2000

ESBD CONSIDERATIONS

Materials and services for this agreement will be procured in accordance with the City's ESBD requirements.

Respectfully submitted,



James Sequeira
Director of Utilities

RECOMMENDATION APPROVED:

Approved:



F Robert P. Thomas
City Manager



Thomas Lee
Deputy City Manager

Attachment

APPROVED
DEC 12 2000
OFFICE OF THE
CITY CLERK

RESOLUTION NO. 2000-718

ADOPTED BY THE SACRAMENTO CITY COUNCIL

ON DATE OF _____

**RESOLUTION AUTHORIZING THE CITY MANAGER AND CITY CLERK
TO EXECUTE AN AGREEMENT WITH THE STATE OF CALIFORNIA,
STATE WATER RESOURCES CONTROL BOARD FOR
EXPEDITED CONSIDERATION OF AN INSTREAM FLOW STANDARD
FOR THE LOWER AMERICAN RIVER**

BE IT RESOLVED BY THE COUNCIL OF THE CITY OF SACRAMENTO THAT:

1. The City Manager and City Clerk are authorized to complete negotiations and execute an agreement with the State Water Resources Control Board (SWRCB) for an amount not to exceed \$300,000 to fund expedited processing of a proposal for a new flow release pattern for the lower American River (ZF41/ZF51).

MAYOR

ATTEST:

CITY CLERK

FOR CITY CLERK USE ONLY

RESOLUTION NO. _____

DATE ADOPTED: _____

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AGREEMENT NO. _____
BETWEEN
THE STATE WATER RESOURCES CONTROL BOARD
AND
THE CITY OF SACRAMENTO

This agreement is entered into this ____ day of _____, 2000 between the State Water Resources Control Board (the "SWRCB"), and the City of Sacramento (the "City").

WHEREAS, Decision 893, adopted by the SWRCB on March 18, 1958, approved the United States Bureau of Reclamation's (USBR) applications to appropriate water at Folsom and Nimbus Dams on the lower American River (Applications 13370, 13371, 13372, and 14662); and

WHEREAS, Decision 893 imposed certain bypass flow requirements on the USBR in order to protect fishery resources in the American River; and

WHEREAS, the City and other stakeholders, including environmental, water supply, business, and other diverse interests, formed the Water Forum to work jointly on the development of a regional plan to address both the need for enhanced water supplies for offstream use and the need to protect instream resources in the lower American River, which regional consensus process has culminated in the Water Forum Action Plan and Agreement; and

WHEREAS, the timely development and SWRCB consideration of recommended flow release requirements for the lower American River developed by the Water Forum stakeholders, the USBR, and state and federal regulatory agencies (hereafter referred to as the "recommended flow release pattern"), is an important component of the Water Forum Agreement; and

WHEREAS, the City is now working with other Water Forum stakeholders, the USBR, and state and federal regulatory agencies toward agreement on a recommended flow release pattern for the lower American River; and

WHEREAS, although the specific elements of such recommended flow release pattern have not yet been fully developed, it is anticipated that after these parties have developed and reached agreement on the recommended flow release pattern, the USBR may petition the SWRCB to update or supplement the bypass requirements imposed on the USBR

DRAFT

by Decision 893 to reflect the recommended flow release pattern for the lower American River; and

WHEREAS, alternatively, the City, on behalf of the Water Forum, may request the SWRCB to consider, on its own motion, whether to update or supplement the bypass requirements imposed on the USBR by Decision 893 to reflect the recommended flow release pattern (hereafter referred to as the "Project"); and

WHEREAS, SWRCB staffing and budget levels are not adequate to allow for consideration of the Project at this time; and

WHEREAS, the SWRCB is willing to enter into an agreement for funding to expedite processing of the Project, provided that there is adequate assurance that expedited processing will not affect the SWRCB's impartiality in reviewing and acting on the Project, and provided further that there is adequate assurance that expedited processing will not delay processing of other pending applications, petitions and complaints; and

WHEREAS, to achieve the expedited processing desired by the Water Forum stakeholders, the City is willing to reimburse the SWRCB for the actual costs incurred in processing the Project on an expedited basis, as provided herein; and

WHEREAS, on November 18, 1999, the SWRCB adopted Resolution No. 99-112, directing the SWRCB Executive Director to prepare and enter into an agreement with the City for such reimbursement.

NOW THEREFORE, in consideration of the above recitals and the mutual promises contained herein, the parties hereto enter into the following agreement:

1. **Scope of Agreement**

A. The SWRCB agrees to expedite the processing of the Project, and to assign necessary staff to expedite work on the Project. For purposes of this agreement, "to expedite" means to process the Project based on the availability of additional funding under this contract, enabling the SWRCB to process the Project without waiting for other sources of funding to become available or delaying the processing of other pending applications, petitions or complaints.

B. The SWRCB agrees that work associated with the Project will be the first priority of staff who are assigned to work on the Project. The City understands, however, that contingencies may arise which would require that staff assigned to expedite the processing of the Project be reassigned to other matters. It is agreed that the City will only be billed for work performed to expedite the processing of the Project.

DRAFT

C. Any environmental documentation necessary to comply with the California Environmental Quality Act (Pub. Resources Code, §§ 21000-21194) (CEQA) shall be prepared in accordance with section 3 of this agreement. The parties understand that CEQA documentation must be completed and adopted or certified in advance of SWRCB action on the Project.

D. The City shall be responsible for the costs of preparing such environmental documentation and shall reimburse the SWRCB for all costs incurred by the SWRCB to expedite the SWRCB's processing of the Project, up to the Maximum Cost amount specified in Section 7. The SWRCB processing costs subject to reimbursement include, but are not limited to, the salary, benefits, and administrative overhead (including paid vacation and sick leave) of the personnel (including supervisors) assigned to expedite processing of the Project, based on their time spent on the Project and standard SWRCB accounting procedures.

E. This agreement governs the City's payment and reimbursement of costs related to environmental review and expedited processing by the SWRCB, on its own motion, of the Project, as defined herein. This agreement is not intended to, and shall not apply to SWRCB processing of any petition filed by the USBR to update or supplement the current bypass requirements imposed on the USBR to reflect the recommended flow release pattern, or any other flow release requirements. In the latter case, costs related to the processing of such a petition may be paid, in whole or in part, pursuant to other agreements, such as the existing cooperative agreement for water rights services between the SWRCB and the USBR, or future agreements to which the SWRCB, the USBR, the City or other entities may be a party.

F. The City acknowledges that it is obligated to pay the SWRCB's expedited processing costs as provided in this agreement until this agreement is terminated as provided in Section 5.

G. The City understands that the reimbursement provided by this agreement is not contingent on the SWRCB's approval of the Project, provided that the City reserves all rights to oppose, protest, or otherwise contest the SWRCB's consideration or approval of any requirement or alternative other than the lower American River flow release pattern recommended by City. Both the SWRCB and the City shall retain complete discretion to act as provided by law.

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2. SWRCB Control Over Work on Project

A. This agreement covers only the rate at which the SWRCB will process the Project. Otherwise, the SWRCB shall retain exclusive control over the manner in which the Project is processed and what action, if any, to take on the Project.

B. The City understands that, in conjunction with its review of the Project, the SWRCB may consider alternatives to the flow release pattern recommended by the City. In addition, the SWRCB in its discretion may consider what conditions, if any, should be imposed on any water right holder including but not limited to the USBR in order to protect public trust resources in the lower American River. For purposes of this agreement, such considerations made in conjunction with the SWRCB's processing of the Project shall constitute part of the SWRCB's processing of the Project; provided that City reserves all rights to oppose the SWRCB's consideration or approval of requirements or alternatives beyond the scope of the actions recommended by City, as provided in Section 1.G., and provided, further, that City may at any time elect to terminate the City's responsibility to pay and/or reimburse costs incurred in connection with such considerations by terminating this agreement in accordance with the provisions of Section 5.

C. Among other things, the SWRCB shall have the sole discretion to: (1) select which SWRCB employees are assigned to work on the Project, (2) direct and evaluate the work of employees assigned to work on the Project; (3) determine the amount of compensation paid to employees assigned to the Project, (4) determine the adequacy of any information submitted in support of the Project, including CEQA documentation, and (5) determine appropriate findings to be made by the SWRCB on any issues related to the Project.

3. CEQA Compliance

Under CEQA, the SWRCB will be the lead agency with ultimate responsibility for the preparation and adequacy of any environmental documentation required in connection with action on the Project. The City, or a consultant retained by the City, shall prepare at the direction of the SWRCB administrative drafts of any environmental documentation necessary to satisfy the requirements of CEQA. The City, or its consultant, also shall prepare draft responses to comments on the environmental documentation. The draft environmental documentation and draft responses shall be provided to the SWRCB in electronic form, in a version supported by Windows 97 or in a format that may be converted easily to Windows 97. The City or its consultant shall make revisions to the draft environmental documentation and draft responses as directed by the SWRCB. The SWRCB will have final authority to

DRAFT

determine what type of environmental documentation is required, and the scope and content of the documentation and responses to comments.

The SWRCB shall have proprietary rights to any CEQA documentation prepared pursuant to this section. In the event that this Agreement is terminated before the SWRCB has taken final action on the Project, the City shall, upon request, provide the SWRCB with any CEQA documentation prepared pursuant to this section, including any unfinished drafts or preliminary analyses.

The SWRCB shall not be responsible for any costs incurred by the City or its consultant in preparing CEQA documentation, nor shall the SWRCB be obligated to compensate the City or its consultant for any CEQA documentation provided to the SWRCB pursuant to this section.

4. **Work To Be Performed.**

A. Upon receipt of the City's request that the SWRCB, on its own motion, consider adoption of the recommended flow release pattern for the lower American River, the SWRCB will assign the personnel necessary to expedite the processing of the Project, which shall be the highest priority work for such personnel pursuant to Section 1.B of this agreement. The SWRCB will commence processing of the Project in a timely fashion. The SWRCB will promptly review any supporting environmental documentation after it is submitted to the SWRCB.

B. The SWRCB will make a good faith effort to meet the following deadlines:

(1) Within 60 working days of receipt of a complete request for SWRCB consideration of the Project, the SWRCB will prepare and submit to the City a proposed workplan and budget for expedited SWRCB processing of the Project. The City shall provide written comments on the proposed workplan and budget within 30 days of receiving them. The submittal of the budget will not constitute a representation by the SWRCB that the expedited work on the Project can be performed for that amount or a lesser amount.

(2) If the SWRCB determines that the matter should be set for hearing, the SWRCB will hold the hearing within 180 calendar days of receipt of a complete request for consideration of the Project, or within 60 calendar days of the close of the public review period for draft supporting environmental documentation, whichever is later.

(3) If the SWRCB holds a hearing, SWRCB staff will prepare any draft order within 270 calendar days of the close of the hearing record, or within 90 calendar

DRAFT

days of adoption or certification of final supporting environmental documentation, whichever is later. The City understands that the SWRCB may need to set additional days of hearing or continue the hearing to receive additional evidence.

(4) If the SWRCB determines that the matter should not be set for hearing, SWRCB staff will prepare any draft order within 270 calendar days of receipt of a complete request for consideration of the Project, or within 90 calendar days of adoption or certification of final supporting environmental documentation, whichever is later.

(5) If SWRCB Board action is required, a SWRCB meeting to consider any draft order shall be scheduled at the discretion of the SWRCB upon completion of the draft order and adoption or certification of final supporting environmental documentation.

(6) If petitions for reconsideration of the SWRCB's order are filed, the SWRCB will take action on the petitions not later than 90 days from the date when the SWRCB adopted the order.

C. The SWRCB will keep the City apprised of significant developments concerning the processing of the Project to the extent permissible under applicable law, including Government Code sections 11430.10-11430.30 [ex parte communications].

D. The purpose of this section is to give the City reasonable assurances that the SWRCB will make a good faith effort to process the Project as expeditiously as possible and that delays will not occur as a result of insufficient staff to work on the Project on a priority basis. Consistent with section 2, nothing contained herein shall limit the SWRCB's discretion, including the time for completing staff work if additional time is required, the opportunity for other persons to participate in any SWRCB proceeding concerning the Project, or the authority of the SWRCB to request such studies as may be necessary to evaluate the Project pursuant to the applicable law. The City also understands that many important matters demand the attention of the SWRCB members and that any hearing scheduled concerning the Project may have to accommodate the press of other business.

5. Termination or Amendment of Agreement

The agreement shall become effective on _____, 2000, or at such later time as it is approved by the State Department of General Services, and shall terminate: (1) when the SWRCB takes final action on the Project, or (2) after thirty (30) days advance written notice of termination by either party, or (3) when the Maximum Cost amount specified in Section 7 is expended by City, or (4) as otherwise required by this

DRAFT

agreement or by law, whichever occurs earlier. Termination of this agreement shall terminate the parties' rights and obligations under this agreement, provided that the City shall reimburse all costs incurred by the SWRCB for expedited processing of the Project prior to the effective date of termination, as provided in this agreement, subject to the provisions of Section 7. This agreement may be amended only by mutual written agreement executed by both parties.

6. Contract Managers

The Contract Manager for the SWRCB shall be Lewis Moeller of the Division of Water Rights. The Contract Manager for the City shall be Jim Sequeira of the Department of Utilities or his authorized representative. Either party may change its Contract Manager at any time following ten (10) calendar days written notice to the other party. No other department or agency shall be delegated as the City's contact without prior written notification by the City.

All correspondence between the parties to this agreement, except as provided on invoices from the SWRCB, shall be to the following:

State Water Resources Control Board
Division of Water Rights
Attn: Lewis Moeller
P.O. Box 2000
Sacramento, CA 95812-2000
Fax (916) 323-0743

City of Sacramento
Attn: Jim Sequeira
1395 35th Avenue
Sacramento, CA 95822
Fax (916) 264-1497

7. Cost and Payment

A. The sum of the costs incurred by the City for preparation of the environmental documentation required by this agreement and the City's reimbursement to the SWRCB for the expedited processing work provided for in this agreement (including the lump sum advance described in paragraph C of this section) shall not exceed a total amount of **Three Hundred Thousand Dollars** (\$300,000.00), referred to in this agreement as the "Maximum Cost", unless this agreement is amended to increase this amount as provided herein.

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B. The SWRCB shall provide to the City the name, salary (does not include benefits and overhead) of all personnel (engineering, environmental and legal) assigned to expedite the processing of the Project as provided herein.

C. Before any work is performed by the SWRCB under this agreement, the City shall advance a lump sum of \$40,000 to the SWRCB to be held in an account for expedited processing of the Project. Any unexpended funds remaining in the account after the termination of this Agreement will be returned to the City.

D. The SWRCB shall furnish the City invoices for the costs incurred during each month. Invoices shall include a summary of activities performed and be accompanied by supporting accounting documents. Such documents shall show the activities and amount of time spent for each SWRCB staff person working on the Project for each month, the combined cost of salary and benefits for each staff person, total indirect administrative charges, special administrative charges for the billing under this agreement, other charges such as rental of hearing facilities, preparation of a hearing transcript, and outside reproduction, and will also include the balance in the City's account.

E. The SWRCB will deduct the amount of each invoice from the account established pursuant to paragraph C of this section, based on normal SWRCB accounting procedures, and will invoice the City for the amount of such deduction. Once the account has been depleted, the City shall, within 30 calendar days of receiving an invoice, submit the amount of the invoice not disputed by the City to the SWRCB at the address given on the invoice. The parties shall use their best efforts to resolve any disputes regarding any amounts billed in any invoice. The SWRCB may, at its discretion, refuse to expedite processing of the Project as provided for in this agreement if the City fails to remit the undisputed amounts in any invoice within 30 calendar days of receiving that invoice.

8. **Dispute Resolution**

In the event there is a dispute under this agreement between the SWRCB and the City, the parties shall first attempt to resolve any such dispute through informal discussions between the Contract Managers. In the event that the Contract Managers are unable to agree upon a resolution, the Contract Managers shall jointly document the nature of the dispute and submit said document to the SWRCB's Chief of the Division of Water Rights, and the Deputy City Manager responsible for oversight of the City's Utilities Department. These individuals, or their designees, shall schedule and attend a meeting to attempt to resolve the dispute. If an agreement still cannot be reached, the dispute shall be presented to the SWRCB's Executive Director, and the City Manager, or their designees. The mutually agreed upon resolution at this level

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shall be final and conclusive. In the event an agreement still cannot be reached, this agreement shall be deemed immediately terminated. Such termination shall not affect the rights and remedies available to any party under applicable law. Any claims regarding disputes over payments made to or requested by the SWRCB which are not resolved pursuant to the provisions of this paragraph shall be resolved in accordance with applicable California statutes regarding claims against public entities.

9. **Access to Facilities, Premises and Records.**

During the term of this agreement and for three years following final action by the SWRCB on the Project, at all reasonable times, the State Auditor General, the City, or any designated representative shall have access to the public records of the SWRCB related to the work performed under this agreement. The SWRCB shall make such records available to the above-named parties for inspection, audit, and copying.

STATE WATER RESOURCES
CONTROL BOARD

Date: _____

By: _____

CITY OF SACRAMENTO

Date: _____

By: _____

Approved as to Form:

Attest:

Deputy City Attorney

City Clerk