**From:** Azhderian, Ara
**To:** Gonzales, Eva
**Subject:** FW: Comments on 2025 HBA Update, 2021 Engineer's Report, 2025 ILT Project Draft Engineers Report
**Date:** Wednesday, September 10, 2025 11:19:20 AM
**Attachments:** MCWRA re 2025 HBA 9-2-2025.pdf

[redacted]

[redacted]

**From:** Thomas S. Virsik <thomasvirsiklaw@gmail.com>
**Sent:** Tuesday, September 2, 2025 11:55 AM
**To:** Woodrow, Amy <WoodrowA@countyofmonterey.gov>
**Cc:** Azhderian, Ara <AzhderianA@countyofmonterey.gov>; Donlon, Kelly L. <DonlonKL@countyofmonterey.gov>
**Subject:** Comments on 2025 HBA Update, 2021 Engineer's Report, 2025 ILT Project Draft Engineers Report



Ms. Woodrow:

Attached please find written public comments this first business day following the announced target date.

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Thomas S.
Virsik
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Via email: WoodrowA@countyofmonterey.gov
2 September 2025

Amy Woodrow
Senior Water Resources Hydrologist
Monterey County Water Resources
1441 Schilling Place
Salinas, CA 93901

Re: September 1, 2025 [sic] deadline for comments on HBA Update, 2021 Engineer's Report, et seq.

Ms. Woodrow:

As invited by the General Manager's comments at the July 9, 2025 workshop, please note the below comments and observations about the current suite of dam-related (being the Nacimiento and San Antonio) project documents, i.e., the 1998 Historic Benefits Analysis (HBA), the current HBA "update" including its Economic Benefits Analysis (New HBA and EBA), the draft 2021 Engineer's Draft Report for Zone 2D (2021 Report), and the recent draft Engineer's Report for the Interlake Tunnel Project (ILT Report). WRA staff at the workshop and in public announcements since then have indicated a further workshop or other public event may be scheduled in October or November on dam safety projects. As staff recognizes, the content of the above array of documents, reports, and drafts overlap in multiple ways – at times inconsistently.

The goal of a reliable funding approach for dam and other infrastructure upkeep is critical and shared broadly throughout the Valley – including by my "southern" clients. It is imperative that whatever path or paths chosen to be reliable. Nobody "wins" if a funding election fails, loans cannot be obtained, much less if even one portion of the Valley loses a key water source, e.g., the 12 K acres of the CSIP. The comments to date, below, and those yet to be made are intended to guide towards solutions, not frustrate them. Nevertheless, beyond the suite of prior reports and studies, the dams and other infrastructure exist within the context of and bound by documents and events on the "legal" or political side of reality. The minutiae thereof are beyond the scope of this comment letter, but include at least the Cost Allocation Committee process, the successful SVWP, Proposition 218 process and the critical role of an Engineer's Report, judgments in validation lawsuits (outright or negotiated through settlement), and robust legal precedent on Proposition 218 and validation actions.

My preliminary oral comments at the July workshop, reduced to bullet points, included:

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- The New HBA is not an update but purports to replace the prior HBA.

- The New HBA purports to follow the analyses of the HBA but starkly disagrees that the reservoirs (1) materially slowed seawater intrusion (SWI), (2) prevented multiple 100 K's AF of intruded water from entering the North, and (3) prevented the SWI "line" from advancing multiple additional miles. See e.g., "old" HBA at ES-5 (a main objective of reservoir operation is to slow SWI; 230 K acre feet of seawater intrusion prevented); ES-6 (reservoirs precluded 41 wells from being lost to SWI; SWI line would have been 6.5 miles more inland but for reservoirs).

- The New HBA concedes the USGS model used is not designed to analyze SWI.

- The SVBGSA in conjunction with its partners has developed a version of the USGS model for the purpose of analyzing project impacts on SWI, which model version was not used in the New HBA.

- The New HBA references Bulletin 52 (1946) but only used data from 1967 (after reservoirs were built) forward, while the HBA relied on data from 1949 through 1994.

- The EBA appears to not consider the 2020 and 2022 SVBGA adopted and DWR approved GSP's that categorize parts of the Valley as sustainable or not sustainable when projecting the economic impact of added water or reduced seawater intrusion in discrete locations in the Valley.

2021 Report

Enclosed are letters and their enclosures dated March 22, March 23, and December 20, 2021, addressing the Draft Engineers Report for proposed Zone 2D. This comment letter will not purport to summarize the entire contents of those letters and enclosures. One point, however, made in the December 2021 letter can now be made more empathically: a successful election does not insulate a fee, charge, or other levy from a constitutional challenge, i.e., the substantive requirements of the Constitution must always be met. Lejins v. City of Long Beach (2021) 72 Cal.App.5th 303 (review denied by the California Supreme Court). The 2021 letters strongly urged the WRA and its decision makers to take guidance from the then-applicable (2019) version of the current Leage of California Cities' Propositions 26 and 218 Implementation Guide, August 2021. (Guide). https://www.calcities.org/resource/propositions-26-and-218-implementation-guide. The Guide was updated in 2021 but remains fully consistent with the advocacy expressed in the 2021 letters.

The other fundamental caution is that the dam projects appear for Proposition 218 purposes as an increase in existing assessments, not genuinely new ones. If the safety and maintenance projects are not a "new project" for Constitutional purposes, the default is that such increases should follow current proportionality principles. See March 22, 2021 letter pages 4-6. The Guide addresses increased assessments. Guide at 50. Changing the names of projects or levies (e.g., CAMP, Zone 2D) does not preclude a project from being "repair, replacement, rehabilitation, [or] care" of a project already subject to a validated proportionality. Article XIII d § 4(a). The agency enjoys no presumptions in its favor. Silicon Valley Taxpayers Ass'n, Inc. v. Santa Clara County Open Space Authority (2008) 44 Cal.4th 431, 448-449; see Guide at 45 et seq.

While the present (so far, oral) proposal is not identical to that of the 2021 Report, it is similar: O&M and repair/rehabilitation of the dams. The lessons learned and advocacy around the 2021 Report should be weighed carefully as they continue to apply. The starting point is that increased assessments for the same universe of benefits to the same parcels by any new name or description must follow the validated proportionality of the Zone 2C assessments. That is by far the simplest approach for the WRA. "Often, the best approach is the simplest." Guide at 39. Sometimes the safest path is the most familiar one.

New HBA

The "old" 1998 HBA analyzed the benefits the two dams provided to the Valley, including flood reduction, water reliability, and slowing SWI. It relied on a data set from 1949 (pre-reservoir) through 1994, the most current then available. It divided the Valley into discrete "units" and segregated the several (e.g., flood v SWI) analyses and provided a tabulation by those geographic units. Thus, an area may have benefited tremendously from slowing SWI but not much from flooding or had greatly increased water levels but no other benefit. The old HBA became the topic of much discussion and negotiation among interests from various parts of the Valley, out of which process came a set of broadly acceptable "numbers" – which numbers became the conclusion of the Engineer's Report and thus the Zone 2C assessments. Because the process had involved most of the major Valley (ag) interests, the proposed Zone 2C rates were familiar and the Proposition 218 election passed comfortably. Unfortunately, the New HBA is not (yet) sufficiently reliable to become the foundation for further process, as explained in this comment letter.

The New HBA claims the following:

> Accordingly, this HBA Update relies on the improvements of knowledge and tools over the past 25 years to provide a revised characterization of the benefit accrued by stakeholders in the Basin from the presence of the Nacimiento and San Antonio Reservoirs. HBA 1.3.5 (emphasis added).

The New HBA, however, relies on a tool conceded unsuitable for analyzing SWI and rejects pre-reservoir actual data upon which the old HBA relied. By its own articulated goals, it fails to improve the existing reservoir benefits analysis by using a different data set. HBA 2-5 (model unable to use same data set used in old HBA), B-8 (uncertainty unknown). The New HBA seemingly succeeds in its analyses of the additional benefits of the new projects, e.g., SRDF and CSIP for the northern SWI areas. ES-11 (last sentence of first paragraph). The New HBA's more current tools confirm decades of MCWRA reports that the CSIP has a materially beneficial effect on northern SWI.

Specific concerns about the New HBA include:

- The New HBA Project definition is unclear – the reservoirs exist in the time period of the new analysis, therefore the projects being assessed (in terms of "with" and "without") are the CSIP and the SRDF, and always "with" the reservoirs, never "without" the reservoirs. Results of such an analysis are primarily attributable to the CSIP and SRDF, and to the changes in reservoir operation, which are not discussed in the analysis.
- The New HBA builds upon the HBA without repeating a "with/without" reservoir analysis (as is done in the HBA) and therefore the HBA benefits with respect to the Reservoirs appear to stand as the foundation of the New HBA.
- At 1-16, last sentence of first full paragraph, though SWI was not reversed, the old HBA concludes the reservoirs did lead to a slowing of the rate of storage loss/SWI.
- At the penultimate full paragraph on 3-40, what is estimated? And what are the uncertainties in, and level of accuracy of, estimates?
- Appendix B re uncertainty is useful, but its substantial caveats and recognition of uncertainty are downplayed in much of the narrative, falsely suggesting reliable conclusions, e.g., inability to use actual or "observed" data for streamflow (B-13).

The New HBA is severely limited in the key aspect noted above, e.g., the USGS model is not designed to analyze SWI. ES-13. Consequently, the New HBA has no discussion or analysis of the SWI contour lines and if and how the reservoirs affected those, e.g., the 250 and 500 ppm lines the WRA has been producing for decades. Graphics of the SWI contour lines are included as Figures 1-14 and 1-15 in the background section of the New HBA but appear not to be discussed or otherwise analyzed. SWI is not a minor or additive element – it is the reason the SWRCB threatened to impose State management in 1995 and would be the factual basis of any DWR intervention under SGMA.

Moreover, the New HBA does not include reference data from a time period without/before construction of the reservoirs and instead fabricates a data scenario without reservoirs by using estimates; no development (such as hydrologic trends and historical climate data) is offered to motivate how useful or reasonable the estimates are in this no reservoir scenario, there is only a statement that this scenario cannot be verified by actual timeseries data. In addition to motivating why this data can / should be relied upon, the New HBA must further provide transparency around when the available data and modeling tools have fallen short and the resultant conclusions are not certain or to what degree they are useful.

The New HBA separates benefits into the hydrologic and flood (and a catchall "other"). The EBA, based on the New HBA, was able to include a stand-alone analysis of "pure" SWI avoidance benefits. See below. The two new reports are at odds on a key aspect aspect of benefits: reduction or slowing of SWI in the northern coastal area.

The apparent take-away is that the modeling approach of the New HBA shows how impactful the CSIP and SRDF have been. Yet, the actual data on SWI, such as water quality data and MCWRA published contours, and the continued use of wells that would have otherwise succumbed to SWI, is enough to demonstrate that these projects have been impactful - so what useful conclusions and learning has this modeling effort resulted in? Those useful conclusions, backed up by accurate characterization of the certainty and applicability of the data used to determine them, can and should be offered up front even if they were not the originally scoped focus of an "updated HBA."

EBA

The EBA is premised on the New HBA, which flaws undermine the separate EBA, e.g., that the reservoirs had little effect on SWI until the CSIP came online in 1998. The EBA lacks a comprehensive summary table by areas or study units. But its Tables 2, 3, and 9 reflect that even on the questionable basis of the New HBA, the lion's share of benefits of all projects were to the CSIP and SWI adjacent lands.

The CSIP benefited the growers who received its water, of course. EBA at iii and 18. Had the CSIP not been built, the State (SWRCB) would have directed all pumping cease in the critical SWI area and with it many business operations and land values. The EBA seems unaware of that threat or the history of the CSIP.

Nevertheless, even on the thinner record, the value of the CSIP benefit starts at $28.1 M. (all figures approximate). EBA Table ES-1. In addition to seemingly "pure" SWI benefit, the projects reduced well replacement in the northern and coastal areas. EBA Table 2. The Pressure accounts for some $90 M or the total

$107 M benefit ascribed to avoidance of well replacement. The increased head and consequent reduction of power needed to pump also shows the Pressure and environs received substantial benefit. Table 3 ($33 M of the $76 M total). Finally, flood benefits also primarily benefited the northern areas. EBA Table 9. ($200 M in North of the total $210 M).

As noted in the above paraphrase of my oral comments at the July workshop, the EBA is ignorant of the GSP's and the present default that the South is sustainable while the North is unsustainable. Under basic free market principles, the dearth of a commodity (water) in a location (the North) tends to make it more valuable than in locations where there is enough. The EBA appears to not have taken that basic principle into account, perhaps because it seems unaware of the stark differences in sustainability status among the parts of the Valley.

ILT Report

A between the lines read of the ILT Report suggests its but a grant deliverable. It seems to lack any indication of the specific engineer author, much less their certification, unlike credible engineer reports. "Thus, a defensible assessment largely depends on a credible engineer's report." Guide at 38, see also page 45. Its brevity is also a red flag, as is its proffer of more than one approach to funding. Of course, early administrative report drafts need not meet specific thresholds, but typically such documents are not publicly released for comment.

More granularly, assertion of a "nexus" is common for Proposition 26, not Proposition 218, funding analyses. ILT Report at 6. Curiously, it appears to rely (or so states) on the New HBA but not the EBA even though part of its goal is to quantify economic benefits. ILT Report at 10. It purports to apply the New HBA benefits analysis to the ILT, thus all but conceding that the ILT's benefits are no different than the current suite of projects subject to the Zone 2C Engineer's Report, successful Proposition 218 election, and validation judgment(s). Its analysis violates nearly all norms of what a credible engineer's report must contain, which can be detailed should the ILT Report ever be presented for formal acceptance. Guide at 37-48.

Conclusion

My clients continue to support the WRA's recent increased transparency, epitomized by its release of these various reports and analyses not as a *fait accompli* but more as invitations to or furtherance of discussion with and among stakeholders. The New HBA and the EBA, however, are not well suited as foundations for any serious discussions or negotiations for the reasons explained above. Perhaps their flaws can be readily addressed, but there is a real danger of the perfect being the enemy of the good. The available foundations – the SVBGSA's GSP's, the old HBA, Zone 2C and all that led to it legally and

politically – may be just enough on which to pursue an all (or at least most) Valley approach to keeping (funding) the critical infrastructure viable.

Very truly yours,

*Thomas S. Virsik*
Thomas S. Virsik

Encl. March 22, 2021 letter to Brent Buche, General Manger MCWRA
March 23, 2021 letter to Brent Buche, General Manger MCWRA
December 20, 2021 letter to Brent Buche, General Manger MCWRA

cc: Ara Azhderian, AzhderianA@countyofmonterey.gov
Kelly Donlon, DonlonKL@co.monterey.ca.us

Thomas S. Virsik
ATTORNEY AT LAW

*Via email only bucheb@co.monterey.ca.us*
March 22, 2021

Brent Buche, General Manager
Monterey County Water Resources Agency
1441 Schilling Place
North Building
Salinas, CA 93901

Re: Comments to Draft Engineer's Report for the Monterey County Water Resources Agency Assessment District Formation Zone 2D - Nacimiento and San Antonio Maintenance Project

Dear Mr. Buche:

On behalf of the Orradre interests and Scheid Family Wines, please consider these comments to the Draft Engineer's Report for the Monterey County Water Resources Agency Assessment District Formation Zone 2D - Nacimiento and San Antonio Maintenance Project ("Draft Report" and "MCWRA") dated January 25. 2021. Julia Shiplacoff, PE, of Stetson Engineers reached out to the MCWRA for detailed back-up information after the February 16 workshop – e.g., the spreadsheets or other explanations of the calculations that supported the content of the Draft Report -- but none was provided. See enclosed. Ms. Wagner, the MCWRA's consulting engineer and author of the Draft Report, stated during a presentation to the Salians Valley Water Coalition ("SVWC") on March 3 that I attended as a guest that the material Ms. Shiplacoff had requested was "coming." It has never arrived. This comment letter and the enclosed draft memorandum from Ms. Shiplacoff ("Stetson Draft Memo") are preliminary and subject to revision once the requested material is made available. I also understand that a revised Draft Report may be soon produced, to which additional comments may be submitted. This letter addresses the Draft Report only.

SUMMARY

As a threshold matter, the Draft Report is fatally flawed in several ways. First, the Draft Report fails to identify, quantify, and separate the general benefit from the special benefits as required under controlling precedent (which is most germane, but not limited, to the alleged "avoidance of a dam breach" benefits). Second, the approach to the "avoidance of a dam breach benefits" is logically and legally unsupported – equating the creation of a risk that is then avoided as a benefit. Third, the projects involved are, for Proposition 218 purposes, maintenance of existing permanent public improvements. The proportionate benefits for such maintenance were determined in a Proposition 218 process for the Salians Valley Water Project ("SVWP") over a decade ago, which the Draft

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Report ignores. In addition, the MCWRA will be unable in a legal proceeding to meet its burdens of justifying additional components of the desired assessments given its refusal to provide detailed information as requested (and promised).

OTHERS' COMMENTS

Both Landwatch and the SVWC submitted comment letters, identifying potential flaws and concerns. While not adopting all content of both letters, the basic approach and recitation of the law, burdens, and standards in both letters is sound. See, February 10, 2021 letter from John Farrow and March 1, 2021 letter from Pamela Silkwood. Specifically, the MCWRA has no authority to exercise its discretion in a manner that undermines Proposition 218's purpose. Silicon Valley Taxpayer's Ass'n, Inc. v. Santa Clara County Open Space Authority (2008) 44 Cal.3rd 431, 445.

JURISPRUDENCE REQUIRES GENERAL BENEFITS TO BE IDENTIFIED AND QUANTIFIED

The discussion of general benefits in the Draft Report is brief. See 4.2.1 of the Draft Report. Utterly lacking is the required quantification of the benefits. "The City's failure, through the engineer's report, to separate and quantify the general and special benefits provided by the proposed assessment renders the assessment and formation of the District constitutionally infirm." Golden Hill Neighborhood Assoc v. City of San Diego (2011) 199 Cal.App.4th 416, 439. To identify, quantity, and separate the general from the special in the engineer's report has been the law since 2010, which requirement is explicitly part of Proposition 218.

> In any legal action contesting the validity of any assessment, the burden shall be on the agency to demonstrate that the property or properties in question receive a special benefit over and above the benefits conferred on the public at large . . .

Article XIIID section 4. Quantification of the general benefits is among the MCWRA's threshold burdens.

> [T]his case involves the failure to separate and quantify the general and special benefits that will accrue, respectively, to members of the general public and occupants of Wildomar residential properties from their common use and enjoyment of the Wildomar parks. The Wildomar parks, like all public parks, will be used by the public at large at least to some extent. The County acknowledges it was required to fund the general benefit portion of the Master Plan from nonassessment sources, and argues it did so. For the reasons explained, however, the Engineer's Report is insufficient to support the County's argument.

Beutz v. County of Riverside (2010) 184 Cal.App.4th 1516, 1537. The court's rationale in Golden Hill applies to the Draft Report: "Like the engineer's report

in Beutz, the engineer's report here did not attempt to separate and quantify the general and special benefits that the proposed services and improvements would confer." Golden Hill 199 Cal.App4th at 438. The Draft Report is fundamentally and fatally flawed.[1]

If the general benefits are addressed in a further iteration, what is required? To start with, Ms. Wagner clarified at the March 3 presentation to the SVWC that the "breach avoidance" benefits were based on "safety and loss of life." Taking that explanation at face value, any alleged benefit is not to parcels, but to persons[2]. Saving lives – obviously laudable – is not a special benefit. It is a benefit to the public who happen to be present in a specific area under a specific set of circumstances, i.e., "the public at large." Silicon Valley Taxpayer's Ass'n, Inc., 44 Cal.3rd at 455 (citing Article XIIID § 2(i)); see also Propositions 26 and 218 Implementation Guide, May 2019, League of California Cities, at II.A and B. It is difficult to fathom a more generalized benefit than avoiding the loss of life or limb. If the sole metric for "breach avoidance" benefits is safety to persons, the benefits are general, not special.

Moreover, the Draft Report acknowledges benefits to recreational interests in its discussion of general benefits but does not quantify them. Draft report at 4.2.1. Quantifying general recreational benefits is entirely feasible, as several years of low water levels in the reservoirs and then the COVID pandemic illustrate. Recreation activity plummeted during the drought and then due to COVID restrictions, e.g., one could not launch watercraft and with it, pursue various recreational activities that generate economic benefit. If a dam breach occurred, the result would be a parallel inability to launch watercraft. The economic value of the benefits of being able to launch watercraft and pursue water recreation can be calculated and by the Draft Report's own concession, is fatally lacking.

AVOIDANCE OF BREACH BENEFITS IS BACKWARD

As the Draft Stetson Memo explains, the analysis of the avoidance of breach benefits is inconsistent with the balance of the Draft Report's analyses and is an effort to shift the risk of damage from floods. Stetson Draft Memo, III.4.(d).

As my oral comments at the SVWC event on March 3, 2021 noted, the breach avoidance benefits are also logically inconsistent with the rules of liability for an event like a dam breach. Ironically, one of the leading authorities of that jurisprudence involved the MCWRA. Arreola v. County of Monterey (2002) 99

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[1] The SVWP Engineer's report in 2002 also fell short in addressing General Benefits but as many oral commentors at the public presentations of the Draft Report pointed out, the MCWRA carefully shepherded its SVWP project and cooperated with the affected interests such that in the end, the assessment passed and only one, limited, lawsuit arose. The MCWRA has now taken the opposite approach by crafting an engineer's report and only then seeking buy in. In addition, the jurisprudence since the SVWP era has clarified the constitutionally required elements in an engineer's report.

[2] That the avoidance of a breach are not benefits but actually a risk to the parcels subject to breach inundation is addressed below.

Cal.App.4th 722. To be blunt, if a MCWRA dam failed and caused damage to landowners in its path, i.e., those who are faced with a high assessment per the Draft Report, the law provides these interests could seek compensation for damages to their lands via inverse condemnation. To ask parcels to pay the MCWRA to refrain from unlawfully injuring them comes across as an old-time protection racket. Put in less dramatic terms, the parcels most at risk will pay more to offset the risk the MCWRA imposes on them. "The fundamental justification for inverse liability is that the government, acting in furtherance of public objectives, is taking a calculated risk that private property may be damaged." Yee v. City of Sausalito (1983) 141 Cal.App.3d 917, 920. The avoidance of a breach is not a special benefit to lands that would be harmed in a breach, it is an avoidance of a risk controlled by the MCWRA. If breach avoidance is a special benefit at all, the benefit is to lands that benefit from the MCWRA's decision to provide one or more special benefits at another's risk. Put concretely, Parcel A far from the dams benefits by increased sustainability while Parcel B close to the dams suffers greater risk of harm from a breach. The Draft Report claims Parcel B is benefited by breach avoidance, whereas it is harmed (i.e., not benefited) by greater exposure to risk.

Additionally, if a future "avoidance of breach" assessment were to take into account the benefits to parcels rather than public safety, one would expect the benefits to be based to a notable degree on the economic value of the lands subject to injury. Broadly speaking, northern areas have a higher economic value than southern at this time, so benefits of avoiding breach injuries would need to take into account the differential. See e.g., HBA Tables 3-17 to 3-19.

MAINTENANCE PROPORTIONALITY IGNORED

The present set of projects is properly labeled as one for "maintenance." Proposition 218 includes in its definition of "maintenance" the "rehabilitation" or "replacement" of permanent public improvements. Article XIIID § 2(f). The SVWP Engineer's Report determined the proportionality of the operation and maintenance ("O&M") for the "existing facilities" of Zone 2C. See Tables 3-7 and 3-10 and Benefit Matrix ES-5a of the SVWP Engineer's report. The Draft Report does not propose additional facilities, only the repair, maintenance, or rehabilitation of the same facilities supported by Zone 2C. As a matter of logic, why would the benefits of the O&M of the same facilities in 2002 (Zone 2C) be radically different in 2021 (Zone 2D), other than the subjective opinion of a different Report author? The Draft Report chooses not to address that patent logical clash. That the costs of maintenance have materially increased is not a basis for determining, i.e., changing, proportionality. Town of Tiburon v. Bonander (2009) 180 Cal.App.4th 1057, 1081-1082 (determining proportionality based on differential in costs for same benefit is unconstitutional). See also Draft Stetson Memo, III.4.(e).

Unlike the Historic Benefits Analysis ("HBA") referenced in the Draft Report, which is a report and subject to the whims of a future political body, the SVWP Engineers Report is one part of a successful Proposition 218 process that binds

"the world" to what was or could have been litigated therein, i.e., the proportionality of the O&M of the existing facilities. The proportionality of the O&M for the existing facilities (the same as those to be supported by Zone 2D) has been validated by the passage of time.

> An agency need not bring a validation action to validate a decision, however. Instead, " 'an agency may indirectly but effectively "validate" its action by doing nothing to validate it; unless an "interested person" brings an action of his own under section 863 within the 60-day period, the agency's action will become immune from attack whether it was legally valid or not.' [Citations.] As to matters 'which have been or which could have been adjudicated in a validation action, such matters ... must be raised within the statutory limitations period in section 860 et seq. or they are waived.' " (Commerce Casino, supra, 146 Cal.App.4th at p. 1420, 53 Cal.Rptr.3d 626 ; see § 870, subd. (a).)

McGee v. Torrance Unified School District (2020) 49 Cal.App.5th 814, 822; see also CCP §§ 860 to 870. To the extent there is any question whether the creation of Zone 2C and the conclusions in the Engineer's Report were subject to validation, the assessments were challenged and the matter resolved by a judgment. Salinas Valley Property Owners for Lawful Assessments v. County of Monterey et al, Monterey County Superior Court No. M66890 (reverse validation action re SVWP assessments) (March 15, 2006 Stipulated Judgment available on MCWRA website).

The proportionality of the assessments for maintaining the permanent public improvements of Zone 2C (identical to Zone 2D) are final and binding on all persons, including the MCWRA and its agents.

> The judgment, if no appeal is taken, or if taken and the judgment is affirmed, shall, notwithstanding any other provision of law including, without limitation, Sections 473 and 473.5 , thereupon become and thereafter be forever binding and conclusive, as to all matters therein adjudicated or which at that time could have been adjudicated, against the agency and against all other persons[.]

CCP § 870 (emphasis added). What was adjudicated or could have been adjudicated when the MCWRA created Zone 2C? The SVWP Engineer's Report supplies answers: the methodology and proportionality of assessments for maintaining the permanent public improvements, i.e., Table ES-5a. See also Stetson Draft Memo, III.4.(e).

Without waiving the substantive objections, given that Proposition 218 allows an increase of a levy or change of methodology, if viewed as a (disguised) change to Zone 2C assessment methodology, the Draft Report fails to explain to the public that the Zone 2D O&M supports the same facilities as Zone 2C but at a

materially different proportionality. The MCWRA bears the burdens in any litigation and hiding the logical and fiscal clash with Zone 2C is at least dishonest, if not misleading. It is one thing if the relevant public is fully informed and affirmatively chooses a radical departure from past decades and it is another when the MCWRA conspicuously avoids a direct comparison of the Draft Report's proportions of benefit with those set forth in the approved and validated SVWP Engineer's Report. The MCWRA is prohibited from exercising its discretion to mislead the public by avoiding a direct comparison of the radically different proportionality of Zones 2C and 2D levies for maintaining the identical permanent public improvements. Silicon Valley Taxpayer's Ass'n, Inc. 44 Cal.3rd at 445.

OTHER FLAWS AND ISSUES TO BE CONSIDERED

Assuming a change of assessment methodologies from Zone 2C is legally permissible, the Draft Report is nevertheless silent on why no hydrological model was used to calculate or inform benefits. Public discussion by the MCWRA and its agents reflect their position that no model was available, i.e., the several USGS models being used by both the MCWRA for its Interlake Tunnel Project planning and the Salinas Valley Basin Groundwater Sustainability Agency ("SVBGSA") were not sufficiently available. The public record, however, reflects modeling results are being presented, albeit with caveats. Slides 27, 28 and 38 from the SVBGSA Advisory Committee Meeting, March 18, 2021. More tellingly, the MCWRA itself has been relying on the newest USGS model for the Salians Valley (SVOM) since 2020, but apparently chose to not use the SVOM to verify the conclusions in the Draft Report. See Slides 1 to 10 of the July 20, 2020 Interlake Tunnel Project report by the MCWRA. The hydrological models were and are available to the MCWRA and could have been used to verify that the new approach to benefits has integrity. That the MCWRA (or perhaps Ms. Wagner) chose not to do so illustrates that the MCWRA is exercising its discretion to undermine, not further, the purpose of Proposition 218.

The flood control benefits analysis appears flawed, or at least lacking justification. The Draft Report chooses a "scale of impact" from zero to five for flood control benefits. No explanation is provided why that scale is justified. Table 11 of the Draft Report reflects benefits for the various sub-areas (excluding those with a zero amount) of multiple thousands to one area of nearly two million dollars. The zero to five impact scale is used to reduce by orders of magnitude the massive – well over one hundred-fold -- difference in flood control benefits between certain subareas. In addition, the analysis relies directly on certain tables from the HBA addressing flood control but omits others with no explanation, e.g., HBA Table 3-19 (showing the sum of flood control benefits of over three million for a subarea compared to several thousand for others). The Draft Report reflects an impermissible exercise of discretion to (1) rely on certain and omit other HBA tables and (2) use a scale of impact that purposely flattens great disparities in benefits, thereby subsidizing parcels

receiving greater benefits by parcels receiving lesser. Silicon Valley Taxpayer's Ass'n, Inc., 44 Cal.3rd at 445.

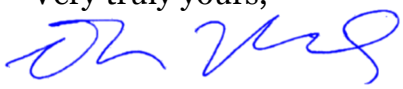
Whether the Draft Report has properly considered the exclusion of federal lands and the inclusion of local and state lands for assessments is not clear. See e.g., Propositions 26 and 218 Implementation Guide, May 2019, League of California Cities, at III.C.

The Draft Report does not explore the fiscal role of the hydroelectric plant. Certain subprojects appear to benefit the hydroelectric plant (low-level outlets), which generates revenue. If the power generation revenue is not fully dedicated to maintenance of the permanent public improvements supported by Zone 2D, then it may be generating special benefits and the cost of the subprojects that support power generation must be apportioned to those that benefit from that revenue.

CONCLUSION

The Draft Report is fatally flawed in several ways, as noted above. It also appears to suffer from a lack of clarity and justification in certain other respects. The best course of action for the MCWRA is to consider the various comments carefully and then engage with the stakeholders in lieu of investing further resources into a new Report or a Proposition 218 proceeding likely to fail and/or be readily and justifiably challenged in court. Alternatively, the MCWRA may consider raising its Zone 2C assessments, which also requires a Proposition 218 process, but has to its advantage decades of consensus on the proportionality thereof.

Very truly yours,



Thomas S. Virsik

c. Kelly Donlon, MCWRA counsel, DonlonKL@co.monterey.ca.us
Clerk, MCWRA Board of Directors, HenaultAG@co.monterey.ca.us

Encl. March 19, 2021 draft memo, Julia Shiplacoff, P.E., Stetson Engineers
February 16, 2021 email, Julia Shiplacoff to Brent Buche
March 18, 2021 GSA Advisory Committee, Slides 27, 28, & 38
July 20, 2020 Interlake Tunnel Project, Slides 1-10, MCWRA

# DRAFT MEMORANDUM

**2171 E. Francisco Blvd., Suite K • San Rafael, California • 94901**
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| | | | |
|---|---|---|---|
| TO: | Thomas S. Virsik, Attorney at Law | DATE: | March 19, 2021 |
| FROM: | Julia Anne Shiplacoff, P.E. | JOB NO: | 2745 |

SUBJECT: **Initial Review of Proposition 218 Engineer's Report: Engineer's Special Benefit Assessment of Monterey County Water Resources Agency's Deferred Maintenance Projects (2021)**

The DRAFT Monterey County 2021 Proposition 218 Draft Engineer's Report on the *Assessment District Formation Zone 2D – Nacimiento and San Antonio Maintenance Project* ("Engineer's Report" or "Report") was made available to Stetson on February 8, 2021 and is dated January 25, 2021. The assessment is made by Wallace Group and the Assessment Engineer is Kari E. Wagner P.E.. Both Nacimiento and San Antonio Reservoirs ("Reservoirs") would receive funding by this special benefit assessment. Analysis and methodology from two prior reports are relied upon and cited frequently by the Engineer's Report:

1.) Montgomery Watson's 1998 Historical Benefit Analysis ("HBA"), and

2.) RMC's 2003 Salinas Valley Water Project Engineer's Report ("SVWP Assessment" and "Zone 2C Assessment").

This memorandum makes use of purple text color to denote a question for, topic of discussion for, or a potential request for information from the authors of the Engineer's Report.

During a public meeting on 2/16/2021 to discuss the Engineer's Report, the Assessment Engineer discussed the content of the supporting spreadsheets detailing the calculation of impact for each benefit. Stetson requested these spreadsheets from the Engineer during the meeting, and followed-up in email to MCWRA, and received positive indication that the materials would be shared. The materials were not shared as of 3/19/2021. These materials were requested to shed light on the methodologies and analyses used to determine the benefit impacts in the Engineer's Report; the current discussion of impact benefits does not contain enough detail to allow for reproduction of the engineer's calculations. For example, in the HBA there are only five sub-areas analyzed in the Salinas Valley, where there are seven sub-areas analyzed in the current Engineer's report – since the Report frequently references the analysis done in the HBA, it was our understanding that the spreadsheet materials could provide the details to show how the HBA analysis translated to the new areas in consideration. Where is the supporting work to show how the analysis resulted in the current benefit impact scales? An appendix of such work would be an important addition to the Engineer's Report.

## I. The Engineer's Report, HBA and SVWP Components At-a-Glance:

| | HBA (1998) | SVWP (2003) | Engineer's Report on the Maintenance Project (2021) |
|---|---|---|---|
| Flood protection without dams benefits | x | x | x |
| Water supply benefits | x | x | x |
| Flood protection from dam breach benefit | | | x |
| Five Sub-areas analyzed (Zone 2A) | x | | |
| Seven Sub-areas analyzed (Zone 2C/2D) | | x | x |
| Groundwater quality benefit | | x | |
| Recreation benefit | | x | |
| Weighting factor based on importance of benefit | | x | |

## II. Relevant Background on Reservoir Funding Zones, HBA, and SVWP

1) Reservoir Funding Zones

a) According to *Section 1.1.3. Funding History* of the Engineer's Report, the Reservoirs were originally funded by the creation of the special assessment Zone 2 and Zone 2A, and the rate of increase of those assessments did not provide adequate funding for the ageing dam facilities. The Zone 2C Assessment replaced Zones 2 and 2A to provide O&M for the Reservoirs plus additional construction known as the Salinas Valley Water Project, which was constructed in 2009/2010 (including the Salinas River Diversion Facility). Zone 2C funding also falls short of the O&M needs of the Reservoirs.

b) With each benefit assessment, the boundary of the zone has been redrawn to include or exclude parcels, as consistent with the shared benefit. The Engineer's Report proposes Zone 2D, which is identical to Zone 2C established by the SVWP Assessment because, by the Engineer's determination, the "parcels have been identified to receive a similar special benefit from the operations of Nacimiento and San Antonio Reservoirs" (p.30).

2) HBA

a) The 1998 HBA established that "the major categories of benefits associated with the operations of Nacimiento and San Antonio Reservoirs are:
   (1) *Hydrologic benefits*, including higher ground water levels, greater reliability of ground water supplies, better operation of wells, and higher quality of ground water;
   (2) *Flood control benefits,* including lower risk of flooding during above-normal and extreme rainfall events, and lower risk of agricultural soil erosion; and
   (3) *Economic benefits* associated with the hydrologic and flood control benefits" (HBA p.ES-2).

b) The HBA also makes an assumption that persists in the Engineer's Report that "the benefits from operations of the reservoirs are measured as the difference between the conditions in the valley "with" and "without" the reservoirs in place, under the same level of development" (HBA p.ES-2). *This assumption is further discussed below in part 3)c).*

c) The HBA flood control benefit analysis shows that flooding without dams happens in all river reaches from River Mile 0 to River Mile 105.8 and the extent is similar with and without the reservoirs. However, the depth of inundation is reduced with the reservoirs and this benefit is greater the lower River Miles more greatly than the higher River Miles; this translates to a benefit that is higher by the mouth of the river in the northern end of the valley and a lower benefit upstream, closer to the Reservoirs. Land use plays into this flood protection benefit analysis because damage to lands where there are many residences, buildings and infrastructure (i.e. cities and towns) is much more expensive than damage to open space lands and fields; again, there is a higher density of buildings and infrastructure in the northern part of the valley (the Pressure sub-area) as compared to the Upper Valley sub-area (five sub-areas in the HBA are included in the Zone 2C assessment, SVWP-p.3-4, though the Zone 2C assessment includes two additional sub-areas for a total of seven sub-areas). The HBA's economic analysis of the flood protection by the reservoirs is based on the acreage of various land use types.

   i) The Engineer's Report assumes that the economic impact of flooding from a dam breach would be the same as the HBA's economic analysis with respect to normal flooding (p. 39). A discussion is warranted to motivate the equivalence to show that the economic impact has not changed with land use change since 1998 and does not change as a result of the extreme depths of the Upper Valley inundation by dam breach versus natural flooding.

3) SVWP Assessment

a) The SVWP Assessment was a Proposition 218 special benefit assessment of the Salinas Valley Water Project, defined on page ES-1 as:
   - Operation and maintenance of the existing reservoirs;
   - Construction of the Nacimiento Dam Spillway Modifications; and
   - Construction of the Salinas River Diversion Facility

b) Benefits for the O&M of existing reservoirs were assessed separately from the benefits of construction of the Nacimiento Dam Spillway Modifications and benefits of the construction of the Salinas River Diversion Facility.

c) The SVWP Assessment created Zone 2C and estimated O&M costs (in 2003) to be $2.64 million, annually. According to the Engineer's Report Comparison of Pay As You Go to Bonding, the Zone 2C assessment currently receives about $3 million, annually, of which about $1.2 million goes to O&M; this sum will continue to contribute funding to O&M and is not being replaced by the Maintenance Project special assessment. The difference between the historical Zone 2C estimated O&M cost and the current funding for O&M is $1.44 million ($2.64 million - $1.2 million). There is no discussion about this difference.

d) The SVWP Assessment asserts that not all benefits are equal because "Some benefits are secondary benefits that occur due to providing the primary benefits. To account for this, a weighting factor is assigned to each of the benefits to distinguish the level of benefit

received" (SVWP p. ES-5). Specifically, control of seawater intrusion and flood control are weighted 3 times higher than all other benefits. This Engineer's Report does not use a similar weighting factor and presents all benefits on the same scale.

## III. The Engineer's Report Project Definition and Benefit Assessments

4) The Engineer's Report identifies the Maintenance Project as the project for creation of a new special assessment zone, Zone 2D. The Maintenance Project is defined as 27 subprojects which will support MCWRA's O&M of Nacimiento and San Antonio Reservoirs. Specifically, the Engineer's Report delineates "zones of benefit, and the proposed assessments" (p.ES-1). The subprojects include, but are not limited to, road construction, valve replacement, informational studies, security updates, seismic upgrades, drainage repairs and a potential (not certain) spillway replacement; subprojects fall into the categories of critical maintenance, maintenance, risk investigation, and upgrade to existing facilities. The task of the Engineer's Report is to apportion the benefits of said subprojects to parcels in the Salinas Valley.

   a) The project definition matters if the benefits will be measured as "with the project" and "without the project."
   b) The definition of the project as the maintenance of the reservoirs instead of as the continued safe operation of reservoirs is confusing in light of the benefits described in this Engineer's Report.
   c) One reason that the project definition is confusing is that the benefits of this Engineer's Report Maintenance Project are based on the HBA, where benefits of the HBA's defined project are benefits *of* operation of the reservoirs, instead of just the maintenance of the reservoirs where the benefit *is* operation. If the Maintenance Project description is the continued safe operation of the reservoirs, then the HBA benefits remain relevant and logical.
   d) Furthermore, this Engineer's Report refers to benefits which are assessed via comparison of *with the reservoir* and *without the reservoir*, as is done in the HBA. Benefits assessed in the same manner as in the HBA include erosivity impact, agriculture land impact, buildings and structures impacts, avoided groundwater pumping cost, avoided well costs, and avoided well costs due to seawater intrusion. There is one "benefit" in the Engineer's Report that is, however, not evaluated under the with/without reservoir scenario and instead is evaluated under a with/without *maintenance* scenario, and that is the flood protection from dam breach "benefit." While a breach of the dam could certainly occur without proper maintenance, a breach of the dam could never occur without the creation and existence of the reservoir; it's obvious why a with/without reservoir scenario doesn't provide this special "benefit." **All other assessed benefits in this Engineer's Report are benefits conferred by the existence of the reservoir, while the dam breach is a *risk* conferred by the existence of the reservoir.**
      i) The assessment of the risk from dam breach was published in 2018 as a result of inundation modeling and mapping, and has not been included in previous special assessments. Risk from natural flooding was assessed in the HBA. The HBA indicates that the lower valley benefitted most from protection provided by the

reservoirs, while the upper valley did not gain as much protection (specifically, in the form of reduced depth of inundation as discussed in *part 2)c)* above). **Therefore, to discuss the potential breach of a dam as posing an increased risk on the upper valley while providing flood protection to the lower valley is in effect to *shift the risk* of damage by floods from the lower valley to the upper valley.** By saying that the upper valley has a greater benefit from the Maintenance Project in the form of protection from flooding in the case of a dam breach, the report is calling out the greater threat and risk that the dams pose on the upper valley if they are not properly maintained. This risk has been present since the creation of the reservoirs and is minimized as a function of maintenance. This current Zone 2D assessment appears to be compensating for inadequate accounting of this risk in the prior determination of required maintenance projects for Nacimiento and San Antonio dams by previous O&M cost estimates and special assessments.

e) Additionally, reliance on the HBA may not be entirely necessary because, on page 24, the Engineer's Report states that the "nine-year operations and maintenance list should have been covered by the O&M budget from the Zone 2C assessments, but the current funding is insufficient to complete these projects." Projects which should have been covered by the Zone 2C assessment would, reasonably and logically, collect funding from the same parcels at the same portion/share of total cost as in the Zone 2C assessment.
   i) Would a rate increase to Zone 2C make logical sense to provide funding for the Maintenance Project? What is the need for a new assessment?
   ii) Which of the Maintenance Project subprojects should have been covered by Zone 2C and which are a result of the "additional requirements for safety, monitoring and regulatory compliance" (p.23)? How do the subprojects of the Maintenance Project differ from the work done under the additional O&M fund being apportioned in this Engineer's Report?

## IV. Discussion

5) Before the Engineer's Report is adopted to reassess and re-apportion the benefits of the Maintenance Project in this proposed Zone 2D, Stetson would like to review the supporting spreadsheets and data which compute the re-apportioning and the land use factor designations.

6) Regarding the Flood Protection from Dam Breach Benefit: Safety and prevention of risk caused by the project isn't a benefit of the project, it's a prerequisite of the project's initial construction and a fundamental responsibility of MCWRA. There is no doubt that the Maintenance Project should be funded and that the work should be completed, however, it is misleading to present a risk as a benefit and that section of the assessment does not read as logical, as it is written. Should a catastrophic dam failure occur, the impact to the community and area would be greater than just the inundation of the parcels – lives could be lost. **Maintenance of the reservoirs doesn't just protect parcels from dam breach inundation, it protects all the benefits conferred by the reservoir's existence.** Inclusion of flood protection due to dam breach may not be a true special benefit; it may be a general benefit.

7) If the Zone 2C assessment methodology, parcel benefit location, and O&M benefits still apply and are still being assessed, could the current Maintenance Project be funded through an increase of the Zone 2C assessment?
8) The SVWP O&M Component assessment is also relevant to this Engineer's Report, and some of its benefits are in fact included in the Engineer's Report – why some and not others? Is this a double counting of special benefits?
9) Possible follow-up research:
   a) Where is the service area receiving power generated at the Nacimiento Hydroelectric Plant? Is maintenance of hydroelectric power a special benefit? Recipients of this power seem to reap a special benefit from certain subprojects which allow for consistent and increased discharge at the low level outlets of Nacimiento Dam into the hydroelectric plant.
   b) What are the general benefits of the Maintenance Project?

# Prop 218 Engineer's Report Workshop - Follow-up

**Julia Shiplacoff** <JuliaS@stetsonengineers.com> Tue, Feb 16, 2021 at 1:02 PM
To: "bucheb@co.monterey.ca.us" <bucheb@co.monterey.ca.us>
Cc: "Woodrow, Amy x4838" <WoodrowA@co.monterey.ca.us>, "Thomas S. Virsik (thomasvirsiklaw@gmail.com)" <thomasvirsiklaw@gmail.com>

Mr. Buche,

Thank you for today's workshop!

I work with Tom Virsik and I made the request to see Kari's spreadsheets detailing the calculation of impact for each benefit, which she mentioned she had in response to Tom's questions. I would also like to understand the calculation of the final impact score/proportion, which I believe a spreadsheet would clear-up.

There were many questions today asking *how* and *why*... I believe the following suggested updates to the report would support everyone's understanding of the how/why of the final impact assessment:

1. A section providing a summary *rationale* with respect to the *use* of information in the HBA and SVWP- what elements were used, what elements not used, and why?
2. Regulatory standards for dam maintenance/operation have changed. Which new regulatory standards impact the benefit assessment and how?
3. Which exact supplemental materials were used in benefit assessment - references and page numbers? Please consider adding references to the appendix of the Engineer's Report (inundation report, HBA, others?).
4. Is there a GIS map of the Factors (what land is designated as what?); one of the tables shows equivalent acreage which suggests this analysis has been completed.
5. Please consider adding a summary table(s) of Benefit Scale of Impact calculations as an appendix.

Thank you for your time and attention. Please feel free to call me to discuss.

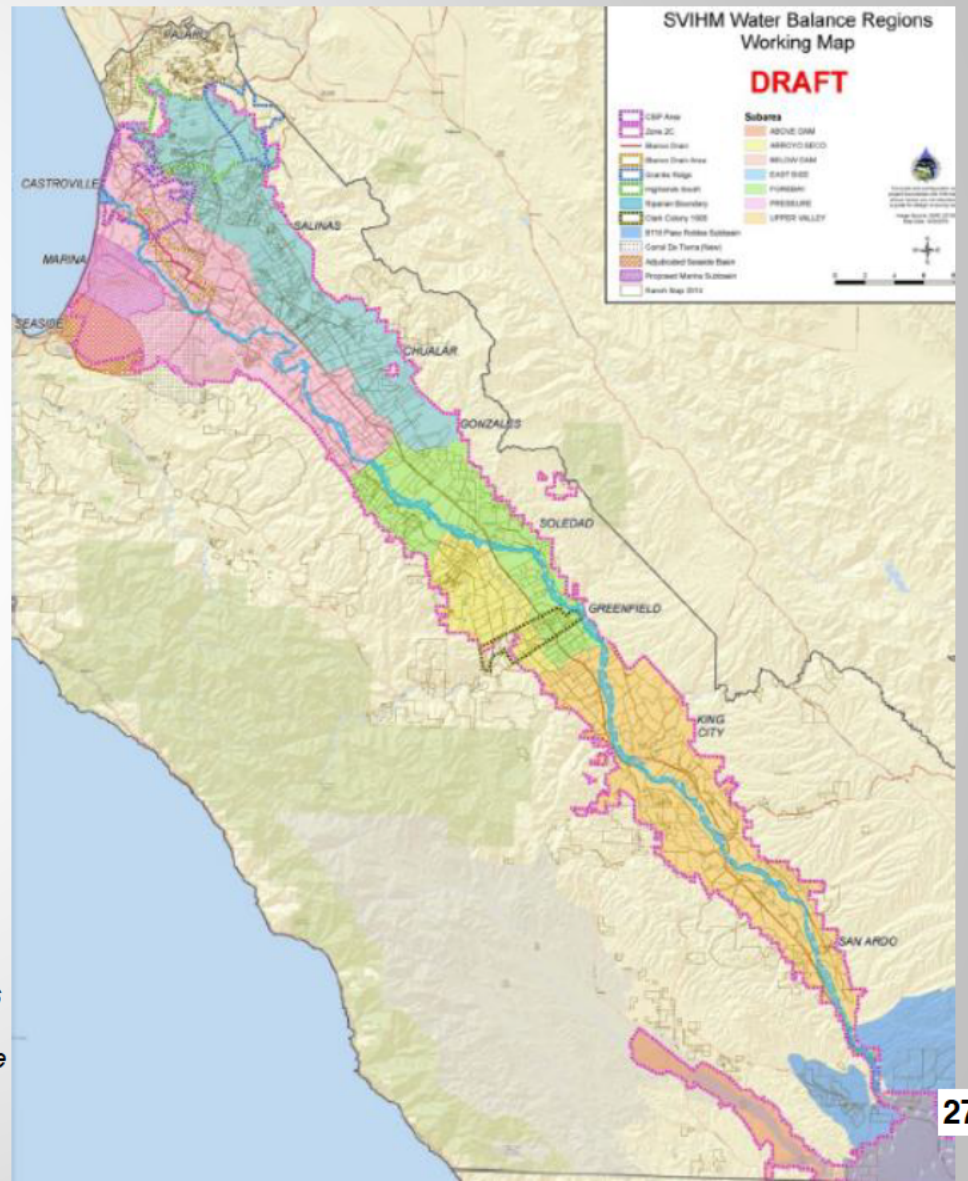
Julia

**JULIA ANNE SHIPLACOFF, PE** Senior Engineer C: 650-479-6044 julias@stetsonengineers.com

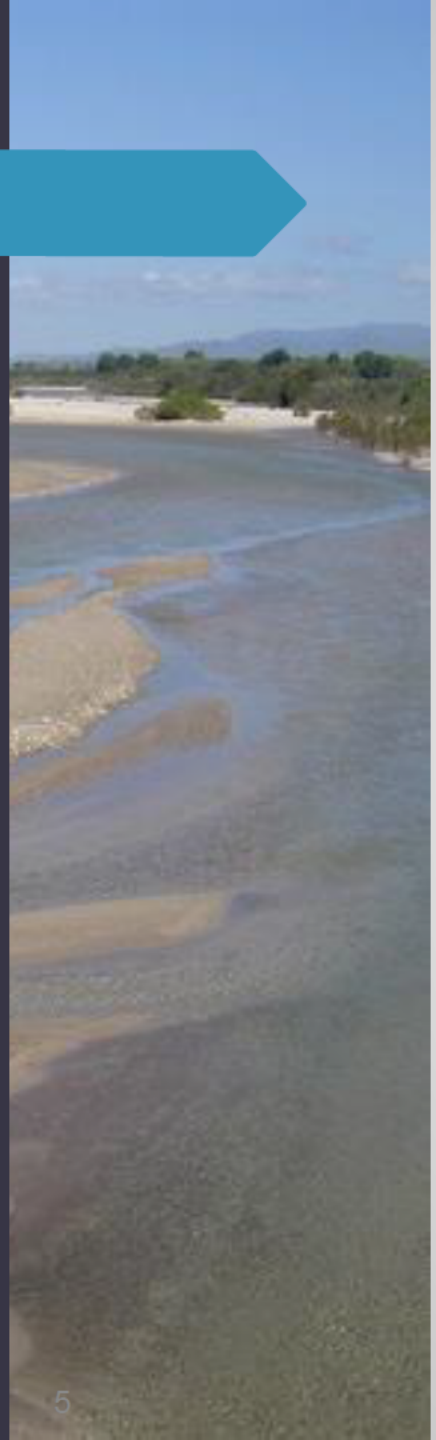
**STETSON ENGINEERS INC.** 2171 E Francisco Blvd, Suite K, San Rafael CA 94901

# Water Budget Tools

- Two models developed by USGS
  - Salinas Valley Integrated Hydrologic Model (SVIHM) – historical and current conditions
  - Salinas Valley Operational Model (SVOM) – future conditions
- Both models will also be used by MCWRA and USBR for other studies in the Valley
- Both models are preliminary. MODELS CONTINUE TO BE UPDATED.




*This data (model and/or model results) are preliminary or provisional and are subject to revision. This model and model results are being provided to meet the need for timely best science. The model has not received final approval by the U.S. Geological Survey (USGS). No warranty, expressed or implied, is made by the USGS or the U.S. Government as to the functionality of the model and related material nor shall the fact of release constitute any such warranty. The model is provided on the condition that neither the USGS nor the U.S. Government shall be held liable for any damages resulting from the authorized or unauthorized use of the model.*



# Important Note

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# Preliminary Future Water Budget (2070)

**All model results are preliminary and subject to revision.*

| | 180/400 | Eastside | Forebay | Upper Valley | Langley |
|---|---|---|---|---|---|
| Groundwater Pumping | -88,500 | -78,400 | -115,900 | -87,500 | -1,400 |
| Drain Flow | -8,400 | -100 | 0 | 0 | -600 |
| Evapotranspiration | -37,000 | -800 | -35,100 | -47,300 | -2,100 |
| Net Streambed Exchange | 54,500 | 14,500 | 106,000 | 72,200 | -1,100 |
| Deep Percolation | 62,000 | 38,700 | 55,400 | 64,100 | 11,700 |
| Seawater Exchange | 2,800 | 0 | 0 | 0 | 0 |
| Flow to/from Monterey | -600 | 0 | 0 | 0 | 0 |
| Flow to/form Eastside | -2,500 | 0 | -500 | 0 | -1,000 |
| Flow to/from Forebay | 2,300 | 500 | 0 | -1,400 | 0 |
| Flow to/from Upper Valley | 0 | 0 | 1,400 | 0 | 0 |
| Flow to/from Langley | 4,300 | 1,000 | 0 | 0 | 0 |
| Flows to/from Surrounding Watersheds | 1,100 | 1,600 | 1,300 | 6,600 | 100 |
| Flow to/from Pajaro | -200 | 0 | 0 | 0 | -300 |
| Flow to/from 180-400 ft | 0 | 2,500 | -2,300 | 0 | -4,300 |
| Flow to/from Paso Robles | 0 | 0 | 0 | 4,900 | 0 |
| Flow to/from Seaside | 0 | 0 | 0 | 0 | 0 |
| Storage Change | -10,500 | -20,500 | 9,700 | 11,400 | 1,000 |

# Interlake Tunnel Progress Report

July 2020

Leadership Group
Salinas Valley Water Coalition
Salinas Valley GSA

# Agenda

1. Update on modeling results – what we learned
2. Water rights amendment requirement
3. Revised project schedule and implementation plan
4. Benefits to Salinas River groundwater sustainability
5. Financial status and cost estimates for various project scenarios
   - Value of project benefits
   - Cost of project benefits
6. Proposition 218 financing & cost allocation options
7. Next steps

# Model introduction

**Salinas Valley Operational Model**

- Built from Salinas Valley Integrated Hydrologic Model (SVIHM) developed by USGS – completed January 2020
- Models the entire Salinas Valley with Reservoirs connected
- Simulates groundwater-surface water interaction
- Operational model configured to MCWRA current operational rules
- Final SVIGSM model expected available to the public – December 2020

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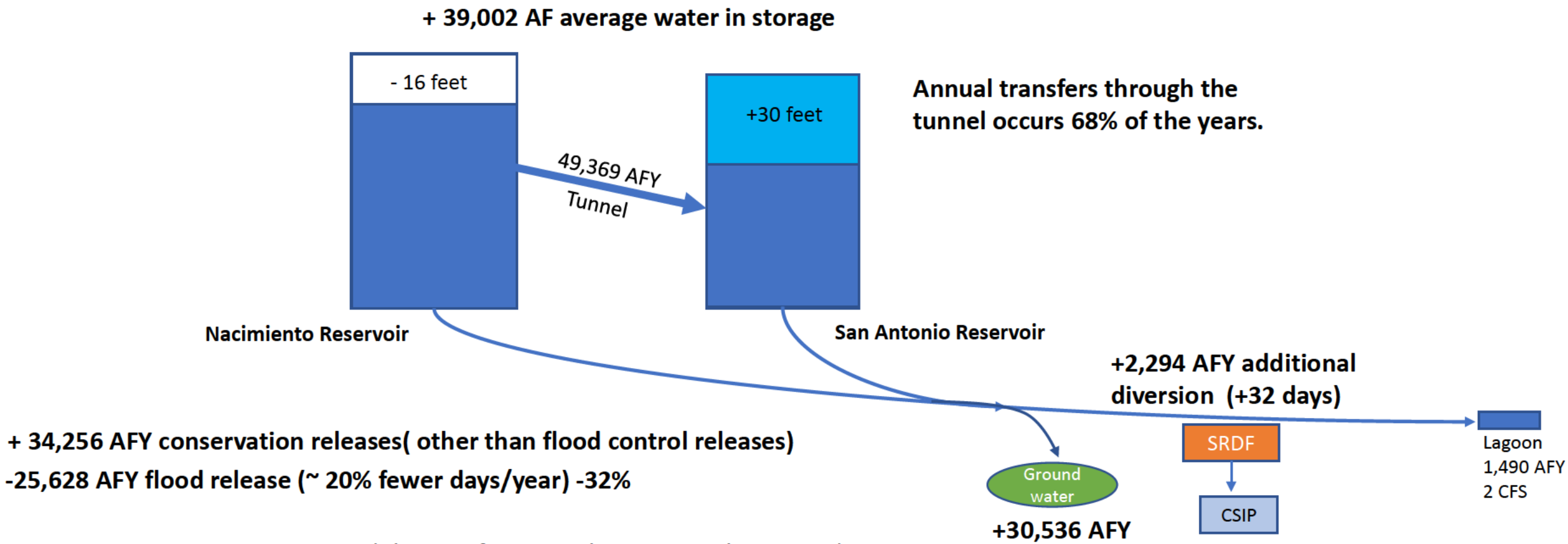
Scenarios modeled:

- Tunnel only
- Tunnel + 7’ San Antonio Spillway raise
- Tunnel + 7’ spillway raise + increased demand at SRDF

**Scenarios compared to baseline model**

# Model results – Tunnel only

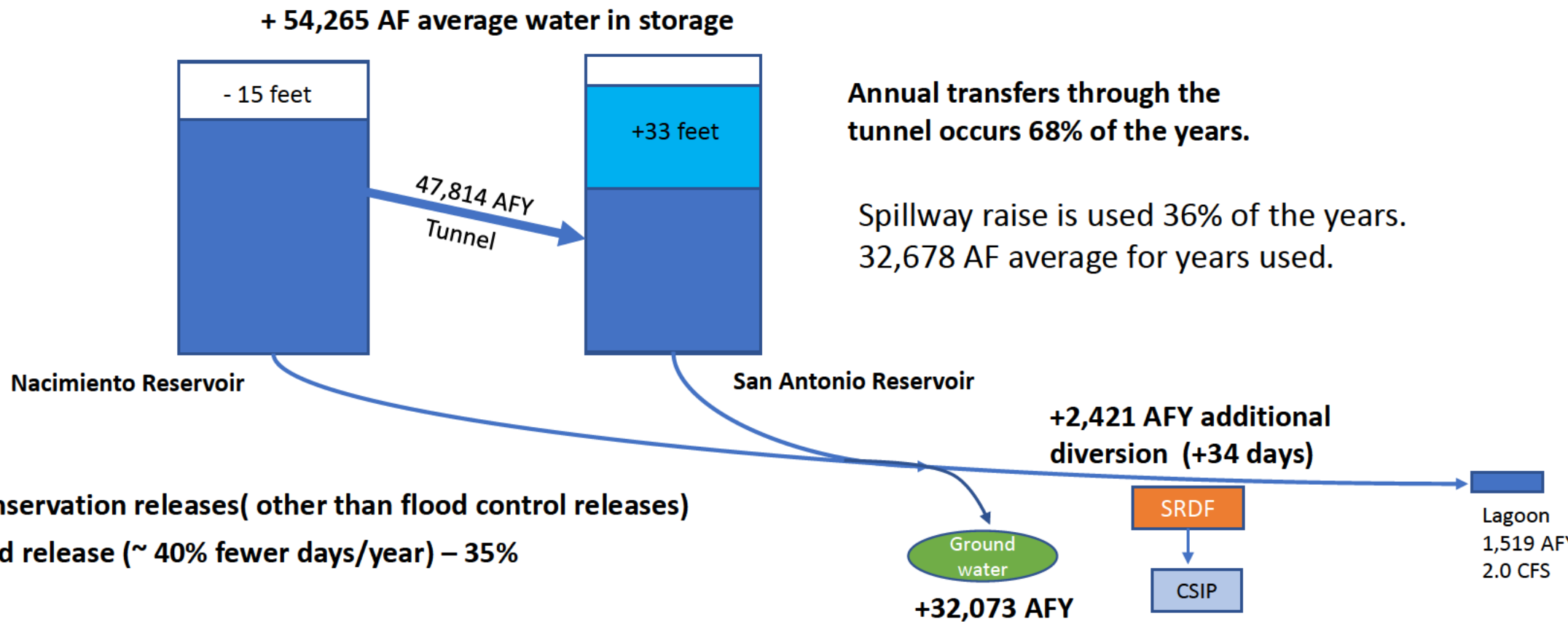
- Increases average water storage by 39,002 AF (average)
- Increases conservation releases by 34,256 AFY
- Reduces flood releases by 32%
- Improves performance of SRDF with 32 additional operating days




(Changes from Baseline – Annual Averages)

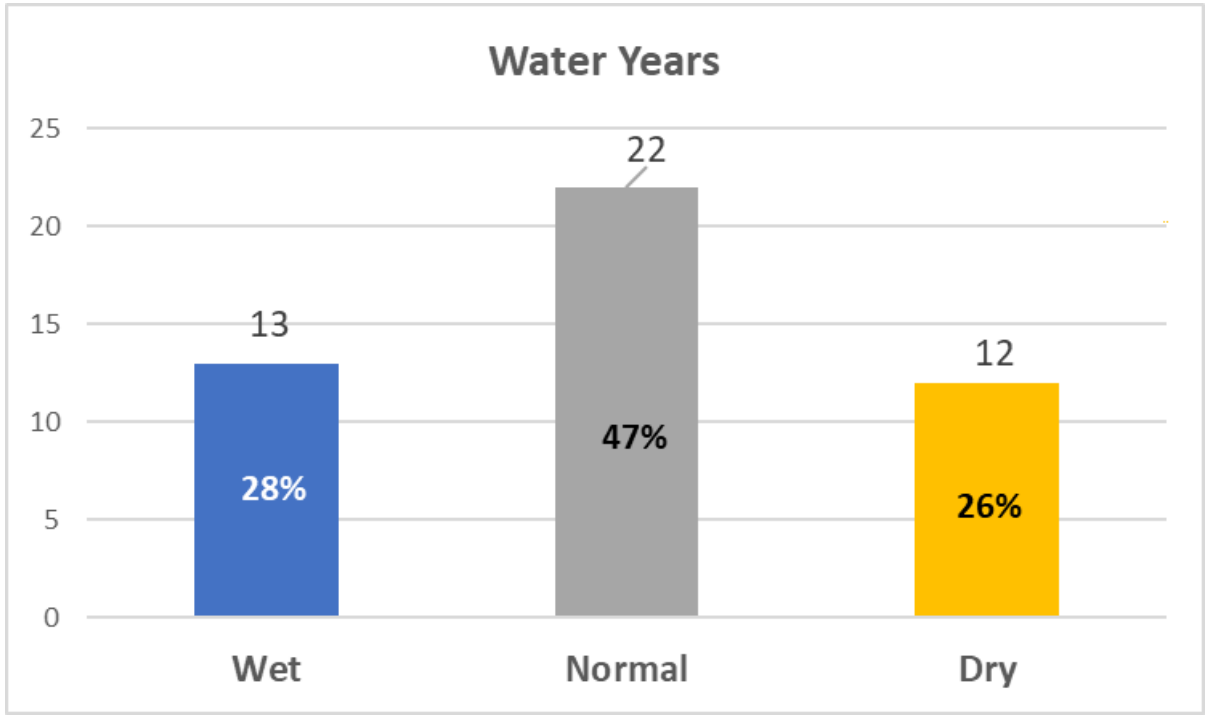
# Model results – Tunnel + 7’ Spillway Mod

- Increases average water storage by 54,265 AF (average)
- Increases conservation releases by 35,945 AFY
- Reduces flood releases by 35%
- Improves performance of SRDF with 34 additional operating days

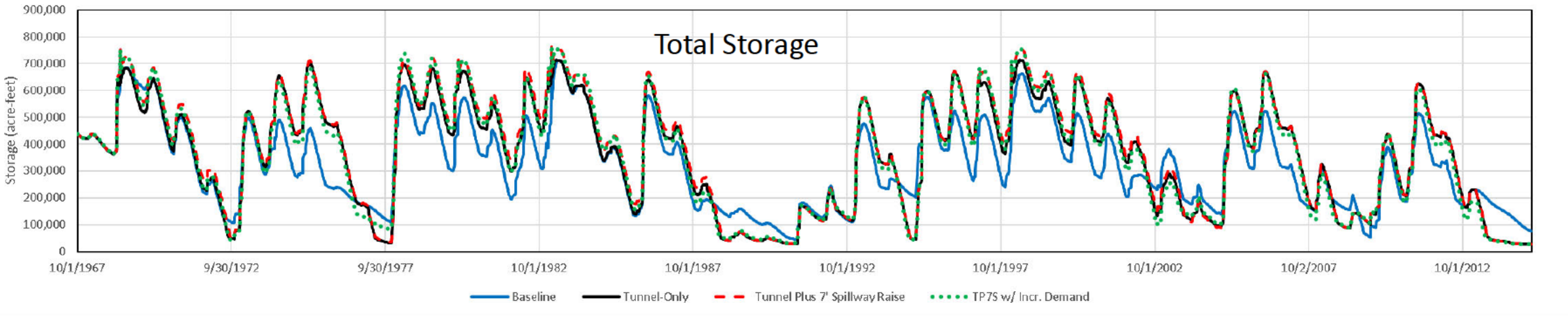


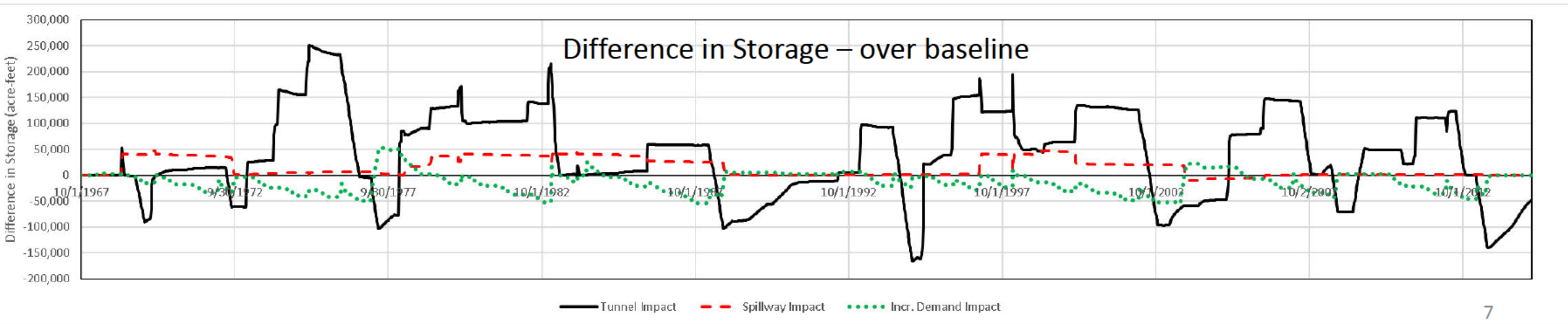

(Changes from Baseline – Annual Averages)

# Model results by water year type

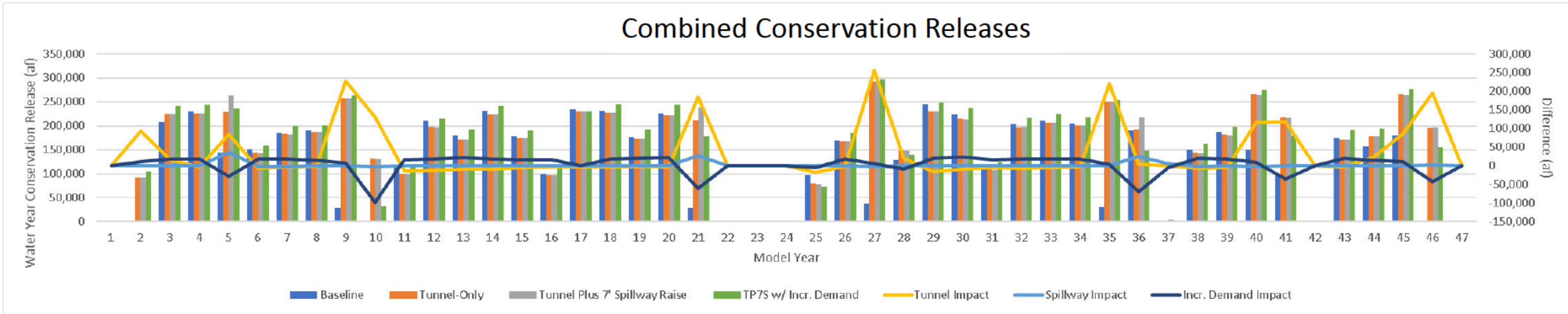


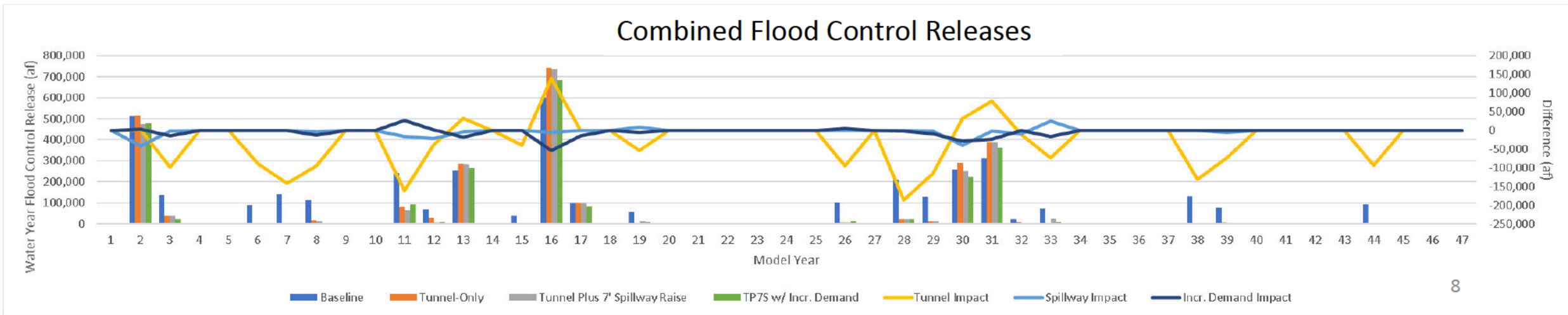
# Model hydrographs – Storage analysis – 47 year history

# Model hydrographs – Conservation Releases /Flood Control Releases

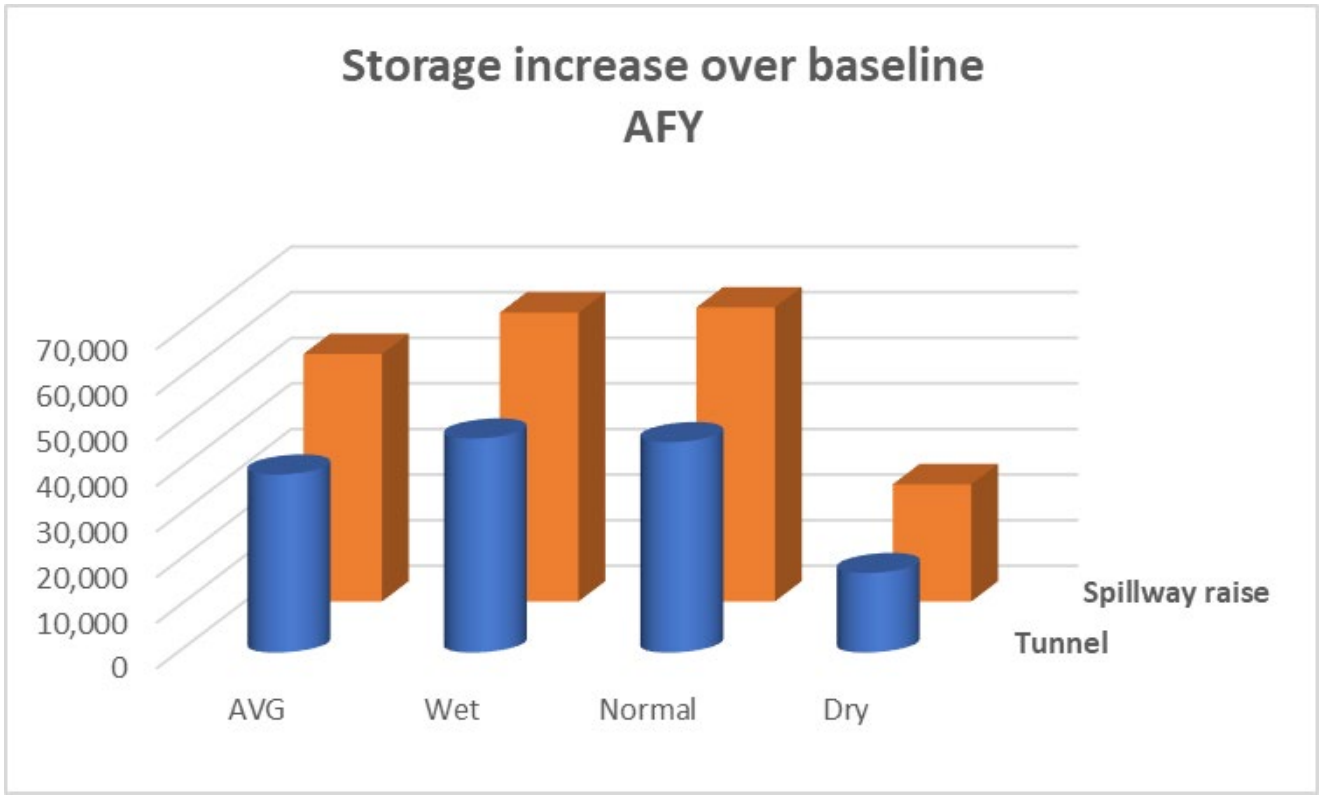



# SVOM Results Summary – average years

| | Tunnel-Only | Tunnel + 7' Spillway Raise | TP7S w/ Incr. Demand |
|---|---|---|---|
| Shows Effect of: | Tunnel | Spillway Raise | Increased Demand |
| Average Δ in Storage (af) | +39,000 | +54,300 | +40,400 |
| Nacimiento Δ Stage (ft) | -16 | -15 | -16 |
| San Antonio Δ Stage (ft) | +30 | +33 | +30 |
| Tunnel Transfer (afy) | 49,400 | 47,800 | 48,300 |
| % of Years w/ Tunnel Transfer | 68% | 68% | 60% |
| Δ Releases other than FCR (afy) | +34,300 | +36,000 | +39,100 |
| Δ Flood Control Release (afy) | -25,600 | -28,100 | -31,600 |
| Δ FCR Days | -20% | -40% | -40% |
| Δ SRDF Diversion (afy) | +2,300 | +2,400 | +18,200 |
| Δ SRDF Diversion Days | +32 | +34 | +27 |

All differences are calculated from the Baseline scenario

# Storage increase over baseline




| | Tunnel | Spillway raise |
|---|---|---|
| AVG | 39,002 | 54,265 |
| Wet | 46,899 | 63,346 |
| Normal | 46,106 | 64,473 |
| Dry | 17,421 | 25,711 |

Thomas S. Virsik
ATTORNEY AT LAW

*Via email only bucheb@co.monterey.ca.us*
March 23, 2021

Brent Buche, General Manager
Monterey County Water Resources Agency
1441 Schilling Place
North Building
Salinas, CA 93901

Re: March 24, 2021 Board of Directors Meeting
Engineer's Report for Zone 2D

Dear Mr. Buche:

Yesterday I submitted a detailed comment letter on behalf of my clients addressing the Report that the public was able to review from February. A new Report dated March 22, 2021 was made available approximately 24 hours before the Agenda suggests the Board may approve it. While not a Brown Act violation, the timing is a gross disappointment to the interests who reached out to the MCWRA and suggests that good faith gestures are seen as weaknesses to exploit.

In the 24 hours available in which to review the Report, detailed technical and legal review is fraught. That is true for the Directors as well. While one can read the Report in one day, checking the references, verifying the arithmetic, and cross-referencing the HBA, SVWP Report, the Brown & Caldwell Study – to name only the most obvious references in the Report – is impossible.

While I or others may have specific comments on specific portions of the Report during the abbreviated time that the public is allowed to provide input, I suggest the Directors consider the below broad concerns and considerations ahead of any more granular observations:

- Almost all of the content of my letter of March 22, 2021 remains at issue. The only change is that this new Report purports to calculate General Benefits. Its approach remains inconsistent with logic and binding precedent.

- The Report implies that providing some amount of evidence is sufficient to meet the MCWRA's burdens. The law is strict: the MCWRA bears the burdens in any litigation and must meet the higher than typical "clear and convincing" standard of proof. In other words, "some" evidence is insufficient on which an engineer can exercise judgment.

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- General benefits include both benefits to members of the public (e.g., not killing people in a catastrophic breach) and to lands not within the assessment zone (e.g., lake interests). The Report appears to not understand the law to that effect.

- Health and safety (e.g., loss of life) are typical general benefits, rather than special benefits to parcels of land.

- Most assessments include some component of general benefit, yet the Report ignores the facial general benefit of avoiding catastrophic floods due to breaches.

- Courts do not defer to the sponsoring agencies or engineers – Courts are required to exercise independent judgment where logical inconsistency can prove fatal to an agency.

- In calculating benefits, burden must be considered (e.g., the risk of harm due to a breach).

- A lack of supporting material and precise phrasing will undoubtedly trigger a slew of justified Public Record Act requests for the underlying material or to demonstrate the lack thereof.

I respectfully suggest that the Directors and staff consider objective resources designed for a sponsoring agency to successfully navigate a Proposition 218 process, should they not feel comfortable listening to the public's advocates. A leading source designed by and for public entities which pursue Proposition 218 processes is the Propositions 26 and 218 Implementation Guide, May 2019, League of California Cities. https://www.cacities.org/Prop218andProp26

The best outcome remains the one my prior letter identified: the MCWRA consider the various comments carefully and then engage with the stakeholders in lieu of investing further resources into a Proposition 218 proceeding likely to fail and/or be readily and justifiably challenged in court.

Very truly yours,

Thomas S. Virsik

c. Kelly Donlon, MCWRA counsel, DonlonKL@co.monterey.ca.us
Clerk, MCWRA Board of Directors, HenaultAG@co.monterey.ca.us

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*Via email only bucheb@co.monterey.ca.us*
20 December 2021

Brent Buche, General Manager
Monterey County Water Resources Agency
1441 Schilling Place
North Building
Salinas, CA 93901

Re: December 20, 2021 Board of Directors Meeting
Item 5
Engineer's Report for Zone 2D

Dear Mr. Buche:

On behalf of my clients in March of this year I submitted several detailed comment letters about the then-current draft Engineer's Report for Zone 2D, as did others including the Salians Valley Water Coalition and LandWatch. The public had nearly a month to digest a February draft of that Report before it was brought to the Board. This time the time-frame is less than a week. Accordingly, the comments herein are bullet points that may be embellished or explained further by oral comments. Should the present draft or a substantially similar one move forward, more detailed written comments may follow, including analyses from engineers and/or economists familiar with dam operations, the HBA, and economic benefits.

The below are areas of concern and, at times, puzzlement in the present draft Report. They are not in order of magnitude of priority:

- Certain entries in the tables are illegible.
- The Report claims the excerpt from the 2004 (i.e., after the SVWP Engineer's Report) CAMP report supports the view that a new zone and assessments methodology is justified, notwithstanding that the excerpt relied upon states:

> *After using long-term debt financing to reduce peaks in year-to-year outlays for Zone 2C candidate projects and additional annual recurring activities, annual cash deficits are projected for each alternative, which indicate the existing assessment must be increased to implement the recommended projects and additional recurring annual activities.*

Agenda packet, page 114 (emphasis supplied)

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- Recreational general benefits are limited to only three specific weeks of a calendar year.
- Flood control benefits are tied to "flood control release days" whereas the MCWRA reservoirs, as operated, (1) provide no benefits when their function is to pass the natural flows (i.e., honoring senior water rights) and (2) "flood control releases" contribute to recharge no matter their nomenclature.
- The Report purports to rely on the HBA but then skews those conclusions by imposing a zero to five scale, which justification is not addressed. This point was raised in prior comments.
- As raised in my own and the SVWC comment letters of March, many of the "subprojects" are on their face characterized as providing a public safety benefit but such benefits (large or small) are omitted. See my 22 March letter.

A narrow example that compares the HBA and the current Report may help reveal that despite its professed reliance on the HBA, the Report contradicts the HBA. The HBA characterized the flood benefits, stated in dollars, of FSU's 1 and 10 as approximately $4 M and $300 K, respectively. HBA at Table ES-3. Using the current Report's estimate of approximately 16 K and 5500 K of flood acres in those two FSU's, respectively, the HBA's benefit calculations for FSU's 1 and 10 translate to approximately $250 and $54 per acre, or a near five-fold difference. The Report, in ways not quite apparent, concludes the per acre flood benefit (for the A or highest benefit lands) of the proposed projects is $132 and $53, respectively, of those two FSU's. Table 18 (Agenda page 100). The proportional flood control benefit between FSU's 1 and 10 has shifted from around 5X from the HBA to around 2.5X in the current Report.

I respectfully suggest that the Directors and staff again review the Propositions 26 and 218 Implementation Guide, May 2019, League of California Cities. https://www.cacities.org/Prop218andProp26 with respect to Engineer's Reports and in general to the burdens of proof and persuasion involved in any Proposition 218 proceeding. As an aside, jurisprudence continues to strictly interpret Proposition 218, e.g., Lejins v. City of Long Beach, Dec.1, 2021 (2021 WL 5628744), wherein the courts struck down a successful (albeit different than the current) Proposition 218 process because the agency could not meet the substantive requirement of the Constitution.

Per the current draft Report the proposed projects are either (1) deferred maintenance that fails to cleave to the SVWP and CAMP era determinations of O&M proportionality or (2) the projects are "new" or being considered "anew" and fail for – among other flaws -- omitting (a) the general public safety and (b) recreational benefits during the other 49 weeks of a calendar year.

The best outcome remains the one my prior letters identified: the MCWRA consider the various prior and current comments carefully and then engage with

the stakeholders in lieu of investing further resources into a Proposition 218 proceeding likely to fail and/or be readily and justifiably challenged in court.

Very truly yours,

*Thomas S. Virsik*

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