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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

SAN FRANCISCO BAYKEEPER, Petitioners, v. SANTA CLARA VALLEY WATER DISTRICT, DOES 1-10, Respondents.	22CV403523 Case No. **VERIFIED PETITION FOR WRIT OF MANDATE AND DECLARATORY RELIEF** Code of Civil Procedure §§ 1060 and/or 1085; Porter-Cologne Water Quality Control Act, Water Code §§ 13000 et. seq.; California Constitution, Article X, § 2; Fish and Game Code §§ 5937 and 5948.

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I. INTRODUCTION

1. San Francisco Baykeeper ("Baykeeper") hereby petitions this Court for a Writ of Mandate pursuant to California Code of Civil Procedure Section 1085:

a. Compelling the Santa Clara Valley Water District ("Valley Water") to perform its mandatory duty of operating its dams to allow sufficient water flows into associated waterways to maintain fish stocks in good condition, as required by Fish and Game Code section 5937;

b. Compelling Valley Water to perform its mandatory duty to remove artificial barriers that prevent fish passage, or to operate its waterways so as to prevent the formation of such barriers, as required by Fish and Game Code section 5948;

c. Compelling Valley Water to perform its mandatory duties to prevent waste and unreasonable use of the State's waters, as required by Article X, section 2 of the California Constitution; and/or

d. Compelling Valley Water to perform its mandatory duties to consider and mitigate impacts to public trust resources, as required by the public trust doctrine.

2. Baykeeper further hereby petitions this Court for a Declaratory Judgment pursuant to California Code of Civil Procedure section 1060 declaring that Valley Water's regulation of flow and operation of its dams is:

a. Unreasonable, in violation of Article X, section 2 of the California Constitution;

b. Unlawful, in violation of Fish & Game Code sections 5937 and 5948; and

c. In violation of the public trust.

3. Valley Water has failed to manage its waterways to protect habitat values for fish and wildlife.

4. Valley Water routinely brings temperatures and flow rates to levels that are unsuitable for fish, despite the presence of protected species such as Steelhead Trout and Chinook Salmon.

5. For fish stocks to return to good condition, Valley Water must increase releases of freshwater flows to provide habitat connectivity that is unavailable under the current flow regime,

and under potential flow regimes currently under consideration by Valley Water. Such increased flows would also provide needed rearing and feeding habitat, and habitat quality would be improved by reduced temperatures.

6. Examples of Valley Water's delay in acting to protect fish and comply with its legal obligations are legion. Valley Water has been aware of these specific issues since at least 1996, entered into an agreement to keep flows and other conditions sufficient to sustain fish stocks in 2003, finally released a draft environmental review for the measures agreed upon in that 2003 agreement in 2021, yet makes no commitment to implement those conditions for at least another decade once its environmental review is completed.

7. Valley Water's current conduct results in fish not being in good condition below Valley Water's dams.

8. The actions and conduct currently identified by Valley Water to implement the 2003 agreement, and as analyzed in the 2021 environmental review will not return fish to good condition below Valley Water's dams.

9. Neither Valley Water's delay, nor the conditions that have existed for over two decades in Valley Water controlled streams, rivers, and creeks, comport with Valley Water's mandatory obligations under the Fish and Game Code, the public trust doctrine, or California's Constitution.

II. PARTIES

A. Petitioner

10. Petitioner BAYKEEPER, d/b/a SAN FRANCISCO BAYKEEPER ("San Francisco Baykeeper") is a regional nonprofit public benefit corporation organized under the laws of the State of California. San Francisco Baykeeper's mission is to protect and enhance the water quality of the San Francisco Bay-Delta estuary for the benefit of its ecosystems and human communities. Founded in 1989, San Francisco Baykeeper is the premier legal and policy advocate for the San Francisco Bay-Delta estuary. Through its on-the-water presence, San Francisco Baykeeper patrols hundreds of miles of waterways throughout the Bay-Delta, investigating pollution problems and bringing

enforcement actions against polluters directly when necessary. San Francisco Baykeeper also uses targeted administrative and legal advocacy before state and regional regulators, playing a lead role in developing sound and legal standards, permits, and regulations to protect and restore the Bay-Delta. A key area of San Francisco Baykeeper's focus is ensuring that state and federal environmental laws are properly implemented and enforced. San Francisco Baykeeper's office is in Alameda County, California. San Francisco Baykeeper has approximately 3,000 members and supporters, most of whom reside in the San Francisco Bay-Delta's watershed. Many of San Francisco Baykeeper's members and supporters live and/or own property along, and/or regularly visit and use the San Francisco Bay, the Delta, and the Central Valley rivers that flow into this estuary for recreational experiences and aesthetic enjoyment.

B. Respondent

11. Respondent SANTA CLARA VALLEY WATER DISTRICT, a political subdivision of the State of California, is a legal flood control and water conservation and development district formed under the provisions of the Santa Clara Valley Water District Act ("Act"). (Enacted by Stats. 1951, ch. 1405, p. 3337 et seq. and most recently amended 2018; see https://www.valleywater.org/sites/default/files/District-act-as-amended-2018.pdf.)

12. Valley Water was established in its current form in 1974 as the successor to the Santa Clara Valley Water Conservation District, founded in 1929, and the Santa Clara Valley Flood Control and Water District, founded in 1951.

13. Valley Water was created by the California Legislature and operates as a special district with jurisdiction throughout Santa Clara County. (Santa Clara Valley Water District, *Fish and Aquatic Habitat Collaborative Effort, Draft Program Environmental Impact Report*, at 1-2 ("DEIR").)

14. Valley Water is an integrated water resources system that is responsible for water supply, flood protection, and stream stewardship for Santa Clara County and its 1.9 million residents.

15. Valley Water's sources of water supply include appropriations from the Guadalupe River, Alamitos Creek, Guadalupe Creek, and other local streams, as well as groundwater and imported waters.

16. Valley Water manages 10 dams and associated surface water reservoirs, three water treatment plants, a recycled water purification center, a water quality laboratory, and approximately 400 acres of groundwater recharge ponds. Valley Water uses these resources to provide wholesale water and groundwater management services to local municipalities and private water retailers who deliver drinking water to homes and businesses.

17. Valley Water is the flood control agency for Santa Clara County, annually conducting activities such as levee maintenance, sediment removal, bank repair, and vegetation management.

18. Valley Water may sue and be sued in all courts of competent jurisdiction. (Act at § 5.2.)

III. JURISDICTION AND VENUE

19. This Court has the authority to issue a writ of mandate to Valley Water as the Supreme, appellate, and superior courts in California have original jurisdiction over actions in the nature of mandamus and the Court therefore may issue such a writ to any party over which it has proper jurisdiction. (Cal. Const. art. VI, § 10; see also Code of Civ. Proc. § 1085.)

20. This Court has jurisdiction over this action pursuant to Code of Civil Procedure Section 1085, as Baykeeper seeks to compel from Valley Water "…the performance of an act which the law specifically enjoins, as a duty resulting from an office, trust, or station…" (Code of Civ. Proc. § 1085(a); see also *Elmore v. Imperial Irrigation Dist.* (1984) 159 Cal.App.3d 185, 192-93 ["The doctrine of exhaustion of administrative remedies is inapplicable in water cases. … The exhaustion of administrative remedies is not a prerequisite to the filing of a mandamus petition in water cases, nor does failure to exhaust preclude the court from exercising its concurrent original jurisdiction."] [citing *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 449 ("*Audubon*")].)

21. This Court has jurisdiction over this action pursuant to Code of Civil Procedure section 1060.

22. Private parties have standing to sue to enforce Fish and Game Code sections 5937 and 5948 as such claims are ultimately a claim for violation of the public trust, and private plaintiffs have standing to sue to protect the public trust. (See *Audubon, supra,* 33 Cal. 3d at 431.)

23. Violation of Fish and Game code sections 5937 and 5948 is evidence of a public trust violation.

24. Venue is proper in this Court pursuant to Code of Civil Procedure Section 395, as Respondent Valley Water is a resident of the County of Santa Clara.

25. Baykeeper has no other plain, speedy, and adequate remedy in the ordinary course of law, and will suffer irreparable injury unless this Court issues the relief requested in this Petition.

26. Baykeeper has appeared before Valley Water and submitted written and oral comments requesting compliance with the claims laid forth herein.

27. Valley Water has taken no action as a result of this request that will address the inadequate and unlawful conditions that currently exist.

28. Valley Water has a mandatory and self-executing duty to prevent waste and unreasonable use of the waters of the State. (See Cal. Const., art. X, § 2.)

IV. LEGAL BACKGROUND

A. Constitutional Requirements

29. Article X, section 2 of the California Constitution protects beneficial uses of water as a public trust resource from waste and unreasonable use.

30. This section and its requirement for reasonable and beneficial use applies to all water resources of the State. (See *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 367 ["The mandates are plain, they are positive, and admit of no exception. They apply to the uses of all water, under whatever right the use may be enjoyed."] ("*Peabody*").)

31. Specifically, article X, section 2 of the California Constitution states:

> It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the

> interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which the owner's land is riparian under reasonable methods of diversion and use, or as depriving any appropriator of water to which the appropriator is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained.

The rule of reasonableness, i.e., the reasonable use doctrine, is the overriding principle governing the use of water in California. (See *Peabody, supra*, 2 Cal.2d at 367-68.)

32. Article I, section 25 of the California Constitution protects fisheries as public trust resources when it states that

> The people shall have the right to fish upon and from the public lands of the State and in the waters thereof, excepting upon lands set aside for fish hatcheries, and no land owned by the State shall ever be sold or transferred without reserving in the people the absolute right to fish thereupon; and no law shall ever be passed making it a crime for the people to enter upon the public lands within this State for the purpose of fishing in any water containing fish that have been planted therein by the State; provided, that the legislature may by statute, provide for the season when and the conditions under which the different species of fish may be taken.

33. Article X, section 4 of the California Constitution protects the right of the public to access navigable waters of the State and prohibits the obstruction or destruction of the free navigation of such waters.

34. Compliance with the California Constitution is mandatory and self-executing. (See *Katzberg v. Regents of U.C.* (2020) 29 Cal.4th 300, 307 ("*Katzberg*"); see also *State Bd. of Ed. v. Levit* (1959) 52 Cal.2d. 441; *Leger v. Stockton Unified School Dist.* (1988) 202 Cal.App.3d 1448 ("*Leger*").)

35. Mandatory, self-executing Constitutional duties give rise to claims for declaratory and injunctive relief. (See *Katzberg, supra*, 29 Cal.4th at 307; *Leger, supra*, 202 Cal.App.3d at 1454-1455.)

36. Water Code section 100 mirrors Article X, section 2 of the California Constitution by stating that all water rights and all uses must be reasonable.

37. Water Code section 100 requires the water resources of the state to be put to beneficial use to the fullest extent of which they are capable.

38. The constitutional mandate that unreasonable use and waste of the State's waters be prevented is also codified at sections 101 and 106.5 of the Water Code.

39. "The longstanding constitutional principle of reasonable use and the public trust doctrine shall be the foundation of state water management policy … ." (Water Code § 85023.)

40. What constitutes an unreasonable use of water is determined on a case-by-case basis depending on the totality of circumstances. (See *Peabody, supra*, 2 Cal.2d at 368; see also *Joslin v. Marin Mun. Water Dist.* (1967) 67 Cal.2d 132, 139 ("*Joslin*"); *Imperial Irrigation Dist. v. State Water Res. Control Bd.* (1986) 186 Cal.App.3d 1160, 1165.) "What may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and great need." (*Tulare Irrigation Dist. v. Lindsay-Strathmore Dist.* (1935) 3 Cal.2d 489, 567 ("*Tulare Irrigation Dist.*").)

41. Conformity of a use, method of use, or method of diversion of water with local custom shall not be determinative of its reasonableness, but is considered as one factor to be weighed in determining the reasonableness of the use, method of use, or method of diversion within the meaning of Article X of the California Constitution. (See Water Code § 100.5.)

42. In determining whether a diversion is unreasonable, in either its volume or timing, impacts on public trust uses and resources must be considered.

43. Diversions of water that harm salmonids are unreasonable uses of water if the diversion can be managed, in either timing or volume, to avoid the harm.

44. The reasonableness of a use of water changes over time. "What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time." (*Tulare Irrigation Dist., supra*, 3 Cal.2d at 576.) Further, the reasonableness of a use of water "cannot be resolved *in vacuo* isolated from statewide considerations of transcendent importance. Paramount among these [is] the ever increasing need for the conservation of water in this state, an inescapable reality of life." (*Joslin, supra*, 67 Cal.2d at 140.)

45. A water user cannot acquire a vested right to the unreasonable use of water. (See, e.g., *Joslin, supra*, 67 Cal.2d at 145.)

46. A water right holder's water use is properly involuntarily curtailed based on the unreasonableness of the use. (See, e.g., *Joslin, supra*, 67 Cal.2d at 140-41; see also Gray, *The Modern Era in California Water Law* (1994) 45 Hastings L.J. 249, 253-72 ("Gray").)

B. <u>The public trust doctrine</u>

47. The public trust doctrine provides that "the sovereign owns 'all of its navigable waterways and the lands lying beneath them as trustee of a public trust for the benefit of the people.'" (*National Audubon Society, supra*, 33 Cal.3d at 434 [internal citations omitted].)

48. The public trust is not limited by the reach of the tides but encompasses all navigable lakes and streams. (See *National Audubon Society, supra*, 33 Cal.3d at 435.)

49. Holders of licenses to use waters of the State of California, such as Valley Water, do not have unlimited authority to use the water allocated in their water rights licenses if that use adversely impacts "public trust resources."

50. The legal concept that certain resources (*e.g.* navigable waters) and resource uses (*e.g.* commerce, fishing) must be preserved for the benefit of the public dates back as far as early Roman and English law. (See *Envtl. Law Found. v. State Water Res. Control Bd*. ("*Environmental Law Foundation*") (2018) 26 Cal.App.5th 844, 856; see also *Audubon, supra,* 33 Cal.3d at 433–34; Joseph L. Sax, *The public trust doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471 (1970) ("Sax").)

51. The United States Supreme Court established in *Illinois Central Railroad v. Illinois* (1892) 146 U.S. 387 that states hold the land under navigable waters "in trust for the people of the State, in order that they may enjoy the navigation of the waters and carry on commerce over them." (*Environmental Law Foundation, supra,* 26 Cal.App.5th at pp. 856–57 [quoting *Long Sault Development Co. v. Call* (1916) 242 U.S. 272, 278–79].)

52. The public trust doctrine is an "affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands," enabled by its "authority as sovereign to exercise a continuous supervision and control." (*Audubon, supra,* 33 Cal.3d at pp. 441, 425.)

53. Early application of the public trust doctrine focused on the protection of "navigation, commerce and fisheries." (See *Audubon, supra,* 33 Cal.3d at p. 434 [quoting *Marks v. Whitney* (1971) 6 Cal.3d 251, 259].)

54. The public trust doctrine extends beyond traditional interests in a waterway to require the protection of ecological values including, but not limited to, the scenic beauty of a waterway, the purity of the air and waters, and the preservation of the tidelands and shoreline in their natural state. Such preservation is recognized as "one of the most important public uses of the tidelands." (*Audubon, supra,* 33 Cal.3d at 434.)

55. There are a variety of public trust interests that pertain to California streams where such streams sustain a fishery.

56. Public trust resources include the natural resources of living streams such as fish and waterfowl.

57. Wildlife such as fish and waterfowl are protected by the public trust doctrine.

58. The public trust doctrine applies to activities that harm fish in all waters within the state.

59. "Wild fish have always been recognized as a species of property the general right and ownership of which is in the people of the state" – they are quintessential public trust resources. (*Cal. Trout v. State Wat. Res. Control Bd.* (1989) 207 Cal.App.3d 585, 630.) "The title to and property in

the fish within the waters of the state are vested in the state of California and held by it in trust for the people of the state." (*Ibid*. [quoting *People v. Monterey Fish Products Co.* (1925) 195 Cal. 548, 563].)

60. "The public trust doctrine, as recognized and developed in California decisions, protects navigable waters from harm caused by diversion of nonnavigable tributaries." (*Audubon, supra*, 33 Cal.3d at 437 [footnotes omitted].) This includes groundwater hydrologically connected to navigable surface waters. (*Id.* at 436-37.)

61. "In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another." (*Audubon, supra*, 33 Cal.3d at 436.) "The state as sovereign retains continuing supervisory control over its navigable waters and the lands beneath those waters. This principle, fundamental to the concept of the public trust, applies to rights in flowing waters as well as to the rights in tidelands and lakeshores; it prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust." (*Id.* at 445.)

62. "[P]arties acquiring rights in trust property generally hold those rights subject to the trust, and can assert no vested right to use those rights in a manner harmful to the trust." (*Audubon, supra*, 33 Cal.3d at p. 437.)

63. Valley Water must evaluate any allocation or diversion of water that impacts a public trust resource in light of the impacts upon public trust interests and "avoid or minimize any harm to those interests." (*Audubon, supra*, 33 Cal. 3d at p. 426.)

64. A property right in water is "only a usufruct—an interest that incorporates the needs of others." (*Environmental Law Foundation, supra*, 26 Cal.App.5th at p. 856 [internal quotations omitted].)

65. It is Valley Water's responsibility to account for "the public nature and the interdependency which the physical quality of the resource implies." (*Ibid*.)

66. Valley Water has a continuing and ongoing duty to protect and manage public trust resources for the benefit of the people of the State and to review and change the management of those

resources to protect public interests. In light of new knowledge or needs, Valley Water has the responsibility to "reconsider allocation decisions even though those decisions were made after due consideration of their effect on the public trust." (*Audubon, supra*, 33 Cal. 3d at 447.)

67. The public trust invokes an affirmative duty that may be surrendered "only in rare cases when the abandonment of that right is consistent with the purposes of the trust." (*Audubon*, 33 Cal. 3d at 440-441.)

C. <u>Statutory Framework</u>

1. <u>California Fish and Game Code section 5937</u>

68. California Fish and Game Code section 5937 is part of the statutory expression of public trust protections for wild fish.

69. California Fish and Game Code section 5937 provides:

> The 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. During the minimum flow of water in any river or stream, permission may be granted by the department to the owner of any dam to allow sufficient water to pass 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, when, in the judgment of the department, it is impracticable or detrimental to the owner to pass the water through the fishway.

(Fish & Game Code § 5937.)

70. Section 5937 places a mandatory duty on dam owners to maintain fish in good condition. (See *NRDC v. Patterson* (E.D. Cal. Aug. 27, 2004) 333 F. Supp. 2d 906 ("*Patterson*").)

71. "Sufficient Water" for purposes of Section 5937 means enough water flow to maintain the "prediversion carrying capacity of fish" in streams, (*California Trout, Inc. v. Super. Ct.*, 218 Cal.App.3d 187, 210 (1990) ("*Cal. Trout II*")), or "enough to restore the historic fishery" below the dam. (*Patterson, supra*, 333 F.Supp. 2d at 924 [citing to *Cal. Trout II* at 210, 213].)

72. Similarly, fish in "good condition" for purposes of Section 5937 means maintenance of fisheries at historic levels. (See *Cal. Trout II*, 218 Cal.App.3d at 210; see also *Patterson, supra*,

333 F.Supp. 2d at 924; Karrigan Bork et. al., *The Rebirth of California Fish & Game Code Section 5937: Water for Fish*, 45 U.C. Davis 809, 860-869 (2012) ("Bork").)

73. To determine whether fish are in good condition, at least three factors are relevant: (1) the fish community; (2) the fishes' populations; and (3) the health of individual fish. (*Putah Creek Water Cases* (Sacramento County Superior Court No. 515766, April 8, 1996) at 10; see also Bork, *supra*, 45 U.C. Davis at 869-872.)

74. Dam operators, such as Valley Water, are required to comply with section 5937. (See *Cal. Trout v. State Water Res. Control Bd.* 207 Cal.App.3d 585, 632-633 (1989), ("*Cal. Trout I*") [State Water Resources Control Board to condition licenses, and operator L.A. Water and Power to release water, consistent with Section 5937]; see also Bork, *supra,* at 887 [describing federal dams under control of local entities covered].)

75. Violations of section 5937 fall under Fish and Game Code section 12000 and are misdemeanors.

2. California Fish and Game Code section 5948

74. California Fish and Game Code section 5948 is another part of the statutory expression of public trust protections for wild fish.

75. California Fish and Game Code section 5948 states that:

> No person shall cause or having caused, permit to exist any log jam or debris accumulation or any other artificial barrier, except a dam for the storage or diversion of water, public bridges and approaches thereto, groins, jetties, seawalls, breakwaters, bulkheads, wharves and piers permitted by law, and debris from mining operations, in any stream in this State, which will prevent the passing of fish up and down stream or which is deleterious to fish as determined by the commission, subject to review by the courts.

76. Thus, section 5948 makes illegal any barrier—other than those barriers covered by specifically described exceptions—that prevents fish passage or that the fish commission determines is otherwise deleterious to fish.

77. Violations of section 5948 fall under Fish and Game Code section 12000 and are misdemeanors.

V. FACTUAL ALLEGATIONS

78. A diverse assemblage of fishes are native to Santa Clara Valley streams, including the Guadalupe River, Stevens Creek, Coyote Creek, and their tributaries.

79. Historically, Santa Clara Valley streams supported at least 20 native fish species, many of which are endemic to California.

80. For example, Steelhead/Rainbow Trout, Chinook Salmon, Coastal Riffle Sculpin, Pacific Lamprey, Sacramento Hitch, White Sturgeon, and Longfin Smelt are native to and depend on the rivers and creeks in this area.

81. No population of Steelhead, Rainbow Trout, Chinook Salmon, Longfin Smelt, Pacific Lamprey, Sacramento Hitch, or Riffle Sculpin is in good condition below Valley Water's dams.

82. The master variable for fish survival in Valley Water's watershed is flow.

83. For decades, Valley Water has used flow regimes that are inadequate to protect and promote recovery of native fish populations.

84. Flow is critical to fish condition: dilution potential affects basic transport mechanisms for most pollutants; temperature is directly correlated with flow; changes in flow affect erosion rates and sedimentation; and increases in flow have the potential to increase turbidity and the concentration of some pollutants. (See DEIR at 3-96.)

A. The Watershed Managed by Valley Water

85. The San Francisco Bay Basin (Region 2) Water Quality Control Plan ("Basin Plan") identifies beneficial uses for waterbodies, including inland streams under Valley Water's control and the Bay estuary. Those uses cover the creeks at issue, and include the following fish and wildlife related beneficial uses: preservation of rare and endangered species (RARE), wildlife habitat (WILD), cold freshwater habitat (COLD), warm freshwater habitat (WARM), fish migration (MIGR), and fish spawning (SPWN).

86. In addition to the overarching designation of these uses in the Basin Plan for inland streams, each of Guadalupe River, Stevens Creek, and Coyote Creek are designated for beneficial uses of water for each of the above fish and wildlife uses (among others).

87. In addition to the wildlife related uses identified, other relevant beneficial uses described in the Basin Plan and applicable to Valley Water's watershed include municipal and domestic supply (MUN), agricultural supply (AGR), commercial and sport fishing (COMM), freshwater replenishment (FRSH), industrial process supply (PROC), groundwater recharge (GWR), water contact recreation (REC1), and noncontact water recreation (REC2).

88. Valley Water's water supply system for the 1.9 million people in its 1,300 square mile service area consists of storage, conveyance, recharge, treatment, and distribution facilities, which include local reservoirs, groundwater basins, groundwater recharge facilities, treatment plants, and imported, raw, and treated water conveyance facilities. (DEIR at 1-2; 3-67.)

89. In 2015, Valley Water supplied a total demand of 285,000 AF, with 120,000 AF supplied from groundwater and 115,000 AF imported, and the other 50,000 AF of demand met from local supplies and recycling. (DEIR at 3-68.)

90. Valley Water has contracts to receive up to 100,000 AF of State Water Project water per year to from the Sacramento–San Joaquin River Delta by way of the South Bay Aqueduct to the Penitencia Water Treatment Plant in San José, and uses storage in the SWP to carry over water from one year to the next when supplies and storage allow. (DEIR at 3-68.)

91. Valley Water has contracts to receive up to 152,400 AF per year of Central Valley Project ("CVP") water from the San Luis Reservoir through the Santa Clara Conduit to the Coyote Pumping Plant in Morgan Hill, and uses CVP storage to carry over water from one year to the next. (DEIR at 3-68.)

92. The watershed managed by Valley Water is a thoroughly engineered system.

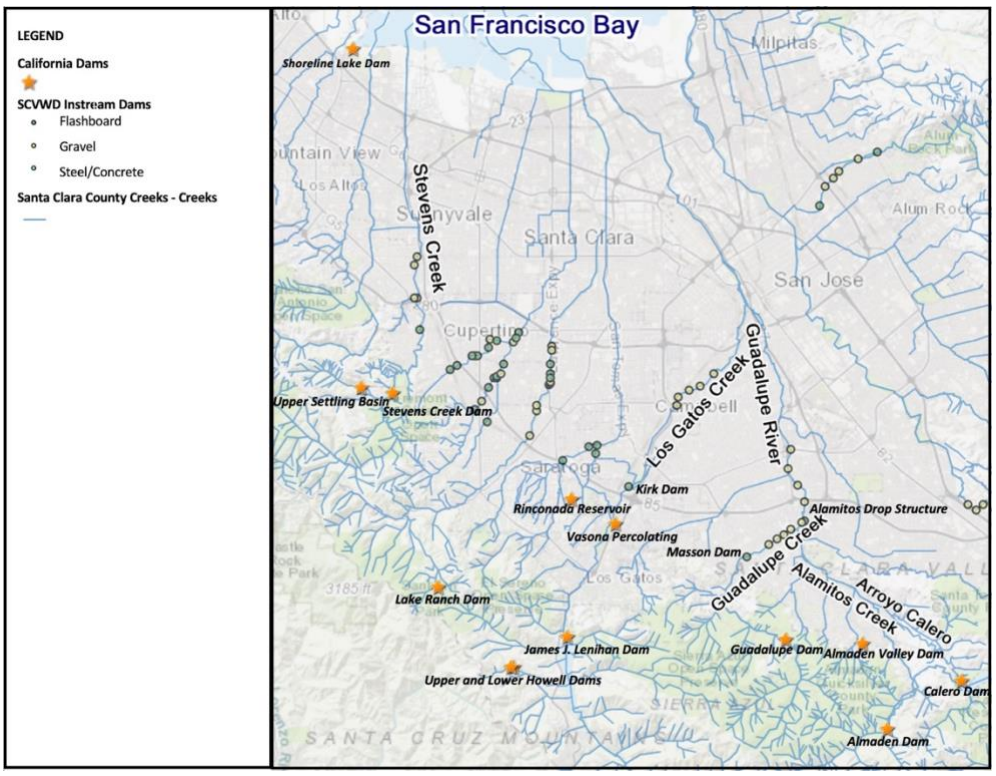
93. Valley Water's conveyance system relies on streams and constructed infrastructure to distribute local and imported supplies through its 10 surface reservoirs, 9 instream water supply diversion dams, 279 miles of natural channels, 44 miles of concrete-lined channels, 17 miles of surface water canals and ditches, 25 groundwater recharge pond facilities, 91 miles of controlled instream recharge, 142 miles of pipelines, 3 pumping stations, 3 drinking water treatment plants, and a recycled water purification plant. (DEIR at 1-5, 3-67.)

94. Flows in the watershed managed by Valley Water are more dependent on anthropogenic forces and decisions than by rainfall through the historical watersheds and groundwater basins. (DEIR at 1-1, 1-2.)

95. Anthropogenic forces that have a major impact on the watershed managed by Valley Water include urbanization, runoff from irrigated agriculture, gardens, and lawns, discharge of nuisance water from foundation pumps and other shallow groundwater drain connections, reservoir releases, and runoff from urban impervious surfaces. (DEIR at 1-1, 1-2.)

96. Valley Water operates 10 reservoirs with dams in Santa Clara County in the Guadalupe River Watershed, the Coyote Creek Watershed, the Lower Peninsula Watershed, and the Pajaro Creek Watershed.

97. Valley Water's operations in the Stevens Creek and Guadalupe River watersheds include six reservoirs (Stevens Creek, Lexington, Vasona, Guadalupe, Almaden, and Calero), a network of conveyance systems, and three sets of groundwater recharge-oriented percolation ponds, operated under the Kirk Diversion, Masson Diversion, and Alamitos Percolation Pond Diversion licenses granted by the State Water Resources Control Board ("SWRCB"). (DEIR at 1-2.)



98. Within the Guadalupe River, Stevens Creek, and Coyote Creek Watersheds, the reservoirs catch, and the system manages flows of, storm runoff that otherwise would flow through the creeks and streams below them into San Francisco Bay.

99. Valley Water has overseen an era of significant change to the waterways in its service area through the construction of stormwater and water supply facilities such as dams, percolation ponds, levees, canals, pipelines, ditches, culverts, concrete channels, flow modification structures, diversion structures, fish ladders, and many other facilities aimed at managing flows. (DEIR at 1-1.)

100. "The present-day hydrology of the Guadalupe River watershed has been substantially influenced by Valley Water's water supply operations and urbanization of the Santa Clara Valley floor, both of which have altered the hydrology of the creek systems over time. Upper watershed reservoirs capture rainfall runoff during the winter and store the water for use in the dry summer months." (DEIR at 2-2, 2-3.)

101. In the late-1800s and early-1900s, the lower part of Los Gatos Creek was a braided stream entering a marsh area at its confluence with the Guadalupe River, but it has been modified over time and is now a defined channel with diversion ditches and off stream percolation ponds. (DEIR at 2-3.)

102. Valley Water holds water rights licenses for the Stevens, Coyote, and Guadalupe watersheds, which allow water diversion and storage for irrigation and domestic uses.

103. Released water for the water rights licenses for the Stevens, Coyote, and Guadalupe watersheds is used to provide instream recharge for water supply, to prevent groundwater pumping-related subsidence, and to provide municipal and industrial supplies when diverted from the creeks to off stream percolation facilities. (DEIR at 1-2.)

104. Valley Water provides approximately 285,000 acre-feet per year (AFY) of water for municipal, industrial, agricultural, and environmental uses. (DEIR at 1-2.)

105. The primary goal of Valley Water's reservoir management is to maximize groundwater recharge, and to that end releases are generally equal to recharge demand at downstream

percolation facilities, with diversion periods generally lasting from December 1 to April 30, though in some cases diversions can begin as early as November 1 and/or last until June 1. (DEIR at 2-7.)

1. Guadalupe River

106. The Guadalupe River originates in the Santa Cruz Mountains and flows northwest into San Francisco Bay.

107. The Guadalupe River watershed covers approximately 170 square miles.

108. The Guadalupe River begins about 400 feet downstream of Almaden Lake at the confluence of Guadalupe and Alamitos Creeks and flows north for 14 miles through San José before it discharges to South San Francisco Bay through Alviso Slough in the community of Alviso. (DEIR at 2-2, 2-3, 3-26.)

109. In addition, the Guadalupe River mainstem intersects two trapezoidal channels—Ross and Canoas Creeks—with earthen and concrete sections throughout that no longer provide anadromous fish habitat. (DEIR at 2-3.)

110. The Guadalupe River has four major tributaries, each regulated by a storage reservoir, the Alamitos, Calero, Guadalupe, and Los Gatos Creeks, and one other primary feature, the Almaden Calero Canal. (DEIR 2-2, 2-3, 3-20.)

111. These tributaries are, in turn, fed by many other small creeks and streams throughout the watershed.

112. Alamitos Creek begins in the Santa Cruz Mountains and includes the Almaden Reservoir in its upper watershed, after which it passes through Almaden Lake, then joins Guadalupe Creek to form the Guadalupe River. (DEIR at 2-3, 3-20.)

113. Almaden Reservoir's approximate maximum controlled outlet capacity is 190 cfs, with an additional outlet capacity of 60 cfs to the Almaden-Calero Canal. (DEIR at 3-20.)

114. Almaden Reservoir's estimated downstream flood capacity is 5,000 cfs. (DEIR at 3-20.)

115. Calero Creek, a tributary of Alamitos Creek, flows northwest from the Calero Reservoir to its confluence with Alamitos Creek. (DEIR at 2-3, 3-21.)

116. Calero Reservoir's approximate maximum controlled outlet capacity is 185 cfs, with an estimated downstream flood capacity of 200 cfs. (DEIR at 3-21.)

117. The Almaden Calero Canal transfers water from Almaden Reservoir to Calero Reservoir during winter when storage in Almaden Reservoir is high enough to allow its use. (DEIR at 2-3.)

118. Guadalupe Creek begins in the Santa Cruz Mountains and includes the Guadalupe Reservoir. (DEIR at 2-3, 3-25.)

119. The Guadalupe Reservoir has an approximate maximum controlled outlet capacity of 235 cfs. (DEIR at 3-25.)

120. The Guadalupe Reservoir's estimated downstream flood capacity is 5,000 cfs. (DEIR at 3-25.)

121. Los Gatos Creek begins in the Santa Cruz Mountains and includes the Vasona and Lexington Reservoirs. (DEIR at 2-3, 3-25.)

122. Los Gatos Creek is a defined channel consisting of a series of diversion ditches and off stream percolation ponds. (DEIR at 2-3, 3-25.)

123. Lexington Reservoir, the largest of the three reservoirs on Los Gatos Creek, has an approximate maximum controlled outlet capacity of 400 cfs, with an estimated downstream flood capacity of 5,000 cfs. (DEIR at 3-25.)

124. Valley Water diverts water from Guadalupe River in a host of ways.

125. The Alamitos Diversion on the Guadalupe River consists of a wooden flashboard dam, a drop structure, a screened diversion structure, and a fish ladder that controls flow for instream recharge and flow to the Alamitos and Guadalupe recharge ponds. (DEIR at 3-71.)

126. The Alamitos Diversion has a permitted diversion of 3,302 acre feet ("AF") per year from November 15 to May 1. (DEIR at 3-71.)

127. Guadalupe River flows are diverted at the Alamitos Dam for groundwater recharge at the Alamitos and Guadalupe Ponds. (DEIR at 3-26.)

128. The Kirk Diversion on Los Gatos Creek uses a 90-foot-long by 7-foot-high rubber dam on a concrete foundation with two sluice gates to divert flows to the Page, Camden, Sunnyoaks, Budd, Oka, and McGlincy Percolation Ponds. (DEIR at 3-71.)

129. The Kirk Diversion has a permitted diversion of up to 9,090 AF per year from November 15 to May 1. (DEIR at 3-71.)

130. Flows from Los Gatos Creek are diverted at Kirk Dam to groundwater recharge in the Budd Avenue, Camden, McGlincy, Oka, Page, and Sunnyoaks Ponds. (DEIR at 3-25.)

131. The Masson Diversion in Guadalupe Creek diverts flows to Los Capitancillos Ponds using a dam, fish ladder, and fish screen. (DEIR at 3-71, 3-72.)

132. The Masson Diversion has a permit diversion limit of up to 0.77 cfs from October 1 to May 1. (DEIR at 3-71, 3-72.)

133. Guadalupe Creek flows are diverted at Masson Dam to groundwater recharge ponds at Los Capitancillos Ponds. (DEIR at 3-25.)

2. Stevens Creek

134. The Stevens Creek watershed is 29-square-miles and originates in the Santa Cruz Mountains, where it is fed by several small ephemeral and perennial drainages as it flows along the San Andreas Fault for approximately 5 miles upstream of Valley Water's Stevens Creek Reservoir. (DEIR at 2-2, 3-19, 3-82.)

135. Stevens Creek flows northward for approximately 13 miles before it discharges to South San Francisco Bay near the city of Mountain View. (DEIR at 2-2, 3-19.)

136. Inflows to Stevens Creek come from reservoir releases, the Permanente Diversion, Heney Creek, and local or imported flow from the Stevens Creek Pipeline. (DEIR at 3-19.)

137. Heney Creek joins Stevens Creek downstream of Valley Water's Stevens Creek Reservoir and north of I-280. (DEIR at 2-2.)

138. Permanente Creek is located just west of Stevens Creek, and all of its flow is diverted by Valley Water to Stevens Creek. (DEIR at 2-2.)

139. Permanente Creek's flows were historically diverted to Stevens Creek through the Permanente Creek Diversion. (DEIR at 2-2.)

140. Valley Water's West Pipeline can be used to provide imported water to Permanente Creek through the Stevens Creek turnout near the Highway 85 bridge.

141. Valley Water's Stevens Creek Reservoir, completed in 1935 and raised 10 feet in 1985, has a capacity of 3,138 acre feet (AF) of water, a surface area of 92 acres, and an approximate maximum controlled outlet capacity of 410 cfs. (DEIR at 2-2, 3-19.)

142. Stevens Creek Reservoir has an estimated downstream flood capacity of 5,000 cfs. (DEIR at 3-19.)

143. Stevens Creek Reservoir is fed by several sources, including the Stevens, Swiss, and Montebello creeks. (DEIR at 3-82.)

144. Stevens Creek does not have any instream diversion facilities. (DEIR at 2-2.)

145. The Stephens Creek and Guadalupe River watersheds are part of the Santa Clara Plain Subbasin. (DEIR at 3-46.)

146. Coyote Creek is part of the Coyote Valley Subbasin. (DEIR at 3-46.)

147. The Santa Clara Plain Subbasin and the Coyote Valley Subbasin are hydrologically connected and in turn are connected to the larger Santa Clara Valley Basin. (DEIR at 3-46.)

3. Groundwater

148. Groundwater movement through the Santa Clara Valley Basin generally follows the topography and the direction of surface flows, with water flowing down from the hills, collecting at the valley floor, and ending up in San Francisco Bay. (DEIR at 3-46.)

149. Valley Water is the groundwater management agency for Santa Clara County and as such its groundwater management activities include groundwater replenishment using locally captured surface runoff and water deliveries from the SWP and CVP, monitoring and protection of groundwater from pollutants, and the construction, operation, and maintenance of facilities to manage groundwater supplies. (DEIR at 3-46, 3-50.)

150. Valley Water's groundwater recharge program facilities include 390 acres of recharge percolation ponds and over 90 miles of local creeks. (DEIR at 3-50.)

151. Valley Water also uses its groundwater subbasins for natural storage and for conveyance, enabling imported water deliveries to be delivered downstream and extracted downgradient. (DEIR at 3-50.)

152. Valley Water maintains monitoring wells to record groundwater depths and quality throughout its managed groundwater subbasins. (DEIR at 3-51.)

153. Valley Water estimates the operational storage capacity of the Santa Clara Plain to be 350,000 AF, with an action threshold of 278,000 AF specified in Valley Water's Groundwater Management Plan (GWMP). Dipping below the action threshold triggers conservation measures and other related actions. (DEIR at 3-50 – 3-51.)

B. <u>The Fish and Aquatic Habitat Collaborative Effort (FAHCE)</u>

154. In 1996, a Water Rights Complaint was filed by a coalition of interested parties[1] with the State Water Resources Control Board alleging that Valley Water was operating its facilities in a way that damaged Steelhead Trout, a threatened species under the Endangered Species Act, as well as other aquatic species. The Complaint requested action to develop a plan to restore these species to a healthy condition. (DEIR at 1-5.)

155. A settlement agreement, called the Settlement Agreement Regarding Water Rights of the Santa Clara Valley Water District on Coyote, Guadalupe and Stevens Creeks, initialed by the Initialing Parties on May 27, 2003 ("Settlement Agreement" or "FAHCE Agreement") and described in Section 6700 of the Water Code, was reached in 2003. (DEIR at 1-5 and Appendix B.)

156. The FAHCE Agreement was intended to implement "flow measures" to remove barriers to fish migration, provide summer rearing habitat, and "improve[] spawning conditions in

[1] The complaint was filed by the Guadalupe-Coyote Resource Conservation District (GCRCD), with the eventual involvement of Trout Unlimited, California Trout, Inc., the Northern California Council of Federation of Fly Fishers, the Pacific Coast Federation of Fishermen's Associations, the National Marine Fisheries Service (NMFS), the U.S. Fish and Wildlife Service (USFWS), and the California Department of Fish and Wildlife (CDFW), collectively referred to by Valley Water as the "Initialing Parties." DEIR at 1-5.

three watersheds: Coyote Creek, Stevens Creeks, and Guadalupe River" sufficient to "restore and maintain healthy [fish] populations." (DEIR at 1-6, 1-7.)

157. The FAHCE Agreement acknowledges that Central California Coast (CCC) Steelhead Trout (Oncorhynchus mykiss; Steelhead Trout or Steelhead) and Central Valley fall-run Chinook Salmon (Oncorhynchus tshawytscha; Chinook Salmon) are not in good condition.

158. The FAHCE Agreement contemplates the application of measures to provide (1) suitable spawning and rearing habitat within each watershed, and (2) adequate flows for passage for adult Steelhead Trout and salmon to reach suitable spawning and rearing habitat and for outmigration of juveniles.

159. The FAHCE Agreement has yet to be fully implemented.

160. The FAHCE Agreement and resulting process did result in a series of reservoir re-operation rule curves that describe the release of water from seven Valley Water reservoirs, Stevens, Guadalupe, Almaden, Calero, Vasona, Anderson/Coyote, and Lexington, designed to better support the life-cycle needs of Steelhead and Chinook Salmon through improved instream flows and reduced water temperatures. (See DEIR at 2-11; see also DEIR Appendix A [Draft FHRP, Reservoir Reoperation Rule Curves – FAHCE Settlement Agreement Appendix E].)

161. Some Valley Water dams are currently operating under dam safety operations restrictions, including the Almaden, Calero, Anderson/Coyote, and Guadalupe reservoirs. (DEIR at 2-12

162. These restrictions limit the implementation of reservoir flow releases. (DEIR at 2-12.)

163. The FAHCE rule curves have yet to be fully implemented throughout the watershed, and will not be until Anderson Reservoir's ongoing seismic retrofit is completed, at the earliest—at least a decade from now. (DEIR at ES-3 [describing a 10-year "Phase One" implementation period, followed by subsequent potential ten-year Phases Two, and Three], 1-7 [delaying environmental review of Coyote Creek watershed], Table 1.5-1 [delaying until seismic retrofit projects are completed].)

164. In 2021, Valley Water issued its DEIR for the FAHCE Agreement.

165. The DEIR delayed implementation of the FAHCE flow regime throughout the watershed for at least another ten years.

166. The DEIR analyzed two potential flow regimes: the "FAHCE Flows" and the "FAHCE+ Flows."

167. According to Valley Water, the FAHCE+ Flows are more beneficial and protective of fish and wildlife than the FAHCE Flows.

168. The FAHCE+ Flows have been partially implemented by Valley Water in portions of the watershed as part of studies and pilot programs.

169. Both the FAHCE and FAHCE+ Flow regimes determine releases of water, and thus flows in downstream rivers and creeks, based on storage levels in reservoirs.

170. As a result, when reservoir storage levels are below certain benchmarks, either due to lack of rainfall, groundwater recharge, diversion to municipal (and other) uses, or for any other reason, the FAHCE and FAHCE+ Flow regimes cannot result in sufficient water instream to maintain fish in good condition.

171. Implementation of the FAHCE rule flow curves is "unlikely to affect the Chinook Salmon population in a biologically meaningful way that differs from the current baseline." (DEIR at 3-219.)

172. Valley Water has adequate natural and imported water supplies to provide sufficient flows for fish to be in good condition while maintaining its ability to provide water for other uses.

173. Valley Water has the ability to alter the amount and timing of its diversions from reservoirs to provide the conditions for fish to be in good condition.

174. Valley Water has sufficient water capacity to alter the amount and timing of its diversion from reservoirs to provide the conditions for fish to be in good condition.

175. Despite the substantial modification of Santa Clara Valley watersheds for agricultural land use, urbanization, and water management activities, streams in the region continue to support diverse assemblages of native species, some of which have high potential for recovery.

176. Valley Water has invested in creating and restoring habitat for native fish, but these habitats currently lack adequate flows for fish to benefit from that habitat.

177. Many San Francisco Bay tributaries in Santa Clara Valley remain largely non-urbanized in their upper watersheds and support healthy native fish assemblages.

178. Given sufficient flows, conditions can exist in the watershed that support healthy native fish.

179. In addition, some native fish species are capable of recolonizing habitats in watersheds after they have been extirpated, especially anadromous fish like steelhead, salmon, and lamprey.

180. If sufficient flows and suitable habitat are restored, the likelihood of reestablishing and recovering populations of steelhead, lamprey, and salmon is high.

181. Other native fish species, which are non-anadromous, require more urgent action as they live in the rivers and streams year-round and have little to no ability to re-colonize areas once they have been extirpated.

C. <u>The Fish within Valley Water's Jurisdiction are Not in Good Condition</u>

182. The native fish below Valley Water's dams, a public trust resource Valley Water is required to protect under the California Constitution, common law, and statute, are in poor condition, at risk of extirpation and worse.

183. First, populations of these species in Santa Clara's creeks and rivers below Valley Water's dams are no longer viable.

184. Second, the flow conditions that exist have a negative impact on fish health at the individual level.

185. Third, limited numbers and diminishing viability of these fish demonstrate that the traditional species diversity that existed in Valley Water's creeks and rivers is no longer present.

186. Fourth, there is not sufficient water in the streams, creeks, and rivers downstream from Valley Water's dams to maintain the prediversion carrying capacity of fish in those waterbodies.

187. And fifth, Valley Water does not provide enough flows to restore historic fisheries below the dams.

188. Each of these enumerated points demonstrates that the fish below Valley Water's dams that traditionally and historically thrived in this region are not in good condition.

189. The decimation and decline of these species and their deteriorating condition are the result of the flows provided by Valley Water.

190. The ongoing FAHCE efforts and actions taken by Valley Water have not and will not reverse the decline of native fish nor restore native fish species to good condition.

1. *Steelhead and Rainbow Trout*

191. Steelhead and resident rainbow trout are not in good condition in Stevens Creek. Sampling efforts through time reveal declining numbers of *O. mykiss* in Stevens Creek, including being near or at zero fish after the drought from 2012 to 2015.

192. According to Valley Water,

> ...all life stages of [Central California Coast] Steelhead are limited by impaired conditions within Stevens Creek and the Guadalupe River watershed. To prevent the extinction of [Central California Coast] Steelhead and shift their trajectory toward recovery, the Recovery Plan (NMFS 2016)[2] indicates that the following conditions be met: clean water, sufficient stream flows, absence of barriers to migration, suitable habitats, and limited harvest.

(DEIR at 3-176.)

193. The necessary conditions, especially the sufficiency of the stream flows, are not being provided.

194. Steelhead/Rainbow Trout (*Oncorhynchus mykiss*) produce two major life history types: a migratory fish that spends time in saltwater before returning to spawn in these creeks (Steelhead), and a resident fish that remains in the freshwater creeks throughout its life (Rainbow Trout).

195. Each type of this species can produce offspring of both itself and the other type; and both life history forms are capable of reproducing more than once.

196. Juvenile Steelhead rear in freshwater for at least a year before migrating to salt water.

[2] See *infra*, at ¶ 203.

197. Both life history types require supportive conditions in their home rivers throughout the year.

198. The *O. mykiss* found in the creeks downstream of Valley Water's dams are part of the are part of the Central California Coast evolutionary significant unit, which is listed as a threatened species under the federal Endangered Species Act.

199. Central California Coast Steelhead adults typically migrate into fresh water between August and March and typically spawn between December and April, with most spawning occurring between January and March. In the Guadalupe River and Stevens Creek, Valley Water reports these activities as occurring only from December to April. (DEIR 3-158.)

200. Steelhead and Rainbow Trout have been documented in numerous Santa Clara Valley creeks and rivers over many decades and are considered native in Coyote Creek, Guadalupe River, and Stevens Creek and their tributaries.

201. These waterways have the potential to maintain independent viable populations of both *O. mykiss* life history types.

202. Coyote Creek and Guadalupe River have the characteristics and capacity to support "functionally independent" populations. Stevens Creek is believed to be able to support a "potentially independent" population.

203. Restoration of independent populations of Steelhead at low risk of extinction in Coyote Creek, Guadalupe River, and Stevens Creek are among NMFS criteria for the recovery of the Central California Coast Steelhead evolutionary significant unit under the endangered species act. (NMFS, 2016, *Final Coastal Multispecies Recovery Plan*, available at http://www.westcoast.fisheries.noaa.gov/protected_species/salmon_steelhead/salmon_and_stee%0Dlhead.html ("NMFS Recovery Plan").)

204. Steelhead are a key segment of the Steelhead/Rainbow Trout populations of which they are part.

205. Steelhead contribute to abundance of resident *O. mykiss* populations and represent an expansion in both a population's life history diversity and spatial extent, attributes of viability which

insulate the population from periodically bad or even catastrophic conditions in the natal freshwater stream.

206. Because Steelhead can disperse into streams that are separated by saltwater (unlike the resident form), they enable *O. mykiss* to re-colonize streams where a population has been lost, maintaining the spatial diversity that is key to overall population viability.

207. Female Steelhead are much larger and carry far more eggs than resident Rainbow Trout, thus each Steelhead female represents a disproportionate fraction of the reproductive potential of *O. mykiss* populations.

208. Steelhead viability, passage, and migration on Stevens Creek is "poor" (NFMS 2016 at 582) due to operation of Stevens Creek reservoir, which blocks approximately 56% of historic Steelhead habitat.

209. The NMFS Recovery Plan targets for Steelhead spawner density in Santa Clara Valley waterways include the following: on the Guadalupe River, 1,800 fish (NMFS Recovery Plan 2016 at p. 491), on Stevens Creek, 9,00 adults (*id.* at p. 581); on Coyote Creek, 3,000 adults (*id.* at p. 682).

210. NMFS regards "Water Diversion and Impoundments" as a very high threat to Steelhead on each of these waterways. (NMFS Recovery Plan at p. 62.)

211. Current Steelhead abundance in each of these watersheds is markedly lower than NMFS' targets.

212. Valley Water claims that *O. mykiss* populations in Stevens Creek improved "substantially" following very wet winter-spring months in 2017 and 2019. However, a 2021 report from Valley Water indicates that only 47 juvenile *O. mykiss* were detected during intensive sampling at six sampling localities on Stevens Creek in 2020. (Valley Water, *2020 Juvenile Oncorhynchus mykiss Rearing Monitoring in Stevens Creek*, February 2021.)

213. As with tributaries to the Guadalupe River, patterns of *O. mykiss* abundance in Stevens Creek suggest that the population is limited and that successful Steelhead migration and spawning are restricted to years with high natural precipitation that produce relatively high river flows despite Valley Water's flow regimes.

214. In Coyote Creek, recent sampling indicates there is no resident rainbow trout population downstream of Anderson Reservoir and that while a remnant population of Steelhead likely exists, it is at risk of extirpation.

215. Low creek flows downstream of Anderson Dam and other Valley Water infrastructure led to drying up of sections of Coyote Creek for several months in 2014, 2015, and 2016, preventing migration of juvenile *O. mykiss* downstream in those years.

216. The failing condition of Steelhead and Rainbow Trout is a result of the flow regime created, used, and operated by Valley Water, including the timing, method, and volume of diversions and releases from reservoirs and dams.

217. Valley Water's flow regime and dam and reservoir operations have failed to maintain the capacity of the rivers and creeks to carry fish, have failed to protect the historic fisheries, and have left fish not in good condition, in violation of California law.

2. *Chinook Salmon*

217. Chinook Salmon (*Oncorhynchus tshawytscha*) are the largest species in the Pacific salmon genus, *Oncorhynchus*. They spawn and rear in most of the sizeable rivers that reach the Pacific Ocean between San Francisco Bay and Alaska and across the Bering Sea to Kamchatka.

218. Like Steelhead, Chinook Salmon are anadromous, meaning they migrate to fresh water to spawn, incubate, and rear, and their juveniles migrate to the ocean, where they spend between one and four years, before returning as adults, to spawn in fresh water. Chinook Salmon spawn only once and die soon after.

219. Central Valley fall-run Chinook Salmon, from which the Chinook Salmon of Santa Clara County are derived, are considered Species of Special Concern by CDFW.

220. Chinook Salmon play important roles in the ecology of freshwater and marine ecosystems; including as contributors to fisheries and as prey for valued wildlife species.

221. The Central Valley population has experienced long-term and recent declines in abundance despite massive hatchery supplementation.

222. The number of Chinook Salmon in Valley Water's rivers, creeks, and streams, has not increased since 1996, despite efforts by Valley Water to improve habitat.

223. The failing condition of Chinook Salmon is largely due to inadequate flows in the rivers, creeks, and streams necessary for spawning, rearing, and migration.

224. According to Valley Water, implementation of the FAHCE Flows is "unlikely to affect the Chinook Salmon population in a biologically meaningful way that differs from the current baseline." (DEIR at 3-219.)

225. Fish surveys in Santa Clara County creeks characterize Chinook Salmon as native to Coyote Creek and the Guadalupe River, in Santa Clara County.

226. Remains of Chinook Salmon were found at the site of a midden located at Mission Santa Clara (CA-SCL-30H), Santa Clara County, made between 1781–1834 CE by tribes indigenous to the area located on a tributary of the Guadalupe River 1.5 miles west of the Guadalupe's mainstem, indicating these fish were likely present in these rivers hundreds of years ago.

227. Adult and juvenile Chinook Salmon have been observed in the creeks and rivers of Santa Clara County at least since the early 1980s.

228. Chinook Salmon continue to exist and attempt to reproduce in Santa Clara County creeks today.

229. Adult Chinook Salmon are currently detectable in the Guadalupe River and Coyote Creek, and their tributaries.

230. Successful completion of the spawning migration requires that adult Chinook Salmon swim upstream, gaining elevation in the process, until they reach stretches of river with adequate depth and velocity, gravel of appropriate size, and sufficient water quality to support spawning and egg incubation.

231. Spawning adult Chinook Salmon typically migrate to the same river, and even the same reach of river, where they were born, during the same season when their parents spawned.

232. Some adults stray from their natal streams and attempt to spawn in non-natal rivers. This straying allows Chinook Salmon to colonize habitats where competition with other members of their species ("conspecifics") is low.

233. Chinook Salmon eggs incubate for several weeks in gravel nests, known as redds, where the flow of cold water provides adequate oxygen and sweeps away metabolic wastes.

234. After incubation, they emerge into the water column as small fish, called fry.

235. Valley Water reports that Chinook Salmon migrate and spawn between October and January in the Guadalupe River. (DEIR 3-158.)

236. Between December and June, after one to seven months of feeding in fresh water, juvenile salmon migrate towards the ocean. (DEIR 3-158.)

237. As they rear and migrate, juvenile Chinook Salmon undergo a metamorphosis called smoltification from freshwater-tolerant fish to saltwater-tolerant fish.

238. Juvenile Chinook Salmon are susceptible to predators on land and in the water.

239. Juvenile Chinook Salmon require cool water streams with adequate in-channel habitat features that provide cover to hide from predators and surfaces for production of prey.

240. Juveniles migrate downstream in response to high flows that assist with transport, cover from predators, and that inundate highly productive off-channel habitats like floodplains and side-channels that are relatively free of predators.

241. Increases in river flow help juvenile Chinook Salmon avoid predation by increasing the depth and turbulence of the water and by increasing the volume of their habitat, thereby reducing the density of predators in their habitats.

242. Numerous studies of Central Valley fall-run Chinook Salmon show that juvenile migratory success is positively correlated with river flow rates and flow variability, and that life history diversity increases with increasing duration and frequency of suitable migration flows.

243. Adult Chinook Salmon are too large to be susceptible to predation by other fish in the streams where they spawn, but, when they migrate through shallow water, their large size makes them conspicuous and susceptible to aquatic and terrestrial mammalian and avian predators.

244. Monitoring by Valley Water indicates that annual surveys have detected as few as 13 and as many as 104 adult Chinook in the Guadalupe River each year between 1998 and 2006. (See Valley Water, *Multiple Lines of Evidence Report: Mitigation Monitoring Anadromous Fish Occurrence, Adult Migration and Spawning. Guadalupe River Project, Downtown San Jose, California*, August 2, 2018.) These are well below the number needed for sufficient abundance to make a viable population or one that is in good condition.

245. The low numbers of Chinook Salmon indicate that the species is not in good condition due to altered flows and resultant poor habitat quality.

246. A review of data from Valley Water demonstrates that Chinook Salmon returns (adults returning to spawn) peaked in 1996.

247. Valley Water maintains and modifies physical elements of the stream bed and riparian zone around creeks in Santa Clara County with the intent to support Chinook Salmon migration, spawning, and rearing.

248. Valley Water has also led or facilitated projects intended, in part, to provide habitat for Chinook Salmon and access to that habitat in streams below its dams.

249. For example, Valley Water has partnered with the Army Corps of Engineers in a Guadalupe Creek Restoration Project, the explicit purpose of which was to restore native anadromous fish, including Steelhead and fall-run Chinook Salmon, to Guadalupe Creek.

250. To complete their upstream and downstream migrations, the migratory pathway must be clear of insurmountable migration barriers and rivers must be flowing deep and fast enough to allow efficient migration and provide cover from aquatic and terrestrial predators (e.g., birds of prey, predatory mammals, humans).

251. These efforts have been inadequate due to lack of necessary flow for Chinook Salmon to complete their migrations.

3. *Longfin Smelt*

252. Longfin Smelt are native to south San Francisco Bay.

253. Longfin Smelt are small, semelparous fish with populations along the Pacific Coast from San Francisco Bay to Alaska. In San Francisco Bay, they are semi-anadromous – part of the population migrates to the ocean and back.

254. The California Fish and Game Commission listed Longfin Smelt as threatened throughout California in 2009.

255. The US Fish and Wildlife Service has acknowledged that the San Francisco Bay population of Longfin Smelt warrant protection under the federal Endangered Species Act, though the Service has maintained since 2012 that such listing has been precluded by other listing priorities.

256. Longfin Smelt are food for mammals, birds, and other fish species.

257. The abundance of the Bay's Longfin Smelt is strongly correlated with river flows into and San Francisco Bay from December to June.

258. Longfin Smelt historically spawned in and near the confluence of Coyote Creek and the Guadalupe River with southern San Francisco Bay.

259. Longfin Smelt still attempt to spawn in this area in all years, but offspring are only found during years with wet winters and/or springs.

260. Historically, adult and larval Longfin Smelt have been detected in the waters off of Santa Clara County near where Stevens Creek, the Guadalupe River, and Coyote Creek drain into San Francisco Bay – primarily following wet winters and/or springs.

261. The spawning success and recruitment of larval and juvenile Longfin Smelt is a function of freshwater flow into the Bay.

262. Fish sampling from 2011-2019 has confirmed that Longfin Smelt juveniles are found in this area only during wet years when local creek and river flows into the southern Bay are high.

263. This same sampling determined that adults returned to spawn in all years and only in years with significant freshwater flow were juvenile or larvae found.

264. Current flow patterns – especially chronic reductions in river flows to the Bay during winter and spring months – limit Longfin Smelt reproduction in this area, eliminating reproductive success in most years.

265. As a result, Longfin Smelt in the South Bay are in poor condition, in substantial part due to the lack of freshwater flows into the Bay from Valley Water's rivers, creeks, and streams.

4. *Coastal Riffle Sculpin*

266. Coastal Riffle Sculpin are a non-anadromous fish that lives year-round in the creeks, rivers, and streams in Santa Clara Valley.

267. Coastal Riffle Sculpin are a unique species of sculpin that are endemic to San Francisco Bay – existing only in North Bay and Santa Clara Valley tributaries to San Francisco Bay.

268. Ohlone Riffle Sculpin are a sub-species of Coastal Riffle Sculpin that are endemic to Santa Clara and San Mateo counties, and live exclusively in the rivers, creeks, and streams within those counties.

269. Ohlone Riffle Sculpin are endangered and are at risk of extinction.

270. Ohlone Riffle Sculpin are non-migratory.

271. Ohlone Riffle Sculpin are known to be present in Guadalupe River and Stevens Creek. (DEIR at 3-156.)

272. Ohlone Riffle Sculpin require suitable temperature and flow conditions year-round throughout their life span in order to be in good condition.

273. Because they remain in freshwater year-round, and are non-anadromous, these species have little to no ability to recolonize prior habitat areas after they are extirpated.

274. Valley Water's existing flow regime leave the creeks, rivers, and streams where Ohlone Riffle Sculpin reside with inadequate water to support viable populations of these fish.

5. *Other Fish Species and the Assemblage of Fish Demonstrate Fish are not in Good Condition*

275. Pacific Lamprey, White Sturgeon, and Sacramento Hitch, among others, are also present in Valley Water's streams and creeks.

276. Historically, each of these fish species lived in Valley Water's streams, creeks, and rivers.

277. Pacific Lamprey are known to be present in Guadalupe River and Stevens Creek. (DEIR at 3-156.)

278. Pacific Lamprey are a migratory fish and are a Species of Special Concern in California and are acknowledged to be in decline throughout much of their range by the U.S. Fish and Wildlife Service.

279. Like anadromous salmonids, lamprey require adequate water quality and river flows to facilitate their freshwater migrations to and from spawning sites and for development of eggs and larvae.

280. Lamprey juvenile and adult immigration periods differ somewhat from those of Central California Coast Steelhead or Chinook Salmon.

281. Pacific Lamprey larvae live in sandy river bottoms for up to 5 years before they metamorphose into ocean-going lamprey; thus, these ammocetes require persistence of suitable conditions over long periods and are highly susceptible to inadequate flows during their incubation, particularly dewatering of their habitats.

282. Sacramento Hitch are believed to be present in the Guadalupe River, Los Gatos Creek, and the estuarine portions of Stevens Creek. (DEIR 3-170.)

283. These native minnows are associated with lower elevation habitats, downstream from areas where Rainbow Trout/Steelhead, Pacific Lamprey, and Ohlone Riffle Sculpin spawn and rear during early stages of their life cycle.

284. Pacific Lamprey, Sacramento Hitch, and White Sturgeon are not good condition in Guadalupe River and its tributaries.

285. Pacific Lamprey, Sacramento Hitch, and White Sturgeon are not in good condition in Stevens Creek and its tributaries

286. Pacific Lamprey, Sacramento Hitch, and White Sturgeon are not in good condition in Coyote Creek and its tributaries.

287. The failing condition of Pacific Lamprey, Sacramento Hitch, and White Sturgeon is due to inadequate flows to support all life cycles of these fish, or to support sufficient habitat.

288. Finally, the failure of Valley Water to maintain these fish in good condition has resulted in the historic fish community – the native fish species that made up the ecosystem historically –also not being in good condition.

289. This is because the native species are not viable, abundant, diverse, or healthy enough to be in good condition themselves.

290. This is also because invasive species have taken over large areas of the watershed.

291. Valley Water's flow regime benefits some of these invasive species at the expense of native fish.

292. Valley Water's flow regime provides inadequate flows to protect the native fish species in its rivers, streams, and creeks.

D. <u>The Streams, Creeks, and Rivers Managed by Valley Water Contain Significant Barriers to Fish Passage and Migration</u>

293. Fish in the system managed by Valley Water face a host of migration barriers, including log jams, road crossings, and impassable culverts.

294. A lack of instream flow can constitute a barrier to fish passage.

295. Incomplete barrier remediation, according to Valley Water, includes the Moffett and Fremont Fish Ladders, the Pheasant Creek Culvert, the Bertram Road Drop Structure, and Guadalupe Creek's Old Dam. (DEIR at 3-111 [Figure 3.5-1 Steven Creek Watershed Points of Interest], and at 3-112 [Figure 3.5-2 Guadalupe River Watershed Points of Interest].)

296. In addition to incomplete barrier remediation, inadequate instream flow both (1) allows barriers to remain instream and create impassible obstructions, and (2) means that potential barriers that would be well covered with water under adequate flow conditions block the migratory channel in times of low or no flow creating obstacle to fish passage.

297. Increasing instream flows would eliminate or cover many of the existing barriers to fish passage within Valley Water's creeks, streams, and rivers.

VI. CAUSES OF ACTION

FIRST CAUSE OF ACTION

(Violations of Fish & Game Code § 5937 Pursuant to Code of Civil Procedure § 1085 Against VALLEY WATER)

298. Baykeeper incorporates each paragraph of this complaint and petition, herein.

299. Valley Water has failed to operate its dams to allow sufficient flows to maintain fish stocks in the Santa Clara County river system in good condition, in violation of California Fish and Game Code section 5937.

300. Since dams were completed, fish stocks have precipitously declined and some fish in the system have been designated as endangered.

301. Valley Water's dam operations have resulted in flows of inadequate duration and quantity for successful upstream migration.

302. Valley Water's dam operations have further reduced the frequency of flows sufficient for successful downstream migration.

303. Valley Water's dam operations have resulted in short-duration flows that trigger Steelhead migration, but are insufficient in volume or duration to allow successful migration to spawning areas for adults, or to the ocean for smolts, resulting in the entrapment of smolts and/or adult fish in a drying channel, ultimately killing those fish.

304. Valley Water's continued dam operations in violation of section 5937 threatens the existence of Steelhead in the river system.

305. Section 5937 is the statutory expression of the public trust doctrine in California, and as such violations of 5937 necessarily implicate a violation of the public trust doctrine.

306. Valley Water's continued failure to maintain sufficient water flows below its dams to keep fish stocks in good condition will cause great and irreparable harm to Baykeeper.

307. Pecuniary compensation is not available under section 5937, and in any event would not afford adequate relief.

308. In contrast, an order compelling water releases of sufficient size and with appropriate timing to provide flows for fish migration will cause minimal impact to Valley Water.

309. The facts and the law relating to this action are not subject to reasonable dispute, and Baykeeper is reasonably entitled to the relief demanded.

310. Baykeeper has no plain, speedy, or adequate remedy in the ordinary course of law because Valley Water will continue to violate section 5937 unless compelled to comply by a court of law. Thus, an actual controversy between Baykeeper and Valley Water exists concerning Valley Water's dam operations and compliance with section 5937.

SECOND CAUSE OF ACTION

(Violations of Fish & Game Code § 5948 Pursuant to Code of Civil Procedure § 1085 Against VALLEY WATER)

311. Baykeeper incorporates each paragraph of this complaint and petition, herein.

312. Valley Water has caused or permitted to exist log jams, debris accumulation, and other artificial barriers, not including dams for the storage or diversion of water, public bridges and approaches, groins, jetties, seawalls, breakwaters, bulkheads, wharves and piers permitted by law, and debris from mining operations, in waterways in Santa Clara County, California, which prevent the passing of fish up and down stream or which are deleterious to fish, in violation of Fish and Game Code section 5948.

313. These barriers to fish passage, as described above, have contributed to fish stocks to precipitously decline and some fish in Santa Clara County waterways have been designated as endangered.

314. Valley Water's flows of inadequate duration and quantity have resulted in barriers to fish passage for successful upstream migration.

315. Valley Water's barriers to fish passage in violation of section 5948 threaten the existence of Steelhead in the river system.

316. Section 5948 is the statutory expression of the public trust doctrine in California, and as such violations of 5948 necessarily implicate a violation of the public trust doctrine.

317. Valley Water's continued failure to remove barriers to fish passage will cause great and irreparable harm to Baykeeper.

318. Pecuniary compensation is not available under section 5948, and in any event would not afford adequate relief.

319. In contrast, an order compelling removal of barriers to fish passage will cause minimal impact to Valley Water.

320. The facts and the law relating to this action are not subject to reasonable dispute, and Baykeeper is reasonably entitled to the relief demanded.

321. Baykeeper has no plain, speedy, or adequate remedy in the ordinary course of law because Valley Water will continue to violate section 5948 unless compelled to comply by a court of law. Thus, an actual controversy between Baykeeper and Valley Water exists concerning Valley Water's barriers to fish passage and compliance with section 5948.

THIRD CAUSE OF ACTION

(Waste and Unreasonable Use by VALLEY WATER)

322. Baykeeper incorporates each paragraph of this complaint and petition, herein.

323. Valley Water's use and method of use of water is unreasonable under California Constitution article X, section 2.

324. Valley Water diverts, pumps, and stores water sufficient to reduce instream flows.

325. That reduction of instream flows creates barriers to fish passage.

326. That reduction of instream flows increases temperature sufficient to harm fish.

327. Valley Water stores, pumps, and diverts water during critical summer months and after instream flows fall below levels determined to be critical minimum levels required to protect fish.

328. Valley Water has failed and continues to fail to manage its water use in a manner that avoids impacts to public trust resources.

329. Valley Water is required to comply with the mandatory duties set out in the California State Constitution, including those duties imposed under article X, section 2.

330. Baykeeper has no plain, speedy, or adequate remedy in the ordinary course of law because Valley Water will continue to violate Article X, § 2 of the Constitution unless compelled to comply by a court of law. Thus, an actual controversy exists between Baykeeper and Valley Water concerning the reasonableness of Valley Water's pumping and diversion of water.

FOURTH CAUSE OF ACTION

(Violations of the public trust doctrine Against VALLEY WATER)

331. Baykeeper incorporates each paragraph of this complaint and petition, herein.

332. Valley Water violated the public trust doctrine, prejudicially abused its discretion, failed to proceed in a manner required by law, and failed to support its findings and conclusions with analysis and facts by authorizing unsustainable flows that:

a. Interfere with, and result in the loss of public trust resources such as fish and wildlife to the detriment of legitimate public trust uses including, but not limited to, navigation, fishing, fish and wildlife habitat, and recreation, tourism, and public infrastructure; and

b. Will irreparably injure and deplete public trust resources, including but not limited to, the Bay's ecosystem, including special status fish and wildlife.

333. Valley Water has never conducted a Public Trust analysis of its water use.

334. Valley Water's ongoing and continuing failure to perform its mandatory duties has and will cause Baykeeper, its members, and the general public to suffer substantial, clear, and certain irreparable injury. Unless and until Valley Water follows the requirements of Article X, section 2 of the California Constitution, it unreasonable use of water and interference with public trust resources will continue. As a result, Baykeeper, its members, and the general public will not be assured of their rights to the State's waters as afforded by the California Constitution.

335. Baykeeper has no plain, speedy, or adequate remedy in the ordinary course of law because Valley Water will continue to fail to conduct a Public Trust analysis of its water use unless compelled to do so by the Court.

VII. PRAYER FOR RELIEF

WHEREFORE, Petitioners pray for the following relief:

1. Declaratory relief stating Valley Water is in violation of:
   - (i) Fish and Game Code sections 5937 and 5948;
   - (ii) The public trust doctrine; and,
   - (iii) In violation of Article X, section 2 of the California Constitution.
2. A peremptory writ of mandate:
   - (i) Declaring that Respondent Valley Water has violated California Fish and Game Code Section 5937;
   - (ii) Declaring that Respondent Valley Water has violated California Fish and Game Code Section 5948;
   - (iii) Declaring that Respondent Valley Water has violated the common law and Article X, section 4 of the California Constitution for the failure to adequately take into account the public trust doctrine;
   - (iv) Declaring that Respondent Valley Water has violated Article X, section 2 of the California Constitution and Water Code section 100 for the waste and unreasonable use of waters of the state;
   - (v) Ordering Valley Water to modify operations at its dams to keep fish stocks in good condition;
   - (vi) Ordering Valley Water to modify operations at its dams to prevent the formation of barriers to fish passage;
   - (vii) Ordering Valley Water to modify operations at its dams to prevent violations of the common law and California Constitution;
   - (viii) Ordering Valley Water to modify operations at its dams to prevent violations of the California Constitution and Water Code section 100;
   - (ix) Enjoining any and all activity in violation of California Fish and Game Code Section 5937 until Valley Water implements an appropriate flow regime;

(x) Enjoining any and all activity in violation of California Fish and Game Code Section 5948 until Respondent Valley Water implements an appropriate flow regime;

(xi) Enjoining any and all activity in violation of the common law and California Constitution until Respondent Valley Water implements an appropriate flow regime; and

(xii) Enjoining any and all activity in violation of the California Constitution and Water Code section 100 until Respondent Valley Water implements an appropriate flow regime.

3. An injunction:

(i) Enjoining any and all activity in violation of California Fish and Game Code Section 5937 until Valley Water implements an appropriate flow regime;

(ii) Enjoining any and all activity in violation of California Fish and Game Code Section 5948 until Respondent Valley Water implements an appropriate flow regime;

(iii) Enjoining any and all activity in violation of the common law and California Constitution until Respondent Valley Water implements an appropriate flow regime; and

(iv) Enjoining any and all activity in violation of the California Constitution and Water Code section 100 until Respondent Valley Water implements an appropriate flow regime.

4. An interim peremptory writ of mandate or injunctive relief:

(i) Until Valley Water has identified and adopted a flow regime that complies with this order, Valley Water use the flow regime described as "FAHCE+" in Valley Water's DEIR, throughout the watershed.

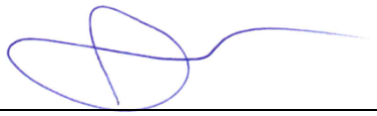
5. For costs of suit, including but not limited to reasonable attorney's fees; and

6. For all such other equitable and legal relief that the Court deems just and proper.

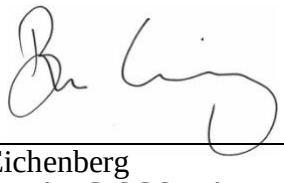
Respectfully submitted,

Dated: September 26, 2022

SAN FRANCISCO BAYKEEPER



Daniel Cooper
SYCAMORE LAW, INC.
Attorney for Petitioner



Ben Eichenberg
SAN FRANCISCO BAYKEEPER
Attorney for Petitioner

VERIFICATION

I, Sejal Choksi-Chugh, declare that:

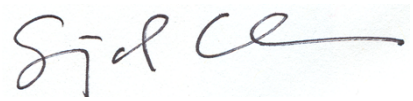
1. I am the Executive Director of San Francisco Baykeeper.

2. Baykeeper's office is located at 1736 Franklin Street, #800, Oakland, California, 94612.

3. I am also an attorney duly admitted and licensed to practice before all courts of this State.

4. I have read the foregoing Verified Supplemental Petition for Writ of Mandate. The factual allegations therein are true of my own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 26th day of September in Lafayette, California.



Sejal Choksi-Chugh
Executive Director,
San Francisco Baykeeper