

September 16, 2016

**BY HAND DELIVERY**

Matt McCarthy  
Division of Water Rights  
State Water Resources Control Board  
1001 "I" Street, 14th Floor  
Sacramento, California 95814

Re: Wastewater Change Petition -- San Bernardino Valley Municipal Water District/East Valley Water District (Sterling Natural Resource Center)

Dear Matt:

Per our discussions of the past week, enclosed is a Wastewater Change Petition (Petition) for the Sterling Natural Resource Center project. We understand that the State Water Resources Control Board (State Water Board) is still considering whether or not Water Code section 1211 applies to this project; we have included in the Petition the reasons that we believe that section 1211 does not apply. If the State Water Board determines that section 1211 does not apply, we are prepared to withdraw the Petition so as to speed processing of our request for SRF funding.

Please note that, acting in accordance with the request of the State Water Board, we have enclosed in the Petition a confidential survey of cultural resources that may be affected by the proposed project. Under California law, such a survey is exempt from disclosure under the Public Records Act. Further, California law forbids San Bernardino Valley Municipal Water District (Valley District) and East Valley Water District (East Valley) from disclosing this report or its contents to the public. Accordingly, Valley District and East Valley are providing the cultural resources survey to the State Water Board with the understanding that the survey will only be used by the State Water Board as part of its processing of the Petition and with the understanding that the State Water Board will keep that survey confidential.


STATE WATER RESOURCES CONTROL BOARD  
DIVISION OF WATER RIGHTS  
SACRAMENTO  
2016 SEP 16 PM 2:46

REC'D 9-16-2016  
CHECK # 273732 - \$850.00  
CHECK # 273731 - \$1,000.00

GC

Please feel free to contact Jane Usher or me if you have any questions regarding the Petition.

Very truly yours,



David R.E. Aladjem

Enclosure: Wastewater Change Petition – Sterling Natural Resource Center project

cc: Doug Headrick, San Bernardino Valley Municipal Water District  
John Mura, East Valley Water District  
Jane E. Usher, Esq., Musick Peeler & Garrett LLP

# **STERLING NATURAL RESOURCE CENTER**

## **Analysis Under Water Code Section 1211**

September 13, 2016

The San Bernardino Valley Municipal Water District (Valley District) and East Valley Water District (East Valley) submit this memorandum to assist the Division of Water Rights in its consideration of their wastewater change petition (Petition) filed pursuant to Section 1211 of the Water Code. The Petition arises out of Valley District's planned construction and operation of the Sterling Natural Resource Center (SNRC or Project), in collaboration with and for the benefit of East Valley, and for which East Valley has applied for State of California clean water funding.

### **I. SNRC Project Background**

The SNRC is a wastewater treatment facility to be built by Valley District in the City of Highland (Attachment 1). The SNRC will have the capacity to treat 10 MGD of wastewater generated within East Valley, which is located entirely within Valley District. The Project will service nearly one-third of the residents of the City of San Bernardino, the City of Highland, and unincorporated areas of the County of San Bernardino, including substantial economically depressed and disadvantaged populations. The SNRC will use bio-membrane tertiary technology to provide stable and reliable wastewater treatment. Its treated wastewater will be retained in the Upper Santa Ana watershed for recharge of the Bunker Hill groundwater basin and preservation of the Santa Ana Sucker and other species through a Habitat Conservation Plan (HCP).

East Valley currently generates 6 million gallons per day (MGD) of raw wastewater, which it delivers to the City of San Bernardino Water Reclamation Plant (WRP) under a service contract (Attachment 2). The service agreement was amended in 1984 to make its terms "permissive;" East Valley may choose whether or not to use the City's wastewater treatment services and must pay the City for such services as East Valley uses.<sup>1</sup> The WRP provides primary and secondary wastewater treatment. The City sends all effluent treated at its WRP to the City's Rapid Infiltration and Extraction facility (RIX) for tertiary treatment. The City discharges from RIX to the Santa Ana River. Until full implementation of the SNRC, East Valley will continue to send its raw wastewater to the WRP for treatment.

After full implementation of the Project, including Santa Ana Regional Water Quality Control Board, U.S. Fish & Wildlife Service, and California Department of Fish and Wildlife final permitting, East Valley will deliver its wastewater to Valley District's newly-constructed SNRC. Once treated at the SNRC, the water will be conveyed primarily to City Creek for beneficial HCP and riparian habitat purposes as well as groundwater recharge; during peak City Creek flows, the water will instead be conveyed to the Redlands Basin for groundwater recharge; the Project also includes a Santa Ana River pipeline that will permit discharge to the RIX outfall

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<sup>1</sup> The voluntary nature of the services agreement between the City of San Bernardino and East Valley was recently confirmed as part of the City's rate-setting process, wherein the City included in its rate structure for wastewater treatment the ability to terminate service upon ninety days' written notice. (Attachment 3).

on an as needed basis. In general, the Project will reduce the amount of raw wastewater that enters the WRP by 6 MGD, and as a result it will decrease the City's discharge from RIX to the Santa Ana River, by 6 MGD.

On March 15, 2016, as lead agency, Valley District certified an Environmental Impact Report (EIR) for the SNRC and adopted a robust suite of Project mitigation measures. The Project's Notice of Determination was filed on March 16, 2016. The key documents confirming these actions are provided as Attachment 4. Karin Cleary-Rose, U.S. Fish & Wildlife Chief, San Bernardino and Riverside counties, attended the Valley District certification hearing to support the SNRC, commenting for the public record that the model SNRC project represents "an improvement for the conditions of the river and the species itself." The supportive comments of both the U.S. Fish & Wildlife Service and the California Department of Fish and Wildlife are provided as Attachment 5 (see especially page 4 of the Minutes of the Valley District certification hearing for the comments of Karin Cleary-Rose).

## **II. SNRC Project Facilities**

The SNRC includes construction of two new lift stations within the EVWD sewer system and associated forcemains to the SNRC; a new wastewater treatment facility in the City of Highland, that will treat the wastewater and produce Title 22 disinfected tertiary recycled water for unrestricted use; and conveyance pipelines to convey the recycled water to its discharge locations. The SNRC facility will have a maximum future capacity of 10 MGD and will include primary treatment, a membrane bio-reactor (MBR), ultraviolet (UV) light disinfection, anaerobic solids processing with off-site solids disposal, and a recycled water pumping station on the Project site.

Recharge of the treated recycled water was evaluated in the SNRC EIR at three potential locations: City Creek, Redlands Basins, and East Twin Creek Spreading Grounds. The geohydrologic evaluations of the three sites confirmed the ability of each of the sites to accept recycled water for groundwater recharge purposes. Because Valley District has the ability to recharge the Basin with imported water and captured storm water at East Twin Creek Spreading Grounds with existing infrastructure, and given the available capacity in City Creek and the Redlands Basins, it has been concluded that using East Twin Creek Spreading Grounds for recharge of recycled water is not a necessary Project component at this time. At this time, the SNRC will discharge recycled water to a combination of the three following locations:

- City Creek – via a new discharge structure within the channel;
- Redlands Basins – via multiple new discharge points/structures within the existing basins currently operated by the City of Redlands; and
- Santa Ana River – via the existing SAR Pipeline for discharge into the inlet to the RIX facility, and ultimately thru the RIX outfall to the SAR.

Project facilities, including both wastewater and treated water conveyance systems, as well as groundwater discharge locations, are shown in Attachment 6.

### III. SNRC Project Benefits

The SNRC, as a new groundwater replenishment project using recycled water, is being implemented for the purpose of furthering efforts to treat recycled water for groundwater replenishment within the Bunker Hill Groundwater Subbasin (Basin) while maximizing benefits to the Santa Ana River and the region. The reliability of water supplies is becoming an increasingly important consideration for the long-term health and economic wellbeing of communities throughout California. With increase in demand of water and more restrictions on water deliveries, it has become even more valuable for communities to consider means of recycling water and including recycled water in the overall water supply portfolio. Implementing this recycled water program will provide a new and reliable local water supply for the region and help offset the need for increased amounts of imported water.

In addition to the wastewater treatment plant, the Project would include modifications to EVWD's wastewater collection facilities in order to convey flows to the new recycled water facility, as well as a treated water conveyance and discharge system. The SNRC will produce disinfected tertiary recycled water (Title 22 quality water) for unrestricted use. The Project will discharge the treated water to City Creek, to existing basins currently operated by the City of Redlands (Redlands Basins), or back to the Santa Ana River as may be needed on an infrequent basis. Key benefits that would result from using recycled water for groundwater recharge are summarized in the table below:

Benefit Category	Benefit Description
Water Supply Reliability	Provides new source of water supply that is reliable, "drought-proof," and locally-controlled
	Diversifies regional water supply portfolio
Resource Management	Provides year-round beneficial use for recycled water
	Promotes highest and greatest beneficial use of recycled water
Integration/Synergies with Other Practices	Augments current groundwater recharge practices employed by the San Bernardino Valley Municipal Water District
Consistency with State Goals and Objectives	Embraces State guidelines and policies relative to recycled water, groundwater management, and diversification of water supplies

### IV. SNRC Project Sponsors

Valley District and EVWD entered into a Framework Agreement in 2015 to advance their integrated recycled water management objectives. Recognizing their mutual goals, the Framework Agreement provides for the construction and operation of the SNRC by Valley District. Valley District is the project sponsor and CEQA lead agency, and will serve as the SNRC owner and operator. EVWD is submitting a Clean Water State Revolving Fund (SRF) application and will finance the Project costs consistent with the Framework Agreement between Valley District and EVWD.

Valley District is responsible for long-range water supply management, including importing supplemental water, and is also responsible, under two judgments from 1969, for managing most of the groundwater basins within its boundaries. Those judgments adjudicate the legal rights of water users that extract groundwater from the groundwater basins within Valley District, as discussed in detail later in this memorandum. Valley District has specific responsibilities for monitoring groundwater supplies in the San Bernardino Basin, which includes the Bunker Hill Groundwater Basin (Attachment 7), and maintaining flows at the Riverside Narrows on the Santa Ana River.

EVWD provides domestic water service to unincorporated areas of San Bernardino County, to the City of Highland and to portions of the City of San Bernardino. EVWD provides treatment and distribution of groundwater, SAR surface water, and imported water, as well as wastewater collection and disposal services.

## **V. SNRC Project Participants**

The Project provides benefit to and is supported by several entities in the region. Valley District is the Project sponsor and SNRC owner and operator. EVWD is the financial sponsor for the Project. The Project will be achieved through collaborative efforts from the following agencies: Valley District, EVWD, City of Redlands, San Bernardino County Flood Control District, DDW, U.S. Fish and Wildlife Service, California Department of Fish & Wildlife, and Santa Ana RWQCB. The following is a brief summary of each Project participant.

### **San Bernardino Valley Municipal Water District**

- Owner and operator of the Project (producer and distributor).
- Regional agency responsible for long-range water supply planning in the San Bernardino Valley.
- Wholesaler of imported State Water Project (SWP) water in its service area.
- Imports SWP water for direct delivery and groundwater recharge.
- Funded construction and manages operation of the East Branch Extension of the State Water Project conveyance system.
- Manages groundwater storage within its service area.
- Provides storm water disposal, recreation, and fire protection services in its service area.
- Is the co-member of the two-seat Watermaster Committee under the *Western* Judgment.

### **East Valley Water District**

- Financial sponsor for the Project.
- Established in 1954 and previously known as the East San Bernardino County Water District.
- Majority shareholder and manager of the North Fork Water Company, through which surface water from the Santa Ana River is diverted.
- Provides treatment and distribution of groundwater, SAR surface water, and imported water.
- Provides wastewater collection and disposal service.

- Contracts for wastewater treatment service through the City of San Bernardino.
- Regional Water Management Group (RWMG) agency under the Upper Santa Ana River Watershed Integrated Regional Water Management (IRWM) Plan.

### **City of Redlands**

- Provides water and wastewater service to an area partially overlying Bunker Hill B groundwater basin.
- Provides treatment and distribution of groundwater, surface water, and imported water.
- Provides wastewater collection, treatment, and disposal services.
- Provides approximately 6,000 AFY of Title 22 recycled water to Mountainview Power Company as cooling water.

### **San Bernardino County Flood Control District**

- Conducts flood control and water conservation activities throughout San Bernardino County.
- Provides flood control protection by intercepting and transferring storm water flows through and away from developed areas.
- Owns and operates extensive facilities including dams, multipurpose (flow-through basins that control flow preventing downstream flooding) and conservation (off-channel basins that receive storm flows) basins, drainage channels, and storm drains.

### **California State Water Resources Control Board, Division of Drinking Water (DDW)**

- Administers California's Drinking Water Program previously administered by CDPH and transferred to DDW on July 1, 2014.
- Responsible for establishing criteria to protect the public health with regard to recycled water use.
- Regulates Water Recycling Criteria contained in the California Code of Regulations, Title 22, Division 4, Chapter 3 (CCR, 2014) including regulations with specific criteria for groundwater recharge projects.
- Holds public hearings on projects and makes recommendations to the RWQCB for inclusion into the water recycling requirements, or project permit.

### **U.S. Fish & Wildlife Service**

- USFWS is responsible for overseeing implementation of the Federal Endangered Species Act and is a trustee agency for fish and wildlife resources under California law.
- USFWS is responsible for protecting species that are listed under the Federal Endangered Species Act by requiring that activities that may affect listed species to obtain permits under the Act.
- An applicant (like Valley District and East Valley for the SNRC) submits a Biological Assessment (BA) to the USFWS that identifies potential impacts to listed species from the proposed action. Valley District completed the BA in June 2016 and the SWRCB requested consultation under section 7 of the Federal Endangered Species Act with

USFWS on August 22, 2016 in order for USFWS to evaluate the potential impacts of SNRC on listed species.

- The USFWS considers the analysis in a BA and then issues a Biological Opinion for a proposed action. The Biological Opinion contains the USFWS' independent judgment about the potential impacts of the proposed action on listed species and contains specific requirements that are needed for the proposed action to proceed without jeopardizing the continued existence of a listed species. A Biological Opinion may also include other measures that USFWS deems to be advisable, but not required, to enhance the listed species. USFWS has indicated that it intends to issue a Biological Opinion for the SNRC by the end of 2016.

### **California Department of Fish & Wildlife**

- CDFW is responsible for overseeing implementation of the California Endangered Species Act, a number of provisions of the California Fish & Game Code (most notably section 1602 permitting), and is identified as a trustee agency for fish and wildlife resources under California law.
- CDFW is responsible for protecting species that are listed under the California Endangered Species Act or other California law (e.g., fully protected species) by requiring that activities that may result in the "take" of listed species obtain a permit under section 2081 of the Fish & Game Code.

An applicant (like Valley District and East Valley for the SNRC) submits an application for a 2081 permit and/or a 1602 permit to CDFW. Such permits are often processed in parallel with permitting under the Federal Endangered Species Act but often also are not filed until after permitting under the Federal Endangered Species Act is complete so that these permits will be consistent with the terms of a Biological Opinion. In the case of the SNRC, there has been extensive coordination between the applicants (Valley District and East Valley) and the permitting agencies (USFWS and CDFW) and there is agreement to delay the section 1602 and section 2081 permitting until after the issuance of a Biological Opinion, on the ground that the terms of the Biological Opinion will likely be protective of all species of concern and so the section 1602 and section 2081 permits may need only to incorporate the terms of the Biological Opinion by reference.

### **Santa Ana Regional Water Quality Control Board**

- Responsible for overseeing surface and groundwater quality and establishing waste discharge requirements in the Santa Ana River Basin.
- Enforces the Water Recycling Criteria established by DDW.
- Incorporates recommendations of DDW into the water recycling requirements (permit) for projects.
- Issues and enforces water recycling permits and requirements.



## VI. Applicability of Section 1211 to the SNRC

As a threshold matter, it remains unclear to Valley District and East Valley whether Section 1211 of the Water Code applies to the SNRC and to them. The plain language of this statute does not fit the actions they contemplate in connection with the construction and operation of the SNRC. Subdivision (a) of Section 1211 of the Water Code provides:

(a) Prior to making any change in the point of discharge, place of use, or purpose of use of treated wastewater, the owner of any wastewater treatment plant shall obtain approval of the board for that change. The board shall review the changes pursuant to the provisions of Chapter 10 (commencing with Section 1700) of Part 2 of Division 2. (emphasis added).

By its own terms, this subdivision does not apply to Valley District or East Valley for three reasons. First, the statute pertains to an entity that plans to change the discharge, use or purpose of *treated* wastewater. East Valley proposes to change only the point of discharge of *untreated* wastewater, from the WRP to the SNRC. Second, the statute is directed to a change made by the owner of a wastewater treatment plant. Neither Valley District nor East Valley own the WRP or RIX, the facilities that currently treat wastewater from East Valley's service area. Only the owner of those wastewater treatment plants is subject to the obligations of Section 1211(a). Accordingly, neither Valley District nor East Valley believe that they have an obligation to seek board approval under Section 1211(a) before they may implement the SNRC project. Requiring the issuance of a permit under section 1211 as a condition precedent to the issuance of a grant or a loan under the SRF program, therefore, can be construed under applicable law as an arbitrary and capricious agency action by the SWRCB.

Third, the City of San Bernardino, which does own the WRP and RIX, will not change its point of discharge, place of use, or purpose of use of the treated wastewater it discharges to the Santa Ana River as a result of the SNRC project. Those factors will remain the same with implementation of the SNRC project. While the total amount of treated wastewater discharged to the Santa Ana River will be reduced with implementation of the SNRC project, this will not result from any change to the point of discharge or place or purpose of use of treated wastewater, but from the fact that the supply of raw wastewater that currently enters the WRP and is then sent by the City to RIX will instead be sent to and treated at the SNRC. In short, the plain language of Section 1211 simply does not apply to the facts at hand.<sup>2</sup>

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<sup>2</sup> Staff for the SWRCB have opined that because, under Water Code Section 11, the present tense includes the future tense, it is appropriate to read the term "owner" as also meaning "future owner." This is an unduly strained construction of Section 1211. First, it is an elementary principle of statutory construction that the Legislature is presumed to know the law and to understand the English language. If the Legislature had intended to apply the statute prospectively to future owners, it would have done so. Second, it is incorrect grammatically to apply Section 11 to this matter. "Tense," the subject of Section 11, pertains to the interpretation of verbs and the time that the action of a verb occurs. But the phrase at issue here, "owner of any wastewater treatment plant," is not a verb; it is a noun ("owner") modified by a prepositional phrase ("of any wastewater treatment plant"). Finally, Water Code Section 1211 follows Water Code Section 1210, which states that the owner of a wastewater treatment plant generally has a right to the treated effluent as compared to the entity that generated the raw sewage. Section 1210 also allows for the exceptional case where the party providing the raw sewage has a right to divert that

Despite the apparent inapplicability of Section 1211, Valley District and East Valley nonetheless submit this wastewater change petition to enable the Division of Water Rights to determine that the SNRC fully satisfies the rationale of Section 1211. The Legislature enacted Section 1211 in 1980 as part of Assembly Bill 1147, to codify recommendations of the 1978 Governor's Commission to Review California Water Rights Law. (See Stats. 1980, ch. 933, p. 2954, § 4; Assemb. Off. of Research, File Analysis of Assemb. Bill No. 1147 (1979-1980 Reg. Sess.) August 18, 1980.) Section 1211 exists to "protect existing downstream users who have depended upon the return flow" of treated wastewater. (Assemb. Com. On Wat., Parks, & Wildlife, Rep. on Assemb. Bill No. 1147 (1979-1980 Reg. Sess.) April 25, 1979, p. 2.) Protected downstream users include not only those entities those whose legal water rights may be affected; protected downstream users also extend to environmental and instream uses.

Valley District and East Valley provide the following summary to address any concerns the Division has regarding the effect of the SNRC Project on biological resources and other users of water. These considerations indicate that, even if the Division were to apply the standards contained in Section 1211 to the SNRC Project (which, as noted above, would expand the statutory language beyond its plain meaning), the SNRC Project satisfies the concerns expressed by the Legislature in Section 1211 and so the Division may properly conclude that the SNRC satisfies the requirements of Section 1211.

#### **VII. Implementation of the SNRC Will Not Operate to the Injury of Any Legal User of the Water Involved**

Following full Project permitting, the SNRC will remove 6 MGD of raw sewage from the City's WRP, which will in turn reduce the City's discharge from its RIX facility to the Santa Ana River by 6 MGD. However, this reduction will not injure or otherwise impact the legal water rights of users downstream of the City's WRP and RIX, because the obligations to provide, as well as the entitlements to receive, Santa Ana River water are fully adjudicated. They will continue to be honored in full, undisturbed, after implementation of the SNRC.

The overall framework of Santa Ana River water rights is set forth in what are known as the *Orange County* Judgment and the *Western* Judgment. These Judgments were correctly summarized at pages 7-9 of SWRCB Order WR 2000-12 and were applied by the SWRCB in Water Right Decision 1649 at pages 25-27. The Judgments are provided as Attachment 8. Together, the two Judgments govern the allocation of Santa Ana River water while acknowledging that additional water projects will be developed in the Santa Ana River Basin. Under these Judgments, the upstream water agencies (Valley District, Inland Empire Utilities Agency and Western Municipal Water District) agreed collectively to provide Orange County Water District (the downstream water agency) with a total of 42,000 acre-feet/year of "base flow" water (i.e. water of relatively regular flows, unlike the peak flows associated with storm events). Under the judgments, Valley District is required to provide 15,250 acre-feet/year, measured at Riverside Narrows, of the total of 42,000 acre-feet/year of base flows that must be provided to Orange County Water District.

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untreated wastewater to another treatment facility; that is the case here. Under those circumstances, the Legislature appropriately decided to allow the matter to be addressed on a case-by-case basis through the CEQA process.

In 1969, to ensure its 15,250 acre-feet/year portion of the downstream water obligation, Valley District entered into an agreement with the City of San Bernardino whereby the City agreed to discharge at least 16,000 acre-feet/year from its sewage plants that would satisfy Valley District's obligation to provide downstream flows under the *Orange County* and *Western Judgments* (Attachment 8, pp. 80 ff in PDF). The SNRC does not modify the terms of the two Judgments or Valley District's agreement with the City; the City will continue to have an obligation to discharge 16,000 acre-feet/year to the Santa Ana River, which water will satisfy Valley District's 15,250 acre-feet obligation and prevent injury to downstream water users.<sup>3</sup>

Moreover, last year the United States Geological Survey measured the City's current level of discharge as 41.4 cfs  $\pm$  4.1 cfs, or between about 26,950 acre-feet/year and 32,880 acre-feet/year to the Santa Ana River. Even at the low end of this range, the City is discharging substantially more water than its 15,250 acre-feet/year obligation to Valley District. A reduction of 6 MGD, or approximately 6,725 acre-feet/year, would – under a worst case scenario – reduce the City's discharge to the Santa Ana River to about 20,000 acre-feet/year, which is well in excess of its 16,000 acre-feet/year obligation to Valley District. Thus, the SNRC project will not deprive lower watershed water rights holders of their entitlement. The Santa Ana River Watermaster prepares an annual report required by the *Orange County* Judgment. As detailed in the 2013-2014 Santa Ana River Watermaster Report (Forty- Fourth Annual Report of the Santa Ana River Watermaster for Water Year October 1, 2013 - September 30, 2014, dated April 30, 2015), RIX contributed the following recent annual discharge volumes:

- 2010-2011: 39,333 AF
- 2011-2012: 37,966 AF
- 2012-2013: 35,390 AF
- 2013-2014: 33,271 AF

Further confirming these conclusions that the SNRC will not impair the legal rights of downstream water users, the Annual Report of the Western-San Bernardino Watermaster for 2015<sup>4</sup> shows that through 2014, Valley District's credits in the San Bernardino Basin area exceed its obligations under the two Judgments by more than 100,000 acre-feet. The 6 MGD reduction in Santa Ana River flows that will result from Valley District's construction and operation of the SNRC will therefore not injure any legal users of water.

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<sup>3</sup> Under the terms of the *Orange County* Judgment, Valley District may, in its sole discretion, reduce discharges to 12,240 acre-feet/year and make up the difference through the use of credits generated in previous years. At present, Valley District has no plans to use its credits as part of the SNRC project and so the analysis in this memorandum relies upon the higher 15,250 acre-feet/year obligation.

<sup>4</sup> The current annual report of the Western-San Bernardino Watermaster may be found at the Valley District website at: <http://www.sbvmd.com/Home/ShowDocument?id=4268>. The entire report, and historical reports going back to 1970, are available at <http://www.sbvmd.com/reports/reports/-folder-1046>.

**VIII. Implementation of the SNRC Will Not Cause Unreasonable  
Adverse Impacts to Fish or Wildlife Resources**

In accordance with CEQA, Valley District prepared and certified an environmental impact report for the SNRC Project (SNRC EIR) that analyzed, among other things, the potential effects of the Project on biological resources and river hydrology.<sup>5</sup> That analysis included modeling of existing flow conditions, water surface levels, and habitat areas in and along the Santa Ana River, as well as the expected effects of the proposed SNRC Project on those elements.<sup>6</sup> The modeling shows that although the SNRC Project will result in an approximately 6 MGD reduction in Santa Ana River flows, the actual measurable effects of this reduction will be relatively small – e.g., an approximately 2.5 inch reduction in the surface level of the River in the Upper Reach, dwindling to a nearly immeasurable reduction in the surface level in the Lower Reach (Attachment 9).

The potential effects of the SNRC project on discharges from RIX are shown in the following table:

<b>Present and Proposed Discharges from East Valley Water District at RIX</b>					
<b>Discharges</b>	<b>Rate (cfs)</b>	<b>Rate (MGD)</b>	<b>Annual Total (afy)</b>	<b>Minimum Obligation of City of San Bernardino (afy)</b>	<b>Surplus Flows Below RIX</b>
<b>Current Discharges from EVWD to RIX</b>					
Estimated Maximum	45.5	29.4	32,940	16,000	16,940
USGS Measurement (2015)	41.4	26.75	30,000	16,000	14,000
Estimated Minimum	37.3	24.1	27,000	16,000	9,000
<b>Proposed Discharges from EVWD to RIX (subtracting 9.3 cfs from present discharges)</b>					
Estimated Maximum	36.2	23.4	26,200	16,000	10,200
USGS Measurement (2015)	32.1	20.7	23,240	16,000	7,240
Estimated Minimum	28.0	18.1	20,270	16,000	4,270

<sup>5</sup> The SNRC EIR is available at <http://sterlingnrc.com/>

<sup>6</sup> See SNRC EIR Figures 3.4-3, 3.4-4, and 3.4-5, collectively provided as Attachment 9.

The table shows that the SNRC Project will not reduce flows below RIX to a point where the City of San Bernardino will be unable to meet its contractual obligations and so will protect downstream water right holders. Moreover, the table shows that it is likely that there will be water in excess of that needed to meet downstream demands even with the SNRC project. At the same time, the table acknowledges that the Project will reduce flows in the Santa Ana River below RIX to levels less than at present.

The Draft EIR for the SNRC recognized that because the Santa Ana River is designated as critical habitat for the listed Santa Ana sucker (SAS), and due to the numerous incremental factors that can affect the species, very small incremental impacts on flows and habitat could have significant adverse impacts on SAS. On page 3.4-54, the Draft EIR stated:

“A reduction of 6 MGD from the RIX discharge would result in minor changes to river hydrology that could increase stress, reduce fitness, and in the long-term degrade the viability of the Santa Ana River population of the listed Santa Ana sucker resulting in a significant impact of the project. Mitigation Measure BIO-3 would provide for the participation in the Upper Santa Ana Watershed HCP or the implementation of the SAS HMMP to offset hydrologic impacts resulting from the reduced discharge. Implementation of the Mitigation Measure would reduce the project’s effect to aquatic habitat in the Santa Ana River. However, even though the mitigation would benefit the aquatic habitat through quality enhancements compared with existing conditions, reduction in flow could be considered a contribution to increased stress on a listed species, resulting in the potential for a significant and unavoidable impact.”

Recognizing these potential adverse effects on SAS, Valley District prepared a multi-part mitigation plan intended to ameliorate the effects of the SNRC and create conditions that will lead to the recovery of the species. This mitigation plan is described in Mitigation Measure Bio-3 at pages 3.4-56 to 3.4-58 in the Draft EIR. This robust mitigation plan was characterized by the USFWS in its formal comment letter as providing a conservation benefit to the species and was the subject of commendation of Valley District by USFWS during the March 15, 2016 by the Valley District Board of Directors on whether or not to approve the project. Copies of both the CDFW and USFWS comment letters, the minutes of the March 15 meeting of the Valley District Board of Directors and subsequent e-mails from CDFW and USFWS supporting the SNRC are attached hereto as Attachment 5.<sup>7</sup> These letters show that, even though the Project will have an adverse effect on fish and wildlife resources, the trustee agencies (USFWS and CDFW) deem the overall effects of the project plus the mitigation measures to be part of a reasonable program to recover the Santa Ana sucker and other native fish species.

Valley District has also prepared a Biological Assessment (BA) for the SNRC that addresses the potential effects of the Project on the SAS and other listed species (Attachment 10). With respect to the SAS, the BA concludes that take could result from the Project, but that the measures that will be implemented as part of the mitigation plan will help achieve the objectives of the draft Santa Ana sucker recovery plan and contribute to regional recovery of the species. Valley District expects that the USFWS will issue a Biological Opinion,

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<sup>7</sup> Although the measurable effects of the SNRC are small, and the SAS mitigation plan is expected to chart a course towards recovery of the species, for the purposes of CEQA, Valley District concluded that because the Project will result in an incremental effect on a sensitive listed species, the effect is properly deemed significant and unavoidable. In light of the Project’s benefits, Valley District prepared a Statement of Overriding Considerations to address this effect.

imposing reasonable and prudent alternatives/measures that will further ameliorate any effects of the SNRC that were not fully mitigated as a result of the mitigation measures contained in the SNRC EIR, by the end of 2016.

### **IX. Conclusion**

For all of the foregoing reasons, Valley District and East Valley respectfully submit that, although the Sterling Natural Resource Center project is not clearly subject to Section 1211 of the Water Code, the Project fully satisfies both of the objectives of a Section 1211 petition. The SNRC will not alter or injure the adjudicated and protected legal rights of the downstream water users along the Santa Ana River. The Project will additionally incorporate and provide a series of model mitigation measures, including a mandatory HCP or HMMP, that are designed to protect, enhance and revitalize habitat to support the recovery of the Santa Ana sucker, while at the same time protecting and supporting all other affected species.