



Community Clean Water Institute

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March 18, 2005

For the Public Record

Ms. Debbie Irvin, Clerk to the Board
State Water Board
P.O. Box 100
Sacramento, CA 95812-0100

Re: Petition submitted by Trout Unlimited and the Peregrine Chapter of the National Audubon Society concerning minimum streamflows

To Whom It May Concern:

On behalf of Community Clean Water Institute, I am writing in response to a petition submitted by Trout Unlimited and the Peregrine Chapter of the National Audubon Society encouraging the State Water Board's adoption of principles and guidelines for maintaining instream flows for North Coast rivers and streams.

In 2002 and 2003, Community Clean Water Institute worked with numerous watershed groups to raise public awareness to prevent a proposed water diversion which would have infringed on the public trust and set a dangerous precedent whereby public resources are stolen (appropriated without public consent) for private profit. Due to public outcry, and the actions of several elected officials who recognized the threat posed, the applicant, Ric Davidge of Alaska, withdrew the applications. We considered this a victory for the commons. This was a rare example of a positive outcome for the public trust.

However, are we any better off now than then? What if another application came forward, from the numerous aggressive corporations looking to privatize public assets? In the age of Enron and WorldCom, the threats to the public trust have never been greater. Protections must be enhanced, codified in law, and public processes must be used to ensure openness and enforcement. The public trust aspect of Water Law must be adhered to, and corporations should not be given extraordinary rights.

We support the petitioners in encouraging the State Water Board to adopt principles and guidelines for maintaining instream flows in coastal streams and to protect the public trust, including the rights of endangered species such as salmon and steelhead. We agree with the petition in asserting that in order to protect steelhead and coho salmon fisheries

and other public trust values, reform of the water rights system is necessary.

We concur with the petition's assessment that the State Water Board and the other State agencies named in the petition have not adopted adequate procedures for coordinated environmental review of water right permit applications and related permit applications. The applications are processed by "rubber stamp." That is why when an outrageous application such as on the Gualala and Albion Rivers by Aqueous Corporation proposed a large scale water export, residents and others were terrified. A rubber stamp for water diversions may have worked in the past, but not in the 21st century.

We concur with the petition's assessment that the State Water Board does not have an adequate procedure for consultation with responsible agencies in the preparation of environmental documents for its action on water right permit applications. Considering endangered steelhead and salmon's struggle with dewatered coastal streams, the Water Board should consult with agencies such as NOAA Fisheries and others. Considering the difficulty of knowing the specific watershed constraints, it is vital to include the County in such decisions. For example, the Sonoma County Permit and Resources Department is responsible for enforcing riparian setbacks in the County General Plan.

Exemptions from environmental review of cumulative impacts for small domestic water uses and stockponds have a negative effect on watersheds. As large-scale industrial vineyards proliferate, dewatering creeks has become commonplace.

We concur with the petition's assessment that the State Water Board does not have adequate guidelines to determine the existing diversions from coastal streams. Landowners have a disincentive to notify the Water Rights division when a creek is dewatered because they fear the creek would be named fully appropriated, and their property value would decline. Complaints are often made by neighbors who are exceptionally committed to the public trust. It is a case of the tragedy of the commons, but it can be mitigated by creating institutions which allow for shared ownership of the commons, and stakeholder communication. For more information on public trust ownership solutions, I recommend the book "Who Owns the Sky" by Peter Barnes.

We concur with the petition's assessment that the State Water Board does not have adequate guidelines to establish water right permit conditions that protect and restore coho and steelhead fisheries in good condition. There should be caveats in water rights to preserve instream flows. Over time, if conditions change, then rights should be modified to preserve the overall ecological integrity of the stream and watershed. Everyone loses when situations of scarcity are brought on by actions taken for short term gain. There should be a hierarchy of actions taken, for example, landscape irrigation efficiency, followed by urban use efficiency (toilets and washing machines), followed by many of the efficiency measures described by the Pacific Institute (www.pacinst.org).

We support the petitioners in encouraging the State Water Board does not take adequate enforcement actions to prevent or correct unauthorized diversions. Community Clean Water Institute has notified the Water Rights division of potentially unlawful water

diversions along riparian corridors and creeks which are routinely dewatered by agricultural and landscape irrigation practices which are inappropriate to water scarce areas. We have notified Department of Fish and Game staff who have supported citizens who have complained. However, the Department of Water Rights usually responds by placing the burden of proof on the complainant, and looks for any reason to close investigations before they have begun. In short, there is very little enforcement taken, and a seeming culture of doing the bare minimum to wait out the complaints and hope they just go away, rather than taking enforcement actions.

We concur with the petition's request that the following remedies including:

- 1) A coordinated response to the petition with the State Water Board acting as lead;
- 2) Adoption of an interagency Memorandum of Understanding (MOU) for coordination of the agencies' respective proceedings to approve or condition water diversions and related facilities or activities; and
- 3) A systematic investigation of central coast streams to identify unauthorized diversions.
- 4) Adoption of guidelines for the substantive review of water right permit applications that use as a starting point the 2002 guidelines for protection of fish prepared jointly by DFG and the National Marine Fisheries Service;
- 4) Enforcement actions and the use of enforcement procedures that effectively prevent or correct unauthorized diversions in the central coast streams; and
- 5) Adoption of regulations to ensure that small domestic use and livestock stockpond registrations comply with CEQA.

As Senator Kuehl recommended, an open process to develop these procedures incorporating public and stakeholder comment will result in a positive outcome.

Sincerely,

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