
State Water Resources Control Board

NOTICE OF ASSIGNMENT

The State Water Resources Control Board's
Executive Director has partially assigned to the
Administrative Hearings Office

Pending Petitions for Change for Licenses
6943 (A005653), 11791 (A005654), 2205 (A007141), 2206 (A007142), 2207
(A007143), 2208 (A008098), 2209 (A008099), 6944 (A008387), 2837 (A009455), AND
5729 (A0011751) of

SANTA CLARA VALLEY WATER DISTRICT

WATER-RIGHT PETITIONS FOR CHANGE FOR WATER RIGHT LICENSE 6943, 11791, 2205, 2206, 2207, 2208, 2209, 6944, 2837, and 5729

On May 12, 2015, Santa Clara Valley Water District (Valley Water) filed with the State Water Resources Control Board (State Water Board) 15 petitions for change for its water rights licenses on Coyote Creek, Stevens Creek, and Guadalupe River (Three Creeks). On May 9, 2024, Valley Water submitted revised petitions pursuant to Water Code sections 1701 and 1707 for Licenses 5729, 6944, 2205, 2206, 2207, and 2208, and Water Code section 1701 for Licenses 11791, 2209, 2837, and 6943. Valley Water filed these change petitions to update the water right licenses to account for its existing water supply operations and assist with the resolution of a water right complaint against Valley Water.

In 1996, the Guadalupe-Coyote Resource Conservation District (GCRCD) filed a complaint with the State Water Board claiming Valley Water's operations on the Three Creeks impacted fish and wildlife in conflict with the Water Code, Fish and Game Code, and other state laws. Subsequent negotiations between GCRCD, Valley Water, the California Department of Fish and Wildlife (CDFW), US Fish and Wildlife Service, and National Marine Fisheries Service resulted in the 2003 Fish and Aquatic Habitat Collaborative Effort, Initialed Settlement Agreement (FAHCE). The Division, by letter dated December 24, 2003, closed the GCRCD complaint against Valley Water based on the progress of the settlement negotiations and pending receipt of anticipated petitions to modify Valley Water's water rights. The FAHCE includes the implementation of a Fisheries Habitat Restoration Plan (FHRP) for the Three Creeks with water released from reservoirs to maintain instream flows for fisheries. The FHRP identifies

E. JOAQUIN ESQUIVEL, CHAIR | ERIC OPPENHEIMER, EXECUTIVE DIRECTOR

specific reservoir reoperations and releases, and programmatic actions (barrier removals and stream enhancements) to restore and maintain healthy steelhead trout and salmon populations in the Three Creeks. The FHRP, coupled with reservoir reoperations and petitioned changes, were the basis for resolution of the 1996 complaint.

The 15 original Three Creeks petitions have been bifurcated into two petition processes. This matter concerns 10 of the 15 original petitions, for licenses on Stevens Creek and Guadalupe River. The five petitions for licenses on Coyote Creek will be dealt with after completion of the Anderson Dam Seismic Retrofit project.

Valley Water is the lead agency for the project under the California Environmental Quality Act. On August 8, 2023, Valley Water certified a Final Environmental Impact Report (EIR) for the project and selected the FAHCE-plus alternative for implementation.¹

Protest on Petitions

The petitions were publicly noticed on May 23, 2024, and were protested by San Francisco BayKeeper (BayKeeper), California Trout and Northern California Council, Fly Fishers International (collectively, Conservation Groups), and CDFW.² None of the protests have been resolved.

The protests primarily raise issues under the Public Trust Doctrine and Fish and Game Code section 5937. All three protests question whether the proposed flow regime in the change petitions is sufficient to maintain fish in good condition below Valley Water's dams under Fish and Game Code section 5937. While the flow regime was developed through the FAHCE process with input from CDFW and the Conservation Groups, the protestants assert that Valley Water has not proposed a definition of "fish in good condition" or conducted sufficient analysis in its EIR or otherwise to evaluate whether the flow proposal will achieve that goal.

In general, the protests assert that resolution centers on defining "fish in good condition," establishing specific measurable objectives to evaluate the success of the proposed flow regime, and implementing an adaptive management program to make necessary changes should the flow regime fall short of its objectives. The parties have retained a mediator to assist in the protest resolution process. On September 12, 2024, Valley Water filed answers to the protests, denying various protests allegations and indicating a potential for resolution of others. However, the parties have not agreed on any formal protest dismissal terms at this time. The protest resolution period is ongoing and ends on December 23, 2024.

¹ The revised petitions and environmental documents have been added to the AHO's administrative record for this proceeding.

² The notice is available on

https://www.waterboards.ca.gov/waterrights/water_issues/programs/petitions/standard_change_petition.html

ASSIGNMENT TO THE ADMINISTRATIVE HEARINGS OFFICE

Water Code section 1112, subdivision (c)(2), provides that the Board may assign an adjudicative hearing, in whole or in part, to the AHO.

On September 27, 2024 Erik Ekdahl, Deputy Director of the Division of Water Rights (Division), transmitted a memorandum to Eric Oppenheimer, Executive Director of the State Water Board, recommending the State Water Board assigned the pending petitions and application to the AHO (Attachment 1).

On September 27, 2024, the Board's Executive Director, Eric Oppenheimer, assigned water right petitions for License 6943, 11791, 2205, 2206, 2207, 2208, 2209, 6944, 2837, and 5729 and to the AHO for further proceedings based on the Division's recommendation (Attachment 2).

HEARING OFFICER AND HEARING TEAM

AHO Hearing Officer Sam Bivins will preside over any hearing in this matter. Other members of the AHO may be present and assist the hearing officer throughout these proceedings. The hearing officer and other AHO staff members may consult with staff of the Board's Division of Water Rights and the Board's Office of Research, Planning, and Performance, attorneys in the Board's Office of Chief Counsel, members of the executive management of the State Water Board, and State Water Board members, to discuss or deliberate on matters relevant to this proceeding.

ADMINISTRATIVE RECORD AND FTP SITE

The AHO will maintain the administrative record for this proceeding on the State Water Board's FTP site. The AHO has moved documents maintained by the Division for the Authority's application and petitions and saved them in a folder for this proceeding. The AHO will save in this folder all future communications and documents submitted by the parties; any notices and rulings issued by the AHO; recordings of any pre-hearing conferences and days of hearing; and any other materials received by the AHO that are relevant to this proceeding. The folder on the State Water Board's FTP site for this proceeding is named "Santa Clara Valley Water District" and may be accessed at <https://ftp.waterboards.ca.gov/>.

Anyone may view and download documents from the FTP site. To access the Santa Clara Valley Water District folder, please email the AHO at adminhrgoffice@waterboards.ca.gov with "Request for AHO-ftp login credentials" in the subject line. After receiving the e-mail request, the AHO will send a reply e-mail with a username and password to access the folder. It is not necessary to cc the service list for such an e-mail request.

PROHIBITION ON EX PARTE COMMUNICATIONS

Parties and interested persons are prohibited from having any ex parte communications (i.e., off-the-record communications) with any members of the Hearing Team, including executive management of the State Water Board and State Water Board members. (See Wat. Code, § 11110, subd. (c); Gov. Code, §§ 11430.10-11430.80.) For additional information about ex parte communications, see the response to FAQ No.16 of the AHO FAQs, which are posted at https://www.waterboards.ca.gov/water_issues/programs/administrative_hearings_office/docs/2022/aho-faq.pdf.

If any party or interested person wants to communicate with the AHO or any member of the Hearing Team regarding a procedural or substantive issue related to this proceeding, with the limited exception for communications about non-controversial procedural matters described below, the party or interested person shall make the communication in writing, shall serve all parties listed on the service list for this proceeding with copies of the communication, and include a proof of service demonstrating such service with the written communication to the AHO. Any such communication shall be sent to the AHO by e-mail to adminhrgoffice@waterboards.ca.gov or by letter addressed to:

State Water Resources Control Board
Administrative Hearings Office
RE: Santa Clara Valley Water District Hearing
P.O. Box 100
Sacramento, CA 95814-0100

A party or interested person may provide the proof of service through a formal proof of service or by other verification. For e-mails, the verification shall be a list of the e-mail addresses of the parties or their representatives in an electronic mail "cc" (carbon copy) list. For letters, the verification shall be a list of the names and mailing addresses of the other parties or their representatives in the cc portion of the letter. Until the AHO issues an updated service list, parties should use the initial service list attached to this notice (Attachment 3).

Communications concerning non-controversial procedural issues are not subject to the prohibition on ex parte communications. (Gov. Code, § 11430.20, subd. (b).) Parties and interested persons may communicate with members of the Hearing Team about non-controversial procedural matters such as requests for log-in credentials, assistance accessing documents or uploading documents to the FTP site, or requests to update the service list. These communications should be sent to the AHO using the e-mail address or physical address listed above and may be sent without serving all parties on the service list with copies of the communication.

Please do not attempt to communicate by telephone or in person with AHO staff or any member of the Hearing Team about these proceedings. If oral communications with members of the Hearing Team are necessary to discuss a procedural or substantive issue, the AHO may set up a conference call in which representatives of all parties may participate. Any party may request such a conference call at any time using the written communications protocols described above with a copy to the service list.

UPDATES TO SERVICE LIST

The AHO prepared the attached service list using information in the Division's files for License 6943, 11791, 2205, 2206, 2207, 2208, 2209, 6944, 2837, and 5729 and current information available to the AHO. If any party or interested person on the service list wants to change any of their information included in the current service list, the party or interested person should submit this information by e-mail to adminhrgoffice@waterboards.ca.gov. The party or interested person does not need to send copies of the e-mail to the service list.

AHO WEBPAGE AND NOTICES

Subject to legal limitations, including the requirements for internet website accessibility in Government Code section 11546.7, the AHO has posted and will post all notices and other documents regarding these proceedings on the AHO's webpage at https://www.waterboards.ca.gov/water_issues/programs/administrative_hearings_office/

Any interested person may sign up to receive all AHO notices at https://www.waterboards.ca.gov/resources/email_subscriptions/swrcb_subscribe.html.

Date: October 7, 2024

/s/ Sam Bivins
Sam Bivins
Hearing Officer

Attachments:

- Attachment 1 - September 27, 2024, Memo from E. Ekdahl to E. Oppenheimer (Santa Clara Valley Water District)
- Attachment 2 - September 27, 2024, Memo from E. Oppenheimer to N. Kuenzi (Santa Clara Valley Water District)
- Attachment 3 - Initial Service List

State Water Resources Control Board

TO: Eric Oppenheimer
Executive Director
State Water Resources Control Board

FROM: Erik Ekdahl
Deputy Director
Division of Water Rights



DATE: September 27, 2024

SUBJECT: TRANSFER OF PETITIONS FOR CHANGE FOR SANTA CLARA VALLEY WATER DISTRICT'S WATER RIGHT LICENSES 6943, 11791, 2205, 2206, 2207, 2208, 2209, 6944, 2837, AND 5729 (APPLICATIONS 5653, 5654, 7141, 7142, 7143, 8098, 8099, 8387, 9455, AND 11751) TO THE ADMINISTRATIVE HEARINGS OFFICE FOR RESOLUTION

The Division of Water Rights (Division) proposes to transfer pending petitions for change for Santa Clara Valley Water District's Water Right Licenses 6943, 11791, 2205, 2206, 2207, 2208, 2209, 6944, 2837, and 5729 (Applications 5653, 5654, 7141, 7142, 7143, 8098, 8099, 8387, 9455, and 11751) to the Administrative Hearings Office (AHO) for resolution.

Background

On May 12, 2015, Santa Clara Valley Water District (Valley Water) filed with the State Water Resources Control Board (State Water Board) 15 petitions for change for its water rights licenses on Coyote Creek, Stevens Creek, and Guadalupe River (Three Creeks). On May 9, 2024, Valley Water submitted revised petitions pursuant to Water Code sections 1701 and 1707 for Licenses 5729, 6944, 2205, 2206, 2207, and 2208, and Water Code section 1701 for Licenses 11791, 2209, 2837, and 6943. Valley Water filed these change petitions to update the water right licenses to account for its existing water supply operations and assist with the resolution of a water right complaint against Valley Water.

In 1996, the Guadalupe-Coyote Resource Conservation District (GCRCD) filed a complaint with the State Water Board claiming Valley Water's operations on the Three

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Creeks impacted fish and wildlife in conflict with the Water Code, Fish and Game Code, and other state laws. Subsequent negotiations between GCRCD, Valley Water, the California Department of Fish and Wildlife (CDFW), US Fish and Wildlife Service, and National Marine Fisheries Service resulted in the 2003 Fish and Aquatic Habitat Collaborative Effort, Initialed Settlement Agreement (FAHCE). The Division, by letter dated December 24, 2003, closed the GCRCD complaint against Valley Water based on the progress of the settlement negotiations and pending receipt of anticipated petitions to modify Valley Water's water rights. The FAHCE includes the implementation of a Fisheries Habitat Restoration Plan (FHRP) for the Three Creeks with water released from reservoirs to maintain instream flows for fisheries. The FHRP identifies specific reservoir reoperations and releases, and programmatic actions (barrier removals and stream enhancements) to restore and maintain healthy steelhead trout and salmon populations in the Three Creeks. The FHRP, coupled with reservoir reoperations and petitioned changes, were the basis for resolution of the 1996 complaint.

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Protest on Petitions

The petitions were publicly noticed² on May 23, 2024, and were protested by San Francisco BayKeeper (BayKeeper), California Trout and Northern California Council, Fly Fishers International (collectively, Conservation Groups), and CDFW. None of the protests have been resolved.

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¹ The revised petitions and environmental documents are available on Valley Water's website: <https://www.valleywater.org/project-updates/creek-river-projects/fahce-fish-and-aquatic-habitat-collaborative-effort>

² The notice is available on https://www.waterboards.ca.gov/waterrights/water_issues/programs/petitions/standard_change_petition.html

the flow proposal will achieve that goal.

In general, the protests assert that resolution centers on defining “fish in good condition,” establishing specific measurable objectives to evaluate the success of the proposed flow regime, and implementing an adaptive management program to make necessary changes should the flow regime fall short of its objectives. The parties have retained a mediator to assist in the protest resolution process. On September 12, 2024, Valley Water filed answers to the protests, denying various protests allegations and indicating a potential for resolution of others. However, the parties have not agreed on any formal protest dismissal terms at this time. The protest resolution period is ongoing and ends on December 23, 2024.

Proceeding before the Administrative Hearings Office

Water Code section 1112, subdivision (c)(2), authorizes the State Water Board to assign an adjudicative hearing, in whole or in part, to the AHO. Hearing officers also have “wide latitude as to all phases of the conduct of the hearing, including the manner in which the hearing will proceed.” (*Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 531, 560, disapproved on other grounds in *Mileikowsky v. West Hills Hospital and Medical Center* (2009) 45 Cal.4th 1259, 1273.)

If the parties are unable to reach an agreement on water right terms that resolve the protestants’ concerns, an AHO hearing officer could conduct a hearing on Valley Water’s petitions and issue a proposed order pursuant to Water Code section 1114, subdivision (c), that considers the proposed flow regime, adaptive management terms, or other outstanding issues raised in the protests. Given the complexity and controversy of the issues raised by these change petitions, there is a potential for a prolonged protest resolution. Should such resolution fail, resolving this matter would be aided by the AHO’s expertise and ability to conduct hearings in a timely manner.

Conclusion and Recommendation

Referring this matter to the AHO will provide a neutral, fair, and efficient forum for adjudicating any issues the parties are unable to resolve in their protest negotiations. Therefore, I am recommending assignment of Valley Water’s petitions to the AHO as described in this memorandum.

If you have any questions regarding this memo, please contact Jane Ling, Acting Manager of the Petition, Licensing, and Registration Section at (916) 341-5335 or by email at Jane.Ling@waterboards.ca.gov.

cc: Erik Ekdahl, Deputy Director, Division of Water Rights
Jule Rizzardo, Assistant Deputy Director, Permitting and Enforcement Branch

State Water Resources Control Board

TO: Nicole Kuenzi
Presiding Hearing Officer
ADMINISTRATIVE HEARING OFFICE

FROM: Eric Oppenheimer
Executive Director
STATE WATER RESOURCES CONTROL BOARD



DATE: September 27, 2024

SUBJECT: TRANSFER OF PETITIONS FOR CHANGE FOR SANTA CLARA VALLEY WATER DISTRICT'S WATER RIGHT LICENSES 6943, 11791, 2205, 2206, 2207, 2208, 2209, 6944, 2837, AND 5729 (APPLICATIONS 5653, 5654, 7141, 7142, 7143, 8098, 8099, 8387, 9455, AND 11751) TO THE ADMINISTRATIVE HEARINGS OFFICE FOR RESOLUTION

The Division of Water Rights (Division) has recommended transferring petitions for change for Santa Clara Valley Water District's Water Right Licenses 6943, 11791, 2205, 2206, 2207, 2208, 2209, 6944, 2837, and 5729 (Applications 5653, 5654, 7141, 7142, 7143, 8098, 8099, 8387, 9455, and 11751) to the Administrative Hearings Office for resolution. I have enclosed the Division's memorandum recommending the assignment for your information. Based upon the Division's recommendation, I assign these petitions to the Administrative Hearings Office to conduct an adjudicative hearing and issue a proposed order pursuant to Water Code section 1114, subdivision (c).

If you have any questions regarding this memo, please contact Jane Ling, Acting Manager of the Petition, Licensing and Registration Section at 916-341-5335 or by email at Jane.Ling@waterboards.ca.gov.

cc: Erik Ekdahl, Deputy Director, Division of Water Rights
Jule Rizzardo, Assistant Deputy Director, Permitting and Enforcement Branch, Division of Water Rights
Jane Ling, Acting Manager, Petition, Licensing and Registration Section, Division of Water Rights
Michael Lauffer, Chief Counsel
Conny Mitterhofer, Hearings Section Chief, Division of Water Rights

E. JOAQUIN ESQUIVEL, CHAIR | ERIC OPPENHEIMER, EXECUTIVE DIRECTOR

**ATTACHMENT 3
INITIAL SERVICE LIST**

Petitioners

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