



tel: 916.455.7300 · fax: 916.244.7300
510 8th Street · Sacramento, CA 95814

December 12, 2022

SENT VIA EMAIL

(board@valleywater.org; clerkoftheboard@valleywater.org)

Santa Clara Valley Water District
Board of Directors
5700 Almaden Expressway
San Jose, California 95118

**RE: Comments on December 13, 2022, Board of Directors Meeting
Agenda Item 2.8 - Adopt a Resolution Authorizing the Execution and
Delivery of WIFIA Agreements and Documentation for Anderson Dam
Projects and Pacheco Reservoir**

Dear Chair and Members of the Board:

This firm represents Stop the Pacheco Dam Coalition, an unincorporated association working with conservation and other groups to protect Santa Clara County's ratepayers and the environment, as well as working ranchlands, from the environmentally destructive, high-cost, and high-risk Pacheco Reservoir Expansion Project ("Dam Project").¹ Given the high risks, high costs, and severe environmental damage associated with the Dam Project, Santa Clara Valley Water District ("Valley Water") should not continue to pursue this project. The Board should not adopt the resolution provided in Agenda Item 2.8 of the December 13, 2022, Board of Directors meeting. Further, the Dam Project should be removed from Valley Water's water supply capital improvements in favor of other projects with lower risk, higher water supply benefits, and less severe environmental impacts.

Valley Water Should Abandon Pacheco Reservoir

Valley Water has already spent tens of millions of dollars, countless staff hours, and numerous board meetings pursuing the Dam Project. However, this time and resources has so far amounted to only an infeasible dam design, an inadequate Draft Environmental Impact Report ("DEIR"), with no other water agencies willing to financially participate in the Dam Project. While these shortcomings have materialized, the cost of the Dam Project continues to spiral out of control.

¹ For more information, see: <https://stoppachecodam.org/>.

Since the Division of Safety of Dams (“DSOD”) informed Valley Water that the hardfill project design was infeasible, there have been no updates of any substance to the interested public, and Valley Water’s plan for the Dam Project is now unclear. In addition to the infeasibility of the design, several state and federal agencies provided highly critical comments on the DEIR.² These agencies called into question the environmental impacts of the Dam Project and the inadequacies of the document. Thus, Valley Water is pursuing several billion dollars of debt to fund a project that has failed to meet basic planning benchmarks.

Additionally, Valley Water has failed to disclose the actual cost of the Dam Project to the public. The 2023-27 Capital Improvement Program estimates the Pacheco Dam to cost roughly \$2.5 billion.³ However, the materials for Item 2.8 show the cost for the 49 percent WIFIA funding would be roughly \$2.914 billion. This does not account for the other 51 percent not funded by WIFIA loans, which at this time would be roughly \$1.3 billion. Therefore, accounting for financing the loan, the project’s total cost is likely closer to \$4.5 billion. In April 2021, with an estimated cost of \$2.520 billion, the Dam Project was reported to have a storage cost of \$18,800 an acre-foot, which is a large underestimate, given debt service costs alone. That is several times higher than most types of water projects.⁴ However, Valley Water has not integrated this exorbitant project cost into its predicted rate increases. Review of Valley Water’s documents and reports indicate that Valley Water’s public costs estimates do not account for the financing costs of the project, and thus the impacts to ratepayers from this project is undisclosed.

Valley Water should cut its losses. It should not pursue a subsequent DEIR or spend the millions of dollars it would need to reconfigure the dam in a manner that meets DSOD standards. Instead, the billions of dollars that would be wasted on a very small amount of water, should be used on more forward-thinking projects. For example, Valley Water should pursue more recycling projects. Its current goal is to “develop recycled and purified water to provide for at least 10% of the Total County water demands by 2025.”⁵

² SPD has compiled public comments on the DEIR here:
<https://stoppachecodam.org/public-concerns/draft-environmental-impact-report-deir-comments-2022/>.

³ The CIP can be accessed at https://s3.us-west-1.amazonaws.com/valleywater.org.us-west-1/s3fs-public/2022-07/CIP_Tab-02_062722_BA.pdf, p. II-22.

⁴ This chart shows other types of water projects with acre-foot costs between \$100 and \$3,000, <https://waterinthewest.stanford.edu/groundwater/charts/cost-comparison/index.html>

⁵ <https://www.valleywater.org/your-water/recycled-and-purified-water>

Additionally, Valley water hopes to produce 24,000 acre-feet of recycled water by 2040. This is low compared with Orange County, for instance, which produces more than 100,000 acre-feet every year. Further, the cost of Orange County water is roughly \$850 an acre-foot;⁶ this is substantially lower than the \$18,800 for the Dam Project.

Valley Water and EPA Cannot Rely on National Environmental Policy Act Categorical Exclusions

The materials for Agenda Item 2.8 indicate that Valley Water intends to utilize 10 separate loans. The first loan would be nearly \$200 million for the planning and design costs for the Anderson Dam projects. Loans 2-10 would be for the construction of the Anderson Dam Projects and the planning, design, and construction of Pacheco Dam. The supplemental memorandum for the agenda item states:

Valley Water’s total capacity to borrow is unchanged, and subsequent construction loans will incorporate land acquisition, project management and construction-related engineering costs that EPA directed to be removed from the initial design and planning loans. This shifting of costs will allow EPA, in its assessment of the impact on the environment of each WIFIA project, to make a Categorical Exclusion determination under the guidelines set forth by the National Environmental Policy Act of 1969 (NEPA) and obligate funds for the design and planning loans.

(December 13, 2022, Supplemental Board Agenda Memorandum, p. 2.) However, as explained in the Stop the Pacheco Dam Coalition’s September 2022 letter to the EPA, this violates NEPA because it piecemeals the project into separate phases.⁷

The Council on Environmental Quality (“CEQ”) regulations address piecemealing. These regulations prevent a piecemeal approach that would divide a “project into multiple actions, each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.” (*Thomas v. Peterson* (9th Cir. 1985) 753 F.2d 754, 758.) The CEQ defines “connected actions” as actions that:

- i. Automatically trigger other actions which may require environmental impact statements.

⁶ <https://www.ocwd.com/gwrs/frequently-asked-questions/>

⁷ Available at: <https://stoppachecodam.org/wp-content/uploads/2022/09/22.09.08-SPDC-WIFIA-Cmt-Ltr.pdf>.

- ii. Cannot or will not proceed unless other actions are taken previously or simultaneously.
- iii. Are interdependent parts of a larger action and depend on the larger action for their justification.

(40 C.F.R. § 1508.25(a)(1) (1984).)⁸ The Dam Project falls squarely under both subsections ii and iii. The construction aspect of the project could not proceed without the planning and design portion of the project. Second, the sole purpose of the planning and design stages of the project is to construct the dam and operate the reservoir. Therefore, the scope of the action includes planning, design, construction, and operation, none of which should be evaluated under a separate NEPA process.

Additionally, public policy mandates against splitting funds into separate phases. Valley Water is asking the EPA to loan money for a high-risk, high-cost, and high environmental impact project that was called into question by local, state, and federal agencies during the review of the project under the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq. [“CEQA”]). Although not explained in the WIFIA Application, it appears that the Dam Project’s costs increased so much from the initial estimates that Valley Water now needs hundreds of millions more just to complete just the planning and design phase. This comes after Valley Water has already spent more than \$80 million on its planning process only to come up with a design that was deemed *infeasible* by the California DSOD, produced an EIR that has been roundly criticized by local, state, and federal agencies, and environmental groups.

The Agenda Item’s Supporting Documentation Fails to Describe Ongoing Litigation

In addition to the flaws described above, none of the documents included in agenda item 2.8 indicate that there is ongoing litigation between Stop the Pacheco Dam Coalition, Sierra Club and Amah Mutsun Tribal Band and Valley Water.⁹ It is unclear why Valley Water has omitted reference to the lawsuit challenging the extensive geotechnical investigations being carried out in furtherance of the Dam, especially since the lawsuit is included on the agenda for closed session. This information should be included in the Master Agreement to properly inform the Environmental Protection Agency of ongoing or threatened litigation.

⁸ See also *Hammond v. Norton* (D.C. Cir. 2005) 370 F.Supp.2d 226, 247.

⁹ See copy of lawsuit here: <https://stoppachecodam.org/wp-content/uploads/2022/08/22.08.23-Amended-Petition.pdf>. This information appears to be required in the WIFIA Master Agreement, Schedule 12(f).

* * *

Funds already spent are not a justification for the continued pursuit of this controversial project. It is not economically sound for Valley Water to pursue a project with such high risks, high costs, and very low rewards for its ratepayers. In addition, the environmental impacts from construction and inundation would be severe and permanent. We respectfully request that the Dam Project be abandoned, and that Valley Water instead invest in lower risk, more environmentally benign water projects that will provide affordable and sustainable water supply for generations to come.

Very truly yours,
SOLURI MESERVE
A Law Corporation

By: 
Osha R. Meserve

cc: Valley Water Board Members:
John L. Varela, Chair Pro Tem, District 1 (jvarela@valleywater.org)
Barbara Keegan, District 2 (bkeegan@valleywater.org)
Richard Santos, District 3 (rsantos@valleywater.org)
Jim Beall, District 4 (jbeall@valleywater.org)
Nai Hsueh, District 5 (nhsueh@valleywater.org)
Tony Estremera, District 6 (testremera@valleywater.org)
Rebecca Eisenberg, District 7 (reisenberg@valleywater.org)