

**BEFORE
THE CITY OF SAN JOSÉ
SANTA CLARA VALLEY WATER DISTRICT
CALIFORNIA DEPARTMENT OF FISH AND GAME**

_____)
In the Matter of Homeless Encampments for:)
Guadalupe and Coyote Creeks)
(Santa Clara County))
_____)

**PETITION BY GUADALUPE-COYOTE RESOURCE CONSERVATION DISTRICT TO
REMOVE AND PREVENT HOMELESS ENCAMPMENTS ON THE GUADALUPE
RIVER, COYOTE CREEK, AND TRIBUTARIES THERETO**

Dated: January 11, 2005

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	PETITIONER.....	3
III.	JURISDICTION	5
IV.	FACTS.....	5
	A. Geographic Scope.....	6
	B. Coldwater Fisheries	6
	C. Impacts of Homeless Encampments	7
	(1). Degradation of Creek Lands and Waters	7
	(2). Poaching of Fish	8
	(3). Threats to Public Safety	9
	(4). Current Efforts to Address Homeless Encampments.....	10
V.	ARGUMENT	10
	A. Camping, Trespassing, and Dumping on the Creek Banks are Illegal.	11
	(1). SJMC Prohibits Camping and Dumping on Public Lands. Riverbanks	11
	(2). SCVWD Ordinance 83-2 Prohibits Trespassing and Dumping onto SCVWD Property	12
	(3). California Water Code Prohibits Dumping Waste into Public Waters.....	12
	(4). California Penal Code Prohibits Trespass.	13
	B. Fish and Game and Game Code section 2000 and ESA Section 4(d) Prohibit Catch of Anadromous Fish in these Creeks.....	13
	C. Homeless Encampments Will Conflict with Implementation of the FAHCE Agreement and Water Quality Certifications for Flood Control Projects.	14
	D. The City, SCVWD, and DFG Are Responsible for the Ineffective Enforcement of Laws Prohibiting Homeless Encampments.	15
VI.	RECOMMENDED ACTION	16
VII.	CONCLUSION	17

I.
INTRODUCTION

1. Guadalupe-Coyote Resource Conservation District (GCRC) respectfully requests that the City of San José (City), Santa Clara Valley Water District (SCVWD), and Department of Fish and Game (DFG) adopt and implement a joint program to remove and thereafter prevent homeless encampments on the Guadalupe River, Coyote Creek, and tributaries thereto. The continuous presence of homeless encampments along these creeks results in substantial pollution of the public waters and surrounding lands, death and harassment of spawning anadromous fish and other wildlife, degradation of the aesthetic quality and other interference with public use and enjoyment.

2. The City and SCVWD regard the Guadalupe River as the “heart of San José.” *See* City of San José *et al.*, Guadalupe River Park Master Plan 2002, p. 1. Even though these creeks are located in a highly developed metropolitan area, they provide spawning and rearing habitat for anadromous and other fisheries. Their banks are riparian habitat for many wildlife species, including foxes, possums, osprey, and frogs. The creeks are becoming popular for many forms of recreation, such as seasonal boating and hiking and picnicking at the several public parks that permit access along the banks. Such recreation provides substantial economic benefits, including increased property values. *See, e.g.*, City of San José, “Trails Improve Quality of Life,” *available at* <http://www.sanjoseca.gov/prns/Trails%20Info/Statistical%20Support%20for%20Trails.ppt>.

3. In cooperation with the City, SCVWD has committed to mitigate the adverse impacts of water supply and flood control facilities and otherwise restore the natural resources and the recreational and other public values of the creeks. These commitments, which are

enforceable conditions of the regulatory approvals for these facilities, will require more than \$200 million in ratepayer and other public funds over the next 30 years.

4. We bring this Petition because, despite good faith efforts, the City, SCVWD, and DFG have not effectively addressed creekside homeless encampments, and because the continuing presence of the encampments will complicate and may frustrate the effectiveness of these restoration efforts. We bring the Petition on four fundamental legal grounds. First, the San José Municipal Code (SJMC), California Penal Code (Penal Code), SCVWD Ordinance 83-2 (Ordinance 83-2) and Porter-Cologne Water Quality Control Act (Water Code sections 13000 *et seq.*) contain several prohibitions against overnight camping, trespassing, and littering associated with the homeless encampments along these creeks. Second, the federal Endangered Species Act (ESA) section 4(d), 16 U.S.C. § 1533(d), and the California Fish and Game Code section 2000, respectively, prohibit the taking of threatened steelhead trout and the poaching of salmon which routinely occur in these encampments. Third, the encampments will interfere with implementation of the Fish and Aquatic Habitat Collaborative Effort (FAHCE) Settlement Agreement, which will likely be approved as a condition of SCVWD's water rights in 2006, and further will interfere with the implementation of the water quality certifications for the lower, downtown, and upper Guadalupe River Flood Control Projects. Fourth, while the homeless individuals directly cause these adverse and illegal impacts on these public trust resources, the City, SCVWD, and DFG have authority and obligation to better enforce the laws which prohibit these impacts; and therefore, their collective failure is a contributing cause.

5. GCRCDD recognizes that homelessness is a social and economic problem that is national in scope and has proven intractable at a local level. We recognize that the City has made substantial efforts to solve the problem within its boundaries and indeed, conducts routine

sweeps of the Guadalupe River and Coyote Creek to remove the encampments. Unfortunately, those sweeps result in a temporary shuffling of locations used for the encampments and have not proven effective in actually reducing the resident population, which may number in the several hundreds. We also recognize that effective and permanent removal of encampments along the creeks will likely result in relocation of the homeless residents to other locations.

6. However difficult, the time is now for an effective solution. As reported in the attached declarations, the homeless population along these creeks appears to have increased substantially in the past decade. We request that the City, SCVWD, and DFG cooperate to assure that homeless do not continue to reside, both unsafely and illegally, on these public lands, and that their encampments do not interfere with the sustainability and public use and enjoyment of these creeks, which are unique public trust assets of Silicon Valley. We are committed to work with these agencies to assist in relocation of these homeless residents to safe and legal locations.

7. The Petition is not intended to result in litigation. We do not demand or even expect a formal answer in pleading form. Instead, GCRCDC requests that the City, SCVWD, and DFG collaborate with us and other interested stakeholders to develop and implement an effective program to remove and thereafter prevent homeless encampments along these creeks.

II.
PETITIONER

8. GCRCDC is a public agency constituted under Public Resources Code sections 9151 *et seq.* Our office is 888 North First Street, Room 204, San José, California, 95112. We undertake investigations, make recommendations, and take other actions to conserve land and water resources within and adjacent to our boundaries, which include reaches of the Guadalupe River, Coyote Creek, and tributaries thereto.

9. In July 1996, GCRCDD brought a Complaint before the State Water Resources Control Board (SWRCB), alleging SCVWD uses its water rights in an unlawful manner that harms water quality and wildlife of the Guadalupe River, Coyote Creek, Stevens Creek, and tributaries thereto. We have initialed the FAHCE Agreement (2003) that is pending before the SWRCB for approval as an amendment to SCVWD's water rights. See www.n-h-i.org/Guadalupe_River.html.

10. In May 1996, GCRCDD filed a notice of citizens' suit under Clean Water Act section 505, 33 U.S.C. § 1365, alleging that the construction of the downtown Guadalupe Flood Control Project violated the conditions of the 1992 water quality certification issued by the San Francisco Regional Water Quality Control Board (RWQCB). We signed a 1998 settlement that became the basis for the 2001 issuance of a new water quality certification for the downtown project. See RWQCB, "Waste Discharge Requirements and Water Quality Certification for Guadalupe River Project," Order 01-036 (March 2001), *available at* <http://www.waterboards.ca.gov/sanfranciscobay/adoporders.htm>. Through the Guadalupe Watershed Integration Working Group (GWIWG), we subsequently negotiated environmental measures that are now incorporated in the water quality certifications for the lower and upper Guadalupe Flood Control Projects. See RWQCB, "Waste Discharge Requirements and Water Quality Certification for Lower Guadalupe River Flood Protection Project," Order R2-2002-0089 (Sept. 2002); "Waste Discharge Requirements and Water Quality Certification for Upper Guadalupe River Flood Protection Project," Order R2-2003-0115 (Dec. 2003).

11. GCRCDD will participate as a member in the Guadalupe Adaptive Management Team that will assist in the implementation of the environmental measures in the FAHCE Settlement as well as the certifications for the flood control projects.

III. **JURISDICTION**

12. The City enforces the San Jose Municipal Code (SJMC) and the California Penal Code with respect to conduct in its parks, creeks, and other public lands. SJMC § 13.44.030; SJMC §§ 1.08.040, 2.04.2201; Penal Code § 602 *et seq.* The City – the City Manager, Department of Recreation, Parks and Services, Police Department, and City Council, among others – enforces regulations that govern camping and dumping refuse into these creeks. The City, through its Department of Housing, also provides facilities and services to homeless residents.

13. The SCVWD enforces regulations to protect water supply and quality, and to protect streams, riparian corridors, and other natural resources, in Santa Clara County. *See* SCVWD Act, § 1.0 *et seq.*

14. The DFG administers the State’s public trust responsibility for protection of fish and wildlife and their habitat. *See* Fish and Game Code §§ 711.7(a), 711.2. DFG administers the prohibition against any taking of fish and wildlife except as permitted by regulation. *See id.*, § 2000. It also administers the prohibition against modification of streambeds or banks, and against artificial barriers in streams. *See id.*, §§ 1603, 5901.

IV. **FACTS**

15. Guadalupe and Coyote Creeks have many beneficial public uses recognized by the Water Code and other state and local laws. These include: water supply, creation, and habitat for steelhead trout, Chinook salmon, southwestern pond turtle, red-legged frog, pacific lamprey, burrowing owl, and many other fish and wildlife species. Unfortunately, during the

past 10 years homeless encampments have become increasingly common along the creeks.¹ *See* Declaration of Lawrence Johmann (Ex. 1), pp. 3-4; Declaration of Roger Castillo (Ex. 2), p. 3; Declaration of Mondy Lariz (Ex. 3), p. 2. The homeless living in these encampments directly pollute the creeks, unlawfully poach salmon and steelhead trout, weaken the riverbank by digging out the walls for shelter, and create a threat to public safety.

A. Geographic Scope

16. The creeks are located within the City's boundaries, and flow through public and privately owned lands. Riparian lands where the encampments are located are largely owned by the City and SCVWD.

B. Coldwater Fisheries

17. According to DFG, the creeks historically supported self-sustaining steelhead and salmon fisheries. *See* DFG, An Historical Review of the Fish and Wildlife Resources of the San Francisco Bay Area (June 1962), pp. 57, 65, 127. Since the early 1990s, GCRCDD (through its Directors) regularly has inspected the creeks to monitor the conditions of these fisheries. The spawning population in each creek has steadily diminished to the current level of several hundred or fewer in each creek. *See* Johmann Declaration, Ex.1, p. 6. This is the result of many contributing causes, including operation of the water supply facilities, flood control measures, urban development of the floodplain, as well as poaching. *See, e.g.*, FAHCE Technical Advisory Committee, Summary and Conclusion FAHCE TAC Evaluation of the Effects of Santa Clara Valley Water District Facilities and Operations on Factors Limiting Habitat Availability and Quality for Steelhead and Chinook Salmon (March 2000).

¹ This is consistent with the general trend for homelessness in San José. In 1995, approximately 10,000

C. Impacts of Homeless Encampments

(1). Degradation of Creek Lands and Waters

18. Up to several hundred homeless individuals currently live in encampments along the banks of the creeks within the City's jurisdiction. *See* Johmann Declaration, Ex. 1, pp. 2-3; Castillo Declaration, Ex. 2, pp. 2-3. The number, size and sophistication of the encampments continue to grow because the banks, including bridges, provide sheltered living areas for the homeless residents. *See* Ex. 1, p. 4; Ex. 2, p. 2; Ex. 3, p. 3.

19. The homeless residents build encampments out of discarded sheet metal, cardboard boxes, stolen construction site materials, tents, and other materials. *See* Johmann Declaration, Ex. 1, p. 4. They also use bridges and dig into the riverbanks to create shelter for their camps.² *See id.* Some even create dens out of large *arundo donax* plants. *See* Lariz Declaration, Ex. 3, p. 3. Some encampments serve as quasi-permanent shelters occupied by up to a dozen people. One even had an electricity supply.³ *See* Ex. 1, p. 5.

20. The homeless residents discard shopping carts, furniture, hypodermic needles, car parts, clothing, personal hygiene products, and other wastes directly into the creeks and onto the banks around the encampments. *See* Johmann Declaration, Ex. 1, Figures 1, 4, 6, 8-12; Castillo Declaration, Ex. 2, p. 2; Lariz Declaration, Ex. 3, pp. 3-4. They also use the creeks as their toilets and showers.⁴ *See* Ex. 1, Figures 3-4, 8, 10; Ex. 3, p. 3. The trash and toxic wastes

people in San José were homeless. *See* City of San José, Consolidated Plan 2000-2005, p. 33. By 1999 the number increased to 12,600. *See id.* "It is evident that homelessness is not decreasing, and the needs have grown." *Id.*

² By digging into the riverbanks, the homeless destabilize the walls and increase the rate of erosion. This affects the overall stability and natural water flow in the creeks' corridors.

³ The San José Mercury News documented a river encampment between Coleman Avenue and Taylor Street containing working refrigerators and televisions in the spring of 1995. *See* Johmann Declaration, Ex. 1, p. 5.

⁴ Mr. Johmann has observed and photographed homeless defecating in the streams on two separate occasions

pollute the creeks.

21. The homeless encampments interfere with volunteer and other efforts to clean-up the creeks. SCVWD advises volunteers "...to stay clear of homeless encampments." SCVWD, "Safety tips for Your Clean-up Event," *available at* http://www.scvwd.dst.ca.us/Water/Watersheds_streams_and_floods/Taking_care_of_streams/A_dopt_A_Creek/Information_for_current_participants/Safety_tips.shtm. At the June 12, 2002 meeting of the Santa Clara Valley Urban Run-off and Pollution Prevention Program (SCVURPP), Mondy Lariz, subcommittee member, asked the City police how they deal with camp trash. *See* Lariz Declaration, Ex. 3, p. 4. A representative from the City reported that police often pushed such trash into the creeks to be washed away. *See id.*

(2). Poaching of Fish

22. The homeless residents catch, eat, and even sell fish from the creeks. *See* Johmann Declaration, Ex. 1, p.6; Castillo Declaration, Ex. 2, pp. 2-3. They use many methods to catch fish, such as treble hooks, nets, spears, clubs, tennis court nets stolen from the parks, and even shopping carts as traps.⁵ *See* Ex. 1, p. 6, Figures 13-16; Ex. 2, p. 2; Lariz Declaration, Ex. 3, p. 3. The homeless residents apparently share information on these methods.

23. As discussed below in Argument Section V.B, all such fishing is poaching. Chinook salmon are vulnerable to poaching because they spawn in the mainstream, when flows

between 1996 and 1998. *See* Johmann Declaration, Ex. 1, p. 5, Figures 3-4.

⁵ Both Mr. Johmann and Mr. Castillo have observed and photographed the homeless' use of shopping carts to trap fish. *See* Johmann Declaration, Ex. 1, Figures 13-16. In November 1998, they observed a shopping cart fish trap constructed completely across the Guadalupe River to capture Chinook salmon. *See id.* A dead Chinook salmon was found in one of the carts. *See id.* Less than two hours after the shopping cart was disassembled and removed, the trap had been partially reconstructed. *See id.*

are low, spawn in shallow areas of the river, and are larger than steelhead. According to DFG warden Combes, “Poaching is going to be the demise of this particular strain of fish if we can’t control it ... It wouldn’t take a whole lot of fishing to wipe out this particular group of fish in short order.” Frank Sweeney, “Stolen grocery carts make easy traps for spawning fish,” SAN JOSE MERCURY NEWS (Nov. 15, 1995), p. 1A; *see also* Castillo Declaration, Ex. 2, p. 2.

(3). Threats to Public Safety

24. The homeless encampments threaten public safety.⁶ *See* Johmann Declaration, Ex. 1, pp. 2-3. The homeless residents may be protective of their encampments and aggressive or hostile towards outsiders. *See id.*; Castillo Declaration, Ex. 2 pp. 2-3. Some homeless residents are sometimes under the influence of alcohol and/or drugs and may be fugitives.⁷ *See* Ex. 1, p. 7. Other people who attempt to use and enjoy the riparian lands adjacent to encampments are at some risk of mugging.⁸ *See id.*, pp. 4, 7-8; Ex. 2, pp. 2-3.

25. The homeless residents of creek encampments are at risk during floods. On several occasions, the City Fire Department has rescued homeless residents trapped on the banks of the Guadalupe River by overflowing floodwaters.⁹ *See* Johmann Declaration, Ex. 1, p. 6.

⁶ Director Larry Johmann cannot recall anytime that he has visited the Guadalupe River in the Downtown area and not encountered a homeless person along the riverbank. *See* Johmann Declaration, Ex. 1, p. 2.

⁷ “Many of the homeless with mental illness and substance abuse problems live along the City’s waterways...” City of San José, Homeless Strategy (August 2003), at p. 5.

⁸ In February of 1995, Mr. Johmann observed a group of vagrants mugging someone along the riverbank. *See* Johmann Declaration, Ex. 1, p. 4. In the fall of 1996, he had numerous unpleasant and potentially dangerous encounters with homeless individuals, and he filed complaints with City Police Department. *See id.*

⁹ Between November and December 2002, the City Fire Department had to rescue homeless people trapped along the riverbanks at the Old Julian Street Bridge on the Guadalupe River in downtown San José, and downstream of Trimble Avenue. *See* Johmann Declaration, Ex. 1, p. 7. The rivers overflowed with storm water and destroyed the homeless encampments. *See id.*

(4). Current Efforts to Address Homeless Encampments

26. According to the City's 2003 Homeless Strategy, the City Police Department, in cooperation with the SCVWD, regularly conduct clean-ups of homeless encampments along the Guadalupe River and Coyote Creek.¹⁰ *See* Homeless Strategy, at p. 19. Once a month, they select 8 to 13 encampments for such clean-ups. Encampments are either randomly selected from a list of known encampments, or are selected based on recent complaints. *See id.*

27. Because the police provide 72-hours notice, most of the homeless residents leave the encampments that are scheduled for removal before the clean-up crews arrive. *See id.* The police inform any such residents that they do meet that camping on the creeks constitutes trespassing and they must relocate. *See id.* A City homeless advocate accompanies the clean-up crews in order to assist with relocation of the homeless residents and provide referrals to services. *See id.*

28. This program has not been effective to date because the homeless residents return immediately after such clean-ups to rebuild their encampments. Also, this program has only been implemented on the Guadalupe River.

V.
ARGUMENT

29. We bring this Petition on four legal grounds. First, the SJMC, Penal Code and Ordinance 83-2 prohibit overnight camping, trespassing and littering on creek banks which are public lands. The SJMC, Ordinance 83-2 and Water Code prohibit the dumping of any trash or toxic material into the City's waters or streams. Second, the Final 4(d) Rule and California Fish

¹⁰ We focus on clean-up actions on the Guadalupe River and Coyote Creek, consistent with the scope of this Petition, but understand the clean-up program is actually a county-wide effort. Pers. Comm., Al Guervich (Jan. 7, 2005).

and Game Code section 2000 prohibit the catch of steelhead trout or salmon, respectively, in these creeks. Third, homeless encampments along the riverbanks will interfere with implementation of the FAHCE Agreement (which, upon SWRCB’s approval, will be a condition of water rights) as well as the water quality certifications for the Guadalupe Flood Control Projects. Fourth, the named agencies contribute to the continuation of these illegal actions and impacts by not enforcing these laws in a systematic manner.

A. Camping, Trespassing, and Dumping on the Creek Banks are Illegal.

(1). SJMC Prohibits Camping and Dumping on Public Lands. Riverbanks

30. Camping is prohibited in public parks, riverbanks or any City land except where specifically permitted. *See* SJMC §§ 2.04.840,¹¹ 13.44.090. No person may be on City park grounds a half-hour after sunset until 8 a.m. the following day without a special permit. *See* SJMC § 13.44.240.

31. SJMC prohibits depositing or littering any trash on City park grounds, unless put into a receptacle designated to receive the same, and prohibits the discharge or deposit of any substance into waters which materially impairs the usefulness of such water for persons or the habitability of such water for the wildlife in its park areas. *See* SJMC §§ 13.44.190,¹² 13.44.230.

32. Homeless encampments on City lands adjacent to such creeks violate these ordinances.

¹¹ “Camping is prohibited in any areas of public parks, riverbanks in any park or recreational facilities, gardens recreational facilities, and/or any recreational property or open space facility owned, managed, or operated by the City except where specifically permitted and or designated by the Director.” SJMC § 2.04.840.

¹² “No person shall throw, discharge or otherwise deposit into the streams any substance, matter or thing, liquid, solid or gas, which materially impairs the usefulness of such water for persons or the habitability of such

(2). **SCVWD Ordinance 83-2 Prohibits Trespassing and Dumping onto SCVWD Property**

33. SCVWD Ordinance 83-2 makes it unlawful to “trespass in any manner whatsoever ... on any property in which the SCVWD owns a fee simple interest or on which the SCVWD owns an exclusive easement for flood control, drainage or water conservation or distribution purposes, except such areas as have been opened to and developed for public recreational or other use.” Ordinance 83-2 § 6.2(g).

34. Ordinance 83-2 also prohibits pollution of SCVWD water supplies “by any direct or indirect means whatever, including the deposit of polluting matter of any kind upon the banks of a watercourse, lake or reservoir where the same may reach or affect such water supplies, ... without securing a special permit.” Ordinance 83-2 § 6.1 *et seq.*

35. Homeless encampments on SCVWD lands adjacent to such creeks violate this ordinance.

(3). **California Water Code Prohibits Dumping Waste into Public Waters.**

36. The Water Code provides that “all waters of the state shall be protected for use and enjoyment by the people of the state.” Water Code § 13000. The State must “exercise its full power and jurisdiction to protect the quality of waters in the state from degradation, ... [and provide for] the health, safety and welfare of the people of the state.” *Id.*

37. The unpermitted discharge of waste into public waters is prohibited. Water Code § 13376; *see also* Clean Water Act § 311, 33 U.S.C. § 1311.

38. Discharge of waste from the homeless encampments violates the Water Code

water for any animal bird, fish, reptile which drinks, swims in or otherwise uses said water.” SJMC § 13.44.190.

section 13776.

(4). California Penal Code Prohibits Trespass.

39. Any person who willfully enters and occupies, digs, fails or refuses to leave, any real property without prior consent, is trespassing and is guilty of a misdemeanor. *See* Penal Code § 602(a) *et seq.*

40. Homeless encampments on public lands owned by the City or SCVWD constitute trespass.

B. Fish and Game and Game Code section 2000 and ESA Section 4(d) Prohibit Catch of Anadromous Fish in these Creeks.

41. State law prohibits the taking of any fish and wildlife except as permitted by regulation. Fish and Game Code § 2000. Regulation prohibits the catch of any salmon or trout (including steelhead) in these creeks at any time. 14 C.C.R. § 7.50(b)(72.5).

42. State law also prohibits unlicensed fishing methods not specifically approved by regulation. *See* 14 C.C.R. § 2.00.

43. In August 1997, the U.S. Department of Commerce's National Marine Fisheries Service (NMFS) listed the Central California Coast Evolutionary Significant Unit (ESU) of steelhead trout as threatened under the ESA. *See* 62 Fed. Reg. 43,937 (Aug. 18, 1997).¹³ This ESU includes all naturally spawning populations of steelhead from the Russian River to Aptos Creek, and the drainages of San Francisco and San Pablo Bays eastward to the Napa River (inclusive), excluding the Sacramento-San Joaquin River Basin. *See* 61 Fed. Reg. 41,541 (Aug. 9, 1996). The listing applies to resident and steelhead trout found in the creeks.

¹³ On June 14, 2004, NMFS issued Proposed Listing Determinations for 27 ESUs of West Coast Salmonids. *See* 69 Fed. Reg. 33,102 (June 14, 2004). The current proposal, which is still undergoing public review, does not change the threatened status of Central California Coast steelhead. *See id.* at 33,162.

44. Under ESA section 4(d), NMFS has adopted a rule prohibiting take¹⁴ of 14 groups of salmon and steelhead listed as threatened under the ESA. *See* NMFS, “A Citizen’s Guide to the 4(d) Rule for Threatened Salmon and Steelhead on the West Coast” (June 20, 2000), available at <http://www.nwr.noaa.gov/1salmon/salmesa/final4d.htm>, at p. 1. The rule prohibits anyone from taking a listed salmon or steelhead, except in cases where the take is associated with an approved program. *See id.*; *see also* 50 C.F.R. § 223.203(a) (“the prohibitions of section 9(a)(1) of the ESA (16 U.S.C. 1538(a)(1)) relating to endangered species apply to the threatened species of anadromous fish listed in § 223.102(a)(1) through (a)(10), and (a)(12) through (a)(19) ...”). Thus, NMFS has prohibited any take of steelhead trout in these creeks.

45. Catch of salmon or steelhead by residents of these homeless encampments violates Fish and Game Code section 2000 and ESA section 4(d).

C. Homeless Encampments Will Conflict with Implementation of the FAHCE Agreement and Water Quality Certifications for Flood Control Projects.

46. The FAHCE Settlement commits SCVWD to implement a comprehensive program for restoration of the coldwater fisheries of these creeks to good condition, once the SWRCB has approved the Settlement as a condition of its water rights. The Settlement provides that, in addition to releasing flows from its storage facilities, SCVWD will undertake non-flow measures to mitigate the adverse impacts of its water supply system on these fisheries. It commits a total of \$146 million (2003) to this restoration program. *See* FAHCE Settlement, § 6.2.2, available at www.n-h-i.org/Guadalupe_River.html. The City and DFG have also initialed the Settlement and commit to support its implementation.

¹⁴ The term, “take,” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. *See* 16 U.S.C. § 1532(19).

47. The water quality certifications for the Guadalupe Flood Control Projects also commit SCVWD to undertake non-flow measures to restore and maintain the coldwater fisheries in good condition. *See* RWQCB, “Waste Discharge Requirements and Water Quality Certification for Lower Guadalupe River Flood Protection Project,” Order R2-2002-0089 (Sept. 2002); “Waste Discharge Requirements and Water Quality Certification for Upper Guadalupe River Flood Protection Project,” Order R2-2003-0115 (Dec. 2003).

48. The FAHCE Settlement and these certifications do not specifically address the homeless encampments as a contributing cause to the current degradation of these fisheries or their habitats. Given the very small populations of these fisheries, there is a significant risk that the poaching and other adverse impacts associated with the homeless encampments will interfere with the effectiveness of the flow release schedules and non-flow measures designed to restore these fisheries to good condition.

D. The City, SCVWD, and DFG Are Responsible for the Ineffective Enforcement of Laws Prohibiting Homeless Encampments.

49. GCRCDD acknowledges that the homeless residents violate the laws that prohibit their creekside encampments and associated impacts on environmental quality. We also acknowledge that any public agency has substantial discretion how to enforce a given law. Finally, we acknowledge that these local and State agencies face budgetary constraints that may be unprecedented in severity. As stated above, this Petition does not allege that the named agencies are legally liable for the violations of laws associated with the homeless encampments. However, we do believe that their ineffective or unsystematic enforcement contributes to the continuing presence of the homeless encampments.

50. These creeks are public trust resources protected by State law as well as local

ordinance. The State, including its subdivisions, has an affirmative duty to assure that the trust resources are maintained in good condition for trust uses, which are navigation, commerce, and fishing, whenever feasible. National Audubon Society v. Superior Court of Alpine County, 33 Cal.3d 419, 446 (1983). The current program to address the homeless encampments does not live up to that duty.

51. This problem is not unsolvable. In the early 1990s, homeless encampments were a similar threat to the restoration of San Francisquito Creek, located on the San Francisco Peninsula. *See* Bill Workman, “Creek’s Keeper is Man With Mission San Francisquito is His Personal Crusade,” SAN FRANCISCO CHRONICLE (Dec. 15, 2000); Lariz Declaration, Ex. 3, p. 4. Palo Alto and Menlo Park, with the help of the Urban Ministry (a church organization that helps the poor), collaborated to relocate homeless residents to shelters. *See id.*

VI. RECOMMENDED ACTION

52. We respectfully request the following response to this Petition.

53. Each named agency will: (A) describe its current program to address homeless encampments from the creeks, including budget, staffing, procedures for coordination with other departments or agencies, availability of relocation assistance, procedures for criminal or civil prosecution, and program results; and (B) cooperate in a systematic survey of all homeless encampments on public lands (whether City, SCVWD, or otherwise) adjacent to the creeks.

54. By March 2005, the agencies will invite interested stakeholders including the FAHCE signatories as well as social service organizations, to establish a collaborative forum to evaluate the causes and potential remedies for the homeless encampments adjacent to these creeks.

55. By December 2006, each agency will adopt a written plan to remove and prevent homeless encampments adjacent to creeks. The plan will include measurable objectives which will be used to track the effectiveness of implementation.

VII.
CONCLUSION

56. GCRC D respectfully requests that the City, SCVWD and DFG establish an effective, collaborative program to address the homeless encampments located along the Guadalupe River, Coyote Creek, and tributaries thereto, as necessary to allow for public use and enjoyment and contribute to the restoration of the creeks to good condition.

Dated: January 11, 2005

Respectfully submitted,

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