

January 15, 2016

Ms. Lisa Van Atta
NOAA Fisheries West Coast Region
Assistant Regional Administrator
Santa Rosa, California Office
777 Sonoma Avenue, Room 325
Santa Rosa, CA 95404

Subject: Santa Clara Valley Water District Fish and Aquatic Habitat Collaborative Effort
Settlement Agreement

Dear Ms. Van Atta:

I am writing to congratulate you on your promotion to Assistant Regional Administrator for the West Coast Region of National Oceanic and Atmospheric Administration Fisheries (NMFS) and look forward to working with you in your new role. I would also like to discuss our efforts to resolve the Santa Clara Valley Water District (District) water rights complaint through the Fish and Aquatic Habitat Collaborative Effort (FAHCE) Settlement Agreement process.

The District's Board of Directors (Board) has provided clear direction to resolve the water rights complaint and facilitate implementation of the FAHCE measures to support fish habitat needs in the Santa Clara County. Your staff has been extremely helpful at both Initialing Parties meetings and the more recently instituted modeling meetings. I greatly appreciate their technical knowledge and the level of effort that the North Central Coast Office has dedicated to this process.

While the technical effort proceeds apace, elements needed to resolve federal agency participation in the Settlement Agreement remain unresolved, i.e., NMFS' August 2015, action items for the process included obtaining legal input that would allow NMFS to initial amendments to the Settlement Agreement. The District and the other Initialing Parties engaged their respective legal counsel in the amendment process this fall. Currently, the Settlement Agreement language specifies a 50-year Habitat Conservation Plan (HCP) as a condition precedent to the effective date of the Settlement Agreement and implementation of the FAHCE restoration measures; despite much on-going effort this goal has remained elusive, and continues to impede implementation of FAHCE measures.

To address this, the District and the complainants have proposed changes to the Settlement Agreement that would allow the FAHCE process to address measures that require state approval and provide for concurrent, or subsequent, federal approval. This "change in regulatory pathway" has been agreed to in principle by the Guadalupe-Coyote Resource Conservation District, Trout Unlimited, and the California Department of Fish and Wildlife. The attached current and proposed Settlement Agreement language has been provided to Mr. Christopher Keifer, counsel for NMFS; we trust that a written response to this proposed language can be provided by the first week of February to allow us to inform our Board.

Although we believe the proposed changes to the Settlement Agreement language address U.S. Fish and Wildlife Service's participation in the process, it is my understanding that your office is also proposing the completion of a 10-year HCP to provide Endangered Species Act (ESA) Section 10 authorization for District Water Supply operations.


At the January 8, 2016, FAHCE Initialing Parties meeting, Mr. Gary Stern committed to provide, by February 4, 2016, a letter from your office with a plan to produce a 10-year HCP within the current year-long schedule. We appreciate Mr. Stern's valuable participation in FAHCE and will carefully review his plan; however, there is great concern that such effort should be undertaken only if it is fully supported by the NMFS Region and with agreement that the effort would not impede current technical work on the modeling effort or delay the schedule for the State Water Resources Control Board (SWRCB) decision-making process. I understand NMFS' letter will include the following:

- A plan and schedule to complete the 10-year HCP plan and federal environmental review by December 2016 -- concurrent with completion of the Fish Habitat Restoration Plan and Program Environmental Impact Report.
- The conservation measures for this proposed 10-year HCP will be essentially the same as the Phase One Measures of the Settlement Agreement.
- The 10-year HCP will be accomplished concurrently with SWRCB approval of the District's water rights petitions and will not delay the initiation of the FAHCE restoration measures.

It is my understanding that this approach would allow for NMFS to initial the amendment to the Settlement Agreement to allow for the change in regulatory pathway. The District understands that it must comply with the ESA and federal permitting authority. However, the change in regulatory pathway would allow some of the environmental benefits of the FAHCE restoration measures to commence, while concurrently obtaining necessary federal approvals.

District staff will provide the District's Board with a quarterly FAHCE update on February 9, 2016. While receipt of Mr. Stern's plan on February 4, 2016, will not provide District staff with sufficient time to include the plan in the staff report on FAHCE, I would like to be able to report to the Board an understanding about whether NMFS agrees in concept to the change in regulatory pathway. It would be helpful to confirm that the proposed expedited 10-year HCP is supported by your office. Please call me at (408) 630-2736, if you have any questions or want to discuss this issue.

Sincerely,



James M. Fiedler, P.E., D.WRE
Chief Operating Officer
Water Utility Enterprise

Attachment: Existing and Proposed Changes in FAHCE Settlement Agreement Provision 5.8

cc/att: Mr. Scott Wilson, California Department of Fish and Game
Mr. Craig Weightman, California Department of Fish and Wildlife
Mr. Gary Stern, NOAA Fisheries North-Central Coast Office
Mr. Ryan Olah, U.S. Fish and Wildlife Service
Mr. Richard Roos-Collins, Water and Power Law Group PC
Ms. Julie Gatenbein, Water Power Law Group PC
Ms. Stephanie Moreno, Guadalupe-Coyote Resource Conservation District
Mr. Matt Clifford, Trout Unlimited
Mr. Nathan Metcalf, Hanson Bridgett LLP

ATTACHMENT
Existing Language and Proposed Changes in FAHCE Settlement Agreement Article 5,
Changes to Regulatory Pathway Provision 5.8 [Dated 11/30/2015]

ARTICLE V
EXPRESS CONDITIONS PRECEDENT AND SUBSEQUENT
REGULATORY APPROVAL TO IMPLEMENTATION OF
ARTICLES VI-IX
TO IMPLEMENTATION OF ARTICLES VI-IX

5.1 Initialing and Release of Agreement. On May 27, 2003 SCVWD and each other Party will initial/initialed the Agreement. Following the Initialing Date, the Agreement will be, which was submitted to the SWRCB as an offer of settlement of the Complaint and will be made available for public review and comment. On [date], the Parties initialed the Amended and Restated Agreement

5.1.1 The initialing of the Agreement will/does not create any binding commitment by any Party to effect any change in the environment, to carry out any project within the meaning of CEQA or NEPA, or to implement the measures set forth in Articles VI through IX, other than to make the Agreement available for public review and comment and for the purpose of defining a project for Environmental Review.

5.1.2 No Party will allege or seek judicial or administrative redress based upon detrimental reliance or estoppel as a result of actions taken by any other Party after the other Party's initialing of this Agreement and before the Effective Date.

5.2 Time Limit for Satisfaction of Conditions Precedent. SCVWD and other Parties' obligations to implement Articles VI through IX, inclusive, will commence on the Effective Date, upon satisfaction of each of the express conditions precedents set forth in paragraphs 5.3 through 5.8 and within 24 (twenty-four) months of the Initialing Date6.

[5.3 CE\QA Compliance ...]

5.4 NEPA Compliance. A condition precedent to the Effective Date is that the lead federal agency (whether the FWS, NMFS, or another agency) for the actions contemplated in this Agreement will have completed Environmental Review for the project in accordance with NEPA and all related applicable laws.

5.4.1 This Agreement will form the basis of the description of the preferred alternative(s) for the purposes of NEPA. It consists of the complete settlement of the Complaint. The project consists of all commitments in the Agreement, including commitments to continue activities undertaken by SCVWD in response to the Complaint and prior to the start of the environmental analysis.

5.4.2 The baseline for purposes of NEPA will not include any activities undertaken by SCVWD after July 11, 1996, the date on which the Complaint was filed, in response to the Complaint or otherwise as part of the FAHCE process, inasmuch as these activities are

experimental management, minor physical alterations, or within the range of ongoing operations~~5.4.~~

~~5.4~~ ~~5.4.3~~ Environmental Review under NEPA will be deemed complete when the FWS, the NMFS, and the Corps have certified that their respective reviews comply with NEPA.

~~5.4.4~~ The Parties recognize that it is likely that the Corps, the FWS, or other federal agency will be the lead agency for purposes of preparing the NEPA document. FWS and NMFS will coordinate environmental review with the Corps. Without regard to which federal agency acts as lead agency, the NEPA document will include a comprehensive conservation strategy.

~~5.5~~ **SWRCB.** A condition precedent to the Effective Date is that, following any administrative or judicial appeal, the SWRCB will have:

~~5.45.1~~ Ordered amendments to the Licenses and Permit in substantial conformity with the agreement; and

~~5.45.2~~ Adopted findings in substantial conformity with those set forth in Exhibit B that conclude that SCVWD's storage, diversion and use of water in implementing this Agreement comply with all applicable laws that are within the jurisdiction of the SWRCB. This finding will cover repair and replacement of the existing SCVWD facilities pursuant to which SCVWD presently diverts, stores and distributes water under the Permit and Licenses set forth in Exhibit A. New facilities, including any proposed diversions, storage or distribution of water unrelated to this Agreement, will require independent review and analysis.

~~5.65~~ **GCRCD.** A condition precedent to the Effective Date is that the GCRCD will have indicated its support for the SWRCB's dismissal of GCRCD's Complaint with prejudice. GCRCD will unconditionally support dismissal of its Complaint by the SWRCB if it determines that findings or amendments to the Permit and Licenses in the SWRCB's final order are in substantial conformity with the Agreement. If it determines that such findings or amendments are not in substantial conformity, GCRCD may, consistent with paragraph 4.1.6, elect not to support dismissal of its Complaint or may undertake an administrative or judicial appeal of the SWRCB's order.

~~5.7~~ **DFG6 DFW.** A condition precedent to the Effective Date is that ~~DFGDFW~~, in its discretion and in accordance with all applicable laws, will have issued any approvals required to adopt or implement the Agreement, including any permit or approvals that may be necessary under the California Endangered Species Act. Such issuance will be done only after ~~DFGDFW~~ has been provided with a full and fair opportunity to evaluate the scientific record, including but not limited to the EIR/~~EIS~~ and any other relevant facts and circumstances.

5.7 Subsequent Activities Under the FHRP that May Require Federal Approval.

~~5.7.1~~ NEPA Compliance. ~~A condition precedent~~Subsequent to the Effective Date ~~is that the lead federal agency (whether the FWS, NMFS, or another agency) for the actions and the Corps will complete any necessary Environmental Review for the activities contemplated in this Agreement will have completed Environmental Review for the project in accordance with NEPA and all related~~subject to permits or other regulatory approvals under the ESA or other applicable federal laws.

5.47.1.1 This Agreement will form the basis of the description of the preferred alternative(s) for the purposes of NEPA. ~~It consists~~For the programmatic elements of the complete settlement of the Complaint. The project consists of all commitments in the Agreement, including commitments to continue activities undertaken by SCVWD in responseFHRP, specific project activities subject to permits or other regulatory approvals under applicable federal laws, will be described, once recommended by the Complaint and prior to the start of the environmental analysisAdaptive Management process, as contemplated by Article VII.

 5.47.1.2 The baseline for purposes of NEPA will ~~not include~~be existing conditions as provided by NEPA and its implementing regulations. The NEPA document will describe and appropriately account for any activities undertaken by SCVWD after July 11, 1996, the date on which the Complaint was filed, in response to the Complaint or otherwise as part of the FAHCE process, ~~inasmuch as these~~including activities that are experimental management, minor physical alterations, or within the range of ongoing operations.

 5.47.1.3 Environmental Review under NEPA will be deemed complete when the FWS, ~~the~~ NMFS, and/or the Corps have ~~certified that their respective reviews~~issued the appropriate Record of Decision (ROD) to comply with NEPA.

 5.47.1.4 The Parties recognize that it is likely that ~~the Corps, the FWS, NMFS or other federal agency~~the Corps will be the lead agency for purposes of preparing the NEPA document. ~~FWS and NMFS~~ will coordinate environmental review with the Corps. Without regard to which federal agency acts as lead agency, the NEPA document will include a comprehensive conservation strategy for those activities subject to permits or other regulatory authorizations under applicable federal laws.

~~5.8 — FWS and NMFS. A condition precedent~~ 5.7.2 ESA Authorization. Subsequent to the Effective Date is that, the FWS and NMFS, ~~each~~ in its complete and sole discretion and in accordance with all applicable laws, and only after having been provided a full and fair opportunity to evaluate the scientific record, including but not limited to the EIR/EIS, any necessary NEPA document, and any other relevant facts and circumstances, will have:

 5.87.2.1 Determined, after completing consultation in full compliance with all requirements of Section 7 of the ESA with any and all responsible federal action agencies, including but not limited to the Corps, that issuance of any permits under the Clean Water Act or any other federal action subject to such consultation that is required to implement the measures contained in this Agreement will neither jeopardize the continued existence of any listed species nor result in the adverse modification of any designated critical habitat, as those terms are used within the meaning of the ESA and provided in Exhibit C;

 5.87.2.2 Found that the Agreement or the implementation of its measures will either not require the issuance of an incidental take permit or issued all such permits under Section 7 or 10 of the ESA as may be necessary to implement the Agreement as provided in Exhibit C;

 5.87.2.3 ~~#Agreed that~~ a permit ~~is required~~ under Section 10 of the ESA, ~~approved~~based on a HCP for the Three Creeks ~~subject to this Settlement, inclusive of a no-surprises provision,~~ would extend for a period not less than 50 (fifty) years ~~from the Effective Date as provided in Exhibit C.~~

~~5.8.3.1 The HCP will be a multi-species program, which will, and include all federally-listed species, and all candidate species, proposed species, and species of special concern, subject to NMFS' jurisdiction at the time the HCP is submitted.~~

~~5.8.3.2 Upon issuance of an incidental take permit, SCVWD will be provided all no-surprises assurances, as set forth in the implementing regulations for the ESA at 50 CFR 17.22(b)(5) and 50 CFR 222.307(g).~~

~~5.8.4 Promised to subsequently, NMFS will work in good faith to incorporate the conservation strategy within the HCP for the coordinate the implementation of any such Three Creeks subject to this Agreement into a countywide HCP for HCP with the Santa Clara County for a period of not less than 50 (fifty) years from the Effective Date, if and when such a countywide HCP is adopted. Valley HCP, over their respective terms.~~