Via electronic mail

August 7, 2023

Board of Directors
Santa Clara Valley Water District
5750 Almaden Expressway
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Board@valleywater.org

Re: August 8, 2023, Board Meeting Agenda Item 3.4, Adopt a Resolution Certifying the Final Environmental Impact Report for the FAHCE Project

Dear Chair Varela and Members of the Board:

California Trout, Inc. (CalTrout) and Northern California Council Fly Fishers International (NCCFFI) provide these comments in response to the Final Environmental Impact Report (FEIR) for the Fish and Aquatic Habitat Collaborative Effort (FAHCE) Project, which will come before the Board for certification on August 8, 2023. We appreciate the considerable efforts of Valley Water staff to reach this milestone.

CalTrout and NCCFFI have participated in the FAHCE process for over 20 years. We have a vested interest in the successful permitting and implementation of a restoration program consistent with the Initialing Parties' commitments under the FAHCE Settlement Agreement to restore and maintain fish and wildlife and other beneficial uses on Coyote, Guadalupe, and Stevens Creeks (Three Creeks) to good condition. We are concerned that the analysis in the FEIR does not show the Fish and Habitat Restoration Plan (FHRP) meets those commitments. We briefly summarize these concerns and request the Board direct further revisions to the FHRP, specifically the proposed Adaptive Management Program.

Under the FAHCE Agreement, the restoration program is intended "to restore and maintain fisheries, wildlife, water quality and other beneficial uses of the Three Creeks in good condition." (Agreement, § 6.2.1). The Agreement's statement of Overall Management Objectives (*id.* at § 6.2.2) reiterates the intention to restore and maintain fish populations by providing suitable habitat and adequate access to that habitat:

> Implementation of the Agreement will restore and maintain healthy steelhead trout and salmon populations as appropriate to *each* of the Three Creeks, by providing (A) suitable spawning and rearing habitat within each watershed, and (B) adequate passage for adult

steelhead trout and salmon to reach suitable spawning and rearing habitat and for out-migration of juveniles.

Despite these express terms, to date Valley Water staff has rejected our and other Initialing Parties' requests that the EIR include "fish in good condition analysis." FEIR, p. 6-22. Staff's response cites to precedent under Fish and Game Code section 5937 and certain provisions of the Water Code that hold "… the release of water in excess of the amount needed to keep fish in good condition is unreasonable if there would be adverse effects on other beneficial uses of water." Excess flows must be balanced against protection of competing beneficial uses of water. *Id.* Staff then concludes that, "[t]he FAHCE program ensures Valley Water's continued compliance with Fish and Game Code Section 5937 and other applicable laws, and *improves* fisheries conditions consistent with the Settlement Agreement's overall management objectives." *Id.* (emphasis added).

We agree with Valley Water staff's statement that, under applicable law, release in excess of the amount needed to keep fish in good condition must be balanced against protection of competing beneficial uses. *However*, a dam owner must first make a release sufficient to maintain "fish in condition." Valley Water may conclude that the FHRP is consistent with the FAHCE Agreement's ultimate purpose and complies with Section 5937 only by showing that the proposed FHRP will maintain "fish in good condition."

Rather than evaluating whether the FHRP will restore and maintain fish in good condition, the FEIR's analysis is limited to showing the FHRP will only "*improve* conditions" for the salmon and steelhead fisheries on the Three Creeks. *Id.* at 6-24 (emphasis added). Again, we reject that "improved conditions" is all Valley Water must show to satisfy its commitments under the FAHCE Agreement or its legal obligations to mitigate the impacts of its water supply facilities and operations. Further, we anticipate that whether the proposed FHRP will effectively mitigate the environmental impacts of Valley Water's water supply facilities and operations on fish and wildlife and other beneficial uses will be a key issue in the State Water Board's consideration of Valley Water's pending petitions to amend its water rights for Guadalupe and Stevens Creek.

Valley Water's pursuit of a FHRP that has not been designed to restore and maintain fish in good condition (consistent with protection of other beneficial uses) will cause FAHCE to fail, even if the FEIR is deemed legally sufficient under CEQA for purposes of Valley Water's action. For that reason, and even if the Board acts to certify the FEIR on August 8, we urge the Board to direct Valley Water staff to undertake further revisions to the FHRP in advance of the State Water Board's consideration of Valley Water's pending water rights change petitions.

Our main recommendation is that Valley Water revise the FHRP's Adaptive Management Program to include measurable objectives (MOs) that have been developed based

on best available information to achieve the FAHCE Agreement's goal of restoring and maintaining salmon and steelhead in good condition on the Three Creeks.[1]

In our DEIR comments we provided a local definition for salmon and steelhead populations in good condition.[2] We have explained that the purpose of defining fish in good condition on the Three Creeks is to set a clear goal consistent with statute that can be used to gauge the effectiveness of the FHRP measures and inform adaptive management decisions over time.[3] The purpose is not to establish a compliance threshold that could trigger enforcement action.

We anticipated further discussions with Valley Water staff and other Initialing Parties regarding the FHRP's proposed approach to adaptive management and, specifically, MOs. Those important discussions have not yet occurred, but they should. In the meantime, we have continued to work with Dr. Joseph Merz on developing MOs for minimum number of immigration and emigration passage days per month (Enclosure 1, Tables 2, 5), and minimum acreage for spawning and incubation and rearing habitat by month (Enclosure 1, Tables 3, 4) to support healthy salmon and steelhead populations when they are present in the Three Creeks. We provide these proposed MOs in Enclosure 1 for consideration as the basis for revising the FHRP. We are willing and ready to work with Valley Water staff and other Initialing Parties to refine these proposed MOs, but we cannot support a FHRP that does not include any MOs developed to keep fish in good condition.

Thank you for considering these comments. CalTrout and NCCFFI are anxious to begin implementation of a restoration program that sound science and best available information show is likely to restore and maintain fish and wildlife and other beneficial uses of the Three Creeks to good condition. We stand ready to work with Valley Water and other Initialing Parties to promptly complete development of an FHRP that is consistent with the intent of the FAHCE Agreement and applicable law.

Respectfully submitted,

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[1] We also made this recommendation in our DEIR comments: "Revise the [Adaptive Management Program], consistent with recommendations made in the Merz Report and Minimum Viable Population Analysis to include measurable objectives, monitoring adequate to demonstrate progress in meeting the measurable objectives, and clear criteria for future management decisions regarding Additional Measures." Letter from CalTrout et al. to Ryan Heacock, SCVWD, re: Fish and Aquatic Habitat Collaborative Effort Draft Program Environmental Impact Report (Oct. 15, 2021) (DEIR Comments), pp. 38-39.

[2] *Id.* at pp. 18-23, Attachment 1: Expert Report of Joseph E. Merz, Ph.D., pp. 6-12, and Attachment 1.1: Fisheries and Aquatic Habitat Collaborative Effort: Population Criteria and Habitat Supply Model to Inform Fishery Management in the Three Creeks; *see also* Enclosure 1, Table 1.

[3] *Id.* at 21.

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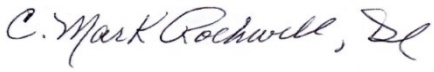

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ENCLOSURE 1

MEASURABLE OBJECTIVES TO RESTORE AND MAINTAIN FISH IN GOOD CONDITION

Table 1. Minimum number of individuals for low risk *O. mykiss* and Chinook Salmon populations, by lifestage, per watershed.

	Minimum Viable Population (Low Risk)	
Life Stage	Steelhead	Chinook
Spawners (immigrants)	83	833
Fry Emergence	182,678	1,777,497
Ocean Entry (Emigrants)	2,766	28,724

Table 2. The number of days needed by immigrating adult steelhead and Chinook salmon to reach upper spawning grounds from estuary for each watershed. We assumed the faster speeds for the slowest species. These equate to the number of contiguous passage days per migration window. Migration events equate to an assumed duration for each species within each watershed ROI related to assumed migration speed and ROI length. The number of passage episodes should be driven by the migration window, expected concentration of migrants, and water year type.

		Minimum contiguous passage days per month						
Watershed	POI	Oct	Nov	Dec	Jan	Feb	Mar	Apr
Coyote Cr	COYO10	1.8	3.6	7.2	9.7	19.4	9.7	4.9
Coyote Cr	UPEN4	1.0	2.0	4.0	5.3	10.6	5.3	2.7
Guadalupe Cr	GUAD7	0.8	1.6	3.2	4.4	8.8	4.4	2.2
Guadalupe Cr	LOSG2	0.8	1.6	3.2	4.4	8.8	4.4	2.2
Guadalupe Cr	GCRK4	1.1	2.2	4.4	6.0	12.0	6.0	3.0
Guadalupe Cr	ALAM4	1.2	2.4	4.8	6.4	12.8	6.4	3.2
Guadalupe Cr	CALE2	1.2	2.3	4.6	6.3	12.6	6.3	3.2
Stevens Creek	STEV6	0.5	1.0	2.0	2.8	5.6	2.8	1.4

Table 3. Minimum acreage of spawning and incubation habitat needed per month for a minimum viable population of steelhead and Chinook Salmon* within each watershed.

	Min Acres		
Month	Steelhead	Chinook	Total
15-31 Oct	-	0.03	0.03
Nov	-	0.35	0.35
Dec	0.01	0.63	0.64
Jan	0.01	0.70	0.71
Feb	0.01	0.70	0.71
Mar	0.02	0.70	0.72
Apr	0.02	-	0.02
May	0.02	-	0.02

*once spawning occurs, habitat must remain activated until emergence is completed

Table 4. Minimum acreage of rearing habitat needed per month for a minimum viable population of steelhead and Chinook Salmon for each watershed.

	Min Acres		
Month	Steelhead	Chinook	Total
Jan	17	18	35
Feb	17	17	34
Mar	15	12	27
Apr	10	10	20
May	8	2	10
Jun	8	-	8
Jul	11	-	11
Aug	12	-	12
Sep	15	-	15
Oct	15	-	15
Nov	16	-	16
Dec	17	-	17

Table 5. Minimum number of contiguous passage days for emigrating juvenile steelhead and Chinook Salmon within each watershed, emphasizing an "early" and "late" migration strategy. Migration events equate to an assume duration for each species within each watershed ROI related to assumed migration speed and ROI length. The number of passage episodes should be driven by the migration window, expected concentration of migrants, and water year type.

		Minimum contiguous passage days		
Watershed	POI	February	March	May
Coyote Cr	COYO10	3	4.5	4.5
Coyote Cr	UPEN4	3	2.5	2.5
Guadalupe Cr	GUAD7	1.4	2.1	2.1
Guadalupe Cr	LOSG2	1.4	2.0	2.0
Guadalupe Cr	GCRK4	1.9	2.8	2.8
Guadalupe Cr	ALAM4	2.0	3.0	3.0
Guadalupe Cr	CALE2	1.9	2.9	2.9
Stevens Creek	STEV6	0.9	1.3	1.3