

DEPARTMENT OF FISH AND GAME  
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(916) 654-3821Trout Unlimited Public Workshop  
March 17, 2005electronic cc: Exec, OCC  
Water Rights Staff

April 15, 2005

Ms. Debbie Irvin, Clerk to the Board  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95812-0100RE: COMMENTS ON PETITION SUBMITTED BY TROUT UNLIMITED AND THE  
PEREGRINE CHAPTER OF THE NATIONAL AUDUBON SOCIETY

Honorable Board Members:

Pursuant to the State Water Resources Control Board's ("SWRCB") February 17, 2005 workshop notice, the Department of Fish and Game ("Department") submits the following comments as a named respondent in the petition submitted by Trout Unlimited and the Peregrine Chapter of the National Audubon Society ("Petition").

**General Comments**

The Petition outlines diversion-related threats to species in California's Central Coast Region.<sup>1</sup> These threats are real and our agency expects their magnitude to increase substantially as water-intensive development inevitably expands through this geographic area. The Fish and Game Commission's decision to list Central Coast ESU coho salmon<sup>2</sup> as "endangered" under the California Endangered Species Act ("CESA") increases the urgency of the situation. That listing decision was effective March 30, 2005.

The Department's "Recovery Strategy for California Coho Salmon" ("Recovery Strategy"), prepared pursuant to Fish and Game Code Section 2106 et seq., highlighted water diversions as a central limiting factor for the species. Among other recommended recovery actions, the Recovery Strategy suggested improved coordination between agencies to avoid and minimize the adverse effects of future or reopened permits and licenses for water diversions on coho salmon, as well as implementing a regional interagency task force for regional project review for water right, Streambed Alteration Program, and CESA permitting. (Recovery Strategy, Section 7.1) This recommendation

<sup>1</sup> For purposes of the Petition, the Central Coast Region includes Marin, Sonoma, Napa, Mendocino, and Humboldt Counties.

<sup>2</sup> The Central Coast ESU includes Coho from Santa Cruz north to Punta Gorda in Humboldt County.

mirrors what is one of the central goals of the Petition, which is to convene a working group to develop and adopt an "inter-agency MOU for coordination of proceedings to approve or condition water diversion and related facilities and activities." Petition, p. 59.

Hence, the Department and the petitioners essentially in agree on the need to improve coordination in overlapping regulatory responsibilities between agencies, such as during California Environmental Quality Act ("CEQA") review and where our agency is issuing Streambed Alteration Agreements pursuant to Fish and Game Code Section 1600 et seq. on the same water projects over which the SWRCB has jurisdiction. An interagency MOU or other such written guidelines could provide a benefit.

In regard to instream flow guidelines, the Department expects that the SWRCB's completion of the mandates of AB 2121 (Kuehl) will be beneficial. The Department expects to participate in that process as appropriate. The 2002 Joint Guidelines prepared by the Department and NOAA Fisheries have been used with some success. However, they have not been officially adopted by the SWRCB. The AB 2121 requirement for the development of instream flow regulations is expected to address this issue. However, despite this pre-existing duty, the Department believes the Petition has merit insofar as it envisions a global approach to the myriad regulatory issues that may inhibit resource protection. The Department believes that synchronizing the AB 2121 process with the development of other written guidelines for agency coordination and procedure could be advantageous.

At the same time that the Department recognizes the urgent risks to aquatic species in the Central Coast Region and the opportunities for improved coordination, our agency is concerned that limited staffing and funding may represent significant obstacles in implementing a complete solution to the problems raised in the Petition. Absent new or increased funds, a number of reforms proposed in the Petition may be impossible to implement. For example, the Petition requests the Department to essentially put together a system of dam inspections to meet the requirements of Fish and Game Code Section 5930 et seq. At current funding and staffing levels, the sheer size of the Central Coast Region makes it prohibitive to comb the region, facility by facility, to conduct inspections and enforce against violations.

The Department, as well as the Petitioners, recognize that a quicker water right permitting timeline would help to ensure effective resource protection and regulatory certainty. However, recent reductions in General Fund appropriations to the SWRCB clearly affect the ability to sustain the staffing levels necessary to expedite the processing of permit applications. And although the Department, as well as the petitioners, advocate for vigorous enforcement by the SWRCB as a disincentive to illegal water diversions, our agency is again mindful that funding and staffing limitations prevent regular and widespread compliance checks and region-wide inspections for illegal diversions.

In short, the Department believes that there is a pressing need for strong resource protection in the Central Coast Region. The Department believes the Petition may have

merit in certain areas, especially in terms of agency coordination in permitting and enforcement. However, the realities of current, limited budget appropriations cannot be ignored.

### ***Specific Responses to Petitioners' Allegations and Claims***

#### **Allegations:**

#### **1. Written Guidelines Regarding Fish and Game Code Section 1600 et seq.**

Paragraph 77, on Page 28 of the Petition, alleges an absence of written guidelines that explain: (A) how DFG determines the level of protection that is "necessary" under Section 1602; (B) how DFG will coordinate with the SWRCB in implementing Title 14 section 750-781.5 of the California Code of Regulations in the environmental review for a decision under Section 1602; or (C) how any required measure will be monitored to assure compliance.

The Department does not have written guidelines in place regarding this subject matter.

#### **2. Written Guidelines Regarding Fish and Game Code Section 5901**

Paragraph 80, on page 28-29 of the Petition, alleges an absence of written guidelines that explain: (A) whether the Department considers existing devices or contrivances that impede passage in Central Coast streams to comply with Section 5901; or (B) how the Department will coordinate with the SWRCB in the environmental review for a decision under Section 5901.

The Department does not have written guidelines in place regarding this subject matter. However, the Department does typically consider Section 5901 when it becomes apparent to staff that a violation is evident. Such an issue may arise either in the review of a water right application or a specific enforcement action. The Department has also begun to compile a database of non-complying facilities when they become evident. Due to budgetary constraints, however, the Department does not have a regular and exhaustive system of Section 5901 compliance inspections in place.

In regards to environmental review, CEQA is not triggered in the enforcement of Section 5901. Guidelines would thus not generally be of assistance in such a proceeding. However, in the review of a water right application, a passage impediment within the meaning of Section 5901 may play a role in CEQA review and the evaluation of potentially significant effects on the environment.

#### **3. Written Guidelines Regarding Fish and Game Code Section 5930**

Paragraph 84, on page 29 of the Petition, alleges an absence of written guidelines that explain: (A) the Department's schedule for inspection of dams in the Central Coast streams; (B) whether the Department considers Section 5931 to apply to these streams,

in light of the prohibition in Section 5901; or (C) how any fishway requirement will be monitored to assure compliance.

The Department does not have written guidelines in place regarding this subject matter. Our agency lacks sufficient staffing and funding to carry out a regular schedule of dam inspections in the region. In terms of Section 5931, the Department believes this provision could be applicable to Central Coast streams in light of Section 5901's prohibition on contrivances that prevent, impede, or tend to prevent or impede the passing of fish up and down stream. It appears that these two sections can be reconciled, since the construction of a properly functioning fishway may remove passage impediments or obstacles.

#### 4. Written Guidelines Regarding Fish and Game Code Section 5937

Paragraph 87, on page 30 of the Petition, alleges an absence of written guidelines that explain: (A) how the Department determines the flow schedule necessary to maintain the good condition of the fishery downstream; (B) how the Department will coordinate with the SWRCB in the environmental review for a decision under Section 5937; or (C) how any required measure will be monitored to determine compliance.

The Department does not have any written guidelines in place regarding this subject matter. The Department has recently cited Dr. Peter Moyle's definition of "good condition" under Section 5937 in administrative proceedings, although our agency has not made any official adoption of this definition. Dr. Moyle proposed his definition in the *Putah Creek Council v. Solano Irrigation District* litigation in the mid-1990's. Dr. Moyle's definition states that to keep fish in "good condition," sufficient water should be released to support three essential levels of fish health:

##### *Individual Level*

- a) Robust body conformation
- b) Relatively free of diseases, parasites, and lesions
- c) Reasonable growth rates for the region
- d) Should respond appropriately to stimuli
- e) Generally, a healthy fish is one that obviously looks good to a human observer, is not stunted, and will take appropriate evasive action when a predator or angler approaches

##### *Population Level*

- a) Multiple Age Classes
- b) Extensive available habitat for all life history stages
- c) All life history stages and their required habitats should have a broad enough distribution within the creek to sustain the species indefinitely (barring stream-long catastrophes)

##### *Community Level*

- a) Dominated by co-evolved species

- b) Has a predictable structure as indicated by limited niche overlap among the species and by multiple trophic levels
- c) Is resilient in recovering from extreme events
- d) Is persistent in species membership through time, and
- e) Is replicated geographically
- f) Generally, a "dynamic assemblage of fishes that will predictably inhabit a given range of environmental conditions."

In terms of environmental review under Section 5937, since this provision is not an independent permitting requirement, CEQA is not triggered. However, Section 5937 may be a component of either a water right application or a Streambed Alteration Agreement. Under Section 782 of Title 23 of the California Code of Regulations, all permits issued by the SWRCB for the diversion of water from a stream by means of a dam which do not contain a more specific provision for the protection of fish require compliance with Section 5937. Thus, it is unclear whether coordination of environmental review between the Department and the SWRCB under this section is necessary given the mandatory nature of Section 5937's application.

#### 5. Written Guidelines Regarding Fish and Game Code Section 6100

Paragraph 89, on page 30 of the Petition, alleges an absence of written guidelines that explain: (A) how the Department determines the level of protection necessary to protect the fishery as required by Section 6100; (B) how DFG will coordinate with the SWRCB in the environmental review for a decision under Section 6100; or (C) how any required measure will be monitored to determine compliance.

The Department's Statewide Fish Screening Policy is contained in the Department's Operations Manual as follows:

#### *"Section 1241 – Statewide Fish Screening Policy*

This fish screening policy is structured to comply with existing fish screening statutes, the National Environmental Policy Act (NEPA), the California Environmental Quality Act (CEQA), the Federal Endangered Species Act (ESA), the California Endangered Species Act (CESA), and court decisions in place at the time of its adoption. All diversions shall be dealt with uniformly on a statewide basis, as outlined in the policy memorandum.

#### *Section 1242 – Diversions Covered by FGC Section 5980*

The Department shall investigate and where necessary order fish screens installed on all diversions with a capacity greater than 250 cubic-feet per second, which affect fishery resources. Diversion in anadromous waters of the State shall be deemed to require screening unless on-site sampling demonstrates otherwise.

In addition, all diversions covered by this section which are located within the essential habitat of a State (CESA) listed species, or the critical habitat of a federally (ESA) listed species, shall be deemed to require screening.

Variances from these requirements shall be supported by a report, prepared by the diverter, which includes data from on-site monitoring and a review of historical entrainment and diversion data. The scope of the report and the sampling effort shall be approved by the Department prior to the initiation of work.

Both approval of the scope of the report and the approval of an exception to this policy shall include the concurrence of the appropriate regional manager, Chief of the Habitat Conservation Division, and Chief of the Wildlife and Inland Fisheries Division. The final exception notice shall be issued by the Chief Deputy Director.

#### *Section 1243 – Diversions Covered by FGC Section 6020*

The Department may consider for screening any diversion with a capacity of 250 cubic-feet per second or less. Activities in this category will be assigned a lower priority than those covered by FGC Section 5980 until all of the Department obligations for both its own diversions, and for those diversions with a capacity greater than 250 cubic-feet per second, have been fulfilled.

In addition, all diversions covered by this section which are located within the essential habitat of a State (CESA) listed species, or the critical habitat of a federally (ESA) listed species, shall be deemed to require screening. Variances from these requirements shall be supported by a report, prepared by the diverter, which includes data from on-site monitoring and a review of historical entrainment and diversion data. The scope of the report and the sampling effort shall be approved by the Department prior to the initiation of work.

Both approval of the scope of the report and the approval of an exception to this policy shall include the concurrence of the appropriate regional manager, the Chief of the Habitat Conservation Division, and the Chief of the Wildlife and Inland Fisheries Division. The final exception notice shall be issued by the Chief Deputy Director.

#### *Section 1244 -- Diversions Covered by FGC Section 6100*

The Department shall require the installation of fish screens, under FGC Section 6100 et. seq., on any new diversion or on the intake of any existing diversion that is either enlarged, relocated, or at which the season of use is changed in salmon and steelhead (anadromous) waters of the State.

In addition, all diversions covered by this section which are located within the essential habitat of a State (CESA) listed species, or the critical habitat of a federally (ESA) listed species shall be deemed to require screening.

Variations from these requirements shall be supported by a report, prepared by the diverter, which includes data from on-site monitoring and a review of historical entrainment and diversion data. The scope of the report and the sampling effort shall be approved by the Department prior to the initiation of work.

Both approval of the scope of the report and the approval of an exception to this policy shall include the concurrence of the appropriate regional manager, Chief of the Habitat Conservation Division, and Chief of the Wildlife and Inland Fisheries Division. The final exception notice shall be issued by the Chief Deputy Director.

#### *Section 1245 -- NEPA and CEQA Process*

When reviewing projects, the Department shall make every effort to require the installation of fish screens on all unscreened diversions where other measures cannot reasonably prevent entrainment of fish. Further, the Department shall make every effort to require the modernization of fish screens which do not meet our present fish screening criteria. This effort shall include the Streambed Alteration process (FGC Section. 1600 et. seq. of the Fish and Game Code). Variations from the fish screening policy shall be treated as discussed above.

#### *Section 1246 -- U.S. Fish and Wildlife Coordination Act*

Under the provisions of this act, the Department shall require the installation of fish screens on all unscreened diversions where fish are present. Further, the Department shall make every effort to require the improvement of fish screens which do not meet our present fish screening criteria. For example, opportunities are provided by the U.S. Army Corps of Engineers permits process under the Federal Rivers and Harbors and Clean Water acts.

The referenced "Fish Screening Criteria" shall be used as the basis for design of fish screens required under this policy. The criteria may be modified by the Department, and it is the responsibility of the project proponent to have the most recent copy of these criteria. Copies are available from the Habitat Conservation Division, Wildlife and Inland Fisheries Division, or from the appropriate regional office of the Department."

Beyond the Department's Statewide Fish Screening Policy, there are no written guidelines in place in regards to the subject matter raised in the Petition.

#### Claims:

1. Claim Ten. DFG Does Not Have An Adequate Procedure For Consultation With the State Water Board In the Environmental Review Under Fish and Game Code Sections 1603, 5901, 5930, 5937, And 6100.

The Department does not have any official procedures in place beyond those required by law in regard to consultation with the SWRCB on the aforementioned statutes. While written guidelines or procedures to address issues surrounding coordination on such statutes, the Department is under no legal duty to adopt such guidelines.

2. Claim Eleven. DFG Does Not Have An Adequate Procedure To Monitor Approvals Under Fish and Game Code Sections 1603 Et Al.

As described above, the Department does not have written guidelines in place regarding the subject matter raised in this claim.

3. Claim Twelve. DFG Does Not Take Adequate Enforcement Actions Under Fish and Game Code Sections 1603 Et. Seq.

As described above, the Department does not currently have the staffing and funding to carry out regular and regionwide dam inspections under Section 5930. Nor does it have the resources to search for and enforce against all illegal operations under Fish and Game Code Section 1603 et seq. Enforcement action may be threatened or commenced once code violations becomes apparent, however. Generally, such enforcement is subject to the Department's discretion under law and is influenced by Departmental program and policy priorities given limited staff resources.

If you have any questions regarding the Department's comments please contact me at (916) 657-4091 or Cathie Vouchilas, Statewide Water Right Coordinator, at (916) 445-3108.

Sincerely,



HARLEE BRANCH  
Staff Counsel

cc:

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