

DISPUTE RESOLUTION MEMORANDUM REGARDING CONSTRUCTION, OPERATION, AND MAINTENANCE OF THE GUADALUPE RIVER FLOOD CONTROL PROJECT

In order to resolve threatened litigation and other concerns, the Signatories support the construction, operation, and maintenance of the Guadalupe River Flood Control Project on the following conditions.

I. Recitals

1. This Dispute Resolution Memorandum concerns the Guadalupe River Flood Control Project (Project) authorized by P.L. 99-662 (1986) and P.L. 101-101 (1989), as further described in U.S. Army Corps of Engineers, Guadalupe River, CA, General Design Memorandum (December 1991), Environmental Impact Statement (July 1985), and Environmental Assessment (September 1990 and January 1991) (hereafter, Project Documents).

2. The Santa Clara Valley Water District (SCVWD), U. S. Army Corps of Engineers (Corps), City of San Jose, and City of San Jose Redevelopment Agency have substantially completed Contracts 1 and 2, between Interstate 880 and Coleman Avenue in downtown San Jose. Construction of Contracts 3A, 3B and 3C has not yet been accomplished. These agencies elected to enter into an alternative dispute resolution (ADR) process with the Guadalupe-Coyote Resource Conservation District (GCRCD), Trout Unlimited (TU), and Pacific Coast Federation of Fishermen's Associations (PCFFA), to resolve issues raised in a Notice of Intent to Sue issued by GCRCD, TU, and PCFFA dated May 22, 1996 and amended November 27, 1996, under the citizen suit provision of the Clean Water Act (33 U.S.C. §1365). The Notice of Intent primarily raised concerns about the adequacy of the environmental mitigation plan for the Guadalupe River Flood Control Project between Interstate 880 and Interstate 280. The U.S. Fish & Wildlife Service (USFWS), State Water Resources Control Board (SWRCB), San Francisco Bay Regional Water Quality Control Board (SFBRWQCB), National Marine Fisheries Service (NMFS), and the California Department of Fish and Game (DFG) participated in the ADR process providing substantive input in their capacity either as experts on species and habitats affected by the project or as permitting agencies.

3. Through this Dispute Resolution Memorandum and subject to legal understandings set forth in Section VII, the Signatories intend to avoid litigation that would delay project completion and intend that the project will provide the authorized level of flood protection; will provide other community and environmental benefits consistent with the public interest in the Guadalupe River; will comply with all applicable laws; will be cost-effective; will be fundable through secure sources; will be timely completed; and will allow for the

restoration of the Guadalupe River and its tributaries. The Signatories do not intend for this Dispute Resolution Memorandum to increase, diminish, or otherwise modify the rights, duties, or authority of any public agency.

II. Proposed Project

1. Signatories state that for the purpose of starting further review as described in Section VI, the proposed project will be described as follows:

A. Construction of Contracts 1 and 2 has been accomplished generally in conformity with Project Documents, except that plantings to mitigate adverse impacts on Shaded Riverine Aquatic Habitat (SRA) will be undertaken as described in Sections III and IV below.

B. The design for Contract 3C, between Interstate 280 and Woz Way, will be as stated in Project Documents, except that removal or degradation of existing SRA will be avoided to the maximum extent feasible.

C. The design for Contracts 3A and 3B will avoid adverse impact on anadromous fisheries to the maximum extent feasible. The design will provide for a covered underground bypass facility. This facility will be presented as one of the alternatives analyzed in the planning and environmental documents necessary for completion of Contracts 3A and 3B.

(1) Subject to modification in the course of the further procedures described below, the design for the bypass facility will be two box culverts approximately 17-feet high by 25-feet wide east of the east bank of the river.

(2) The banks and channel between the inlet and outlet structures of this bypass facility will be maintained in a natural state to the maximum extent feasible. Inlet and outlet structures will be located and designed so as to avoid impacts on existing SRA to the maximum extent feasible.

III. Early Implementation

1. The Signatories state that, to the maximum extent feasible, the Corps, in cooperation with SCVWD, will mitigate existing SRA and other riparian impacts caused by Contracts 1 and 2 prior to final approval of the proposed project for Contract 3.

A. The Corps, in cooperation with SCVWD, will expeditiously complete any necessary planning and other work preparatory to actual construction of the mitigation measures.

B. To the maximum extent feasible, the Corps, in cooperation with SCVWD, will construct appropriate mitigation measures, including SRA plantings, in 1998; and will complete implementation of such mitigation measures in 1999.

2. Construction associated with Contract 3C, in whole or part, may proceed in advance of the proposed project for Contracts 3A and 3B, provided:

A. A mitigation plan substantially in conformity with Section IV is developed by April 15, 1999.

B. The Corps, in cooperation with SCVWD, has constructed mitigation measures as provided in paragraph III.1.

C. Impacts of construction of Contract 3C will be mitigated before or concurrent with such construction as allowed in Sec. 906 (a) (1) of Water Resources Development Act of 1986, P.L. 99-662 (1986).

D. The Corps, in cooperation with SCVWD, has obtained final approval for Contract 3C.

3. SCVWD may undertake mitigation in addition to that provided above, prior to final approval of the proposed project for Contract 3. Upon such final approval, the Signatories will review completed mitigation measures to compare their actual benefits with the mitigation requirements under the final mitigation plan.

4. In consultation with the other Signatories, SCVWD will develop and implement an accounting system for mitigation measures undertaken by SCVWD in this and future projects and activities which affect the ecological quality of the Guadalupe River and its tributaries. The system will track the benefits of such mitigation measures and will provide that benefits in excess of the requirements for this project can be credited by appropriate agencies for use by SCVWD on other projects and activities.

IV. Environmental Mitigation Plan

1. The Corps, in cooperation with SCVWD, will develop a plan for mitigation of adverse impacts of the proposed project on riparian vegetation, anadromous fisheries, and other beneficial uses in the Guadalupe River.

2. The plan will be designed and implemented to fully mitigate project-related impacts to beneficial uses as required for water quality certification and will comply with all other applicable laws requiring mitigation of environmental impacts. In satisfaction of this purpose, the plan will:

A. include any hydraulic or geomorphic analysis necessary to assure the viability of the plan. The Signatories anticipate that the ongoing study by Northwest Hydraulics, Inc., under contract with the Corps, will be adequate for this purpose and may be modified as appropriate in the course of the further review described in Section VI.

B. provide for replacement of existing riparian vegetation, including SRA, removed for project construction or operation. The replacement vegetation will have at least equal value for protection of the anadromous fisheries. Functional equivalency of value will be confirmed by application of the Habitat Evaluation Procedure (HEP).

C. provide for other measures necessary to assure that the project will not cause elevated water temperature or other project impacts in the project reach to harm anadromous fisheries and other beneficial uses, during project construction and over the entire project life including the transition period before replacement vegetation matures. The plan may include flow augmentation to reduce water temperature in the project area.

D. provide for adaptive management of the project by SCVWD to help ensure success of the mitigation measures and to provide for corrective action in the event of mitigation failure. The Signatories intend that the completed project, in combination with other efforts beyond the project scope, will allow for restoration of self-sustaining fisheries in good condition throughout the Guadalupe River and its tributaries.

E. account for mitigation measures undertaken for this project. The Signatories agree to compare actual benefits of completed early implementation measures against mitigation requirements of the final mitigation plan, and to credit any excess as provided in paragraph III.4.

V. Adaptive Management

1. SCVWD will operate, maintain, and otherwise manage the project in an adaptive manner. SCVWD, in consultation with the other Signatories, will develop an adaptive management program that will be included in the project, subject to the final approval as described in Section VI. The program will include the following elements:

A. measurable objectives for each project benefit. As to anadromous fisheries, the Signatories acknowledge that the measurable objectives will relate to those habitat qualities impacted by this project and will not hold the project responsible for other environmental conditions which may limit the population or distribution of these fisheries.

- B. operation and maintenance procedures intended to contribute to the achievement of such objectives.
- C. systematic monitoring of actual conditions, and evaluation of whether the measurable objectives are being achieved. At least annually, SCVWD will report the monitoring results in an appropriate form to the other Signatories.
- D. modification of project design, mitigation, operation or maintenance procedures, as appropriate, to remedy any shortfall in a project benefit.
- E. appropriate mechanisms for the Signatories to participate in the implementation of the adaptive management program. Following project construction, the Signatories will meet at least annually for the purpose of exchanging information on the adaptive management program.
- F. appropriate assurances for implementation of the program.

VI. Further Procedures

1. The Signatories will encourage their respective organizations to implement this Dispute Resolution Memorandum. By September 15, 1998, Signatories will confirm in appropriate written form their organizations' intent to implement this Dispute Resolution Memorandum. For the purpose of this Memorandum, the organizations who support such implementation will be Signatories following ratification.

2. Provided that all of the organizations represented by Signatories express their intent to implement this Dispute Resolution Memorandum, the Corps and SCVWD will prepare the planning and environmental documents necessary for completion of the proposed project, including the mitigation plan and adaptive management program; and will seek final approval of the preferred alternative chosen in the National Environmental Policy Act and California Environmental Quality Act process.

A. In such further review, the alternative described in Section II will be the proposed project.

B. The environmental documents will include an analysis of cumulative impacts of this and related projects, on the basis of information developed after publication of Project Documents.

C. For the purpose of this Dispute Resolution Memorandum, final approval means the receipt by the Corps and SCVWD of those permits, certifications, or other approvals or modifications of existing approvals, that they are required to obtain under applicable laws prior to construction.

3. To the maximum extent feasible, the Corps, in cooperation with SCVWD, will develop the mitigation plan described in Section IV by April 15, 1999. After that date, they may modify the mitigation plan as necessary to obtain final approval.

4. To the maximum extent allowed by law, the Corps and SCVWD will encourage the other Signatories to participate in the preparation of the planning and environmental documents described in paragraph VI.2. The Corps and SCVWD acknowledge that:

A. This Dispute Resolution Memorandum states general principles which will be expressed in more specific terms in the mitigation plan, adaptive management program, and other documents described in paragraph VI.2.

B. The participation of the other Signatories in the preparation of these documents will help further the purpose of this Dispute Resolution Memorandum.

5. To the maximum extent allowed by law, the Signatories will:

A. support applications necessary for project construction, operation, and maintenance in substantial conformity with this Dispute Resolution Memorandum;

B. support designation of cold water fisheries as a beneficial use of the Guadalupe River and any other conforming amendments to the SFBRWQCB Basin Plan; and

C. publicly express their support for final approval and necessary funding.

6. Provided the Corps and SCVWD obtain final approval of the construction, operation, and maintenance in substantial conformity with this Dispute Resolution Memorandum:

A. The Signatories will support such construction, operation, and maintenance.

B. GCRCD, TU, and PCFFA will withdraw their notice of Clean Water Act citizens' suit, dated May 22, 1996 and amended November 27, 1996; and will not support or bring other litigation to challenge project completion, operation, and maintenance in substantial conformity with this Dispute Resolution Memorandum.

7. The Signatories will make best efforts to resolve any concerns that arise regarding implementation of this Dispute Resolution Memorandum.
 - A. Not later than September 15, 1998, the Signatories will meet and confer to obtain the advice of individual signatories regarding the status of the Project.
 - B. From September 16, 1998 through final completion of construction, the Signatories will meet and confer as needed in order to obtain individual advice regarding the Project and otherwise to assure continuing cooperation resulting in final resolution of the threatened litigation and other disputes described in Section I, paragraph 2. In preparation for such meeting(s), the Corps, SCVWD, and other Signatories as appropriate will prepare written status reports.
 - C. Following project construction, the Signatories will meet in accordance with the terms of the adaptive management program.
8. This Dispute Resolution Memorandum may be modified by mutual written consent.
9. The Signatories recognize that time is of the essence in implementation of this Dispute Resolution Memorandum.

VII. Rights, Duties and Authorities

1. This Dispute Resolution Memorandum establishes procedures intended to result in final resolution of the threatened litigation and other disputes described in Section I, paragraph 2. It does not increase, diminish, or otherwise modify the rights, duties, or authority of any Signatory. All of the understandings of this Dispute Resolution Memorandum are subject to existing law, policy, authority, and availability of funds.
2. This Dispute Resolution Memorandum does not modify the allocation of responsibilities among SCVWD, Corps, City of San Jose, and City of San Jose Redevelopment Agency for project construction, operation, or maintenance, including funding thereof.

**SIGNATURE FOR CONCURRENCE WITH
AUGUST 7, 1998 AMENDMENTS**

Michael Aceituno
Chief, Division of Habitat Conservation
U.S. Fish and Wildlife Service,
Sacramento Office

Oscar Balaguer
Environmental Specialist
Division of Water Quality
State Water Resources Control Board

James R. Bybee
Habitat Conservation Manager,
Northern California
National Marine Fisheries Service

Darrell Dearborn
Senior Deputy City Manager
City of San Jose

Mike Nolan
Chief of Civil Branch of PPMD
U.S. Army Corps of Engineers,
Sacramento District

Ralph Qualls
Director
City of San Jose
Department of Public Works

Richard Roos-Collins
Natural Heritage Institute
Attorney for Guadalupe-Coyote Resource
Conservation District, Pacific Coast
Federation of Fishermen's Associations,
and Trout Unlimited

Ken Talbot
Assistant Director, Project Management
City of San Jose Redevelopment Agency

Kay Whitlock
Assistant General Manager
Santa Clara Valley Water District

Richard Whitsel
Chief, Wetlands Office
San Francisco Bay Regional Water
Quality Control Board

Carl Wilcox
Environmental Services Supervisor, Region III
California Department of Fish and Game

Stan Williams
General Manager
Santa Clara Valley Water District

Mark Wolfe
Natural Heritage Institute
Attorney for Guadalupe-Coyote
Resource Conservation District,
Pacific Coast Federation of Fishermen's
Associations, and Trout Unlimited

James Ferguson
Project Manager
Santa Clara Valley Water District