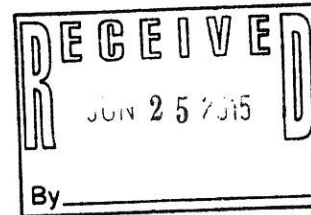


June 23, 2015

Mr. Richard Roos-Collins  
Ms. Julie Gantenbein  
Water and Power Law Group PC  
2140 Shattuck Avenue, Ste. 801  
Berkeley, CA 94704-1229



Matt Clifford,  
Staff Attorney  
Trout Unlimited  
2239 5<sup>th</sup> Street  
Berkeley CA 94710

Subject: Response to your letter dated June 3, 2015 regarding the Fish and Aquatic Habitat Enhancement Agreement: June 9, 2015, Board Meeting, Agenda Item 4.3

Dear Mr. Roos-Collins, Ms. Gantenbein and Mr. Clifford:

The Board of the Santa Clara Valley Water District greatly appreciates your letter on behalf of the Guadalupe Coyote Resource Conservation District and Trout Unlimited, regarding the Fish and Aquatic Habitat Enhancement Agreement. The June 9, 2015, work study session of the District Board was useful to our understanding the issues and urgency of this matter. The Board shares your desire to resolve the water rights issues expeditiously, and our mission embraces protection of fish, wildlife, and recreation while providing a reliable water supply.

Your letter lists four proposed actions for which you requested, at the meeting Board on June 9, 2015, that the Board provide direction to staff. The Board acted on your request at the June 22, 2015, Board meeting. We understand given the long history of this process, clear direction is key. Our commitment to resolution and direction to staff is listed below with our response.

Proposed Action:

1. *District staff should complete the Fish Habitat Restoration Plan (FHRP) and Environmental Impact Report not later than the schedule provided to the Board on June 9, 2015.*

The Board directed staff to complete the Fish Habitat Restoration Plan (FHRP) and the FHRP EIR by December 31, 2015. Staff clarified this date represents the items in the District's control up through receipt of public comments on the public draft of the EIR. The administrative of the FHRP was completed and sent to you on June 19, 2015. The administrative draft of the EIR will be completed by August 31, 2015.

Proposed Action:

2. *District Staff should promptly consult with initialing parties on the scientific work plan for the EIR, to resolve any differences regarding analytical methods.*

Mr. Richard Roos-Collins  
Ms. Julie Gantenbein  
Mr. Matt Clifford  
Page 2  
June 23, 2015

The Board has directed staff to provide the work plan for the Reoperations Rule Curve Analysis Modeling the Effects of CEQA Alternatives to you and other initialing parties; staff are available for further discussion to explain or resolve any differences regarding analytical methods.

Proposed Action:

3. *The District should implement all remaining non-flow measures in Phase I not later than five years after the SWRCB's approval of the Change Petition. The FHRP now being drafted should include a specific schedule for such implementation.*

The Board understands that the Settlement Agreement Regarding Water Rights of the Santa Clara Valley Water District on Coyote, Guadalupe, and Steven Creeks contains identified, well described measures, such as removal of District-owned barriers. The Board has directed staff to schedule such projects for completion within five years after the date of the SWRCB issuance of the water rights order. The Board also directed staff include a process to identify remaining stream improvement projects, such as installation of large woody debris, or gravel augmentation, where specific implementation sites have not been selected. Final implementation schedules for any project are dependent upon the acquisition of environmental permits and the cooperation of property owners for projects not located on District lands or right-of-ways.

Proposed Action:

4. *District Staff should work with other initialing parties to amend or supplement the Agreement to specify the pathway for regulatory approvals.*

The Board has directed staff to participate in meetings with the initialing parties. The first meeting was held on June 10, 2015, for this purpose and future meetings are scheduled monthly beginning in mid-July until the Agreement is amended.

Again, thank you for your letter of June 3, 2015, and your participation at our Fisheries and Aquatic Habitat Collaborative Effort work study session on June 9, 2015. We look forward to working with you and your clients on this very important project.

Sincerely,

  
Gary Kremen  
Chair, Board of Directors

cc: Board of Directors

**WATER AND POWER  
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June 3, 2015

***Via Electronic Mail***

Chairman Gary Kremen  
Vice-Chairman Dennis Kennedy  
Director Barbara Keegan  
Director Richard P. Santos  
Director Linda J. LeZotte  
Director Nai Hsueh  
Director Tony Estremera  
Santa Clara Valley Water District  
5750 Almaden Expressway  
San Jose, CA 95118-3614

**Re: Fish and Aquatic Habitat Enhancement Agreement: Agenda Item 4.3 (June 9, 2015 Board Meeting)**

Dear Directors:

We write on behalf of the Guadalupe Coyote Resource Conservation District (GCRCD), American Rivers, California Trout, Santa Clara County Creeks Coalition, and Trout Unlimited (TU), regarding the Fish and Aquatic Habitat Enhancement (FAHCE) Agreement.

In 1996 the GCRCD filed the water rights complaint that resulted in the FAHCE Agreement. Along with GCRCD, CalTrout and TU initialed the Agreement in May 2003 and have actively participated in implementation thereafter. American Rivers and the Creeks Coalition have cooperated in recent years.

We respectfully submit four proposed actions for your consideration. We have previously discussed them with District Staff. It is our understanding that these proposals should be elevated to the Chief Executive Officer or Board, as appropriate. Hence, this letter. We request the opportunity to address the Board regarding the status of FAHCE and these proposed actions.

**1. District Staff should complete the Fish Habitat Restoration Plan and Environmental Impact Report not later than the schedule shown in the Board Agenda Memo.**

The FAHCE Agreement as initialed in 2003 is draft, not final. Section 5.2 states that the District will secure regulatory approvals by May 2005. These approvals are pre-conditions for the Effective Date for the Agreement, including full implementation of the conservation program.<sup>1</sup> They also are necessary to assure that the District's water rights comply with the Water Code, the federal Endangered Species Act (ESA), and other applicable laws. We are ten years behind this deadline.

On April 30, 2015, the District filed a Change Petition with the State Water Resources Control Board (SWRCB). This petition proposes to amend the District's water rights per the Agreement. As of this date, the Fish Habitat Restoration Plan (FHRP), which describes the conservation program, and the Environmental Impact Report (EIR), are still being drafted. The SWRCB will act on the Change Petition only once the FHRP and EIR are submitted in complete form. The District must separately assist the National Marine Fisheries Service (NMFS) in the preparation of an Environmental Impact Statement (EIS) as the basis for any incidental take authorization under the ESA, the other major regulatory approval for the Agreement.

After missing the deadline set in Section 5.2, the District has proposed target dates to complete the applications for regulatory approvals. It has missed every one of these dates, including the date stated in the September 23, 2014 Board meeting.<sup>2</sup> While we understand that this is a complex effort, we will not accept further delay within the District's reasonable control.

Following the September 23, 2014 Board meeting, we joined District staff and made specific representations to the SWRCB that the EIR would be published in 2015. Our credibility and reputation are on the line, too. Further, GCRCD has invested substantially in the Agreement. This investment includes thousands of hours of efforts by the volunteer directors, monitoring and reporting the physical conditions of the creeks.<sup>3</sup> It includes an expenditure of

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<sup>1</sup> The Agreement includes covenants (or obligations) that were effective upon initialing, including Section 5.2. See Article IV. The obligation to implement the conservation program is effective on the Effective Date, once all regulatory approvals have been secured. See Section 2.2.8 and Article V.

<sup>2</sup> In August 2005, the District issued the scoping notice for an EIR (Attachment 1). In January 2006, District staff expected that the final EIR would be published by May 2007 (Attachment 2). In May 2009, the estimate was December 2009 (Attachment 3). In June 2011, the estimate was 2013 (Attachment 4). In September 2011, the estimate was 2014 (Attachment 5). In the September 23, 2014 quarterly report, the estimate was December 2015 (Attachment 6). The current Board Agenda Memo shows that that target date for the final EIR is March 2016.

<sup>3</sup> Over the past several decades, GCRCD Directors have compiled an extensive library of photographs and other documentary records of their inspections, reach by reach. They have submitted many of these records for use in the adaptive management program for the Guadalupe Flood Control Projects. They have notified law enforcement authorities regarding illegal uses of public lands and waters. As one further example, in the course of inspecting a storm water outfall in 2005, GCRCD Board Chair Roger Castillo located the petrified bones of a mastodon. The bones were excavated by University of California Berkeley and are now displayed as "Lupe" in the San Jose Children's Museum. <https://www.cdm.org/visit/exhibits/mammoth-discovery/>.

more than \$250,000 for consultants to undertake scientific studies through 2001,<sup>4</sup> negotiate and co-draft the Agreement, and work with the District in the partial implementation of the Agreement to date.<sup>5</sup> This allocation was based on the GCRCD's reasonable expectation that the collaborative work would result in actual benefits for County residents. We postponed litigation of the complaint, on the basis of the Agreement and the expectation that the District would comply with it, including the obligation to seek and secure regulatory approvals by May 2005. Most importantly, the fish and other public trust resources in these creeks are in worse shape than when the Agreement was initialed.

The District should be accountable to take those actions within your control, not later than this schedule. We will conclude that the District has breached this Agreement, if the District permits further delay in the completion of the FHRP, EIR, and other documents necessary for regulatory approvals. In that unfortunate circumstance, we will notify the SWRCB of this breach and will take other appropriate actions.

**2. District Staff should promptly consult with initialing parties on the scientific work plan for the EIR, to resolve any differences regarding analytical methods.**

The FAHCE Agreement proposes a conservation program. It provides that the EIR will analyze the comparative merits of this program and alternatives. If that document shows that the conservation program (or any element) as proposed in 2003 is inferior to an alternative, the Agreement provides that the initialing parties may negotiate a formal amendment. And absent an amendment in that circumstance, any initialing party may protest applications for regulatory approvals. In sum, it is critical that the initialing parties are comfortable with the analytical methods which HDR Engineering, as the District's consultant, is using to prepare the EIR.

Last summer, the GCRCD and conservation groups submitted a punch list of issues for detailed analysis in the EIR. An example is coldwater management zone (as proposed in the Agreement) versus the alternative of continuous flow below the District's dams. The March 23, 2015 workshop, which is referenced in the Board Agenda Memo, was introductory and did not resolve that or other issues. We do not know what study methods are being used to address our punch list.<sup>6</sup>

The District and other initialing parties should promptly consult on the work plan which HDR Engineering or other consultant will use to address such unresolved issues. We make this

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<sup>4</sup> See Attachment 7.

<sup>5</sup> Under the procedures of the Agreement for partial implementation before the Effective Date, we participated in the vetting of those non-flow measures that have been completed to date, as described in the Board Agenda Memo. As a more recent example, we proposed the sequence for regulatory approvals (namely, proceeding immediately with the Change Petition) that the District Staff endorsed, and the Board approved, on September 23, 2014.

<sup>6</sup> At the March 23<sup>rd</sup> workshop, HDR Engineering presented an overview of its modeling method to evaluate the rule curves in the Agreement. Otherwise, we have only seen the Environmental Services Contract between SCVWD and HDR, including the general scope of work.

request pursuant to FAHCE Agreement section 4.2.2, which requires the initialing parties to share “data, information, and documents to the extent necessary to satisfy the filing and recording requirements of State and Federal regulatory agencies....”

**3. The District should implement all remaining non-flow measures in Phase I not later than five years after the SWRCB’s approval of the Change Petition. The FHRP now being drafted should include a specific schedule for such implementation.**

The Board Agenda Memo shows that the District Staff are drafting the FHRP as part of the Change Petition. We are uncertain whether this draft will comply with the requirements of the FAHCE Agreement.

Section 6.2.4.3 requires that the FHRP must specify “techniques, locations, and implementation schedules...” for measures (other than flow releases) to enhance spawning and rearing habitat in the three creeks. The Agreement also requires related studies and plans in Phase I of implementation. These include: removal of various barriers to fish passage, evaluation of the feasibility of trap-and truck above Anderson Reservoir and Stevens Creek Reservoir, modification of Stevens Creek Dam and certain other facilities to enhance downstream water quality, and other measures to enhance spawning and rearing habitat. Within one year of the Effective Date, Section 7.3 requires adaptive management for the conservation program, including measurable objectives for the desired future conditions of the fisheries.

We are concerned that the plan now being drafted is largely programmatic, answering the general question: should the District commit to these non-flow measures? Even if the SWRCB approves the Change Petition, these measures may not be actionable until the District undertakes further project-level reviews and secures associated approvals.

The FAHCE Agreement provides for full implementation of Phase I by May 2015. While some barriers to fish passage have been removed (with our active cooperation) as reported in the Board Agenda Memo, many non-flow measures required in Phase I have not been implemented. Given the ten-year delay in formally starting Phase I, we will not accept a lengthy schedule for implementing the remaining measures.<sup>7</sup> We specifically request that the remaining measures should be implemented not later than five years after the SWRCB’s approval of the Change Petition, subject to any further regulatory approvals. To that end, the FHRP now being drafted should include a specific schedule for all further efforts necessary to design, fund, permit, and construct such measures.

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<sup>7</sup> The Agreement specifies three phases for implementation, each ten years in length, followed by Phase IV, which is perpetual. See Section 6.1. The Agreement does not require that implementation of measures in a specified phase will take the whole ten years.

**4. District Staff should work with other initialing parties to amend or supplement the Agreement to specify the pathway for regulatory approvals.**

As discussed above, Section 5.2 of the Agreement provides that the District will seek and secure regulatory approvals by May 2005. Section 2.2.8 provides that all approvals must be secured before the District is obliged to implement any measures. Yet, as the Board Agenda Memo reports, the District has completed various non-flow measures that could lawfully be implemented before the Agreement is approved. These and certain other provisions of the Agreement are outdated. We request that the District work with other initialing parties to amend or supplement the Agreement to specify the pathway forward (including schedule and consultation procedures) to secure regulatory approvals.

**Conclusion**

Given the continuing drought, we recognize that the District faces unprecedented challenges in water supply reliability. It is time to resolve the challenge posed nineteen years ago when our complaint alleged that the District's water rights do not include terms necessary to protect the beneficial uses of fish, wildlife, and recreation in the three creeks that are the basis of your water supply. This is a unique and extraordinary opportunity to advance the District's purposes as stated in the District Act section 4.c(3)-(7), for the benefit of your customers and the general public.

We look forward to discussion with your Board on June 9.

Sincerely,



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Attachments

Cc: GCRCD Board  
Debra Caldon  
Jim Fiedler  
Anthony Fulcher  
Beau Goldie  
Frank Maitski  
Nathan Metcalf  
Gary Stern  
Lisa Van Atta  
Craig Weightman  
Scott Wilson  
Susan Glendenning