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AUG 02 2023

Clerk of the Court
Superior Court of CA County of Santa Clara
BY *C. Pham* DEPUTY
C. Pham

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA**

SAN FRANCISCO BAYKEEPER,
Petitioner,

vs.

SANTA CLARA VALLEY WATER
DISTRICT, DOES 1-10,
Respondents.

Case No. 22CV403523

**ORDER RE: DEMURRER AND
MOTION TO STRIKE**

Submitted Matter

The demurrer and motion to strike to the Verified Petition for Writ of Mandate and Declaratory Relief (the "Petition") by Respondent Santa Clara Valley Water District ("Valley Water") came on for hearing before the Honorable Thomas E. Kuhnle on June 8, 2023 at 1:30 p.m. in Department 18. The matters having been submitted, the court orders as follows:

I. FACTUAL AND PROCEDURAL BACKGROUND

Petitioner San Francisco Baykeeper ("Petitioner") filed its Petition on September 27, 2022. According to the Petition, Petitioner is a regional nonprofit public benefit corporation organized under the laws of the State of California. (Petition at ¶ 10.) Petitioner's mission is to protect and enhance the water quality of the San Francisco Bay-Delta estuary for the benefit of

1 its ecosystems and human communities. (*Ibid.*) Through its on-the-water presence, Petitioner
2 patrols hundreds of miles of waterways throughout the Bay-Delta, investigating pollution
3 problems and bringing enforcement actions against polluters directly when necessary. (*Ibid.*)
4 Petitioner also uses targeted administrative and legal advocacy before state and regional
5 regulators, playing a lead role in developing sound and legal standards, permits, and regulations
6 to protect and restore the Bay-Delta. (*Ibid.*)

7 Valley Water, a political subdivision of the State of California, is a legal flood control
8 and water conservation and development district formed under the provisions of the Santa Clara
9 Valley Water District Act. (Petition at ¶ 11.) Valley Water is an integrated water resources
10 system that is responsible for water supply, flood protection, and stream stewardship for Santa
11 Clara County and its 1.9 million residents. (*Id.* at ¶ 14.) Valley Water is also the flood control
12 agency for Santa Clara County, annually conducting activities such as levee maintenance,
13 sediment removal, bank repair, and vegetation management. (*Id.* at ¶ 17.)

14 In 1996, a Water Rights Complaint was filed by a coalition of interested parties¹ (the
15 “Interested Parties”) with the State Water Resources Control Board alleging that Valley Water
16 was operating its facilities in a way that damaged Steelhead Trout, a threatened species under the
17 Endangered Species Act, as well as other aquatic species. (Petition at ¶ 154.) The Complaint
18 requested action to develop a plan to restore these species to a healthy condition. (*Ibid.*)

19 A settlement agreement, called the Settlement Agreement Regarding Water Rights of the
20 Santa Clara Valley District on Coyote, Guadalupe and Stevens Creeks, initialed by the Interested
21 Parties on May 27, 2003 (the “FAHCE Agreement”), and described in Section 6700 of the Water
22 Code, was reached in 2003. (Petition at ¶ 155.)

23 The FAHCE Agreement was intended to implement “flow measures” to remove barriers
24 to fish migration, provide summer rearing habitat, and “improve[] spawning conditions in three
25
26

27
28 ¹ The Interested Parties include: (1) Guadalupe-Coyote Resource Conservation District; (2) Trout Unlimited;
(3) California Trout, Inc.; (4) the Northern California Council of Federation of Fly Fishers; (5) the Pacific Coast
Federation of Fishermen’s Associations; (6) the National Marine Fisheries Service; (7) the U.S. Fish and Wildlife
Service; and (8) the California Department of Fish and Wildlife. (Petition at ¶ 154, fn. 1.)

1 watersheds: Coyote Creek, Stevens Creek, and Guadalupe River” sufficient to “restore and
2 maintain healthy [fish] populations.” (Petition at ¶ 156.)

3 The FAHCE Agreement contemplates the application of measures to provide (1) suitable
4 spawning and rearing habitat within each watershed, and (2) adequate flows for passage for adult
5 Steelhead Trout and salmon to reach suitable spawning and rearing habitat and for outmigration
6 of juveniles. (Petition at ¶ 158.) The FAHCE Agreement has yet to be fully implemented.
7 (*Id.* at ¶ 159.)

8 In 2021, Valley Water issued its Draft Environmental Impact Report (“DEIR”) for the
9 FAHCE Agreement. (Petition at ¶ 164.) The DEIR delayed implementation of the FAHCE flow
10 regime throughout the watershed for at least another ten years. (*Id.* at ¶ 165.)

11 The DEIR analyzed two potential flow regimes: the “FAHCE Flows” and the “FAHCE+
12 Flows.” (Petition at ¶ 166.) Both the FAHCE and FAHCE+ Flow regimes determine releases of
13 water, and thus flows in downstream rivers and creeks, based on storage levels in reservoirs.
14 (*Id.* ¶ 169.) As a result, when reservoir storage levels are below certain benchmarks, either due
15 to lack of rainfall, groundwater recharge, diversion to municipal (and other) uses, or for any
16 other reason, the FAHCE and FAHCE+ Flow regimes cannot result in sufficient water instream
17 to maintain fish in good condition. (*Id.* at ¶ 170.)

18 The ongoing FAHCE efforts and actions taken by Valley Water have not and will not
19 reverse the decline of native fish nor restore native fish species to good condition. (Petition at
20 ¶ 190.)

21 The Petition asks the court for a writ of mandate pursuant to Code of Civil Procedure
22 section 1085:

- 23 a. Compelling Valley Water to perform its mandatory duty of operating its dams to
24 allow sufficient water flows into associated waterways to maintain fish stocks in good
25 condition, as required by Fish and Game Code section 5937;
- 26 b. Compelling Valley Water to perform its mandatory duty to remove artificial barriers
27 that prevent fish passage, or to operate its waterways so as to prevent the formation of
28 such barriers, as required by Fish and Game Code section 5948;
- 29 c. Compelling Valley Water to perform its mandatory duties to prevent waste and
unreasonable use of the State’s waters, as required by Article X, section 2 of the
California Constitution; and/or

1 d. Compelling Valley Water to perform its mandatory duties to consider and mitigate
2 impacts to public trust resources, as required by the public trust doctrine.

3 (Petition at ¶ 1.)

4 Petitioner also seeks a declaratory judgment under Code of Civil Procedure section 1060
5 declaring Valley Water’s regulation of flow and operation of its dams is:

- 6 a. Unreasonable, in violation of Article X, section 2 of the California Constitution;
7 b. Unlawful, in violation of Fish & Game Code sections 5937 and 5948; and
8 c. In violation of the public trust.

9 (Petition at ¶ 2.)

10 According to the Petition, Valley Water has also failed to manage its waterways to
11 protect habitat values for fish and wildlife. (Petition at ¶ 3.) In particular, Valley Water
12 routinely brings temperatures and flow rates to levels that are unsuitable for fish, despite the
13 presence of protected species such as Steelhead Trout and Chinook Salmon. (*Id.* at ¶ 4.)

14 On September 27, 2022, Petitioner filed the Petition alleging causes of action for:
15 (1) Violations of Fish & Game Code, § 5937; (2) Violations of Fish & Game Code, § 5948;
16 (3) Waste and Unreasonable Use; and (4) Violations of the Public Trust Doctrine.

17 On December 16, 2022, Valley Water filed the motions presently before the court, a
18 demurrer and motion to strike. Valley Water filed a request for judicial notice in conjunction
19 with the motions. Petitioner filed written oppositions. Valley Water filed reply papers.

20 **II. PRELIMINARY ISSUES**

21 **A. Request for Judicial Notice**

22 “Judicial notice is the recognition and acceptance by the court, for use by the trier of fact
23 or by the court, of the existence of a matter of law or fact that is relevant to an issue in the action
24 without requiring formal proof of the matter.” (*Poseidon Development, Inc. v. Woodland Lane*
25 *Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117.)

26 Valley Water requests judicial notice of the following:

- 27 • California Water Code Appendix, Chapter 60;
28 • July 12, 1996 Administrative Complaint filed before the State Water Resources
Control Board;

- The FAHCE Agreement;
- Official FAHCE Webpages;
- Administrative Records and Official Acts Relating to FAHCE Implementation;
- Public Comments on the FAHCE DEIR;
- Correspondence from Administrative Agencies;
- Administrative Records Related to the Anderson Dam Seismic Retrofit Project (“ADSRP”);
- Official Websites on the Anderson Dam and the ADSRP;
- California Drought Conditions Website.

(See Request for Judicial Notice at Exs. 1-25.)

Petitioner filed a response to the request for judicial notice, conceding the request in part while disputing some of the exhibits. Despite objections raised by Petitioner, the court finds the request to be well-taken in support of the demurrer and motion to strike. (See Evid. Code, §§ 452, subds. (a), (b), (c), (h), 453.) Accordingly, the request for judicial notice is GRANTED.

The court declines to consider the supplemental request for judicial notice filed by Valley Water on May 30, 2023, as it constitutes new evidence raised for the first time in the reply papers. (See *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537 [the general rule of motion practice is that new evidence is not permitted with reply papers]; see also *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 252 [improper to introduce new evidence in reply].)

B. Writs of Mandate

A petition for writ of mandate brought under Code of Civil Procedure section 1085 “may be issued against a public body or public officer ‘to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station’ in cases ‘where there is not a plain, speedy, and adequate remedy, in the ordinary course of law.’” (*Flores v. Department of Corrections and Rehabilitation* (2014) 224 Cal.App.4th 199, 205 (*Flores*)).

“ ‘Two basic requirements are essential to the issuance of the writ: (1) a clear, present and usually ministerial duty upon the part of the respondent [citations]; and (2) a clear, present and beneficial right in the petitioner to the performance of that duty.’ ” (*Flores, supra*, 224 Cal.App.4th at p. 205.) “A ‘ministerial duty’ is one generally imposed upon a person in public office who, by virtue of that position, is obligated ‘to perform in a prescribed manner required by

1 law when a given state of facts exists.’ ” (*City of King City v. Community Bank of Central*
2 *California* (2005) 131 Cal.App.4th 913, 926.)

3 “When a court reviews an administrative decision pursuant to Code of Civil Procedure
4 section 1085, it merely asks whether the agency’s action was arbitrary, capricious, or entirely
5 lacking in evidentiary support, or whether the agency failed to follow the procedure and give the
6 notices the law requires.” (*Kreeft v. City of Oakland* (1998) 68 Cal.App.4th 46, 53.)

7 **C. Demurrer Standard**

8 “In reviewing the sufficiency of a complaint against a general demurer, we are guided by
9 long settled rules. ‘We treat the demurrer as admitting all material facts properly pleaded, but
10 not contentions, deductions or conclusions of fact or law. We also consider matters which may
11 be judicially noticed.’ ” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) “A demurrer tests only
12 the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the
13 complaint; the question of plaintiff’s ability to prove these allegations, or the possible difficulty
14 in making such proof does not concern the reviewing court.” (*Committee on Children’s*
15 *Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213–214.) “[I]t is error for a trial
16 court to sustain a demurrer when the plaintiff has stated a cause of action under any possible
17 legal theory.” (*Gregory v. Albertson’s, Inc.* (2002) 104 Cal.App.4th 845, 850.)

18 A petition for writ of mandate is subject to a demurrer on the same grounds as a civil
19 complaint. (See Code Civ. Proc., § 1109; see also *Hilton v. Board of Supervisors of Santa*
20 *Barbara County* (1970) 7 Cal.App.3d 708, 713 [“the sufficiency of a petition in a mandamus
21 proceeding can be tested by demurrer”].)

22 **III. DEMURRER TO THE PETITION**

23 Valley Water argues the Petition is subject to demurrer on the following grounds: (1) the
24 claims raised in the Petition are not ripe; (2) the court should abstain from adjudicating the
25 Petition until review of Valley Water’s California Environmental Quality Act (“CEQA”) Project
26 has concluded and a final plan for FAHCE/+ Implementation Project has been approved; (3) the
27 Petition fails due to the absence of indispensable parties; (4) the first and second causes of action
28 fail to state a claim; and (5) the Petition fails to state a claim for declaratory relief.

1 The Petition argues that Valley Water must take immediate steps to address harm to fish
2 and wildlife. For example, paragraph 6 of the Petition states:

3 Examples of Valley Water’s delay in acting to protect fish and comply with its
4 legal obligations are legion. Valley Water has been aware of these specific issues
5 since at least 1996, entered into an agreement to keep flows and other conditions
6 sufficient to sustain fish stocks in 2003, finally released a draft environmental
7 review for the measures agreed upon in that 2003 agreement in 2021, yet makes no
8 commitment to implement those conditions for at least another decade once its
9 environmental review is completed.

10 The Petition articulates its claims and concerns in 335 paragraphs spread across 41 pages of text.
11 Petitioner’s opposition to the demurrer frames its concerns in a similar fashion.

12 In response, Valley Water’s demurrer describes its efforts to address the concerns raised
13 by the Interested Parties in 1996, which Valley Water contends overlap with the issues raised in
14 the Petition. Valley Water also describes its ongoing efforts to protect aquatic species and
15 related issues by conducting studies, implementing pilot programs, and preparing the DEIR.
16 Valley Water also highlights constraints that limit its ability to respond to Petitioner’s concerns,
17 including federal oversight of the ADSRP.

18 As explained below, at this preliminary stage the court must assume that all material facts
19 alleged in the Petition are true. While the arguments presented in Valley Water’s submissions
20 may ultimately have merit, nearly all are premature.

21 **A. Ripeness**

22 “The ripeness requirement, a branch of the doctrine of justiciability, prevents courts from
23 issuing purely advisory opinions. [Citation.] It is rooted in the fundamental concept that the
24 proper role of the judiciary does not extend to the resolution of abstract differences of legal
25 opinion. It is in part designed to regulate the workload of courts by preventing judicial
26 consideration of lawsuits that seek only to obtain general guidance, rather than to resolve specific
27 legal disputes. However, the ripeness doctrine is primarily bottomed on the recognition that
28 judicial decision-making is best conducted in the context of an actual set of facts so that the
issues will be framed with sufficient definiteness to enable the court to make a decree finally
disposing of the controversy. On the other hand, the requirement should not prevent courts from

1 resolving concrete disputes if the consequence of a deferred decision will be lingering
2 uncertainty in the law, especially when there is widespread public interest in the answer to a
3 particular legal question. [Citations.]” (*Pacific Legal Foundation v. California Coastal Com.*
4 (1982) 33 Cal.3d 158, 170.)

5 “A demurrer may be sustained when the complaint shows on its face the claim is not ripe
6 for adjudication.” (*Breneric Associates v. City of Del Mar* (1998) 69 Cal.App.4th 166, 188.)

7 Valley Water argues that the claims in the Petition are not ripe because those issues are
8 the subject of a pending CEQA review, which is intended to accomplish the same relief sought in
9 the Petition. According to Valley Water, among the issues to be decided by the CEQA review, is
10 implementation of the FAHCE/+ Implementation Project. Once the Project is finalized, Valley
11 Water states that a challenge may be brought under CEQA.

12 But, as Petitioner points out in opposition, the Petition does not challenge the DEIR, the
13 FAHCE Agreement, or the implementation of the FAHCE/+ Implementation Project. Rather,
14 Petitioner alleges, in part, that Valley Water violated its mandatory duty to maintain its fish
15 stocks in good condition as required under the California Constitution, the Fish and Game Code,
16 and the public trust doctrine. (See, e.g., Petition at ¶¶ 1, 184, 189, 190, 288.) For example,
17 Valley Water does not contest that “the ongoing FAHCE efforts and actions taken by Valley
18 Water have not and will not reverse the decline of native fish nor restore native fish species to
19 good condition.” (*Id.* at ¶ 190.) Because Valley Water does not contest specific allegations in
20 the Petition, it cannot foreclose all claims as unripe, and because a party cannot successfully
21 demur to a portion of a complaint, its ripeness argument must fail. (See *Financial Corp. of*
22 *America v. Wilburn* (1987) 189 Cal.App.3d 764, 778 [“[A] defendant cannot demur generally to
23 part of a cause of action”]; see also *PH II, Inc. v. Super. Ct.* (1995) 33 Cal.App.4th 1680, 1682
24 [“A demurrer does not lie to a portion of a cause of action”].)

25 Therefore, the demurrer to the Petition on the ground of ripeness is OVERRULED.

26 **B. Judicial Abstention**

27 “Under the abstention doctrine, ‘a trial court may abstain from adjudicating a suit that
28 seeks equitable remedies if “granting the requested relief would require a trial court

1 to assume the functions of an administrative agency, or to interfere with the functions of
2 an administrative agency.” [Citation.]’ [Citation.] Abstention may also be appropriate if “the
3 lawsuit involves determining complex economic policy, which is best handled by the Legislature
4 or an administrative agency,” ’ or if “granting injunctive relief would be unnecessarily
5 burdensome for the trial court to monitor and enforce given the availability of more effective
6 means of redress.” ’ [Citations.]” (*Hambrick v. Healthcare Partners Medical Group, Inc.*
7 (2015) 238 Cal.App.4th 124, 147-148 (*Hambrick*).

8 In general, abstention is appropriate only if there is an alternative means of resolving the
9 issues raised in the plaintiff’s complaint. (*Klein v. Chevron U.S.A., Inc.* (2012) 202 Cal.App.4th
10 1342, 1369.)

11 The judicial abstention doctrine may be raised as a ground for demurrer. (See *Hambrick*,
12 *supra*, 238 Cal.App.4th at pp. 133, 138 [trial court, relying on abstention doctrine, sustained
13 demurrers to the statutory causes of action].) In deciding whether or not to abstain, a trial court
14 must examine “(a) the complexity of the issue(s) presented, (b) its/their overlap with issues
15 committed to the primary jurisdiction of the regulatory authority, and (c) the possibility that
16 inconsistent directions will be given to the regulated entity if the [c]ourt acts in tandem with the
17 authorized regulator’s continuing exercise of its power to direct specific conduct.” (*Id.* at p.
18 138.)

19 Valley Water asserts judicial abstention is appropriate because the relief requested by
20 Petitioner would require the court to assume or interfere with the functions of Valley Water.
21 But Petitioner does not request that the court assume the functions of an administrative agency.
22 Rather, it seeks that Valley Water meet its mandatory duties as set forth in the Petition. (See
23 Petition at ¶ 1.) Also, given the limitations on demurrer, Valley Water has not effectively
24 demonstrated that this lawsuit includes *only* complex issues best handled by an administrative
25 body as opposed to the court.

26 Consequently, the demurrer to the Petition on the ground of judicial abstention is
27 **OVERRULED.**

1 **C. Indispensable Parties**

2 A plaintiff (or petitioner) must join as parties all those whose interests are so directly
3 involved that the court cannot render a fair adjudication in their absence. (Code Civ. Proc.,
4 § 389.)

5 A person must be made a party to a proceeding if “(1) in his absence complete relief
6 cannot be accorded among those already parties, or (2) he claims an interest relating to the
7 subject of the action and is so situated that the disposition of the action in his absence may (i) as
8 a practical matter impair or impede his ability to protect that interest, or (ii) leave any of the
9 persons already parties subject to a substantial risk of incurring double, multiple or otherwise
10 inconsistent obligations by reason of his claimed interest.” (Code Civ. Proc., § 389, subd. (a).)

11 If such a person cannot be joined, “the court shall determine whether in equity and good
12 conscience the action should proceed among the parties before it, or should be dismissed without
13 prejudice, the absent person thus regarded as indispensable. The factors to be considered by the
14 court include: (1) to what extent a judgment rendered in the person’s absence might be
15 prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the
16 judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided;
17 (3) whether a judgment rendered in the person’s absence will be adequate; (4) whether the
18 plaintiff or cross-complainant will have an adequate remedy if the action is dismissed for
19 nonjoinder.” (Code Civ. Proc., § 389, subd. (b).)

20 “A person is an indispensable party if his or her rights must necessarily be affected by the
21 judgment.” (*County of Alameda v. State Bd. of Control* (1993) 14 Cal.App.4th 1096, 1105.)

22 “Failure to join an ‘indispensable’ party is not ‘a jurisdictional defect’ in the fundamental
23 sense; even in the absence of an ‘indispensable’ party, the court still has the power to render a
24 decision as to the parties before it which will stand. It is for reasons of equity and convenience,
25 and not because it is without power to proceed, that the court should not proceed with a case
26 where it determines that an ‘indispensable’ party is absent and cannot be joined.” (*Sierra Club,*
27 *Inc. v. California Coastal Com.* (1979) 95 Cal.App.3d 495, 500.)

1 “Failure to join an indispensable party is a ground for demurrer.” (*Organizacion*
2 *Comunidad de Alviso v. City of San Jose* (2021) 60 Cal.App.5th 783, 791; Code Civ. Proc.,
3 § 430.10, subd. (d).)

4 Valley Water argues the Interested Parties are necessary parties because of Petitioner’s
5 challenge to the FAHCE/+ Implementation Project is essentially a challenge to the FAHCE
6 Agreement. Valley Water suggests the absence of the Interested Parties would render the court’s
7 remedy incomplete and penalize the Interested Parties for Petitioner’s failure to participate in the
8 FAHCE/+ development and implementation process. But, as stated above, the Petition is not a
9 challenge to the FAHCE/+ development and implementation process. Rather, Petitioner seeks
10 relief in part based on Valley Water’s failure to perform mandatory duties in connection with
11 maintaining fish stocks in good condition. Such claims do not appear to implicate or entirely
12 displace the Interested Parties. Nor is it clear from the moving papers what causes of action
13 could be brought against the Interested Parties for Valley Water’s failure to comply with the law.

14 Accordingly, the demurrer to the Petition for failure join indispensable parties is
15 OVERRULED.

16 **D. Failure to State a Claim**

17 “ ‘The absence of any allegation essential to a cause of action renders it vulnerable to a
18 general demurrer. A ruling on a general demurrer is thus a method of deciding the merits of the
19 cause of action on assumed facts without a trial.’ [Citation.] ‘Conversely, a general demurrer
20 will be overruled if the complaint contains allegations of every fact essential to the statement of a
21 cause of action, regardless of mistaken theory or imperfections of form that make it subject to
22 special demurrer.’ [Citation.]” (*Morris v. JPMorgan Chase Bank, N.A.* (2022) 78 Cal.App.5th
23 279, 291-292 (*Morris*).)

24 “A complaint, with certain exceptions, need only contain a ‘statement of the facts
25 constituting the cause of action, in ordinary and concise language’ [citation] and will be upheld
26 ‘so long as [it] gives notice of the issues sufficient to enable preparation of a defense.’ ”
27 [Citation.] “[T]o withstand a demurrer, a complaint must allege ultimate facts, not evidentiary
28 facts or conclusions of law.’ [Citation.]” (*Morris, supra*, 78 Cal.App.5th at p. 292.

1 Valley Water argues the first and second causes of action are subject to demurrer for
2 failure to state a claim. Valley Water also contends the entirety of the Petition fails to state a
3 claim for declaratory relief. (Code Civ. Proc., § 430.10, subd. (e).)

4 **1. First Cause of Action: Violations of Fish and Game Code, § 5937**

5 Petitioner's first cause of action is for violations of Fish and Game Code section 5937.

6 That section states:

7 The owner of any dam shall allow sufficient water at all times to pass through a
8 fishway, or in the absence of a fishway, allow sufficient water to pass over,
9 around or through the dam, to keep in good condition any fish that may be planted
10 or exist below the dam. During the minimum flow of water in any river or
11 stream, permission may be granted by the department to the owner of any dam to
12 allow sufficient water to pass through a culvert, waste gate, or over or around the
13 dam, to keep in good condition any fish that may be planted or exist below the
14 dam, when, in the judgment of the department, it is impracticable or detrimental
15 to the owner to pass the water through the fishway.

13 In support of the first cause of action, Petitioner alleges:

14 Valley Water has failed to operate its dams to allow sufficient flows to maintain fish
15 stocks in the Santa Clara County river system in good condition, in violation of
16 California Fish and Game Code section 5937.

17 (Petition at ¶ 299.) Petitioner also alleges:

18 Valley Water's continued failure to maintain sufficient water flows below its dams to
19 keep fish stocks in good condition will cause great and irreparable harm to Baykeeper.

20 (*Id.* at ¶ 306.)

21 Valley Water contends the first cause of action fails to state a claim as it impermissibly
22 attempts to direct or exert control over Valley Water's discretionary decisions with respect to its
23 dam and water management. (See *Bldg. Indus. Ass'n v. Marin Mun. Water Dist.* (1991) 235
24 Cal.App.3d 1641, 1646 ["Although a court may order a public body to exercise its discretion in
25 the first instance when it has refused to act at all, the court will not compel the exercise of that
26 discretion in a particular manner or to reach a particular result."].) In support, Valley Water
27 relies on various remedies set forth in the prayer for relief of the Petition. (See Petition at Prayer
28 for Relief, Nos. 2(v)-(vii) and 3 (i)-(iv).) But, to the extent the Petition alleges an improper

1 remedy, the proper procedural vehicle is motion to strike, not demurrer. (See *Caliber*
2 *Bodyworks, Inc. v. Super. Ct.* (2005) 134 Cal.App.4th 365, 384 [“A demurrer is not the
3 appropriate vehicle to challenge a portion of a cause of action demanding an improper
4 remedy.”]; *Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002) 108 Cal.App.4th
5 1028, 1047 [“a demurrer cannot rightfully be sustained to part of a cause of action or to a
6 particular type of damage or remedy”]; see also *Venice Town Council v. City of L.A.* (1996) 47
7 Cal.App.4th 1547, 1562 [“[A] demurrer tests the sufficiency of the factual allegations of the
8 complaint rather than the relief suggested in the prayer of the complaint.”].)

9 Therefore, the demurrer to the first cause of action on the ground that it fails to state a
10 claim is OVERRULED.

11 **2. Second Cause of Action: Violations of Fish and Game Code, § 5948**

12 Petitioner’s second cause of action is for violations of Fish and Game Code section 5948.

13 That section states:

14 No person shall cause or having caused, permit to exist any log jam or debris
15 accumulation or any other artificial barrier, except a dam for the storage or
16 diversion of water, public bridges and approaches thereto, groins, jetties, seawalls,
17 breakwaters, bulkheads, wharves and piers permitted by law, and debris from
18 mining operations, in any stream in this State, which will prevent the passing of
19 fish up and down stream or which is deleterious to fish as determined by the
20 commission, subject to review by the courts.

19 In support of the second cause of action, Petitioner alleges in relevant part:

20 Valley Water has caused or permitted to exist log jams, debris accumulation, and other
21 artificial barriers, not including dams for the storage or diversion of water, public bridges
22 and approaches, groins, jetties, seawalls, breakwaters, bulkheads, wharves and piers
23 permitted by law, and debris from mining operations, in waterways in Santa Clara
24 County, California, which prevent the passing of fish up and down stream or which are
25 deleterious to fish, in violation of Fish and Game Code section 5948.

24 (Petition at ¶ 212.) Petitioner also alleges:

25 Valley Water’s continued failure to remove barriers to fish passage will cause great and
26 irreparable harm to Baykeeper.

27 (*Id.* at ¶ 317.)
28

1 Valley Water raises the same arguments to the first and second causes of action for
2 failure to state a claim. Thus, for reasons explained above, the demurrer is not sustainable on
3 this ground.

4 Consequently, the demurrer to the second cause of action on the ground that it fails to
5 state a claim is OVERRULED.

6 3. Declaratory Relief

7 Code of Civil Procedure section 1060, which governs actions for declaratory relief,
8 provides: “Any person interested under a written instrument . . . or under a contract, or who
9 desires a declaration of his or her rights or duties with respect to another . . . may, in cases of
10 actual controversy relating to the legal rights and duties of the respective parties, bring an
11 original action . . . for a declaration of his or her rights and duties in the premises, including a
12 determination of any question of construction or validity arising under the instrument or
13 contract.”

14 As an initial matter, the court notes there is no specific cause of action for declaratory
15 relief in the Petition. Instead, Petitioner seeks a remedy for declaratory relief in connection with
16 each cause of action. (See Petition at Prayer for Relief No. 1(i)-(iii).)

17 Valley Water argues there is no basis for declaratory relief as the Petition, at its core,
18 challenges the effectiveness of Valley Water’s ongoing efforts to finalize a flow regime in
19 compliance with the law. In support, Valley Water relies on *Monterey Coastkeeper v. California*
20 *Regional Water Quality Control Bd., etc.* (2022) 76 Cal.App.5th 1, 18, which states:

21 Declaratory relief generally is not available to use the courts to tell an
22 administrative agency how to do its job. An action for declaratory relief ‘does not
23 confer upon the court the authority to make pronouncements in a field reserved to
24 other branches of government. [Citation.]’ [Citation.] Such is the case here.
25 Although the complaint generally alleges a pattern and practice of ignoring or not
26 implementing the NPS Policy, at its heart, the complaint contests the effectiveness
27 of the State Board’s and regional water boards’ efforts to implement the policy.
28 This will not support an action for declaratory relief, and the trial court did not err.

27 The court finds Valley Water’s position to be persuasive and there is no substantive
28 opposition by Petitioner on this point. That said, the allegations for declaratory relief are set

1 forth as a remedy to each cause of action, and not a cause of action by itself, and thus the proper
2 procedural vehicle is motion to strike, not a demurrer.

3 * * * * *

4 Therefore, the demurrer to the Petition for failure to state a claim based on declaratory
5 relief is OVERRULED.

6 **III. MOTION TO STRIKE PORTIONS OF THE PETITION**

7 Valley Water moves to strike the following portions of the Petition: (1) paragraphs
8 146-147, 214-215, and 286; (2) all references to “Coyote Creek” and “Anderson Reservoir” at
9 paragraphs 78, 86, 96, 98, 102-103, 161, 163, 200, 202-203, 209, 225, 229, 258, and 260. Valley
10 Water argues these paragraphs should be stricken because: (1) allegations regarding the Coyote
11 Creek watershed and Anderson Dam are preempted by the Federal Power Act (“FPA”) and
12 multiple Federal Energy Regulatory Commission (“FERC”) orders; and (2) FERC is the proper
13 forum for advocating operational changes to Coyote Creek and Anderson Dam.

14 **A. Text in the Petition Valley Water Seeks to Strike**

15 Specific examples of references to “Coyote Creek” and “Anderson Reservoir” in the
16 Petition that Valley Water seeks to strike include:

17 A diverse assemblage of fishes are native to Santa Clara Valley streams, including
18 the Guadalupe River, Stevens Creek, Coyote Creek, and their tributaries.
(Petition at ¶ 78.)

19 In addition to the overarching designation of these uses in the Basin Plan for
20 inland streams, each of Guadalupe River, Stevens Creek, and Coyote Creek are
21 designated for beneficial uses of water for each of the above fish and wildlife uses
(among others). (*Id.* at ¶ 86.)

22 Coyote Creek is part of the Coyote Valley Subbasin. (DEIR at 3-46.) (*Id.* at
23 ¶ 146.)

24 The Santa Clara Plain Subbasin and the Coyote Valley Subbasin are
25 hydrologically connected and in turn are connected to the larger Santa Clara
26 Valley Basin. (*Id.* at ¶ 147.)

27 Low creek flows downstream of Anderson Dam and other Valley Water
28 infrastructure led to drying up of sections of Coyote Creek for several months in
2014, 2015, and 2016, preventing migration of juvenile *O. mykiss* downstream in
those years. (*Id.* at ¶ 215.)

1 **B. Legal Standard**

2 A court may strike out any irrelevant, false, or improper matter asserted in a pleading.
3 (Code Civ. Proc., § 436, subd. (a).) A court may also strike out all or any part of a pleading not
4 filed in conformity with the laws of the State of California. (Code Civ. Proc., § 436, subd. (b).)
5 Irrelevant matter includes “immaterial allegations.” (Code Civ. Proc., § 431.10, subd. (c).) “An
6 immaterial allegation in a pleading is any of the following: (1) An allegation that is not essential
7 to the statement of a claim or defense; (2) An allegation that is neither pertinent to nor supported
8 by an otherwise sufficient claim or defense; (3) A demand for judgment requesting relief not
9 supported by the allegations of the complaint or cross-complaint.” (Code Civ. Proc., § 431.10,
10 subd. (b).)

11 “In passing on the correctness of a ruling on a motion to strike, judges read allegations of
12 a pleading subject to the motion to strike as a whole, all parts in their context, and assume their
13 truth.” (*Clauson v. Super. Ct.* (1998) 67 Cal.App.4th 1253, 1255.) “In ruling on a motion to
14 strike, courts do not read allegations in isolation.” (*Ibid.*) Indeed, “In the construction of a
15 pleading, for the purpose of determining its effect, its allegations must be liberally construed,
16 with a view to substantial justice between the parties.” (Code Civ. Proc., § 452.)

17 **C. Allegedly Irrelevant Allegations**

18 Valley Water argues that any references to Anderson Dam and Coyote Creek are
19 irrelevant because federal statutes and orders preempt state law and thus make it impossible for
20 this court to address claims concerning Anderson Dam and Coyote Creek. The preemption
21 argument is addressed below, but it should be stated now that Valley Water’s argument does not
22 render irrelevant, or immaterial, each and every reference to Anderson Dam and Coyote Creek.
23 It is helpful to the court to understand the factual context in which the claims in the Petition
24 arise, including the aquatic species and the relative size and importance of the Coyote Creek
25 watershed verses other watersheds discussed in the Petition. For example, allegations such as
26 “[a] diverse assemblage of fishes are native to Santa Clara Valley streams, including the
27 Guadalupe River, Stevens Creek, Coyote Creek, and their tributaries” (Petition at ¶ 78) are
28

1 relevant because they assist the court in understanding the scope of the issues before it with
2 respect to all three watersheds mentioned in the Petition.

3 On these grounds alone, Valley Water’s motion to strike the identified paragraphs and the
4 words “Anderson Dam” and “Coyote Creek” in other paragraphs is DENIED.

5 **D. Preemption**

6 Valley Water’s core argument is that the FPA and FERC orders relating to Anderson
7 Dam and Coyote Creek will necessarily preempt any orders based on state law that this court
8 may issue. A party may move to strike allegations on preemption grounds. (See *Garcia v.*
9 *Superior Court* (2022) 80 Cal.App.5th 63, 66 [real party in interest filed motion to strike class
10 allegations on federal preemption grounds].)

11 **1. Applicable Law**

12 “Under the supremacy clause of the United States Constitution (U.S. Const., art. VI, cl.
13 2), federal law “shall be the supreme Law of the Land.” [Citation.] Therefore Congress may
14 preempt state laws to the extent it believes such action is necessary to achieve its purposes.’
15 [Citation.]” (*Curtin Maritime Corp. v. Pacific Dredge & Construction, LLC* (2022) 76
16 Cal.App.5th 651, 669.) “Although federal law may preempt state law, ‘[c]ourts are reluctant to
17 infer preemption, and it is the burden of the party claiming that Congress intended to preempt
18 state law to prove it.’ [Citation.]” (*Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 815.)

19 “Under the FPA, the construction and operation of a dam or hydroelectric power plant
20 requires a license from FERC. [Citations.] Operation of a licensed facility is ‘conditioned upon
21 acceptance by the licensee of all the terms and conditions of [the FPA] and such further
22 conditions, if any, as [FERC] shall prescribe,’ which must be stated in the license. [Citation.]
23 A FERC license must provide for, among other things, ‘the adequate protection, mitigation, and
24 enhancement of fish and wildlife . . . and for other beneficial public uses, including irrigation,
25 flood control, water supply, and recreational and other purposes.’ [Citations.] To achieve this
26 and other objectives of the FPA, FERC is granted express authority ‘to require the modification
27 of any project and of the plans and specifications of the project works before approval.’
28

1 [Citation.]” (*County of Butte v. Department of Water Resources* (2022) 13 Cal.5th 612, 626
2 (*Butte County*)).

3 “In two decisions, *First Iowa*² and *California v. FERC*,³ the high court determined that
4 state regulatory efforts that conflicted with the exclusive federal licensing authority granted by
5 the FPA were preempted. *First Iowa* concerned the state’s attempt to require an applicant for a
6 federal license to secure a state permit for a privately operated project that would regulate ‘the
7 very requirements of the project that Congress has placed in the discretion’ of the federal agency.
8 [Citation.] *California v. FERC* similarly involved ‘overlapping federal and state regulation.’
9 [Citation.] In that case, the high court rejected an attempt by the state to mandate minimum
10 stream flow requirements on a private project that were higher than federal flow requirements.
11 Both decisions interpreted the FPA to leave ‘the permit requirements at issue to the federal
12 sphere.’ [Citation.]” (*Butte County, supra*, 13 Cal.5th at p. 630.)

13 2. Application of Preemption Law to Allegations in the Petition

14 Valley Water argues that Petitioner is seeking orders that will modify Anderson Dam
15 operations and the amount of water flowing into Coyote Creek. Such orders, Valley Water
16 argues, are preempted by three FERC orders governing operations of Anderson Dam pending
17 completion of the Anderson Dam Seismic Retrofit Project. (See RJN at Exs. 14, 16, 18.)

18 Valley Water’s motion to strike based on preemption fails for at least four reasons.

19 First, preemption does not apply absent interference with the FERC licensing process.
20 (See *Butte County, supra*, 13 Cal.5th at p. 634 [“A state court order granting the injunctive relief
21 the Counties initially sought would stand as a direct obstacle to the accomplishment of
22 Congress’s objective of vesting exclusive licensing authority in FERC.”].) “None of those cases
23 defined the field to include the state’s prerogative to govern the work of its own agency in a
24 manner that does not conflict with federal law.” (*Id.* at p. 631.) Many allegations in the Petition
25 relate to actions that would not interfere with the FERC licensing process.

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² *First Iowa Hydro-Electric Cooperative v. Federal Power Comm’n* (1946) 328 U.S. 152.
³ *California v. FERC* (1990) 495 U.S. 490, 496-497.

1 Second, while FERC orders may constrain Anderson Dam operations at present, the
2 Seismic Retrofit Project is scheduled to be completed in 2032. (RJN Ex. 20, at p. 1; Petition, at
3 ¶ 163.) As Petitioner notes, it is a “one-time, limited duration Retrofit Project.” (Opp. at p. 3.)
4 FERC orders will not be in effect after the work is done. (Reply, at p. 1 [operational constraints
5 will affect Anderson Dam “pending completion” of the Seismic Retrofit Project].) References to
6 “Anderson Dam” and “Coyote Creek” are therefore not irrelevant or immaterial because the
7 remedies sought by Petitioner could be initiated or phased in after the work on Anderson Dam is
8 completed and FERC orders have expired.

9 Third, the Petition alleges various claims, some of which are grounded in Fish and Game
10 Code sections 5937 and 5948. FERC’s Order Approving, In Part, Reservoir Drawdown and
11 Operations Plan (the “Plan”) (RJN Ex. 18) states that certain work affecting Coyote Creek that
12 may be ordered under Fish and Game Code section 5948 is not within the scope of FERC’s
13 authority. Thus, Petitioner argues that the FERC orders do not preempt all state law relating to
14 the entire Coyote Creek watershed.

15 The Plan states: “This order does not authorize Valley Water’s proposals for retrofitting
16 the Coyote percolation dam and constructing downstream flood protection measures as these
17 facilities are *outside the Commission’s jurisdiction*, as discussed below.” (Plan, at p. 1, emphasis
18 added.) These facilities affect Petitioner’s claims regarding fish passage. The Plan states that
19 the Coyote percolation dam can be modified in order to ensure the existing fish ladder operates
20 to ensure unimpeded passage over the bladder when it is deflated. “The Coyote percolation dam
21 does not serve a project purpose and is *not part of the Anderson Dam Project....*” (*Id.* at p. 14,
22 emphasis added.) The Plan also states, “The Coyote percolation dam and the Coyote Creek
23 flood management measures were not required by the February 20 Directive, *are not part of the*
24 *existing exemption*, and are not miscellaneous structures that are used and useful in connection
25 with or necessary or appropriate in the maintenance and operation of the Anderson Dam
26 Project.” (*Id.* at p. 8, emphasis added.)

27 Fourth, while FERC orders require Valley Water to prepare certain protection plans
28 affecting fish species, they are limited to the effects of the Anderson Dam Project. Those plans

1 are not directed at tributaries of Coyote Creek, since they are not affected by flows out of
2 Anderson Dam.⁴

3 Accordingly, the motion to strike allegations based on the doctrine of preemption is
4 DENIED.

5 **E. Collateral Attacks on FERC Orders**

6 Valley Water also argues that if Petitioner is seeking an order to change Anderson Dam
7 operations, it would constitute a collateral attack on the FERC orders and this court is not the
8 proper forum to resolve such disputes.

9 “To determine whether a challenge constitutes a collateral attack on an order by the
10 Federal Energy Regulatory Commission, we consider whether a successful challenge would
11 require the court to modify or set aside the Commission order. [Citation.]” (*Save the Colorado*
12 *v. Spellmon* (10th Cir. 2022) 50 F.4th 954, 961.)

13 Valley Water argues the Petition seeks to modify three FERC orders (see RJN at Exs. 14,
14 16, 18) directing Valley Water’s operations, which include various requirements for the
15 protection of fish in connection with the project. (See, e.g., RJN at Ex. 16 at ¶¶ 11, 24, 26-28,
16 30, 33, 37, 40, 48(A), 48(B)(1), (8), & 11.) Valley Water argues further that if the Petition is
17 successful, any order of the court prescribing changes to Anderson Dam operation or related
18 activities occurring within Coyote Creek would de facto modify those orders.

19 Valley Water’s motion to strike, however, does not seek to strike specific allegations
20 relating to potential changes or modification to Anderson Dam. Nor do the moving papers
21 clarify which allegations (some or all) are the subject of this argument. This is critical as the
22 Petition at paragraphs 200, 214, 225, 229, and 286, for example, are unrelated to changing or
23 modifying Anderson Dam operations. Furthermore, as the opposition points out, Petitioner does
24 not seek to modify any FERC order by way of this Petition as the requested relief pertains to
25

26 _____
27 ⁴ The materials for which Valley Water sought judicial notice include references to features and operations affecting
28 tributaries of Coyote Creek, such as operations of the Cherry Creek Reservoir. Moreover, “The fourth reach of
Coyote Creek, which is outside of the FOCF action area, is tidally influenced, *rather than influenced by Anderson
Reservoir operations*, is mostly flooded during high tides, and supports salt marsh. This reach extends from the
Highway 237 Bridge to the outlet of Coyote Creek into Alviso Slough.” (RJN Ex. 15, p. 2-14, emphasis added.)

1 Valley Water's failure to comply with state environmental law. And as explained above, FERC
2 agrees that certain changes to Coyote Creek are outside of its jurisdiction, and other materials for
3 which Valley Water sought judicial notice indicate that Coyote Creek tributaries and its lower
4 reaches are not directly affected by the FERC orders.

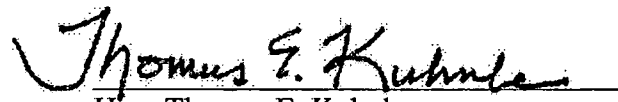
5 Consequently, the motion to strike allegations on the ground that this court is not a proper
6 forum is DENIED.

7 **Disposition**

8 The demurrer to the Petition is OVERRULED in its entirety.

9 The motion to strike allegations in the Petition is DENIED in its entirety.

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11 Dated: August 1, 2023


12 Hon. Thomas E. Kuhnle
13 Judge of the Superior Court
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**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA**
DOWNTOWN COURTHOUSE
191 NORTH FIRST STREET
SAN JOSE, CALIFORNIA 95113
CIVIL DIVISION

FILED

AUG 02 2023

Clerk of the Court
Superior Court of CA County of Santa Clara
BY C. Pham DEPUTY

RE: **San Francisco Baykeeper vs Santa Clara Valley Water District**
Case Number: **22CV403523**

PROOF OF SERVICE

ORDER RE: DEMURRER AND MOTION TO STRIKE (SUBMITTED MATTER) was delivered to the parties listed below the above entitled case as set forth in the sworn declaration below.

If you, a party represented by you, or a witness to be called on behalf of that party need an accommodation under the American with Disabilities Act, please contact the Court Administrator's office at (408) 882-2700, or use the Court's TDD line (408) 882-2690 or the Voice/TDD California Relay Service (800) 735-2922.

DECLARATION OF SERVICE BY MAIL: I declare that I served this notice by enclosing a true copy in a sealed envelope, addressed to each person whose name is shown below, and by depositing the envelope with postage fully prepaid, in the United States Mail at San Jose, CA on August 02, 2023. CLERK OF THE COURT, by Catherine Pham, Deputy.

cc: Marcus Benjamin Eichenberg 1736 Franklin Street, Suite 800 OAKLAND, CA 94612
Daniel Gordon Cooper 1004 O'Reilly Avenue San Francisco, CA 94129
Eric J Buescher 1736 Franklin Street, Suite 800 OAKLAND, CA 94612
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