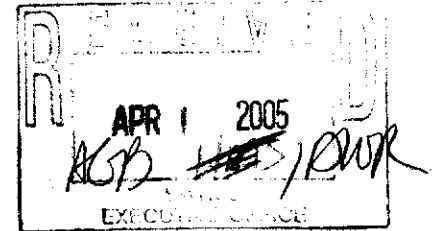




COAST ACTION GROUP
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March 30, 2005

Trout Unlimited Public Workshop
March 17, 2005

electronic cc: Exec, OCC
Water Rights Staff

Art Baggett, Chair
State Water Resources Control Board
P.O. Box 100
Sacramento, California, 95812-0100

Subject: Comments - Petition Submitted by Trout Unlimited and Peregrine Chapter of the National Audubon Society and March 17th Workshop on the Petition - Stream Diversion Policy.

Dear Chairperson Baggett and Board Members:

General

You interest and attention to this matter is very much appreciated. The obvious general consensus indicated by all parties participating in the workshop is that we all understand that there is a problem with permitting and enforcement in stream diversion oversight by the Division of Water Rights. There was no argument with the fact that public trust values are not being protected given the current status of SWRCB (Division of Water Rights) implementation of permitting and review process. The primary question, from the Board and other interested parties, is "How are we going to implement and enforce appropriate policy and State Water Code, given the resources at hand?"

With that question in mind, Coast Action Group supports the Petition and associated remedies noted in the Petition. In making this statement, and given the limited resources at hand for implementation at the Division of Water Rights (SWRCB), and other participating responsible agency, there are many areas where cost effective solutions are available. Employment of these solutions will help resolve outstanding issue (noted in the Petition) in complying with State Water Code and other Public Resources Code and, also, provide for better protection of these public trust resources - water, aquatic life, and fish.

You should be constantly reminded; in the words of our Governor: "Water is our future."

Problems of policy implementation can be separated into basic areas: Large Projects that have ongoing permits, permit renewal or license challenges/protests, Small projects with permits/license, Small projects without permit/licence, Complaints, and Projects that are ignored to this point. The following is a discussion of some remedies and policy ideas related to these various classes of issue:

Large Projects that have ongoing permits, permit renewal or license challenges and or protests

Coast Action Group has no expertise in this area. However some issue in this class is evident from a management point of view. These large projects require in-depth environmental review and extensive long term participation from staff and multi-agency coordination. Significant resources are required in resolution. The best suggestion that Coast Action Group can offer is better coordination of participating responsible agency in addressing issue.

Small projects without permits/license - or permits/license applied for and pending

There are thousands of unpermitted and unlicensed diversions or impoundments currently extant. While individually the impact of one such small diversion or impoundment may be small, cumulative the aggregate the impact of such diversions and impoundment is huge - a devastating factor in the management of water resources for the protection of fish and aquatic life.

Implementation of the joint NMFS (NOAA Fisheries)/DFG Guidelines for Maintaining Instream Flows is neither impossible nor costly for responsible agency in the case of these unpermitted or permit/ license applied for cases. In fact, implementation of the "Guidelines" would go a very long way in addressing problems related to illegal use and maintaining instream flows. The basic theory of the "Guidelines" is that water is diverted, allowing for some by-pass flow, during period of high flows and retained (impounded) for use during critical low flow periods. This seems logical, not rocket science, and within the realm of possibility - in most cases - as a condition of permit/license.

It does not seem that difficult a task to notice those applying for permits or license that if they desire same that they must conform to the "Guidelines" by agreement and condition of permit/license. Failure to agree to and demonstrate compliance, on paper and physically, should subject any party diverting or impounding water without a permit/license to a cease and desist order - with applicable penalty. When faced with the probability of not getting their water, or permit/license, most parties needing to irrigate will conform quite readily.

Division of Water Rights has not approached this problem by processing permits/licenses with the conditions attached to permits/licenses that incorporate the "Guidelines". It is suggested that the Division of Water Rights can immediately notice applicants of required conditions so that the applicants can take action.

The financial burden to accomplish this remedy is minimal.

Small projects with permits/license

Small projects with permits/license probably can not be forced to adopt new conditions - "Guidelines".

However, notice can be sent requesting voluntary compliance.

Any small project that is found to be violation of their permit/license, or in violation of State Water Code or Fish and Game Code where the method of diversion or amount of use is a threat to or is damaging public trust values is subject to permit revocation and/or modification. In many of these cases the "Guidelines" can be applied to mitigate and bring out of compliance diversion/impoundment into compliance with conditions of "Guidelines" incorporated.

Coho Recovery Guidelines

The Board members at the workshop were interested in the availability of the Department of Fish and Game (a co-responsible agency - beneficial uses/fish and aquatic species) to work with the SWRCB/Division of Water Rights on enforcement and resolution of related (and/or multi-jurisdictional) issues.

The following statement represents the intent of the Recovery Strategy for California Coho Salmon (DFG 2004):

"The Department of Fish and Game shall review all proposed water diversions and provide recommendations to protect aquatic habitat which provides for all coho salmon life stages. Where appropriate, these recommendations will be consistent with the July 17, 2002 draft of the proposed National Marine Fisheries Service/CDFG joint guidelines for maintaining instream flows to protect fisheries in mid-California coastal streams. The Recovery Plan shall include a strategy to maintain or recover instream flow throughout the region adequate to facilitate recovery of coho."

Please reference Coho Recovery Strategy language in Appendix. This language, as well as SWRCB basic responsibility as a responsible agency to protect beneficial uses and public trust resources, supports implementation of actions by the SWRCB requested by the Petition - including use of "Guidelines".

Note: Coho salmon are now effectively listed under CESA.

All responsible agency must cooperate, and employ reasonable standards (including State Resources and Water Code) for coho recovery under this listing.

Complaints

Not only are permit/license applications not processed in reasonable periods of time; Complaints and other enforcement issue reside, unresolved, in the pile of things to do for unreasonably extended periods of time.

Examples of Regional Issues

The summarization of the two issues, below, give some idea of how the lack of enforcement plays into conditions that are limiting factors for beneficial uses - community water sources, fisheries, and aquatic life.

Gualala - North Gualala Water Company - Diversion for Vineyard use.

In the case of the North Gualala Water Company the SWRCB was successful in asserting authority, over challenges by the water company, in maintaining instream flows. The water company claimed that SWRCB had no jurisdiction- due to claim of percolating ground water. The file showed, and the Court found, that there was hydrologic connection with subsurface flows in a confined channel. Thus, the SWRCB has authority to enforce minimum by-pass flow standards.

The minim by-pass flow condition of permit/license is 4 cfs - during critical low flow periods. During years of low rainfall this by-pass flow is continually violated by the water company. The SWRCB has not taken action to enforce provision of the permit. To guarantee supplies during low flow periods the water company would, and should, develop alternative water sources. In this case to support beneficial use protection via compliance with permit/license conditions, the SWRCB should give notice of intent to enforce permit conditions and encourage the water company to move forward with development of alternative water sources.

Currently Gualala River basin is experiencing massive conversions of timber production land to vineyard use. Nearly 1,000 acres applied for or approved to date with a massive 1,900 acre project in the wings. With grape plantings at 1,200 to 2,000 vines per acre (minimum, it can be up to 3,000 or more), and water use per plant from 1/2 to 1 gallon per day. Using simple math you can see that there is additional massive diversion potential and use of water. Water diverted from streams and watercourses, and in some cases impounded, will be sought for irrigation of these newly developed vineyards. This will put additional strain on the water resources of the Gualala River.

Conservation and implementation of "Guidelines" is mandated for protection of the Beneficial Uses of Water. Failure to address issues related to the water company will only expand the problems related to water use.

The solutions are well within the grasp of the SWRCB. Action, in terms of policy implementation, would better serve the resource and the agency if initiative is taken now rather than later. SWRCB actions must be consistent with DFG Recovery Strategy for California Coho Salmon. See Appendix - 8.2.1.7 Gualala River HSA

Garcia - Stornetta Complaint - License 6470 (Application 16700)


In August of 2003 formal complaint was filed with the division of water rights. A riparian license with specific diversion limits is extant. The complaint asserts, and all information in the file (pumping electric bills, point of diversion, pump capacity, areas of irrigation) supports findings that water diverted is grossly in excess of permit/license and that 1/3 of all the total use is transferred to another basin outside of the use area of the riparian license. The dairy has claimed that there is no state authority via the use of the percolating ground water argument. All information, geology, hydrology, well pumping tests, show hydrologic connectivity with subsurface flow in a confined channel.

Given this information, the Division of Water Rights has yet to make a finding and enforce the conditions of the License.

Conclusion

In support of the issues raised in the Petition, it is reasonable to expect that action can be taken in areas discussed above. Cost effective actions, including implementing the "Guidelines" on pending (or out of compliance) permits/licenses are well within the realm of possible responsible action by the SWRCB.

Sincerely,


For Coast Action Group

Appendix - Wording from CDFG Coho Recover Strategy

COHOSALMONRECOVERYSTRATEGY7.1

7.1 STREAMFLOW

RW-I-B-01 Encourage the use of passive diversion devices designed to allow diversion of water only when minimum flow requirements are met or exceeded. Identify and develop adequate passive diversion structure designs.

RW-I-C-01 Encourage cooperative effort to plan water supply development and growth that are not harmful to coho salmon habitat. Work in coordination with the California Department of Housing and Community Development, Association of Bay Area Governments, counties, cities, water districts, and others. Provide funding and education to accomplish this.

RW-I-D-01 Encourage elimination of unnecessary and wasteful use of water from coho salmon habitat, through education components of this strategy. Encourage water conservation for existing uses.

RW-I-D-02 Improve coordination between agencies to avoid and minimize the adverse effects of future or reopened permits and licenses for water diversions on coho salmon. Promote consistency and pool limited resources to implement a regional interagency task force for regional project review (water rights, 1600, CESA). Include staff that represent the Department, SWRCB, RWQCB, NOAA Fisheries and, where applicable, other agencies. Where feasible, use programmatic, cost-efficient approaches and incentives to working with landowners to permit off-channel storage ponds. For the CCC Coho ESU, the SWRCB shall consider the June 23, 2002 Draft Guidelines developed by NOAA Fisheries and the Department in the water rights proceedings for streams with coho salmon including season of diversion and off-stream storage, and maintenance of the natural hydrograph, where appropriate. Encourage NOAA Fisheries and the Department to work with SWRCB to modify the guidelines to be appropriate to the SONCC Coho ESU as needed.

RW-I-D-03 Provide conservation incentives to minimize negative effects of water drafting for roads and fire suppression, including, but not limited to:

- a. Streamline permitting for actions that result in an improvement of instream flows;
- b. Support multiple uses of water storage systems (e.g., USFS, CDF, counties, landowners); and
- c. Cost-share funding where low-flow, trickle recharge water storage is used to avoid adversely affecting streamflow or coho salmon habitat.

RW-I-D-04 Evaluate the rate and volume of water drafting for dust control in streams or tributaries and where appropriate, minimize water withdrawals that could impact coho salmon. When feasible, use alternatives to water as a dust palliative (including EPA-certified compounds) that are consistent with maintaining or improving water quality.

RW-I-D-05 Explore ways to improve implementation of the Department' Lake or Stream Alteration Notification and Agreement process to protect coho salmon from the adverse affects of projects that would alter the bed, banks, channel, or natural flow streams.

RW-I-D-06 Pursue funding for the assessment, cataloging, and compliance monitoring of water diversions within the range of coho salmon. Upgrade the existing water rights information system so that water allocations can be readily quantified by watershed.

RW-I-D-08 Support a comprehensive streamflow evaluation program to determine instream flow needs for coho salmon in priority watersheds.

7.2 WATER RIGHTS

RW-II-A-01 Review authorized diversions that have no provisions to protect coho salmon. Review should be conducted in order of priority for streams with coho salmon habitat.

RW-II-A-02 Identify unauthorized diversions.

RW-II-A-04 Where flows are a limiting factor in priority coho salmon habitat, petition the SWRCB to add streams to the Declaration of Fully Appropriated Streams.

RW-II-A-05 Inventory water use and water availability in streams with coho salmon habitat. Ensure that water availability analyses on priority coho salmon habitat accurately reflect existing water use and availability. Require

streamflow gauging devices on priority coho salmon streams when approving water development projects. Continue to require riparian and pre-1914 water users to file annual statements of diversion and use.

RW-II-B-01 Pursue opportunities to acquire or lease water, or acquire water rights from willing sellers for coho salmon recovery purposes. Develop incentives for water right holders to dedicate instream flows for the protection of coho salmon (Water Code §1707).

RW-II-B-02 Evaluate the cumulative effects to coho salmon from the creation of new riparian water rights associated with land subdivisions and rezonings. Where cumulative impacts on flows will be detrimental to coho salmon, consider mitigations or conditions that would protect coho salmon or avoid adverse effects to coho salmon. Conditions could include requirements that would not allow riparian water rights for new parcels at the time subdivision approvals are made.

RW-II-B-03 Within the range and distribution of coho salmon, diversion screens should be constructed, repaired, upgraded, reconstructed, and maintained in accordance with Department/NOAA Fisheries Screening Criteria.

7.17 INTEGRATION WITH OTHER PLANS AND PROGRAMS

RW-XXXI-B-07 To minimize and reduce the effects of water diversions, direct the Department to work with the SWRCB, present supportive evidence, and actively participate in making recommendations needed to implement provisions of the FGC. This may include:

- a. Identifying and implementing actions to improve coordination between the agencies and others to address season of diversion, off-stream reservoirs, bypass flows protective of coho salmon and their habitat including spawning gravel and natural hydrograph, and avoidance of adverse impacts caused by water diversion;
- b. Funding of assessment and geographic information system (GIS) mapping of water diversions and determination and monitoring of FGC §1600 program compliance related to water diversions; and
- c. Evaluating requests for on-stream dams on coho salmon streams above migratory reaches for the effects on the natural hydrograph and the effects on the supply of spawning gravel for recruitment downstream.

7.20 ENFORCEMENT OF EXISTING LAWS

RW-XXXIII-A-01 Support enforcement of existing laws, codes, regulations, and ordinances that address the protection of coho salmon and their habitat. Habitat includes but is not limited to water (quality and quantity), pools, riffles, instream LWD, riparian vegetation and estuaries. Existing laws, codes, regulations, and ordinances include, but are not limited to FGC §§1600, 5650, 5900 through 6100 (with an emphasis on 5901, 5937, and 6100), PRC §§ 10000-10005, CESA, and the ESA. The term "" includes, but is not limited to, education, issuing warnings, issuing citations, developing cases for referral to district attorneys offices and/or the Office of the Attorney General.

RW-XXXIII-A-02 Provide adequate budgetary funding and positions for agencies with enforcement authority to enforce laws and codes relevant to coho salmon protection.

RW-XXXIII-A-03 Review diversions and use of water in priority coho salmon streams to determine which permits and/or licenses need modification for the protection of coho salmon. Where necessary, formally request that the terms of water rights permits/licenses be modified for protection of coho salmon. This will require field studies to evaluate impacts and develop supportive evidence and formal hearings to consider proposed changes. This program must be adequately funded to be implemented.

RW-XXXIII-A-04 Agencies with the primary authority for fish and water should lead enforcement efforts and coordinate with all local, State and Federal agencies with regulatory authority affecting coho salmon.

RW-XXXIII-A-05 Request that enforcement to prevent unauthorized diversion and use of water and water permit processing a high priority. Enforcement of existing codes including Water Code §§1052 Trespass and 1831 *et seq.*, Cease and

8.2.1.7 Gualala River HSA

MC-GU-O3 Enforce existing bypass flow permit conditions of the SWRCB and the Department for the North Gualala Water Company diversion on North Fork Gualala River.