

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD
ORDER WR 2026-XXXX

In the Matter of the Petitions of
Santa Clara Valley Water District
for Change in

Licenses 6943, 11791, 2205, 2206, 2207, 2208, 2209, 6944, 2837, and 5729
(Applications 5653, 5654, 7141, 7142, 7143, 8098, 8099, 8387, 9455, and 11751)

SOURCE: Stevens Creek and Guadalupe River

COUNTY: Santa Clara

**DRAFT ORDER APPROVING PETITIONS FOR CHANGE AND
ISSUING AMENDED LICENSES**

BY THE DEPUTY DIRECTOR:

1.0 INTRODUCTION

On May 12, 2015, Santa Clara Valley Water District (Valley Water) filed petitions for change for its water right licenses with the State Water Resources Control Board (State Water Board), Division of Water Rights (Division). 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 pursuant to 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.

2.0 BACKGROUND

In 1996, the Guadalupe-Coyote Resource Conservation District (GCRCD) filed a complaint with the State Water Board claiming Valley Water's operations on Coyote Creek, Stevens Creek, and Guadalupe River (collectively, Three Creeks) impacted fish and wildlife in conflict with the Water Code, Fish and Game Code, and other state laws. Valley Water denied these claims. Subsequent negotiations between GCRCD, Valley Water, the California Department of Fish and Wildlife (CDFW), U.S. Fish and Wildlife Service, and National Marine Fisheries Service resulted in the 2003 Fish and Aquatic Habitat Collaborative Effort (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.

Valley Water originally filed 15 petitions to modify its water rights on the Three Creeks as part of the FAHCE. The 15 original petitions have now been separated into two petition processes because five of the petitions are associated with the Anderson Dam Seismic Retrofit (ADSR) project. The petitions associated with the ADSR project will be addressed separately, after completion of the ADSR project.

2.1 Summary of Valley Water Licenses

Valley Water holds 10 post-1914 water right licenses that are the subject of this Order. Valley Water's Licenses 6943, 2205, 2206, 2208, 2209, and 2837 allow diversions from the Guadalupe River system, including Guadalupe Creek, Almaden Creek, and Calero Creek. Licenses 11791, 6944, and 5729 allow diversions from Los Gatos Creek, tributary to the Guadalupe River. License 2207 allows diversions from Stevens Creek. Water diverted under these licenses is stored in surface reservoirs and rediverted to underground storage through a series of percolation pond complexes and instream

percolation. The water is stored underground in the Santa Clara Subbasin of the Santa Clara Valley Groundwater Basin (Basin 2-009.02).

License 6943 (Application 5653)

License 6943 allows diversion of water from Guadalupe River, tributary to Alviso Slough thence Coyote Creek thence the San Francisco Bay, at two points of diversion located within the NE $\frac{1}{4}$ of SW $\frac{1}{4}$ and SW $\frac{1}{4}$ of SW $\frac{1}{4}$ of projected Section 9, T8S, R1E, MDB&M. Up to 3,302 acre-feet per year (AFY) may be diverted from November 15 to May 1 of the succeeding year. Water may be used for irrigation and domestic purposes within 159,075 acres within the Santa Clara Valley Water Conservation District, as shown on the map filed with the State Water Board.

License 11791 (Application 5654)

License 11791 allows diversion of water from Los Gatos Creek, tributary to Guadalupe River thence Alviso Slough thence Coyote Creek thence the San Francisco Bay, at the Kirk Diversion Dam/Structure located within the SW $\frac{1}{4}$ of SE $\frac{1}{4}$ of projected Section 3, T8S, R1W, MDB&M. Up to 9,090 AFY at a maximum diversion rate of 80 cubic feet per second (cfs) to underground storage may be diverted from November 15 to May 1 of the succeeding year. Water may be used for irrigation and domestic purposes within the Santa Clara Valley Water District's gross service area of 240,000 acres, including 143,900 irrigated acres, as shown on the project map filed with the State Water Board.

License 2205 (Application 7141)

License 2205 allows diversion and storage of water from Alamos Creek, tributary to Guadalupe River thence Alviso Slough thence Coyote Creek thence the San Francisco Bay, at Almaden Dam located within the NW $\frac{1}{4}$ of SW $\frac{1}{4}$ of projected Section 11, T9S, R1E, MDB&M. Water is stored in Almaden Reservoir. Up to 2,500 AFY may be diverted from December 1 to April 30 of the succeeding year. Water may be used for irrigation and domestic purposes within a net area of 126,000 acres within a gross area of 155,800 acres within T5S, T6S, T7S, T8S, and T9S, R1W and R2W, R1E, R2E, and R3E, MDB&M.

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License 2206 (Application 7142)

License 2206 allows diversion and storage of water from Guadalupe Creek, tributary to Guadalupe River thence Alviso Slough thence Coyote Creek thence the San Francisco Bay, at Guadalupe Dam located within the NE $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 30, T8S, R1E, MDB&M. Water is stored in Guadalupe Reservoir. Up to 3,500 AFY may be diverted from December 1 to April 30 of the succeeding year. Water may be used for irrigation and domestic purposes within a net area of 126,000 acres within a gross area of 155,800 acres within T5S, T6S, T7S, T8S, and T9S, R1W and R2W, R1E, R2E, and R3E, MDB&M.

License 2207 (Application 7143)

License 2207 allows diversion and storage of water from Stevens Creek, tributary to San Francisco Bay, at Stevens Creek Dam located within the NW $\frac{1}{4}$ of NW $\frac{1}{4}$ of Section 27, T7S, R2W, MDB&M. Water is stored in Stevens Creek Reservoir. Up to 4,000 AFY may be diverted from December 1 of each year to April 30 of the succeeding year. Water may be used for irrigation and domestic purposes within a net area of 126,000 acres within a gross area of 155,800 acres within T5S, T6S, T7S, T8S, and T9S, R1W and R2W, R1E, R2E, and R3E, MDB&M.

License 2208 (Application 8098)

License 2208 allows diversion and storage of water from Calero Creek, tributary to Alamos Creek thence Guadalupe River thence Alviso Slough thence Coyote Creek thence the San Francisco Bay, at Calero Dam located within the NW $\frac{1}{4}$ of NE $\frac{1}{4}$ of projected Section 6, T9S, R2E, MDB&M. Water is stored in Calero Reservoir. Up to 3,500 AFY by storage may be diverted from December 1 to April 30 of the succeeding year. Water may be used for irrigation and domestic purposes within a net area of 126,000 acres within a gross area of 155,800 acres within T5S, T6S, T7S, T8S, and T9S, R1W and R2W, R1E, R2E, and R3E, MDB&M.

License 2209 (Application 8099)

License 2209 allows diversion and storage of water from Alamos Creek, tributary to Guadalupe River thence Alviso Slough thence Coyote Creek thence the San Francisco

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Bay thence the San Francisco Bay, at the Almaden-Calero Canal located within the NW $\frac{1}{4}$ of SE $\frac{1}{4}$ of projected Section 11, T9S, R1E, MDB&M. Water is conveyed through the Almaden-Calero Canal and stored in Calero Reservoir via Calero Dam. Up to 6,000 AFY by storage at a rate not to exceed 100 cfs may be diverted from December 1 to April 30 of the succeeding year. Water may be used for irrigation and domestic purposes within a net area of 126,000 acres within a gross area of 155,800 acres within T5S, T6S, T7S, T8S, and T9S, R1W and R2W, R1E, R2E, and R3E, MDB&M.

License 6944 (Application 8387)

License 6944 allows diversion and storage of water from Los Gatos Creek, tributary to Guadalupe River thence Alviso Slough thence Coyote Creek thence the San Francisco Bay, at Vasona Dam located within the NW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Section 10, T8S, R1W, MDB&M. Water is stored in Vasona Reservoir and rediverted at the Kirk Diversion Dam/Structure within the SW $\frac{1}{4}$ of SE $\frac{1}{4}$ of projected Section 3, T8S, R1W, MDB&M. Up to 1,684 AFY may be diverted from December 1 to June 1 of the succeeding year. Water may be used for irrigation and domestic purposes within 159,075 acres within the Santa Clara Valley Water District, as shown on the map filed with the State Water Board.

License 2837 (Application 9455)

License 2837 allows diversion of water from Guadalupe Creek, tributary to Guadalupe River thence Alviso Slough thence Coyote Creek thence the San Francisco Bay, at Masson Dam located within the NE $\frac{1}{4}$ of SE $\frac{1}{4}$ of projected Section 18, T8S, R1E, MDB&M. Up to 0.77 cfs may be diverted from October 1 of each year to May 1 of the succeeding year. Water may be used for irrigation, domestic, and industrial purposes within projected Sections 1, 2, 10, 11, 12, 13, 14, 15, and 16, T8S, R1W, MDB&M, and Sections 6, 7, 8, and 18, T8S, R1E, MDB&M. License 2837 is the only one of the 10 licenses subject to this Order that currently authorizes industrial use.

License 5729 (Application 11751)

License 5729 allows diversion and storage of water from Los Gatos Creek, tributary to Guadalupe River thence Alviso Slough thence Coyote Creek thence the San Francisco

Bay, at Lenihan Dam located within the SE $\frac{1}{4}$ of SE $\frac{1}{4}$ of projected Section 29, T8S, R1W, MDB&M. Water is stored in Lexington Reservoir and rediverted at Vasona Dam and the Kirk Diversion Dam/Structure. Up to 30,000 AFY may be diverted from November 1 to May 15 of the succeeding year. Water may be used for irrigation and domestic purposes within a net area of 126,000 acres within a gross area of 155,800 acres within T5S, T6S, T7S, T8S, and T9S, R1W and R2W, R1E, R2E, and R3E, MDB&M.

3.0 PROPOSED CHANGES

Through these petitions, Valley Water requests that the existing licenses for diversion and use of the waters of Stevens Creek and Guadalupe River in Santa Clara County be modified to update the current purposes of use, points of diversion, and places of storage, and to incorporate other terms and conditions to implement the FAHCE. The petitions request changes to the purposes of use under the licenses to municipal and fish and wildlife preservation and enhancement, from the existing uses of domestic water supply, industrial, and irrigation, to align the current purpose of use with the current requirements of the Water Code and State Water Board regulations. License 2837 would retain its existing authorization for industrial use. Where applicable, the petitions also request that points of rediversion and places of percolation to underground storage be added to reflect Valley Water's current water supply operations.

Surface water diverted under these water right licenses is released for underground storage within the Santa Clara Subbasin of the Santa Clara Valley Basin, identified by the Department of Water Resources as Basin 2-009.02. The Santa Clara Subbasin covers a surface area of 297 square miles that is located entirely in Santa Clara County and underlies parts of 14 cities. Due to different land use and management characteristics, Valley Water further delineates the Santa Clara Subbasin into two groundwater management areas: the Santa Clara Plain and Coyote Valley. The Santa Clara Subbasin has an operational storage capacity of 383,000 acre-feet. Groundwater storage fluctuates depending on pumping and recharge conditions but generally remains within the operational range.

Valley Water and the protesting parties propose as a condition of approval of amended water right licenses, the implementation and incorporation of the FAHCE Fish Habitat Restoration Program Implementation Plan (FHRP or Implementation Plan) (January 2026), a copy of which is attached hereto, including any updates. The goal of the FHRP is to restore and maintain native fish in good condition in the affected waters. Required measures include: (i) flow measures, including base and pulse instream flows; (ii) non-flow measures, including removal of barriers and impediments to fish migration; (iii) an adaptive management program; and (iv) requirements for annual and periodic monitoring and reporting, as specified in the FHRP.

4.0 PROTESTS AND PROCEDURAL BACKGROUND

4.1 Procedural Background — Water Rights Petitions and Protests

On May 9, 2024, following ongoing discussions among the parties to the FAHCE to finalize components of the FHRP, and Valley Water's preparation of an Environmental Impact Report (EIR) pursuant to the California Environmental Quality Act (CEQA), 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. The State Water Board publicly noticed the petitions on May 23, 2024, and San Francisco Baykeeper (Baykeeper); California Trout and Northern California Council, Fly Fishers International (collectively, Conservation Groups); and CDFW submitted protests (Protestants).

The protests primarily raise issues related to the public trust doctrine and compliance with Fish and Game Code section 5937. All three protests question whether the proposed flow regime in the change petitions would be 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 the phrase "fish in good condition" or conducted sufficient analysis, either in its EIR or elsewhere, to evaluate whether the flow proposal will achieve that goal. In general, the protests assert that resolution would require a definition of the phrase "fish in good condition," establishment of specific measurable objectives to evaluate the

success of the proposed flow regime, and implementation of an adaptive management program to make necessary changes should the flow regime fall short of its objectives.

On September 27, 2024, the Deputy Director of the Division transmitted a memorandum to the Executive Director of the State Water Board, recommending assignment of the pending petitions to the State Water Resources Control Board's Administrative Hearings Office (AHO). Also on September 27, 2024, the Executive Director assigned the pending petitions to the AHO for further proceedings based on the Division's recommendation. The AHO issued a Notice of Assignment on October 7, 2024, and held status conferences on November 21, 2024, and February 11, 2026.

4.2 Resolution of the Protests

After assignment of the petitions to the AHO, the parties retained a mediator to assist in the protest resolution process and engaged in structured mediation over a period of more than one year. The parties resolved all protests through an Agreement to Resolve Protests (Agreement) filed with the AHO on January 16, 2026. Attached to the Agreement, the parties submitted (1) terms the parties proposed as conditions of the amended water right licenses, and (2) the FHRP, which the parties propose for approval by the State Water Board and implementation as a condition of the amended water right licenses.

The FHRP specifies flow measures, non-flow measures, adaptive management, and monitoring and reporting requirements that Valley Water will implement and includes a process for periodic updates. Refinements, additions, and adaptive modifications to the FHRP are expected to occur. Pursuant to the FHRP, proposed changes to the FHRP will be reviewed and consented to by the Adaptive Management Team (AMT), which consists of members from Valley Water and other parties to the Agreement. The goal of the FHRP is to delineate how Valley Water will comply with Fish and Game Code section 5937 in the operation and maintenance of its dams on the Three Creeks.

Following the resolution of the protests with the Agreement, all Protestants have formally withdrawn their protests to these petitions.

4.2.1 Flow Measures (FHRP Chapter II)

Valley Water will operate the dams based on the FAHCE Plus rule curves, which are reservoir operating criteria that were developed as part of the process resulting from the 2003 FAHCE. The FAHCE Plus rule curves provide operational criteria for (1) winter base flows to promote fish spawning and incubation; (2) pulse flows to promote adult immigration and juvenile emigration; (3) summer flows and temperature management for fish rearing; and (4) flow ramping to minimize impacts to aquatic species that could occur with rapid changes in instream flow conditions. Implementation of these flow measures is based on reservoir storage of local water, which does not include imported water, at specified times of the year. The rule curves prescribe a minimum instream flow, and incorporate pulse flows, summer and winter baseflows, and temperature targets. Stevens Creek and Guadalupe Creek have designated cold water management for specific reaches in which there are temperature targets to support summer rearing, which is accounted for in the rule curves. Valley Water will analyze the impacts of the rule curves and pulse flows through monitoring, including flow, water temperature, and water depth, and will evaluate achievement of the measurable objectives specified in FHRP Chapter IV.

Deviations from the rule curves may be made to protect human health and safety. Likewise, repairs and maintenance of Valley Water facilities may require temporary modifications of reservoir releases. The AMT will be notified of updates to these schedules and will be given opportunities to make recommendations. In the event of an emergency, Valley Water will provide notifications to the AMT, including a brief written description of the emergency actions, and provide an opportunity to meet and discuss the emergency response.

4.2.2 Non-Flow Measures (FHRP Chapter III)

Valley Water will implement non-flow measures such as habitat enhancement, barrier remediation, and various feasibility studies and pilot projects, according to the schedule described in Table 3 of the FHRP to enhance the quality and quantity of suitable spawning and rearing habitat within the watersheds. Valley Water will analyze the impacts of the non-flow measures, and it will evaluate achievement of the measurable

objectives specified in FHRP Chapter IV. The schedule for non-flow measures will be reviewed annually by the AMT and will be revised pursuant to FHRP Chapter IV. For each measure that involves construction, Valley Water will establish an operation and maintenance plan.

4.2.3 Adaptive Management Program and Monitoring (FHRP Chapter IV)

Valley Water is responsible for administering and implementing the adaptive management program for the flow and non-flow measures described above, in collaboration with the AMT. In consultation with the AMT, Valley Water will monitor habitat quantity and quality, evaluate fisheries response and trends, and strive to continually improve the effectiveness of the FHRP.

Measurable objectives as specified in FHRP Chapter IV are categorized as Compliance, Monitoring, Biological, and Environmental Objectives. Valley Water will immediately implement the Compliance and Monitoring Objectives in FHRP Table 4. Upon the Board's approval of the amended licenses, the AMT will also develop Biological and Environmental Objectives pursuant to FHRP Chapter IV.H. Biological and Environmental Objectives will inform changes to the Compliance and Monitoring Objectives, but will not be used to determine compliance with the licenses unless specifically agreed to or required as part of an update to the FHRP.

4.2.4 FHRP Five-Year Update (FHRP Chapter IV.H)

Valley Water, in conjunction with the AMT, will prepare an Initial Five-Year Update to the FHRP, which will be submitted to the State Water Board for review and approval. The purposes of this update are to:

- 1) Evaluate and determine whether the implementation of the flow and non-flow measures will maintain fish in good condition; and
- 2) Propose corrective measures as needed to restore and maintain fish in good condition.

This Initial FHRP Update shall follow the prescribed steps in FHRP chapter IV.H.1. In each step, Valley Water will develop a proposal for the AMT's review.

After completion of the Initial Five-Year Update, Valley Water may develop, in consultation with the AMT, additional periodic updates to the FHRP as needed. These updates may include any changes to flow and non-flow measures to better achieve the measurable objectives. Once a periodic update is finalized, Valley Water shall submit the update to the Deputy Director. The updated FHRP shall be incorporated by reference into the licenses upon submittal, replacing Attachment 1 of the licenses subject to this Order. The Deputy Director may, however, reject an update upon determining that the update is insufficient to protect fish, instream beneficial uses, or other public trust resources. Upon rejection, the previous version of the FHRP will control and remain a condition of the licenses.

5.0 CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

Before approving a project, a responsible agency must make findings under sections 15091 and 15093 of the CEQA Guidelines (Cal. Code Regs., tit. 14, § 15000 et seq.), if applicable. (CEQA Guidelines, § 15096, subd. (h).) Under section 15091, for every significant effect of the project, a responsible agency must make one of the following findings: (1) changes or alterations have been required in, or incorporated into, the project which avoid or substantially lessen the significant environmental effect as identified in the final EIR; (2) such changes or alterations are within the responsibility and jurisdiction of another public agency and not the agency making the finding, and such changes have been adopted by such other agency or can and should be adopted by such other agency; or (3) specific economic, legal, social, technological, or other considerations, including provision of employment opportunities for highly trained workers, make infeasible the mitigation measures or project alternatives identified in the final EIR. (CEQA Guidelines, § 15091, subd. (a).) If approval of the project will cause an unmitigable significant impact, CEQA Guidelines section 15093 requires the approving agency to make a statement of overriding considerations, before approving the project. A responsible agency's role in considering alternatives and mitigation measures is limited to only the direct or indirect environmental effects of those parts of the project it decides to carry out, finance, or approve. (CEQA Guidelines, § 15096, subd. (g)(1).)

Valley Water is the lead agency for the preparation of environmental documents developed pursuant to CEQA for the proposed project. The State Water Board is a responsible agency under CEQA for the purpose of considering whether to approve Valley Water's petitions for change. The State Water Board, as a responsible agency, must review and consider the environmental effects of the project identified in any CEQA document prepared and reach its own conclusions on whether and how to approve the project involved. (Cal. Code Regs., tit. 14, § 15096, subd. (a).)

On August 8, 2023, Valley Water certified a Final EIR for the project and selected the FAHCE Plus alternative for implementation. Although the EIR recognizes that the project will have certain significant unmitigable impacts, such as noise impacts, the EIR does not identify any direct significant impacts to resources within the State Water Board's purview such as water quality, biological resources, and public trust resources. The State Water Board, as a responsible agency under CEQA, finds there are no potentially significant impacts within the Board's purview resulting from the project as evaluated by Valley Water. All potentially significant impacts within the Board's purview will be mitigated to less than significant levels through implementation of the mitigation measures identified in the Final EIR as well as the terms and conditions of the amended water right licenses approved by this Order. The Division intends to issue a Notice of Determination within five days of the issuance of this Order.

6.0 ANALYSIS OF PETITIONS FOR CHANGE

Water Code sections 1700 through 1705 govern changes in the place of use, purpose of use, or point of diversion of an appropriative water right. The State Water Board must grant permission to make such changes and "before permission to make such a change is granted the petitioner shall establish, to the satisfaction of the State Water Board, and the State Water Board shall find, that the changes will not operate to the injury of any legal user of the water involved." (Wat. Code, § 1702.) The petitioner also must establish that the proposed changes will not effectively initiate a new right. (Cal. Code Regs., tit. 23, § 791, subd. (a).) Approval of a change petition must be in the public interest and must not unreasonably harm fish, wildlife, and other instream beneficial uses.

As described below, the evidence in the record supports a finding that the proposed changes will not result in injury to any legal user of water, will not result in the initiation of a new right, and are protective of public trust resources.

6.1 Injury to any Legal User of Water

A water right holder may be injured by a change to an existing water right if the change would interfere with the right holder's exercise of its right in a significant and material way. (State Water Board Order WR 79-22, p. 7; *Hudson v. Dailey* (1909) 156 Cal. 617, 630.) No downstream diverters of record would be injured by the requested changes. There are no increases in entitlement for diversion or consumptive use of water, no changes in timing of diversion, no reduction in return flows, and no reductions in availability of water within the stream for other legal users. Therefore, there will be no effect on any downstream legal user of water.

The proposed action will not impact riparian right holders located downstream of Valley Water's operations because there will be no change to natural flows available to them. Accordingly, granting these changes will not result in injury to any other lawful user of water. (Wat. Code, § 1702; Cal. Code Regs., tit. 23, § 791, subd. (a).)

6.2 Initiation of a New Water Right

To support a finding that a proposed change to a license will not initiate a new right, the State Water Board must determine that the proposed change will not increase the amount of water taken from a water source at a given time or authorize a net increase in diversion as compared to the existing right. (Order WR 2004-0029, p. 15; Order WR 2009-0061, pp. 5–7.)

Valley Water filed the change petitions to update the water right licenses to account for its existing water supply operations. There are no proposed increases in entitlement, water quantity, or consumptive use of water, no changes to timing of diversion or use, no reduction in return flows, and no reduction in the availability of water within the streams. Based on these findings, the State Water Board finds that granting the change petitions and amending the subject licenses would not initiate a new water right.

6.3 Consideration of Public Trust Resources and Public Interest

The State Water Board has an independent obligation to consider the effect of approval of Valley Water's petitions on public trust resources and to protect those resources where feasible. (*National Audubon Society v. Superior Court* (1983) 33 Cal. 3d 419.) Public trust resources may include, but are not limited to, wildlife, fish, aquatic-dependent species, streambeds, riparian areas, tidelands, and recreation in navigable waterways, as well as fisheries located in non-navigable waterways. In addition, it is the policy of this state that all state agencies, boards, and commissions shall seek to conserve endangered species and threatened species and shall use their authority in furtherance of the purposes of the California Endangered Species Act. State agencies should not approve projects that would jeopardize the continued existence of any endangered species or threatened species if there are reasonable and prudent alternatives available consistent with conserving the species or its habitat that would prevent jeopardy. (Fish & G. Code, §§ 2053 & 2055.)

Although the Agreement is not binding on the State Water Board, the State Water Board supports the negotiated solution. Attached to the Agreement are (1) terms that the parties propose for the State Water Board's approval as conditions of the water right licenses; and (2) the FHRP Implementation Plan, which the parties propose the State Water Board approve and require to be implemented as a condition of the water right licenses. As discussed above, the FHRP specifies flow measures, non-flow measures, adaptive management, and monitoring and reporting requirements that Valley Water will implement. The goal of the FHRP is to delineate how Valley Water will comply with Fish and Game Code section 5937 in the operation and maintenance of its subject dams. Flow operations are also subject to the rule of reasonableness under article X, section 2 of the California Constitution.

Fish and Game Code section 5937 provides: "[t]he owner of any dam shall allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around, or through the dam, to keep in good condition any fish that may be planted or exist below the dam." The statute does not, however, expressly define "good condition." The approach to determine whether fish are

in “good condition” in the FHRP is based on the Valley Water Board of Directors-approved project (FAHCE Plus) described in the Final EIR, which is, in turn, based on the 2003 FAHCE. The three-tiered approach to assessment of “good condition” utilized in the FAHCE Plus, which was originally described by Moyle et al. (1998) and Moyle and Marchetti (1999), considers three levels of fish health: individual, population, and community.

The FHRP includes a process for periodic updates. Proposed changes to the Implementation Plan will be brought to the AMT for discussion.

The amended licenses are subject to the continuing authority of the State Water Board in accordance with applicable law and in the interest of the public welfare to protect public trust uses and to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water. With the conditions identified in Valley Water’s environmental document, the FHRP, the parties’ Proposed Conditions for Incorporation into Water Right Licenses, and the conditions identified in this Order, the State Water Board finds that approval of the petitions will not cause unreasonable effects on fish, wildlife, or other instream beneficial uses, will protect public trust resources to the extent feasible, complies with Fish and Game Code section 5937, and is in the public interest. (Order WR 2009-0033, p. 6, fn. 4, citing *National Audubon, supra.*)

7.0 CONCLUSIONS

The State Water Board finds that approval of the petitions, as conditioned by this Order, will not result in injury to any legal user of water, will not initiate a new water right, will not unreasonably affect fish, wildlife, or other instream beneficial uses, and is in the public interest.

Pursuant to State Water Board Resolution No. 2012-0029, the State Water Board has delegated the authority to administer the State Water Board’s water rights program to the Deputy Director for Water Rights. This delegation includes the authority to act on change petitions in proceedings where no hearing is required in accordance with Water Code section 1704, subdivision (c).

ORDER

IT IS HEREBY ORDERED that Valley Water's change petitions for Licenses 6943, 11791, 2205, 2206, 2207, 2208, 2209, 6944, 2837, and 5729, are approved and the amended licenses issued, subject to inclusion of the following terms and conditions in each amended license:

1. This License is subject to the Agreement To Resolve Protests of Change Petitions for Water Right Licenses 2205, 2206, 2207, 2208, 2209, 2837, 5729, 6943, 6944, and 11791 Held By Santa Clara Valley Water District (Settlement Agreement) dated January 16, 2026, between Santa Clara Valley Water District, California Department of Fish and Wildlife, California Trout, Fly Fishers International – Northern California Council, and San Francisco Baykeeper, to the extent the agreement covers matters within the State Water Board's authority to impose terms and conditions on its approval of the change petitions. The terms of this License incorporate the terms proposed by the Settlement Agreement to the extent authorized. If there is a disagreement between the Settlement Agreement and the terms of this License, the License terms apply.
2. Licensee shall implement the Fish Habitat Restoration Plan (FHRP) included in this License as Attachment 1. Implementation includes, but is not limited to, the following actions:
 - a. the flow measures, including base and pulse instream flows;
 - b. the non-flow measures, including removal of barriers and impediments to fish migration;
 - c. the Adaptive Management Program (AMP); and
 - d. the requirements for annual and periodic reporting specified in the FHRP.

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3. Licensee shall convene an Adaptive Management Team (AMT) and implement the FHRP in consultation with the AMT. The composition, procedures for consultation, and responsibilities of the AMT shall be as specified in the FHRP.

4. Licensee shall prepare an Initial Five-Year Update of the January 2026 FHRP on the schedule specified in Chapter IV.H of the January 2026 FHRP, including the milestones for the elements specified in this term. The Initial Five-Year Update shall be approved by the AMT and submitted to the Deputy Director for the Division of Water Rights (Deputy Director) for review and approval. The Deputy Director shall complete review of the updated FHRP and issue any approval of all or a portion of the update within 90 days of submittal, or 180 days after submittal upon written notice to the parties of the need for additional time. Licensee shall implement the updated FHRP and the updated FHRP shall replace the January 2026 FHRP as Attachment 1 to this License following approval by the Deputy Director. Licensee shall consult with the AMT in the preparation of all FHRP updates. The updated FHRP shall include the following elements, which shall be developed using the best available science and reasonable efforts to apply such science:
 - a. Fish Assemblage. Licensee shall identify any additions to the assemblage of representative fish species present in the affected waters, as stated in Table 5 of the January 2026 FHRP Table 5.

 - b. Biological Objectives. Licensee shall establish Biological Objectives for fish species, consistent with the goal of restoring and maintaining native fish (as listed in FHRP Table 5) in good condition in the affected waters. Good condition consists of three elements: health of individual fish, self-sustaining populations, and a resilient community of fish species. The Biological Objectives shall describe productivity, life history, and spatial extent, consistent with: Moyle et al., *Fish Health and Diversity: Justifying Flows for a California Stream*, (1998) 3 Fisheries 7, pp. 6–15; Moyle &

Marchetti, *Applications of Indices of Biotic Integrity to California Streams and Watersheds* in Assessing the Sustainability and Biological Integrity of Water Resources Using Fish Communities (T.P. Simon et al., 1999); McElhany et al., "Viable Salmonid Populations and the Recovery of Evolutionarily Significant Units," NOAA Technical Memorandum NMFS-NWFCS-42 (2000); Lindley, et al., *Framework for Assessing Viability of Threatened and Endangered Chinook Salmon and Steelhead in the Sacramento-San Joaquin Basin*, 5 San Francisco Estuary and Watershed Science 1 (2007), art. 4; and Cain et al., *Conservation Planning Foundation for Restoring Chinook Salmon (Oncorhynchus Tshawytscha) and O. mykiss in the Stanislaus River* (2019). Biological Objectives shall be specific, measurable, achievable, relevant, and timebound.

- c. Environmental Objectives. Licensee shall establish Environmental Objectives that describe the quantities and qualities of aquatic habitat necessary to achieve the Biological Objectives. The Environmental Objectives shall be specific, measurable, achievable, relevant, and timebound. In developing the Environmental Objectives, Licensee shall consider the following information as relevant to the Biological Objectives:
- i. basic life history information, including identification of different life stages and their habitat associations to the extent habitat suitability criteria are available in the literature for each species and life stage;
 - ii. availability of suitable habitat (e.g., temperature, depth, velocity, dissolved oxygen), both present and potential;
 - iii. spawning habitat needs, including suitable spawning substrate;
 - iv. rearing habitat needs; and

- v. migration needs, including both immigration and emigration for the migratory species.

- d. Existing Environmental Conditions. Licensee shall update its monitoring programs as needed and update its evaluation of environmental conditions within the geographic scope defined by the FHRP. This update shall use bathymetric data and hydrological analysis, relying on the best current scientific methods to identify the current availability of suitable habitat area and instream flow-habitat relationships relevant to the Environmental Objectives.

- e. Comparison of Existing Environmental Conditions and Objectives. Licensee shall compare the existing environmental conditions with the Environmental Objectives to determine whether such objectives are being met. Potential shortfalls (“stressors”) include availability of existing and potential physical habitat, inter-annual and seasonal variation in hydrologic conditions, flow quantity and timing, temperature, dissolved oxygen, unsuitable substrate, infrastructure or other channel modifications, passage barriers and similar impediments, poaching, pollutants, and other conditions that affect habitat availability and suitability for the Fish Assemblage.

- f. Stressors Analysis. Licensee shall analyze and rank the relative contributions of Stressors as impediments to achieving the Biological Objectives, for the purpose of adaptive management of the flow and non-flow measures.

- g. Flow and Non-Flow Measures. Licensee shall update flow and non-flow measures stated in the FHRP (January 2026) based on the scientific tasks described in paragraphs (b) – (f) above.

5. Following completion of the Initial Five-Year Update of the FHRP described in Term 4, Licensee shall periodically review the FHRP as specified in the AMP section of the FHRP to enable continued use of the best available science and specific, measurable, achievable, relevant, and time-bound objectives. Licensee shall promptly submit any updates to the FHRP to the Deputy Director. Updates to the FHRP shall be subject to review and may be rejected by the Deputy Director. The Deputy Director shall complete review of updates to the FHRP and issue any rejection of all or a portion of the updates within 90 days of submittal, or 180 days after submittal upon written notice to the parties of the need for additional time. The updated FHRP shall be incorporated by reference into this License upon submittal, replacing Attachment 1 of this License. If the update is rejected by the Deputy Director, the FHRP that preceded the update shall continue to apply.

6. To initiate dispute resolution by the State Water Board for an unresolved dispute pursuant to the FHRP or the Settlement Agreement, a disputing member of the AMT or a party to the Settlement Agreement shall submit a request for dispute resolution to the Executive Director of the State Water Board (Executive Director). The Executive Director may act on the request or may assign the matter to the Administrative Hearings Office for additional proceedings such as, but not limited to, a hearing that includes oral testimony and cross-examination, a hearing based solely on written submissions, or mediation. To the extent that the procedures for requesting dispute resolution in this term are different than the procedures described in the FHRP, the procedures in this term are controlling. The dispute resolution procedures described in this term, the FHRP, and the Settlement Agreement are the sole and exclusive means, or process, for resolving any dispute amongst the AMT members or Settlement Agreement parties in the following circumstances:

- a. An AMT member disputes a draft element of the Initial Five-Year Update of the FHRP described in Term 4. For the purposes of the Initial Five-Year Update, Baykeeper will be a member of the AMT.
 - b. A party to the Settlement Agreement requests dispute resolution regarding interpretation or implementation of the Settlement Agreement, as part of the dispute resolution process described in Section 6.1.5 of the Settlement Agreement.
 - c. An AMT member disputes decisions made as part of the AMP, including an update to the FHRP.
 - d. An AMT Member or Baykeeper requests dispute resolution regarding any alleged violation of any term or condition set forth or referenced in this License, including the FHRP as a condition thereof.
7. The State Water Board reserves the authority, following notice to Licensee and AMT members, and opportunity for a hearing, to add, amend, revise, supplement, or delete terms and conditions in this License to protect vested rights, fish, wildlife, and other instream beneficial uses and public trust resources, and to otherwise best develop, conserve, and utilize the state's water resources in the public interest.
8. Licensee shall prepare and submit to the Deputy Director for review and approval, a plan describing the measurement, quantification, and accounting of water diverted and beneficially used pursuant to this License, including water diverted to and withdrawn from underground storage and water put to fish and wildlife preservation and enhancement uses. The plan shall be submitted by January 31, 2027. If water in underground storage pursuant to the License will be extracted by entities other than the Licensee, the plan shall address how the Licensee will quantify extraction and use of water stored underground by those

entities and how the Licensee will determine that the extractions are from water stored by the Licensee and not based on other water rights.

The plan may address multiple water right licenses held by the Licensee. Licensee may determine the aggregate amount of withdrawal from underground storage across the multiple water rights held by the Licensee, however, Licensee must assign withdrawal volumes to each water right in order of priority. If water will be stored longer than one year underground, the plan shall include accounting for expected losses of stored water over time.

The plan shall, to the extent possible, include the information that will be used to comply with the measurement and methodology requirements of California Code of Regulations, Title 23, Division 3, Chapters 2.7 and 2.8, including any measurement methodologies submitted to comply with section 934 of those regulations. The plan may also incorporate any methodologies or data developed pursuant to a groundwater sustainability plan approved pursuant to Water Code sections 10733 and 10733.8 or alternative approved pursuant to Water Code sections 10733.6 and 10733.8 for the Santa Clara Subbasin. The plan shall be implemented as approved by the Deputy Director and shall be relied upon to develop information for Licensee's annual Reports of Licensee (Annual Reports).

9. Where the extractor of water under this License is not the Licensee, the Licensee must follow either the Notification Approach (paragraph a.), the Agreement Approach (paragraph b.), or a combination thereof, as described below, to ensure compliance with this term.
 - a. Notification Approach. The Notification Approach may only be used if the Licensee is a Groundwater Sustainability Agency (GSA) with regulatory authority over the extractor or a local public agency with water supply authority that has a contractual relationship regarding water supply with the extractor. Licensee shall notify each extractor that the Licensee will

account for extraction and use of surface water under the Licensee's water rights ahead of other bases of right for water available at the extractor's extraction location. The notification shall provide the extractor with an opportunity to opt out of this accounting methodology.

- b. Agreement Approach. The Licensee shall secure a written agreement, or other confirmation of the extractor's agreement as approved by the Deputy Director, documenting that each extractor agrees to extract and use water stored under licenses held by the Licensee prior to other bases of right for water in the Santa Clara Subbasin (Subbasin 2-009.02) of the Santa Clara Valley Groundwater Basin.
- c. Documentation of Compliance. Documentation for the Notification and Agreement approaches shall include a map and list of extractors, separately identifying those with notifications and agreements. For the Notification Approach, the Licensee shall summarize the notification process and list the name and location of those who were notified. The documentation should also identify the locations of any parties who declined to be included as extractors.

Documentation of individual notifications and copies of any agreements shall be maintained by Licensee, and available to the State Water Board upon request. The requirements of this term may be incorporated into the plan required by Term 8 and shall be satisfied within 18 months of the issuance of this amended License.

- 10. Any extraction and use of water diverted pursuant to this License by extractors other than the Licensee shall comply with the terms and conditions of this License, including the specified place of use. Water diverted pursuant to this License shall not be transferred or exchanged outside the authorized place of use or to any party not designated as an extractor pursuant to this condition.

11. No water shall be collected to storage outside of the specified season to offset evaporation and seepage losses or for any other purpose.
12. Unless otherwise specified, all annual submittals required by this License shall be included as an attachment to the Licensee's Annual Report and due at the same time as the Annual Report.
13. Nothing in this water right authorizes or guarantees the use of, or decides the necessity regarding access to, any lands or facilities not owned by the Licensee. Licensee is solely responsible for obtaining any necessary land rights or land access agreements. In addition, Permittee is solely responsible for obtaining any necessary facility use agreements with the owner of the facility intended for use.
14. Licensee shall install and maintain outlet pipes of adequate capacity in the dams as near as practicable to the bottom of the natural stream channel, or provide other means satisfactory to the Deputy Director, in order that water entering the reservoirs which is not authorized for appropriation under this License may be released.
15. In compliance with section 5937 of the Fish and Game Code, if storage or diversion of water authorized by this License is by means of a dam, the licensee shall allow sufficient water at all times to pass through a fishway or, in the absence of a fishway, allow sufficient water to pass over, around, or through the dam to keep in good condition any fish that may be planted or exist below the dam; provided, that during a period of low flow in the stream, upon approval of the State Department of Fish and Wildlife, this requirement will be satisfied if sufficient water is passed through a culvert, waste gate, or over or around the dam to keep in good condition any fish that may be planted or exist below the dam if it is impracticable or detrimental to pass the water through a fishway. In the case of a reservoir, this provision shall not require the passage or release of water at a greater rate than the unimpaired natural inflow into the reservoir.

16. This permit is subject to prior rights. During some years, water will not be available for diversion during portions or all of the season authorized herein. Licensee shall not divert under this License when available supplies are insufficient to satisfy the demands of water rights senior to the priority date of this License, including any federal reserved rights, whether or not those senior rights are adjudicated. Licensee shall comply with any regulation or order issued by the Board that curtails diversions under this right.

17. Any approval by the Board, Executive Director, or Deputy Director of a plan or other submission required by a term or condition in this License, may be approved in whole or in part, denied in whole or in part, or approved with conditions deemed necessary and appropriate to achieve the intended purposes.

Juliet Christian-Smith
Deputy Director
Division of Water Rights
State Water Resources Control Board