



February 5, 2015

(3/3/15) Public Meeting
303(d) List of 2012 California Integrated Report
Deadline: 2/5/15 by 12:00 noon



Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
P.O. Box 100, Sacramento, CA 95812-2000
Via Electronic Mail: commentletters@waterboards.ca.gov

Re: *Comment Letter—303(d) List portion of the 2012 California Integrated Report*

Dear State Water Board Members and State Water Board Staff:

Thank you for the opportunity to comment on the proposed federal Clean Water Act (CWA) section 303(d) list of water quality limited segments (303(d) List) portion of the 2012 California Integrated Report as well as the associated supporting draft Staff Report and fact sheets (2012 Integrated Report). California Coastkeeper Alliance (“CCKA”) is a network of twelve Waterkeeper organizations working to protect and enhance clean and abundant waters throughout the state, for the benefit of Californians and California ecosystems.

Waterkeepers monitor and report changes to the health of local waters, submit data to the State and Regional Water Boards, advocate for the listing of impaired waters, and are involved in efforts to restore impaired waters. In the nearly four years following our initial submission of data to support flow listings in August 2010, we have worked collaboratively with a coalition of tribes, fishing groups and conservation groups to illustrate the clear need, and basis in science and law, for specified Section 303(d) flow listings with myriad comment letters. We have presented before the State Water Board in a special hearing, met with Board staff and members repeatedly, collected requested information about flow listing strategies in other states, created a shortlist of priority waterways impaired by flow, and endeavored to address any other questions or issues raised by the Board and staff. As such, our organizations and our fishing and tribal partners have invested heavily in this process, and stand to be significantly impacted by the 2012 Integrated Report.

I. The Board’s Failure to List Waters Impaired by Flows Precludes the Application of Needed Tools to Restore Flow and is Inconsistent with its Public Trust Duties.

Despite years of advocacy and work to assemble relevant science, law and policy information, the Integrated Report fails to list any waterways in the North Coast as impaired due to altered flows. This is at odds with extensive evidence put before the State Water Resources Control Board and the North Coast Regional Water Quality Control Board regarding the dire state of these waterways with regard to flow. As described in our myriad comments and data submissions, listing for flows triggers numerous important benefits for local waters, including, but not limited to:

- Higher prioritization of identified, impaired waterways on lists of bond and other funds earmarked for restoration of impaired waters.
- Reduce the burden of proof in state regulatory processes that can address flow needs, such as waste and unreasonable use hearings and public trust doctrine applications.
- Better support local land use and planning decisions by requiring decision makers to consider flow impacts in CEQA assessments.
- Allow the state to better track and highlight the primary causes of waterway impairment.

Listing for flows under the 303(d) List would align official state acknowledgement of waterways impaired by a lack of flows with actual, documented conditions, as robustly supported by the scientific evidence mentioned above. Further flow impairment listings provide a long list of benefits, not just to river ecosystems and the protection of beneficial uses, but also to regional decision makers, state and local agencies, and the State Board itself. Given the escalating threats facing the region's waterways and salmonids and the length of time between listing cycles, we urge the State Water Board to take immediate action to incorporate flow listings into the 2012 303(d) List.

The rivers and streams for which flow impairment listings are needed – especially the native fish that depend on them – require immediate state action not achievable by any other means.¹ For example, California Coastkeeper Alliance was required to bring suit in 2007 to compel the Department of Fish and Wildlife and State Water Board to work together to implement mandates to set minimum flows and reflect those numbers in the approval of water rights permits.¹ The actions subsequent to the conclusion of this matter have been hampered by lack of sufficient funding, communication and other impediments, with the result that water diversions continue – and in many places are escalating – despite the needs of waterways and fish.² Immediate action is needed to – *at a minimum* – formally recognize that “no water” is a problem the state will acknowledge and act on.

The State Water Board's failure to include any flow listings is at odds with clear law and science. The Clean Water Act, its implementing regulations and U.S. EPA Guidance, provide the overarching legal and regulatory direction for state action. Even assuming that further guidance and process on flows listings would be beneficial in close cases, the waterways that our groups identified on a priority shortlist (see attached) were selected because they are the most egregiously impaired due to altered flows – in some cases having no flow at all for months of the year when flows historically were regularly present.

Continued refusal by the state to take even the most straightforward steps – such as recognizing that a dry waterbody is impaired because it cannot support fish – raises serious public trust concerns. The State Water Board is entrusted to protect public trust resources, which includes ensuring waterways continue to flow. The California public trust doctrine protects navigable streams and their tributaries for a variety of uses including fishing and habitat for fish. The doctrine requires states to manage lands underlying navigable waters in trust for the benefit of the public.³ It creates a duty for states to protect waterways for preservation and public use.⁴

Courts have interpreted the California Constitution as entrusting the State Water Board with broad authority to prevent the degradation of public trust resources and to preserve the natural flow of waterways. The courts have defined the public trust doctrine to include “the preservation of those lands *in their natural state*, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.”⁵ In exercising its authority, courts have held that state agencies must err on the side of the public trust principles and

¹ CA. Pub. Res. Code Sec.s 10000 *et seq.*

² See, e.g., DFW, “Instream Flow Program Annual Report 2011” (Feb. 2012), available at: http://www.dfg.ca.gov/water/instream_flow.html.

³ *Martin v. Waddell's Lessee*, 41 U.S. (3 How.) 212, 228-30 (1845).

⁴ *National Audubon Society v. Superior Court of Alpine County*, 658 P.2d 709, 724 (Cal. 1983), *Marks v. Whitney*, 6 Cal. 3d at 257, and *State of California v. Superior Ct. (Lyon)*, 29 Cal. 3d 210, 231 (1981).

⁵ *Id.* at 259-260.

ecological quality.⁶

The State Water Board has an affirmative duty to ensure navigable waterways – remain navigable – and preserve a waterways natural habitat. In *Audubon Society*, the State Water Board allowed diversions that nearly depleted Mono Lake, and defended its action by concluding that “it was required to allocate all available water for beneficial use by appropriators, notwithstanding the potential environmental harm such diversions would cause.”⁷ The *Audubon Society* court required the Board to reconsider the permits and take into account the public trust doctrine.⁸ Although the doctrine originally protected navigable waterways for the purposes of navigation, commerce, and fishing, *Audubon Society* extended the geographic scope of the doctrine to non-navigable streams that feed navigable waterways, and it “expanded the purpose of the doctrine to the preservation of water’s function as natural habitat.”⁹

As the Supreme Court held in *Audubon Society*, and as recently reaffirmed in *Light v. State Water Board*,¹⁰ “no party can acquire a vested right to appropriate water in a manner harmful to public trust interests and the state has ‘an affirmative duty’ to take the public trust into account in regulating water use by protecting public trust uses whenever feasible.”¹¹ Therefore, the State Water Board not only has the authority to prevent waterways to become impaired by low flows, but it has an affirmative duty to protect public trust resources to ensure navigable waterways do not become impaired from low flows.

Additionally, the State Water Board’s Public Trust Enforcement Unit should take immediate action to direct water users and water masters to stop dewatering streams and rivers where clear violations of the public trust doctrine have occurred.

II. We Strongly Oppose the Proposed De-Listing of Ballona Creek and Ventura River Watershed Segments.

The statement that the four listings on the existing 303(d) list due to flow related alterations in the Ballona Creek and Ventura River watersheds “will likely be proposed for delisting as part of the next Listing Cycle” is extremely concerning. As discussed at length in Santa Barbara Channelkeeper’s comments, the flow listings of Reaches 3 and 4 of the Ventura River for pumping and diversion accurately reflect the current diminished flows and resulting impairments to designated beneficial uses in those Reaches. The listings are legally valid, and consistent with the State Water Board’s Listing Policy. In contrast, delisting Reaches 3 and 4 from the 303(d) list as impaired for flows due to excessive pumping and diversion is inconsistent with the Listing Policy, the Clean Water Act, and facts on the ground. We urge the State Water Board to consider the substantial and significant evidence Channelkeeper references to support the existing impairment listings in its decision.

III. Additional Board Work to Address Efforts Should Proceed Parallel to 303(d) Listings.

The Staff Report lists State and Regional Water Board work underway to address flow through other programs. While we recognize these efforts and their possible precedent-setting utility to inform future efforts, it is important to note that they cannot replace, water quality related flows listings for the reasons described herein

⁶ See *BCDC v. Emeryville*, 69 Cal. 2d at 533. *Candlestick Properties, Inc. v. San Francisco Bay Conservation and Development Com.*, 11 Cal App.3d 557 (1970) (hereinafter *Candlestick Properties*).

⁷ *Audubon* at p. 427.

⁸ *Id.* at pp. 446–447

⁹ *Light* at xx; (*Id.* at pp. 434–435, 437; see *Center for Biological Diversity, Inc. v. FPL Group, Inc.* (2008) 166 Cal.App.4th 1349, 1361 [“an important purpose of the public trust over bodies of water is to protect the habitat for wildlife”].)

¹⁰ *Light* Cite.

¹¹ *Light* xx; (*Audubon Society, supra*, 33 Cal.3d at pp. 446–447.)

and in numerous comment letters and memos to date. The Bay-Delta Flow Criteria is specific to the Delta, and does not address other impaired waterways where readily available data exists that they are impaired due to flows. Curtailments of the Miller/Deer/Antelope creeks using the public trust doctrine were temporary drought actions that have been lifted and were region specific to the Central Valley, and does not address North Coast impaired waterways. The frost protection regulations in the Russian River and North Coast Instream Flow Policy serve to protect instream flows through restrictions on surface water rights conditions that are subject to Reasonable Use and public trust doctrines and need to be expanded into other regions where data shows waterways are impaired due to low flows. We encourage the Board to use all of the many tools at its disposal to address the pervasive flow issues that impact the rivers and streams in the priority shortlist and many others throughout the North Coast, particularly as we confront the real possibility that this drought could become the new normal. CCKA encourages the Board to use all of the many tools at its disposal to address the pervasive flow issues that impact the rivers and streams, the urgency with which conditions of dewatered waterbodies must be addressed demands direct acknowledgment by the Board how and why a lack of flows is impairing waterbodies.

We urge the Board to list waters impaired by flow and to proactively apply the public trust and reasonable use doctrines to address the pervasive flow issues the North Coast, and state. For example, the State Water Board should apply the Reasonable Use Doctrine to agricultural water use. The Reasonable Use Doctrine is the “cornerstone of California’s complex water rights laws.”¹² All water use must be reasonable and beneficial regardless of the type of underlying water right. Collectively, the State Constitution,¹³ California Statutes,¹⁴ case law, and administrative decisions, give the State Water Board authority to broadly implement the Reasonable Use Doctrine to promote more efficient water use and provide additional flows for fish.¹⁵ Agricultural diversions are largely responsible for many of California’s low flows. The State Water Board admits that there “are proven measures and technologies available now to make agricultural water use more efficient.”¹⁶ Additionally, the State Water Board has said on the record that:

“Persons who do not employ some or all of these [water efficiency] technologies, where they are economically justifiable, locally cost effective and not harmful to downstream agriculture and other environmental needs, *are simply using water unreasonably.*”¹⁷

The State Water Board has already determined that “more efficient and reasonable agriculture practices have the potential to *enhance flows*, reduce contaminants, and *minimize fish losses*. The Reasonable Use Doctrine can be used to promote such practices.¹⁸ Regardless of whether the State Water Board lists waterways for flow impairments, the Board should use its broad authority under the Reasonable Use Doctrine to prevent the waste and unreasonable use from inefficient agricultural and other practices to protect instream flows.

¹² Craig Wilson, Delta Watermaster, “The Reasonable Use Doctrine and Agricultural Water Use Efficiency” pg. 3 (Jan. 2011), available at: http://www.swrcb.ca.gov/board_info/agendas/2011/jan/011911_12_reasonableusedoctrine_v010611.pdf

¹³ Section 2 of the California Constitution declares that the “right to water or to the use or flow of water in or from any natural stream or water course in this state is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.”

¹⁴ Water Code Section 275 states that the State Water Board “shall take *all appropriate proceedings or actions* before executive, legislature, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state.”

¹⁵ The Legislature made its intent clear that “the state should *take vigorous action*...to prevent the unlawful diversion of water,” (Water Code 1825) and that the “constitutional principle of reasonable use and the public trust doctrine shall be the *foundation of state water management policy*...” (Water Code Section 85023).

¹⁶ Pg. 10.

¹⁷ Pg. 10.

¹⁸ Pg. 13.

For example, public resources are expended to conduct stream-by-stream studies to determine, how much water fish need. However, these studies are costly and time consuming; they provide agencies an excuse to maintain the status quo of no water for fish; and even when the studies are completed, the recommended instream flows are not enforced. For example, current instream flow studies on the Scott River are designed to meet requirements of Public Resources Code 10000-10005, but not the aforementioned Reasonable Use or Public Trust doctrines. This approach allows the State Water Board to not wait for the Department of Fish and Wildlife to present their studies before taking action to get water back into streams. Instead of continuing to conduct stream-by-stream studies, the State Water Board should redesign current and future instream flow studies so they quantify instream flows necessary to meet California's legal obligations under the Reasonable Use and Public Trust doctrines.

Furthermore, the State Water Board should produce a legal memo or fact sheet describing the limitations of water rights. Guidance on the Reasonable Use and Public Trust doctrines limit water rights would empower NGO advocates and water users to advance collaborative solutions. Without State Water Board guidance on the matter, local water users are unwilling to make compromises on their wasteful and unreasonable water use.

Finally, the State Water Board can restore instream flows by taking the following actions:

- (1) Develop Water Bond guidance with grant-scoring criteria that prioritizes projects that permanently dedicate water for instream use;
- (2) Require that water conserved with public funds be permanently dedicated to meet instream flow needs via CA Water Code Section 1707;
- (3) Recognize tribal cultural and subsistence use of water as "beneficial."
- (4) Require applicants for new water rights to demonstrate that water is available for appropriation in excess of water necessary to meet public trust requirements, potential uses of unexercised riparian water rights, and unregistered pre-1914 water rights.

IV. We Strongly Support New Humboldt Bay Bacteria Listings.

We strongly support the designation of Little River, Widow White Creek, Martin Slough, lower Elk River, Jolly Giant Creek, and Campbell Creek to the Federal Clean Water Act's list of impaired waters as impaired by high concentrations of fecal coliform bacteria, such as E. coli. Humboldt Baykeeper has monitored, collected and submitted data to support these listings back in 2010. These areas are frequently used for swimming and other recreation, domestic water supplies, commercial oyster farms, and recreational/subsistence shellfish harvest.

While Humboldt County monitors local beaches and posts warnings, and oyster beds are frequently monitored to ensure the safety of commercially-grown oysters for human consumption, little has been done to identify the sources of polluted runoff. Humboldt Baykeeper looks forward to working with the State and Regional Water Board to develop plans to restore water quality by limiting bacterial pollution that is finding its way into these streams—and ultimately into Humboldt Bay and coastal waters.

We look forward to continued work with the State Water Board to ensure the health and resiliency of our rivers and streams as we face drier, hotter conditions in the coming years.

Thank you,



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Konrad Fisher, Klamath Riverkeeper
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Five Disappearing Northern California Rivers Using the Clean Water Act to Resuscitate Waterways Sucked Dry

In August 2010, tribal, fishing, and conservation groups submitted more than one thousand pages of detailed studies, data, and analysis to inform the Board's development of the 2012 Clean Water Act Section 303(d) List. As detailed in that letter, and at several subsequent State Water Board meetings on this matter, California is legally required to include on its 303(d) List *all* of the waterways that "readily available" data indicate are impaired, including impairments due to alterations in natural flow.

Other states (Idaho, Washington, North Carolina, South Carolina, Tennessee, Michigan, Vermont) have begun this essential task of identifying water bodies impaired by altered flows, with support by U.S. EPA. Within California, U.S. EPA's Bay Delta Action Plan¹ notes, "identifying those impairments and identifying the cause (whether it is a "pollutant" for purposes of Section 303(d) or some other cause) is a critical part of the Clean Water Act response to the Estuary's problems."

To support the Board's effort, our coalition developed a shortlist of waterways in Region 1 that are clearly and incontrovertibly impaired, and for which low flows are so clearly a cause that there are no reasonable arguments against their 303(d) listing: **Scott River, Shasta River, Upper Main Eel River, Mattole River, and Russian River tributaries (Maacama Creek & Mark West Creek).**

Our coalition worked with local groups throughout the region to create a shortlist of priority waterways based on the following criteria, among others:¹¹

- a. Significant data was submitted prior to August 2010 as part of the CWA 2012 303(d) scoping process, or is otherwise readily available (e.g., such as in government databases) and demonstrates altered flows such that impairment could not be dismissed as either naturally occurring or episodic.
- b. Local stakeholders are invested in the health of the waterway, and could inform and participate in restoration of the health of the listed waterway.
- c. Prior formal recognition of flow issues with the waterway by State Water Board, Department of Fish and Game, or other state or local agencies.
- d. Ongoing or potential injury to threatened or endangered species.
- e. Waterways within the National or California Wild and Scenic River System, or Class I streams (habitat for fishery resources) or Class II streams (habitat for aquatic non-fish vertebrates and/or aquatic benthic macroinvertebrates).
- f. Waterways where listing would help prevent waste, unreasonable use or unreasonable method of use of water, or unreasonable diversion or method of diversion of water.

Given California's current drought, long history of water management issues, and the challenges to come with climate change, every tool must be used to prevent further damage and to restore degraded waterways. Including these critically impaired waterways on the 2012 303(d) List for Region 1 (North Coast Regional Water Quality Control Board) is an important first step to restoring these rivers and creeks. The brief descriptions provided below summarize the detailed flow data and information that has been submitted to the State Water Board.

1. **Scott River.** Sections of the Scott River are completely dewatered during summer months, while other sections are severely flow-impaired. Adjudicated water rights alone are sufficient to allow complete dewatering of the Scott River during the summer and early fall. In addition, a shift from surface diversions, which are naturally self-limiting, to groundwater wells have made worse the apparent over-appropriation of water in the watershed.ⁱⁱⁱ
2. **Shasta River.** Seven major diversion dams and numerous smaller structures located on the Shasta River, substantially and rapidly reduce flows in the main stem when they are in operation. In addition, Dwinnell Dam, located at about river mile 40, has dramatically altered the flow regime in all seasons of the main stem river. During various times of the year, no water is released from Dwinnell Dam for fish in the Shasta River. These flow alterations have adversely affected salmonid populations in the river.^{iv}
3. **Eel River Tributaries.** Historic land use, including pervasive logging that altered stand composition across the region, vastly increased sedimentation and altered hydrology and soils is exacerbated in many areas by unregulated dry-season diversions related to marijuana cultivation. Consequently, the major Eel River tributaries of South Fork, Van Duzen, Upper Main and Middle Main suffer from low flows that often produce temperatures lethal to listed fish species.^v These issues are particularly pronounced on the Outlet Creek stretch of the Upper Main River, in several South Fork drainages, and on Van Duzen River.
4. **Mattole River.** A detailed study of the Mattole River Basin found that lack of adequate late summer and early fall stream flow is recognized as one of the most important limitations on salmonid habitat in the Mattole River basin. In recent years, juvenile salmonids have become stranded in pools due to excessively low flows, causing mortality and necessitating fish rescue operations.^{vi}
5. **Russian River Tributaries:**
 - a. **Maacama Creek.** In Maacama Creek “[s]tanding crops of fall fish show a major reduction in many years, suggesting that low flow conditions are limiting, and these low flow conditions are likely linked to agricultural water use.”^{vii} “Coho salmon are at very high risk of extinction in the Russian River basin. Because “the biggest problem is over-consumption of water,” listing of these waterways as impaired by natural flow alterations/water diversions is an important step in ensuring their return to good health.
 - b. **Mark West Creek.** Ten years ago all 28 miles of Mark West Creek had water in the summer. Today, because of increased diversions, only 3½ miles have water. Department of Fish and Wildlife flow records of Mark West Creek dating back to the 1960s show that the lowest summer stream flow has historically been 2 cfs; recent summer stream flows are averaging at approximately that level.

For additional information, contact Sara Aminzadeh, California Coastkeeper Alliance (Sara@cacoastkeeper.org) or Linda Sheehan, Earth Law Center (lsheehan@earthlaw.org).

ⁱ U.S. EPA. “Water Quality Challenges in the San Francisco Bay/Sacramento-San Joaquin Delta Estuary: EPA’s Action Plan,” p. 9, available at <http://www.epa.gov/sfbay-delta/pdfs/EPA-bayareaactionplan.pdf> (August 2012).

ⁱⁱ Criteria 4-6 taken from the State Water Board’s AB 2121 Enforcement Priorities. See Appendix G AB 2121 work (see Appendix G).

ⁱⁱⁱ S.S. Papadopoulos & Associates Inc. 2012. Groundwater Conditions in Scott Valley, California. Report prepared for the Karuk Tribe, Happy Camp, CA.

^{iv} Lestelle, L. 2012. Effects of Dwinnell Dam on Shasta River salmon and considerations for prioritizing recovery actions. Report prepared for the Karuk Tribe, Happy Camp, CA.

^v Patrick Higgins, Consulting Fisheries Biologist, “Evaluation of the Effectiveness of Potter Valley Project National Marine Fisheries Service Reasonable and Prudent Alternative (RPA): Implications for the Survival and Recovery of Eel River, Coho Salmon, Chinook Salmon, and Steelhead Trout” (February 2010).

^{vi} Randy D. Klein, Hydrologist, “Hydrologic Assessment of Low Flows in the Mattole River Basin 2004-2006,” (March ‘07).

^{vii} Letter from Patrick Higgins, Consulting Fisheries Biologist to Traci Tesconi, County of Sonoma, “Pelton House Winery Application #PLP05-0010,” (Dec. 29, 2008), p. 12 (included in Appendix A).