



San Francisco Bay Regional Water Quality Control Board

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August 7, 2023

Santa Clara Valley Water District
5750 Almaden Expressway
San Jose, CA 95118
Attn: Mr. Ryan Heacock
Email: RHeacock@valleywater.org



Subject: Comments on the Final Environmental Impact Report for the Fish and Aquatic Habitat Collaborative Effort Program, Santa Clara County (SCH No. 2015022008)

Dear Mr. Heacock:

San Francisco Regional Water Quality Control Board (Water Board) staff submitted comments on the draft environmental impact report (EIR) 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) on October 15, 2021. On July 6, 2023, Valley Water issued the final EIR, including responses to our comments and those of others. We appreciate the opportunity to review and comment on the final EIR and responses to comments before Valley Water Board of Directors considers certification of the final EIR, currently scheduled to occur on August 8, 2023.

The Project is intended to be 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* (State Water Resources Control Board (State Water Board), 2003). 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 Board through water rights change petitions ("flow measures"). Compliance with CEQA is part of the State Water 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. FAHCE flow measures, non-flow measures, and adaptive management would be implemented in Stevens Creek and Guadalupe River, while adaptive management would also be implemented in Coyote Creek. CEQA review for flow and non-flow measures in Coyote Creek will be evaluated under a separate CEQA process for the Anderson Dam Seismic Retrofit Project.

This letter elaborates on our previous comments to request clarification and to incorporate the current status of issues that affect the Project, specifically for two key issues: (1) the methods used to evaluate temperature in the affected creeks; and (2) the proposed use of Santa Clara Valley Habitat Plan fees as mitigation for impacts, recognizing that the Plan has limited availability of mitigation that would meet the Water Board's requirements, and that while fees for that could provide appropriate mitigation, Plan fees generally would not. As summarized below, we may require additional mitigation on a project-by-project basis when a project under the FAHCE program is proposed for implementation, pursuant to Clean Water Act (CWA) section 401, the California Water Code, and the San Francisco Bay Basin Water Quality Control Plan (Basin Plan).

Comments

1. Significance Threshold for Evaluating Daily Temperature

Valley Water should clarify the modeling methods to evaluate temperature relative to the FAHCE agreement's "not to exceed" thresholds during seasonal windows specified in the agreement for a daily average of 19°C (66.2°F) in Stevens Creek and 18°C (64.4°F) in Guadalupe Creek, and a daily maximum temperature of 22°C (71.6°F) in the two creeks. We are concerned that the metric Valley Water used for evaluating the maximum daily temperature was the *mean* weekly average temperature. This differs from the metric the Water Board uses to evaluate daily temperature conditions, which is the *maximum* weekly average temperature (MWAT) (Campbell 2002¹). Additionally, here, we are requesting clarification of the modeling information to ensure the Project's potential environmental impacts have been analyzed appropriately. We recommend Valley Water coordinate with us to discuss this issue; we may require a technical memorandum to address this request depending on the nature of Valley Water's responses.

Aside from the differing interpretation of MWAT (where MWAT refers to the *maximum* weekly average temperature rather than the mean (Cambell 2002)), we want to clarify issues around Valley Water's response to our comment on this topic. Our comment requested that Valley Water use an MWAT of 17°C. The 17°C MWAT is based on biological temperature requirements of steelhead and supported by technical information from the scientific literature. As such, a 17°C MWAT is a valid numeric interpretation of a narrative objective and is relevant as a CEQA mitigation

¹ Campbell Timberland Management (Campbell), 2002. Stream Temperature Indices, Thresholds, and Standards Used to Protect Coho Salmon Habitat: a Review. Prepared by Stillwater Sciences, Arcata, for Campbell. Fort Bragg, CA. March 2002. Available from Water Board upon request.

endpoint.

Valley Water asserted that a 17°C MWAT is not applicable in this situation because it was derived from Clean Water Act (CWA) section 303(d) evaluation guidelines, which Valley Water claimed were irrelevant to a CEQA analysis. This refers to the Water Board's use of the 17°C MWAT in its evaluation of Los Gatos Creek temperature impairment pursuant to CWA section 303(d) (Los Gatos Creek is tributary to Guadalupe River and is covered in the Project). Valley Water has misconstrued the CWA section 303(d) Listing Policy² (Listing Policy) concerning what use may be made of evaluation guidelines. Valley Water quoted a passage in the Listing Policy stating that evaluation guidelines shall only be used for 303(d) purposes. However, the 17°C MWAT is not merely an evaluation guideline, but is also a scientifically defensible numeric interpretation of a narrative water quality objective. As such, the Water Board are not prohibited from using it—a numeric interpretation of narrative objectives—in other regulatory contexts, like permits or CEQA analyses. In fact, such numeric interpretations of narrative objectives are used routinely in California and elsewhere. For example, the Water Boards derive numeric water-quality-based effluent limitations for narrative objectives in NPDES permits when a discharge has the reasonable potential to cause or contribute to an exceedance of narrative objective (see, e.g., 20 C.F.R. § 122.44(d)(1)(vi)).

Valley Water further responded that documentation prepared as part of the Los Gatos Creek 303(d) listing process contains the statement, “there is no requirement to utilize any evaluation guidelines selected for 303(d) list assessments as monitoring requirements or triggers in...permits.” The language “there is no requirement” is not a prohibition against such use. This language merely indicates that the Water Board is not required to use the value, but is also not prohibited from doing so. Importantly, and as explained above, the 17°C MWAT is not merely an evaluation guideline for 303(d), but also a component of a numeric interpretation of a narrative objective, and it is appropriate and within the Water Board's authority to use such a numeric interpretation of a water quality objective for the purpose at hand, as an endpoint for a CEQA analysis.

The 17°C MWAT is currently one component of how the Water Board numerically interprets its narrative temperature water quality objective. However, we concur with Valley Water's statement that there is a process underway for possible re-evaluation of the temperature requirements for Central Coast steelhead; we are partnering with Valley Water on this evaluation. Accordingly, the Water Board will not insist on the evaluation 17°C MWAT for the CEQA analysis, but we reject the rationale provided by Valley Water that such analysis is irrelevant to the CEQA analysis or somehow legally impermissible or prohibited as a matter of policy.

² Statewide Water Quality Control Policy For Developing California's Clean Water Act Section 303(d) List. Adopted September 30, 2004; amended February 3, 2015. Available online: https://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2015/020315_8_amendment_clean_version.pdf. Accessed August 4, 2023.

Crucial to FAHCE implementation are the flow measures that will include reservoir releases. The flows will be optimized with respect to timing, duration, and flow rate, to help maintain creek water temperatures within the FAHCE thresholds in designated creek reaches. This will partially depend on the volumes of cool water stored in reservoirs, which may vary depending on water year precipitation. These factors vary between the two flow measure alternatives analyzed in the EIR (i.e., the FAHCE Alternative (the Proposed Project) and the FAHCE-Plus Alternative). We request Valley Water consider incorporating the hybrid flow regime proposed by National Marine Fisheries Service (NMFS) in their comments letter dated August 2, 2023. NMFS' proposal combines parts of the two flow alternatives evaluated in the EIR—the FAHCE Alternative and the FAHCE-Plus Alternative. NMFS indicates that the hybrid approach incorporates strengths of each EIR alternative, with the winter/spring streamflows and summer temperature management components from the FAHCE Alternative and the pulse flow components from the FAHCE-Plus Alternative. Use of the hybrid alternative would allow Valley Water to release more water in wet years, while still reducing flows in dry years. This approach could help improve flow conditions, including creek water temperature, with minimal, if any, delay for additional environmental review pursuant to CEQA.

2. Valley Habitat Plan

In our comments on the DEIR we pointed out that mitigation via paying fees to the Santa Clara Valley Habitat Agency pursuant to the Santa Clara Valley Habitat Plan would not be an acceptable method to mitigate impacts to waters of the State. Since those comments, in June 2023, the Water Board authorized the enabling instrument for the VHP in-lieu fee program (ILF Program). The credits released when the enabling instrument was signed include a limited number of mitigation credits for impacts to intermittent streams, riparian areas that are not waters of the U.S., and perennial streams with listed fish species. These credits should be available for purchase by Valley Water for any FACHE projects that impact these types of aquatic resources.

While the signing of the ILF Program enabling instrument is an important milestone, the number of available credits to purchase is limited. We will continue to work with the Valley Habitat Agency and others to support the Agency's addition of projects to the ILF Program that can provide mitigation credits acceptable to the Water Board.

Meanwhile, this letter serves as a reminder that paying VHP fees that are not tied to specific credits under the ILF Program would remain unacceptable as mitigation for impacts to waters of the State. Valley Water asserted in response to our comment on this issue that other agencies have approved the VHP and, therefore, the VHP should fulfill the criterion in the State Water Resources Control Board's *State Policy for Water Quality Control: State Wetland Definition and Procedures for Discharges of*

*Dredged or Fill Material to Waters of the State*³ (Procedures) that indicates implementation of an “approved watershed plan” may mitigate for impacts to waters of the State. However, the Procedures require that watershed plans be approved by “the permitting authority”—in this case, the Water Board. While review by other agencies can be beneficial, Valley Water’s comment would result, incorrectly, in placing approval authority of a plan under the responsibility of other agencies besides the Water Board. Unfortunately, the Habitat Agency did not include the Water Boards in the preparation of the Valley Habitat Plan and has not yet addressed shortcomings we have identified in the plan.

The following points summarize why the payment of VHP fees does not provide mitigation for impacts to waters of the State and address other issues raised in Valley Water’s response on this topic:

- ***The VHP was developed to provide mitigation for impacts to special status species managed by U.S. Fish and Wildlife Service (USFWS) the California Department of Fish and Wildlife (CDFW).*** The VHP was developed to provide a framework for sustaining populations of special status species that are protected under the authorities of the USFWS and the CDFW. The VHP collects fees for impacts that occur mostly in the urbanized core and uses the funds to provide habitat for special status species in rural areas of Santa Clara County.

When the Water Boards assess impacts to waters of the State, the Water Boards consider potential impacts to twenty beneficial uses that are assigned to waters of the State in each Water Board’s Basin Plan. The VHP only addresses impacts related to listed species and their habitat; this represents only a subset of the beneficial uses that the Water Boards are charged with preserving in their Basin Plans.

- ***The VHP Is not a watershed plan.*** We do not concur with Valley Water that the VHP meets the definition of a watershed plan. A watershed plan assesses the sizes, locations, and characteristics of the various types of waters (e.g., first order creeks, second order creeks, third order creeks, perennial wetlands, seasonal wetlands, freshwater wetlands, marine wetlands) within the watershed. Mitigation provided under a watershed plan is designed to ensure that the relative distribution of the various types of waters and their combined functions and values are sustained and improved. Under a watershed plan, mitigation for impacts to waters should consist of in-kind mitigation located within the same location in the watershed as the impacted waters. In other words, impacts to a headwater creek should be provided through the creation of a headwater creek and impacts to a seasonal wetland

³ California State Water Resources Control Board (State Board), 2022. State Policy for Water Quality Control: State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State. April 6, 2021. Available online: https://www.waterboards.ca.gov/water_issues/programs/cwa401/docs/2021/procedures.pdf Accessed August 4, 2023.

in the Valley floor should be mitigated by creating a seasonal wetland in the Valley floor—or, the overall result of the plan should be to sustain that approach over time.

Many of the impacts authorized under the VHP are occurring in the urbanized Valley floor, while most of the mitigation projects are being implemented in rural areas. This results in a net export of aquatic habitat from urbanized areas on the Valley floor to rural ridges. This net transfer of aquatic resources from the urbanized core to rural areas is not consistent with mitigation under a watershed plan.

- ***The VHP was developed without Water Board's and other key agencies' participation.*** The VHP was developed by the stakeholders, the USFWS and CDFW. The Water Boards (both San Francisco Bay and Central Coast Regional Water Boards), the NMFS, and the Corps were not invited to participate in developing the VHP. Near the end of the development process, USFWS staff asked the Water Boards to consider using the VHP in the Certification process. Staff in both Water Boards reviewed the VHP documents and provided comments on the revisions to the VHP that would be necessary to include Certifications in the VHP process. None of the comments provided by the Water Boards were incorporated in the VHP. The Water Boards cannot accept the VHP because it does not yet include acceptable mitigation for impacts to waters of the State.
- ***The Corps accepts the Habitat Agency fees as minimization, but not as compensatory mitigation.*** The Corps accepts the payment of Valley Habitat Agency fees as a means of minimizing impacts for projects that have small impacts, but not as compensatory mitigation for impacts to waters of the U.S. The Corps' acceptance of Valley Habitat Agency fees as a minimization measure, rather than a mitigation measure, is not a basis for the Water Boards to accept Habitat Agency fees as mitigation for impacts to waters of the State.
- ***The FAHCE Program was designed to protect steelhead, which are not one of the species protected by the VHP.*** The federal agency tasked with the preservation of central California coast steelhead, the NMFS, was not invited to participate in the VHP's development. The VHP's mitigation practices, which allow impacts in the urban core to be mitigated in rural areas, are not consistent with sustaining viable populations of steelhead because steelhead must migrate through the urban core to reach spawning beds. At this time, the VHP has not implemented any mitigation projects in the urban core that would improve conditions for steelhead migration through the urban core to spawning beds and we are not aware that such work is planned, or that the Plan's fee structure is sufficient to support it.

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, Guadalupe River, and Coyote Creek watersheds, and we look forward to continuing to work with you on the FAHCE program and future projects for implementing FAHCE. As summarized above, we request clarification of the temperature modeling and evaluations. We would like to meet to discuss this issue with you as soon as possible.

If you have any questions about our comments, feel free to contact Susan Glendening at 510.622.2462 or at Susan.Glendening@waterboards.ca.gov.

Sincerely,



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