



San Francisco Bay Regional Water Quality Control Board

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October 15, 2021

Santa Clara Valley Water District
Attn: Ryan Heacock
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SUBJECT: Comments on the Draft Environmental Impact Report for the Fish and Aquatic Habitat Collaborative Effort Program, Santa Clara County (SCH No. 2015022008)

Dear Mr. Heacock:

The San Francisco Regional Water Quality Control Board (Water Board) staff have reviewed draft environmental impact report (DEIR) for the *Fish and Aquatic Habitat Collaborative Effort Program* (Project) prepared by Santa Clara Valley Water District (Valley Water) pursuant to the California Environmental Quality Act (CEQA) (SCH No. 2015022008). Thank you for extending the due date for submitting comments from August 16 to October 15, 2021.

The DEIR states that the Project is a restoration plan for steelhead trout (*Oncorhynchus mykiss*) and Chinook salmon (*O. tshawytscha*) populations through implementation of a portion of the *Settlement Agreement Regarding Water Rights of the Santa Clara Valley Water District on Coyote, Guadalupe, and Stevens Creeks*¹ (2003) including a Fish Habitat Restoration Plan. The Stevens Creek and Guadalupe River watershed systems have been identified as habitat for federal Endangered Species Act-listed California Central Coast steelhead. The Guadalupe River watershed is also habitat for the Central Valley fall-run Chinook salmon (federal species of concern and State species of special concern). The Project would therefore enhance the beneficial uses of these waters, pursuant to the San Francisco Bay Basin Water Quality Control Plan (Basin Plan), for spawning habitat, fish migration habitat, rare and endangered species habitat, cold freshwater habitat, warm freshwater habitat (SPWN, MIGR, RARE, COLD, and WARM) and would have concomitant improvements to the wildlife beneficial use (WILD).

¹ DEIR, Appendix B.

The Project includes changes in Valley Water's reservoir operations through new reservoir rule curves, which will require Valley Water to obtain authorization from the State Water Resources Control Board (State Board) through water rights change petitions ("flow measures"). Compliance with CEQA is part of State Board's evaluation of the change petitions. The Project also includes habitat improvement measures, biological monitoring, and adaptive management ("non-flow measures"). Together, these measures and actions are referred to as the Fisheries Aquatic Habitat Collaborative Effort (FAHCE) program.

The Project has the potential for actions that will require the Water Board's approval under the federal Clean Water Act, the California Water Code, and Basin Plan for discharges of dredge and fill material. The Basin Plan includes the California Wetlands Conservation Policy, which requires no net loss and a long-term net gain in the extent, functions, and values of wetlands, including riparian wetlands. Accordingly, the Water Board is a Responsible Agency under CEQA. We also serve as the regional liaison to State Water Resources Control Board (State Board) in their evaluation of Valley Water's proposed changes to water rights as part of the Project. We offer the following comments to guide Valley Water in completing the Project EIR, and to highlight the Water Board's concerns.

An overarching concern presented in our comments is that the DEIR does not demonstrate clearly or concisely whether the Proposed Project or another alternative should be carried forward to implementation. The DEIR is difficult to review because data results are not integrated to build a case to support an alternative, so it does not meet the State standard for decision makers and the public to rapidly understand the DEIR. (CEQA Guidelines, section 15140), so should be revised and recirculated. We are also concerned that after 18 years of the Agreement issuance (see Project Overview below), implementation has still not started. As a result, adjustments to FAHCE implementation may be necessary to make up for lost time and maximize the potential for successfully meeting the steelhead and Chinook salmon restoration goals as soon as possible.

Project Overview

The *Settlement Agreement Regarding Water Rights of the Santa Clara Valley Water District on Coyote, Guadalupe, and Stevens Creeks* (Agreement) was issued in 2003 by the State Board. The purpose of the Agreement is to settle a water rights complaint alleging that Valley Water's "use of its water right licenses on Coyote Creek, Guadalupe River, and Stevens Creek degraded fish, wildlife, water quality, and other beneficial uses, in violation of the California Constitution, Water Code, Fish and Game Code, and the public trust doctrine." (Agreement, Recital C). The signatory parties to the Agreement (including Valley Water) are California Department of Fish and Wildlife (CDFW), National Marine Fisheries Service (NMFS), U.S. Fish and Wildlife Service (USFWS), Guadalupe-Coyote Resource Conservation District (withdrew from the claim in 2020), Trout Unlimited, the Pacific Coast Federation of Fishermen's Associations, and California Trout, Inc.

The FAHCE objectives are "to restore and maintain healthy steelhead and Chinook salmon populations by providing: (a) suitable spawning and rearing and (b) adequate passage for adult steelhead trout and Chinook salmon to reach suitable spawning and rearing habitat and for out-migration of juveniles." While the FAHCE objectives cover three watersheds—Stevens Creek, Guadalupe River, and Coyote Creek—the DEIR covers only the Stevens Creek and Guadalupe River watersheds for the flow and non-flow measures, but for adaptive management, would cover all three watersheds. This is because Coyote Creek flow and non-flow measures will be

covered under the CEQA review for Valley Water's Anderson Dam Seismic Retrofit Project (ADSRP).

The Project objectives, therefore, are specific to the Stevens Creek and Guadalupe River watersheds and also stipulate Valley Water's priorities for water supply:

- Objective 1: Restore and maintain a healthy steelhead population in the Stevens Creek watershed by providing suitable spawning and rearing habitat, adequate passage for up-migrating adults and out-migrating juvenile steelhead, and extended distribution of suitable habitat in Phases 2 and 3 as determined through the adaptive management program (AMP);
- Objective 2: Restore and maintain healthy steelhead and Chinook salmon populations in the Guadalupe River watershed by providing suitable spawning and rearing habitat, adequate passage for up-migrating adults and out-migrating juvenile fish, and extended distribution of suitable habitat in Phases 2 and 3 as determined through the AMP; and
- Objective 3: Maintain flexible and reliable groundwater recharge to support current and future water supply and water deliveries in a practical, cost-effective, and environmentally sensitive manner so that sufficient water is available for any present or future beneficial use. (DEIR, section ES-1.2, p. ES-2)

Three alternatives, in addition to the "No Project" alternative, were analyzed in the DEIR, with two baselines for current (2015) and future (2035) conditions, which has a greater water demand than the 2015 baseline. The non-flow measures are common to all three alternatives as follows:

- *The Non-Flow Measures Only Alternative* entails fish passage barrier remediation; spawning and rearing habitat improvements; bank stabilization guidelines; completion of an Advanced Recycled and Other Urban Water Plan; other non-flow measures specific to both the Stevens Creek and Guadalupe River watersheds. This alternative is not a feasible alternative because it lacks the flow measures for reservoir and water operations.
- *The FAHCE Alternative and FAHCE-Plus Alternative* would also include (in addition to the non-flow measures) the planned changes to the release of impounded water from seven Valley Water reservoirs (Stevens, Guadalupe, Almaden, Calero, Vasona, Anderson/Coyote, and Lexington) to support the life-cycle needs of steelhead and Chinook salmon, and water rights changes to include the Fish and Wildlife Enhancement Purpose of Use necessary to implement the changes to the reservoir releases (reservoir rule curves).

Of these three action alternatives, only the FAHCE and FAHCE-Plus alternatives could potentially meet the Project objectives because they both include reservoir rule curve changes. The FAHCE and FAHCE-Plus alternatives vary by such factors as the reservoir volume thresholds to inform decisions for the frequency, timing, and rates of pulse flows; ramping rates to prevent fish stranding; and winter and summer base flows. The DEIR analyses for flow measures are at the project level, and for the non-flow measures are at a programmatic level that would require additional CEQA review. Valley Water selected the FAHCE Alternative as the Proposed Project. However, according to the DEIR, FAHCE-Plus is the environmentally superior project.

Comments

Comment 1. The DEIR is Inconclusive and Should be Revised and Recirculated

Valley Water selected the FAHCE Alternative as the Proposed Project, even though the FAHCE-Plus Alternative was deemed the environmentally superior project. However, the DEIR does not include a clear or concise explanation for selecting the FAHCE Alternative over the FAHCE-Plus Alternative, nor why the FAHCE-Plus Alternative is environmentally superior. For example, the results of the modeling outputs in DEIR Chapter 3, and Appendix K-*Fisheries and Aquatic Habitat Technical Memorandum* are a mixed bag depending on which outputs are reviewed for the current and future baseline (2015 and 2035), salmonid species and life stages, habitat type (migration/passage, spawning, rearing), habitat criteria (e.g., passage, temperature) and creek. For example, steelhead spawning habitat in Guadalupe River and Alamitos and Calero creeks would decrease (though Calero Creek is known to have spawning adult), while spawning habitat in Guadalupe Creek would increase (compared to existing baseline) (DEIR, p. 208). As a result, the DEIR is inconclusive based on the presentation of information. We therefore recommend Valley Water revise and recirculate the DEIR to provide a better presentation of the extensive modeling and analyses that have been done. To revise the DEIR, we recommend that Valley Water first meet regularly with Agreement signatory parties, other agencies and interested stakeholders, including the Water Board (similar to the ADSRP processes) to provide the opportunities for collaborative syntheses of the FAHCE modeling methods and outputs.

For the water rights change petitions, Valley Water seeks to “add Fish and Wildlife Enhancement as a Purpose of Use” and other minor updates to the ten existing water rights licenses applicable to the Stevens Creek and Guadalupe River watershed water bodies (Appendix L-*Proposed Petitions to Change Water Rights*). We support addition of the Fish and Wildlife Enhancement purpose to the ten water rights licenses, but we are unable to endorse the DEIR findings for State Board’s consideration of Valley Water’s water rights change petitions because it is not clear how either the FAHCE or FAHCE-Plus alternative would meet the DEIR restoration objectives.

Comment 2. Impacts to Federal and State Jurisdictional Wetlands and Other Waters

The Water Board will need to issue CWA section 401 water quality certifications for the non-flow measures projects covered in the DEIR at the programmatic level following additional CEQA review. It is not yet clear whether the Project, as proposed, would comply with State water quality standards. To issue water quality certification for a Project, the Water Board must be able to find that the Project complies with State water quality standards, which include compliance with the statewide Procedures for Discharges of Dredged or Fill Material to Waters of the State (Procedures). The Procedures contains relevant portions of the U.S. Environmental Protection Agency’s Clean Water Act section 404(b)(1) “Guidelines for Specification of Disposal Sites for Dredge or Fill Material” with minor modifications to make them applicable to waters of the State (hereafter State Supplemental Dredge or Fill Guidelines). Pursuant to the State Supplemental Dredge or Fill Guidelines, the project must demonstrate that it is the least environmentally damaging practicable alternative (LEDPA). For the LEDPA, an alternatives analysis must show: (1) that a sequence of actions has been taken to first avoid, then minimize, and lastly compensate for adverse impacts to waters of the state that cannot be practicably avoided or minimized; (2) that the potential impacts will not contribute to a net loss of the overall abundance, diversity, and condition of aquatic resources in a watershed; (3) that the discharge of dredged or fill material will not violate water quality standards and will be consistent with all applicable water quality control plans and policies for water quality control; and (4) that the

discharge of dredged or fill material will not cause or contribute to significant degradation of waters of the State. The DEIR has CEQA-related environmental impacts and mitigation criteria, but additional impacts from dredged and fill projects which have yet to be fully described will likely require additional mitigation.

For example, Impact AQUA-1 (a through b)—*Adverse direct or indirect effects on any species identified as a candidate, sensitive, or special-status species in local or regional plans, policies, or regulations, or by CDFW, NMFS, or USFWS*, is found to be less than significant for CEQA purposes. However, for compliance with the CWA, section 401 and California Water Code, even a creek improvement project must be evaluated for how it meets LEDPA. The DEIR best management practices (BMPs) and (AMMs) only address the construction activities and would not address the potential losses in acreage, functions, and/or values of wetlands and other waters of the State due to temporal disturbances to habitats; type changes; permanent impacts from placement of fill that disrupts natural ecological and geomorphic processes; or operations of a facility subject to Clean Water Act (CWA), section 401. Such factors should be further analyzed in additional CEQA documents that tier off of this DEIR for the non-flow measures projects. Even if such details are not provided in a CEQA document, they would need to be included in an application for a water quality certification for compliance with CWA, section 401, and the California Water Code.

Comment 3. Program Metrics

The monitoring methods and procedures in the proposed adaptive management plan (DEIR, Appendix A, Ch. 6-*Adaptive Management Plan*) would cover reservoir volumes, flow metrics, creek conditions, and occurrences of adult and juvenile salmonids. However, the AMP lacks metrics for specified outcomes, and we are unable to discern how the monitoring program would meet the FAHCE overall management objectives to restore and maintain healthy steelhead and Chinook salmon populations by providing: (a) suitable spawning and rearing and (b) adequate passage for adult steelhead trout and Chinook salmon to reach suitable spawning and rearing habitat and for out-migration of juveniles. We recommend the DEIR and AMP be revised to include watershed-scale metrics that would define the targets for restoring and maintaining the local salmonid populations. Monitoring targets may need to include reference sites, creek carrying capacity, escapement targets, and other factors.

The monitoring program should also be designed to account for factors that are not within Valley Water's control such as drought conditions and other climate change effects. In our letter to Valley Water dated June 30, 2017, after the scoping meet of June 19, we suggested Valley Water incorporate a monitoring program with watershed-scale, randomized monitoring so that the conditions that are outside of Valley Water's control could be eliminated as a source of variation in the monitoring results. We reiterate this recommendation in revising the DEIR.

For example, CDFW has developed a monitoring approach for other areas in California, which we referenced in our June 2017 comment letter.² Additionally, the Procedures has provisions for an approved watershed plan to serve as a framework for meeting LEDPA (see Comment 2). This underscores the value of a watershed plan as a decision-making framework for project plans, designs, and prioritization. We also believe that watershed-scale monitoring would assist Valley Water with the development of future projects in a manner that will facilitate the permitting processes by jumpstarting this watershed-based approach through the collection of

² Adams, Peter B., et al, 2011. California Coastal Salmonid Population Monitoring: Strategy, Design, and Methods. Fish Bulletin 180. California Natural Resources Agency and California Department of Fish and Wildlife. Sacramento.

new data during as early as water year 2022. This could begin establishing a baseline data set for the other projects being planned or in progress, such as the Lower Guadalupe River and the Upper Guadalupe River flood control projects. By consolidating such monitoring into a single watershed-scale program (like the CDFW example or similar approach with randomized sampling) monitoring costs may potentially be reduced which could allow funding to be reallocated for additional creek enhancements or other priorities.

Comment 4. Valley Habitat Plan (VHP) Scope and Payment of VHP Fees

The references to the Valley Habitat Plan (VHP) in the DEIR are disjointed and incomplete. For example, the DEIR mentions that only a part of the Guadalupe watershed is covered by the VHP (p. 1-11), and the DEIR is silent about whether the VHP covers the Stevens Creek watershed. The VHP should be revised to clarify the Valley Habitat Plan coverage, including a map of the VHP boundaries, and the VHP program details. The DEIR states on p. 3-269 (top of page) that the VHP “does not cover aquatic species.” This statement should be revised to indicate that the VHP does not cover fish or riparian waters. Further, the statement is inaccurate because the VHP does indeed cover aquatic species: it covers take of California red-legged frog (*Rana draytonii*), California tiger salamander (*Ambystoma californiense*), Foothill yellow-legged frog (*Rana boylei*), and Western pond turtle (*Actinemys marmorata*). These species do not live full-time in water but they require water for their life cycle needs. These species may be protected pursuant to the Water Board’s Basin Plan, through protection of the beneficial uses of the waters that support them, including the RARE, WILD, WARM, and COLD beneficial uses.

The DEIR indicates that payment of VHP fees, i.e, Mitigation Measure TERR-1d-*Payment of VHP Impact Fees*, would mitigate for impacts to the covered species noted above, riparian waters, and jurisdictional state and federal wetlands (Impacts TERR-1, TERR-2, and TERR-3, respectively). It is our understanding that the VHP is being revised, but at this time, the Water Board cannot accept VHP impact fees, so additional mitigation would be required to compensate for the TERR-1, TERR-2, and TERR-3 impacts, and the DEIR should be revised accordingly.

We have been working with the Valley Habitat Agency for roughly 10 years on the VHP. During the development of the VHP, the Habitat Agency worked with CDFW and USFWS to develop a Habitat Conservation Plan that would protect special status species and the habitats necessary to sustain those species. The Water Boards were not invited to participate in the development of the VHP. Therefore, mitigation measures in the VHP were focused on species and their habitat needs. The VHP did not consider the Water Board’s mitigation requirements or the Water Board’s need to comply with the State’s no net loss policy.

In order to meet the requirement of no net loss, in most cases the Water Board must be able to identify specific mitigation projects that provide sufficient compensatory mitigation for impacts to waters of the State. The Water Boards can accept the purchase of mitigation credits from an approved Mitigation Bank (Bank) or an approved In Lieu Fee (ILF) Program. However, the Water Boards can only accept the purchase of mitigation credits when the credits available at a Bank or ILF are appropriate to the type of water impacted by a project and the impacts occur within the service area of a Bank or ILF Program.

At this time, the VHP is neither a Bank nor an ILF Program. The VHP is working on creating an approved ILF Program. When the ILF Program is approved, projects may purchase mitigation credits from the ILF Program if the project is located within the ILF Program’s service area and the ILF Program has appropriate mitigation credits for the impacted type of water. Please revise

the DEIR to incorporate details on the current status of the VHP and additional mitigation for impacts to riparian waters to meet the Water Board's requirements.

Comment 5. Temperature Thresholds and Criteria

The temperature modeling methods in the DEIR should be clarified and updated with temperature thresholds to protect the aquatic biota and maximize the potential for successful FAHCE implementation. The DEIR, p. 3-98 indicates that the temperature significance threshold was 71.6°F (22°C) in the Stevens Creek and Guadalupe River cold water management zones (CWMZs) to maintain daily maximum summer base flow temperatures at 19°C in Stevens Creek CWMZ; the daily maximum was held at 18°C in the Guadalupe River CWMZ. Appendix K-*Fisheries and Aquatic Habitat Technical Memorandum* contains extensive data for temperature modeling, and it indicates that the mean weekly average temperature (MWAT) threshold was held at 19°C.

We believe that Valley Water should use a lower number than a mean water average temperature (MWAT) of 19°C because we are currently using an MWAT of 17°C as the chronic adverse effects threshold for evaluating impairment in other watersheds and Los Gatos Creek. We are currently working with Valley Water on a regional temperature study to determine whether we should raise the threshold for watersheds in the southern San Francisco Bay Region. We recommend Valley Water use an MWAT of 17°C for temperature analyses until we complete the regional study.

Also, please clarify this statement that appears in the Executive Summary and a few other DEIR sections pertaining to the FAHCE-Plus Alternative (*italics added for emphasis*): "In FAHCE-plus, *temperature limits were raised within the normal temperature range for steelhead rearing to enhance summer flows for supporting rearing habitat downstream.*" Our interpretation of this is that the DEIR analyses rely on "relaxed" water temperature thresholds that may be counter-effective in meeting the Project objectives. For example, DEIR, p. 3-214, states: "When compared with the current baseline, the Proposed Project would increase upstream and downstream passage opportunities and more so for downstream passage opportunities if temperature thresholds are relaxed." An assumption to relax the temperature should be vetted with the signatory parties and other stakeholders including the Water Board.

Comment 6. Project Schedule for FAHCE Implementation

The Agreement was conceived to be implemented in up to three ten-year phases (Phases 1, 2, and 3) with adaptive management (Phase 4) following completion of each phase (or portions of each phase). Phase 1 is implementation of the flow measures (i.e., the new reservoir rule curves) and a certain suite of non-flow measures projects (e.g., fish passage barrier removals) in each watershed. Through adaptive management decisions, additional projects under Phase 2, then Phase 3, may be implemented if the objectives were not being met. The DEIR should be revised to include a schedule for implementation of the flow and non-flow measures. There have been major changes since inception of the Agreement measures, so the prioritization and phasing should be revised to address current conditions more appropriately. Some of the changes include early implementation of some of the non-flow measures projects such as fish passage barrier removals; early implementation resulted in projects completed over the past 20 years.

Another major change is the reservoir water elevation restrictions placed on the Almaden, Guadalupe, and Calero dams by the Division of Safety of Dams around 2012 because of seismic safety risks, so reservoir rule curve changes for those dams could not be fully

implemented until the dams are upgraded. The DEIR has potential dates for the Guadalupe and Calero dams improvements, but not for Almaden Dam (repairs to the Almaden-Calero Canal would be part of the Almaden Dam improvements). Given the interconnections between Valley Water's reservoirs which in turn can inform reservoir operations, we believe the DEIR should be revised with more information on improvements to multiple dams and the canal repairs, and how those projects will be linked to FAHCE phasing.

We recommend Valley Water meet with the Agreement initialing parties and other agencies and stakeholders to rework the FAHCE phased schedule. Developing a new phased plan would help to leverage the benefits of projects completed or being planned within FAHCE, as well as external projects, and identify the best way to improve conditions for steelhead and Chinook salmon as soon as possible. Valley Water's One Water Program may be a basis for developing a new phased implementation plan but we recommend that additional agencies and other stakeholders (e.g., the cities where the creeks flow) also participate to maximize shared goals, funding, and benefits, among the affected jurisdictions and the community members.

A new Project phasing and schedule should also clarify the Adaptive Management Plan and procedures. The DEIR states that Phase 4 for the Adaptive Management Plan would start 31 years following Phase 1, 2, and 3. However, some of the FAHCE non-flow measures have already been completed, some up to about 20 years ago. The DEIR also states that "it is possible that Phase 4 will directly follow after Phase 1." Yet, a different section indicates that an adaptive management team has already started meeting in October 2020. We recommend the DEIR be revised to document the actual adaptive management process in effect now through revised Project phasing and scheduling, to the extent feasible.

Comment 7. Stevens Creek Outlet Works, Turbidity, and Temperature

We recommend the DEIR be revised to include turbidity monitoring during the dry season at this Stevens Creek outfall to track the potential for turbid discharges from the reservoir to the creek with the dual port outlook structure project. This is necessary to evaluate the potential for adverse effects of reservoir discharges on RARE, WILD, COLD, WARM, and spawning habitat (SPWN) beneficial uses to inform the success of habitat improvements in the creek. Additionally, the DEIR, p.2-26 states: "Performance measures for the multiport outlet would be associated with the performance measures for summer rearing flows." This addresses the flows and temperature in both Stevens Creek and Stevens Creek Reservoir, but not additional water quality concerns in Stevens Creek pertaining to turbidity. Operations of the new outlet structure should minimize the potential for exceedances of the turbidity water quality objective pursuant to the Basin Plan, and the DEIR should be revised to address this more clearly.

Comment 8. Soil Characterization for Beneficial Reuse, Imported Fill, and Legacy Mercury Mining Contamination in Guadalupe River Watershed

The DEIR should be revised to indicate that the criteria in the Water Board May 2000 staff report, *Beneficial Reuse of Dredged Materials: Sediment Screening and Testing Guidelines*, or the most current revised version³ would be applicable to soil reuse and imported soil fill for future non-flow measures projects. Modifications to these procedures may be approved on a case-by-case basis, pending Valley Water's ability to demonstrate that the soil proposed for

³ The Water Board draft staff report (May 2020), *Beneficial Reuse of Dredged Materials: Sediment Screening and Testing Guidelines*, is available online at: https://www.waterboards.ca.gov/sanfranciscobay/water_issues/available_documents/benreuse.pdf. Accessed October 12, 2021

reuse and any imported soil fill material is unlikely to adversely impact beneficial uses of the jurisdictional wetlands and waters in the Project. The DEIR should be revised with the correct criteria for determining soil reuse and imported soil use in the Project. Please note that we will require a soil sampling and analysis plan, acceptable to the Executive Officer, to be included in a 401 water quality certification application for a proposed project.

The DEIR indicates that Valley Water would implement best management practice (BMP) GEN-3 to prevent sedimentation and erosion of sediment containing mercury for construction of non-flow measures projects in the Guadalupe River watershed. We require Valley Water to follow the *Sediment Characterization Plan* in Valley Water's Stream Maintenance Program Manual, Attachment F, in addition to BMP-GEN-3. Please revise the DEIR accordingly. Implementation of project-specific monitoring will be necessary in addition to BMP GEN-2 and *Sediment Characterization Plan* criteria to meet requirements of the Guadalupe River Watershed Mercury total maximum daily load plan (TMDL)⁴ The DEIR should address this in more detail and in the subsequent CEQA reviews for individual projects that would tier off this DEIR.

Comment 9. Maintenance

The DEIR (e.g., section 1.3.2.1, p. ES-8) indicates that FAHCE non-flow measures projects would be maintained via the FAHCE adaptive management plan (AMP) (and would be consistent with Valley Water's Stream Maintenance Program (SMP)). We recommend that a project-specific maintenance plan is developed for each non-flow measures project to eliminate gray areas or speculation for coverage under the FAHCE AMP, or the SMP. Before revising the DEIR, we recommend that Valley Water coordinate with the signatory parties and other agencies and interested stakeholders about the process for folding a FAHCE project into the SMP.

Comment 10. NPDES Stormwater Municipal Regional Permit

The DEIR section for Regulatory Setting (3.5.3, p. 3-87) did not include the NPDES Stormwater Municipal Regional Permit (Order No. R2-2015-0049 NPDES Permit No. CAS612008, and subsequent revisions) and should be revised to include this. Specifically, the DEIR should be revised to include measures that will avoid and minimize impervious surfaces including gravel roads in the non-flow measures projects. This must be addressed during early stages of project design. If impervious surfaces in a project would be unavoidable, then the project must incorporate nature-based stormwater treatment systems such as infiltration swales, to disconnect direct discharge of stormwater runoff to storm drains and waters of the State to the maximum extent practicable, including impervious surfaces that are less than the MRP trigger for C.3 permit criteria.

The DEIR should be revised to demonstrate the appropriate site design and stormwater treatments are incorporated in the Project before finalizing the EIR. This is necessary to ensure the appropriate amount of space to accommodate onsite stormwater treatment systems is available. In addition, the DEIR should be revised to ensure that necessary measures to control trash are included, consistent with MRP Provision C.10.

Comment 11. Review of Completed Projects has not Been Vetted Via the Required Adaptive Management Plan

⁴ Guadalupe River Watershed Total Maximum Daily Load Plan is available online at: https://www.waterboards.ca.gov/sanfranciscobay/water_issues/programs/TMDLs/guadalupeivermercurytmdl.html. Accessed October 12, 2021.

The DEIR provides a list of several projects were constructed and operational – some for as long as 20 years – without the benefit of the Adaptive Management Plan, which is a key part of FAHCE. The DEIR should address this shortcoming and account for the potential for modifications to the completed projects, subject to adaptive management decisions to be determined. This would support the intent of the Agreement, which states: “Pursuant to the adaptive management program of Article VII, the Parties will periodically evaluate and determine whether such barriers interfere with the timely achievement of the management objectives for each creek.” (Agreement, section 6.2.4.2; see DEIR, Appendix B (and other parts of the DEIR) for the purported list of completed projects) It is unclear whether the completed projects have ever been vetted with the AMT.

Comment 12. Various Issues that Should be Corrected or Clarified in the Revised DEIR

We have questions about various modeling assumptions, methods, and certain statements in the DEIR. In revising the DEIR, please correct or clarify these items in the main body and throughout the various appendices where some items are recurring. Some of these points may require additional analyses and discussions with agencies and other interested parties for resolution.

- a. Los Gatos Creek 303(d) Listing. The DEIR, section 3.5.2.1, states that the Water Board proposed listing Los Gatos Creek downstream of Lexington Reservoir as impaired for water temperature. This section should be updated to indicate that the Los Gatos Creek temperature impairment was confirmed by the Water Board and the State Board pursuant to the Clean Water Act, section 303(d) (Water Board Resolution No. R2-2019-0011 (March 13, 2019), and State Board Resolution No. 2020-0039 (October 20, 2020), respectively)).
- b. Calero Creek Flooding Under 2015 Baseline. Impact HYD-2, *Substantially alter the existing drainage pattern of the site or area, including through the alteration of the course of stream runoff in a manner that would result in flooding on or off site*, indicates creek flow would overtop the banks in Calero Creek under the 2015 baseline but the impact was deemed less than significant. The DEIR should be revised to include new projects that would mitigate flooding under the 2015 baseline scenario and coordinate such flood mitigation with the Calero dam replacement project and other related projects. If flow measures are not implemented until closer to 2035 because of Project implementation and dam retrofit schedules, the impact may be less than significant. The DEIR should address this as appropriate rather than claiming the impact is less than significant. This highlights a need for the DEIR to be revised to include more details for Project phasing and implementation.
- c. Mitigation Measure TERR-2-Mitigation for Wetlands and Other Waters of the United States and State outside of VHP-covered Areas. This mitigation measure states that impacts to jurisdictional wetlands and other waters of the State will be restored to pre-project functions and values at a minimum mitigation ratio (performance objective) of 1:1. Please note that the Water Board does not prescribe ratios and the expectation stated in the DEIR of a minimum ratio of 1:1 may not result in acceptable mitigation depending on the project-specific conditions.

Mitigation for unavoidable impacts to wetlands or other waters must be such that the Project and mitigation, taken together, meet the no net loss, as described in the Basin Plan. The purpose of the no net loss policy is to ensure no overall net loss and to achieve a long-term net gain in the quantity, quality, and permanence of wetlands acreage and values. Compensatory mitigation is determined in part on the functions and areal extent of the lost wetlands. The factors we evaluate for determining the amount of

mitigation necessary include but are not limited to the impact site and mitigation project dimensions, the method of proposed mitigation (e.g., enhance, restore, create), and timing of completing a mitigation project. For instance, the mitigation length and/or area will be increased by an additional 10 percent for each year mitigation is delayed to compensate for the additional temporal loss. Similarly, the Water Board may decrease the amount of mitigation if the proposed mitigation project is constructed quickly, has a small footprint for construction activities, and has far-reaching beneficial impacts in waters downstream and/or upstream of the mitigation project construction footprint. The DEIR should be revised to address the Water Board's mitigation requirements without a specific ratio.

- d. Cumulative Impacts. The cumulative impacts analyses are incomplete and should be revised. The DEIR did not find any significant impacts of cumulative impacts of the non-flow measures projects; such findings are premature based on the information provided in the DEIR. We recommend Valley Water prepare mini concept plans similar to the approach Valley Water used for the "Countywide Gravel and Large Woody Debris Augmentation Program" report (April 25, 2018).⁵
- e. Completed Projects. The completed projects list (e.g., Table 2.6-1) include the Evelyn Street Fish Passage Project on Stevens Creek. Although a structure was constructed, it is not performing as intended and a new structure must be redesigned and constructed (or the existing structure must be retrofitted). The DEIR should be revised to correct any references to this structure as being complete.
- f. Legacy Mercury Mining Contamination. The DEIR p. 3-83 incorrectly indicates mining waste is a source of mercury contamination in Stevens Creek. There are no known sources of mercury mining waste in the Stevens Creek watershed. (Source: Carri Austin, Water Board staff, October 11, 2021) Please correct this in the revised DEIR.
- g. BMP WQ-6, Limit Impact of Concrete near Waterways. (DEIR, p. 2-42, Table 2.7-1) The DEIR states that this BMP would: "Reduce runoff from increasing impervious surfaces and eliminate contact with uncured concrete." The full text of the BMP is related to avoiding contact with uncured concrete with water to minimize pH effects of the concrete and does not address reducing runoff from increasing impervious surfaces. Please correct the short-hand description of this BMP since implementing it would not reduce stormwater runoff from impervious surfaces. Additionally, the DEIR should be revised to include measures for projects to be designed so that impervious surface including gravel roads, are avoided and if they are unavoidable, to ensure the stormwater runoff is captured, detained, retained, and treated, before it enters a receiving water or storm drain. (See also Comment 13.)
- h. HEC-RAS Modeling Assumptions. The DEIR, Appendix J-*White Paper on Work Flow of the HEC-RAS Cross Section Analysis*, indicates that HEC-RAS models that were built for flood protection projects were used for the FAHCE modeling, but that those models lacked the topographical data for low-flow conditions that are a key part of FAHCE implementation and success. The work-around solution to make up for the lack of low-flow topographical data in the creek "points of interest" (POIs) was to stitch in new HEC-RAS reaches of 1,000 to 2,000 linear feet around the POIs. However, the DEIR states that "this process was subject to speculation regarding the situation and selection of

⁵ Countywide Gravel and Large Woody Debris Augmentation Program report.
Online: <https://s3.us-west-2.amazonaws.com/assets.valleywater.org/215152%20Program%20Report%2004-25-2018.pdf>.
(Accessed October 13, 2021)

neighboring XSs up and down-stream and therefore is a source of uncertainty regarding the hydraulic conditions at the POIs.” (Appendix J, pp. 8-9). We support the statement that “additional field data collected can be used to further verify these relationships” (Appendix J, p. 13). Please provide additional information for field verification of the creek POIs and connectivity between the POIs, habitat conditions that go beyond the modeling outputs for flow depth, temperature, and velocity, and other factor to evaluate the FAHCE objectives. In addition, please clarify if this approach and other modeling assumptions were endorsed by the adaptive management team. We recommend that moving forward, Valley Water provide means for input by the agencies, signatory parties, and other interested parties on the pros and cons for such decisions and to determine whether other actions such as collecting field data would be warranted.

- i. The DEIR, Appendix K-*Fisheries and Aquatic Habitat Technical Memorandum*, refers repeatedly to the *Fisheries Habitat Estimation Methodology Technical Memorandum* but that memo was not included with the DEIR. Please summarize this memo and the implications of the estimation methodology for the Project alternatives. Also, please distribute the memo to the Water Board and other interested parties.
- j. Appendix G- *Valley Water Daily WEAP Model Technical Memorandum*, (WEAP Model is the “Water Evaluation and Planning” Model) results states that the modeling outputs are explained in Appendix R (i.e. p. 7 and others) and that a Tableau tool was available to review WEAP model outputs. Appendix R is missing from the DEIR. Valley Water staff indicated that the references to Appendix R and the Tableau tool should have been deleted. (Source: Ryan Heacock (Valley Water), September 23, 2021, email to Susan Glendening (Water Board)). Please correct the inaccurate references to Appendix R and the Tableau tool that is not publicly available.
- k. Technical Work Group. Please revise the DEIR, section 1.6.1 (p. 1-16), which incorrectly states that the Water Board was part of a Technical Work Group (TWG) that advised on the development of the Fisheries Habitat Restoration Plan. Water Board staff attended a handful of meetings and did not advise on the plan.

Comment 13. Stakeholder Participation

The DEIR states that Valley Water met the minimum requirements for consulting with Tribal Nations pursuant to AB 52, even though AB 52 was adopted after Valley Water issued the Notice of Preparation. (DEIR, p. 1-18). Please provide clarification on additional steps Valley Water would take to ensure that the interests of Tribal Nations are addressed in future projects covered programmatically in the DEIR. The Water Board will not be able to issue a water quality certification for a project until the SHPO consultation has been completed. We recommend that Valley Water engage with Tribal nations early and frequently aside from the minimum requirements pursuant to AB 52. We recommend Valley Water consult with Water Board and State Board before finalizing revising or finalizing the DEIR to ensure that CEQA review would cover requirements that may be necessary for future permitting of the flow measures and non-flow measures projects as the State Board continues to develop policies and procedures to maximize inclusion of traditionally under-represented communities and counter the adverse effects of institutional racism.⁶

⁶ *State Board Resolution Condemning Racism, Xenophobia, and Racial Injustice and Strengthening Commitment to Racial Equity, Diversity, Inclusion, Access, and Anti-Racism* (Draft, June 2021). (Online at: https://www.waterboards.ca.gov/racial_equity/docs/070721_9_drftreso.pdf. Accessed October 12, 2021)

Additionally, we recommend that moving forward, Valley Water include the Water Board when soliciting agencies' feedback on the plans, studies, and reports associated with FAHCE. This is because the Water Board has permitting authority for the excavation, dredge or fill of materials in wetlands and other waters of the State that could occur under the proposed Project. This section incorrectly states that the Water Board was part of a Technical Work Group (TWG). Though Water Board staff attended about five TWG meetings, we did not advise on the Fisheries Habitat Restoration Plan in part because we were not part of the TWG.

Conclusion

We support the Project because it could improve creek flows and habitat quality to support salmonids and other aquatic biota in the Stevens Creek and Guadalupe River watershed. As summarized in our comments, however, additional analyses and discussions are necessary for the proposed Project to meet CEQA requirements.

We look forward to continuing to work with you on this project. If you have any questions about our comments, feel free to contact Susan Glendening (Susan.Glendening@waterboards.ca.gov).

Sincerely,

Elizabeth Morrison
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