



August 15, 2013

Felicia Marcus, Chair, and Board Members
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Via Electronic Mail: commentletters@waterboards.ca.gov

Re: 8/20/13 Board Meeting, Item 9: Discussion of Board Members' priorities and organizational issues

Dear Chair Marcus and State Water Board Members:

Thank you for the opportunity to weigh in on the development of the State Water Resources Control Board's upcoming priorities. It is our understanding that one of the current priorities for the SWRCB is the development and implementation of instream flow studies, with the Department of Fish and Wildlife and others, to identify minimum instream flows necessary to the health of key California waterways. We support this effort and look forward to its continued success. However, we believe that the importance of ensuring adequate instream flows calls for additional administrative attention to ensuring that waterways actually enjoy the flows needed to thrive. For example, water rights enforcement PYs are focused on Delta waterways – an important area of need, but not the only area, as the attached August 8th letter to the SWRCB attests. Other areas of the state are suffering from critically low water flows that require immediate attention, and it is to be expected that this situation will unfortunately continue into the near future.

For these reasons, we request that the priority on instream flow identification include two additional key tasks. First, we request that a subset of the current water rights enforcement staff be created and given flexibility to respond to immediate, critical water rights enforcement needs (the definition of which could be set as part of this priority effort, but which would include the types of enforcement needs that have resulted in the flows situation described in the attached letter). This "SWAT-team" type approach would better ensure that critical instream water needs are met, and would inform illegal diverters statewide that their actions will be addressed.

Second, we request that the SWRCB prepare a report that describes the following: its current authorities for ensuring that needed water is retained in waterways, the challenges and opportunities related to implementation of these authorities, the opportunities for partnerships with other agencies who have related authorities (*e.g.*, Department of Fish and Wildlife), notable

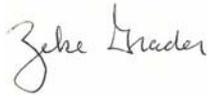
opportunities to leverage implementation of these authorities, gaps in authorities that should be filled in order to adequately address instream flow needs, and recommendations for next year's set of priorities with respect to development and implementation of such authorities. This should include both surface water and ground water, as ground water extraction is significantly impacting instream flows in many areas of the state. Authorities include but are not limited to "waste and unreasonable use" determinations (California Water Code Sec. 275 and California Constitution Article X), Section 1707 transfers, public trust actions (for both surface water and ground water), adjudications, and others.

In summary, we commend the SWRCB's efforts with DFW to identify the instream flows needed to ensure waterway health. To be effective, however, this identification effort should be paired with an implementation plan that ensures that waterways in fact will enjoy these minimum flows. The steps proposed above will address immediate, acute needs through targeted enforcement, as well as set the foundation for the necessary, longer-term implementation strategy to address chronic problems. We look forward to working with you on these efforts to protect the health of the state's waterways.

Sincerely,



Linda Sheehan
Executive Director
Earth Law Center
lsheehan@earthlaw.org
Fremont, CA
510-219-7730



William F. "Zeke" Grader
Executive Director
Pacific Coast Federation of Fishermen's Assocs
zgrader@ifrfish.org
San Francisco, CA
415-561-5080, x224

Attachment 1 – Letter from S. Craig Tucker et al. to SWRCB, "Request for emergency action to augment flows in Scott River" (Aug. 8. 2013)

ATTACHMENT 1



Please direct all correspondence in response to this letter to:

S. Craig Tucker, Ph.D.
Klamath Coordinator, Karuk Tribe
PO Box 282
Orleans, CA 95556
(cell) 916.207.8294
(email) ctucker@karuk.us

Mr. Tom Howard, Executive Director
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Mr. Chuck Bonham, Director
CA Department of Fish and Wildlife
1416 Ninth Street, 12th Floor
Sacramento, CA 95814

August 8, 2013

Re: Request for emergency action to augment flows in Scott River.

Dear Mr. Howard & Mr. Bonham:

We the undersigned respectfully request that you take emergency action to ensure a minimum 30 cfs in-stream flow in the Scott River and prevent further harm to populations of ESA listed coho salmon, Chinook salmon, Pacific lamprey and steelhead. Without immediate action, drought conditions combined with excessive water withdrawals will lead to the complete dewatering of reaches and severe dewatering of others resulting in a fish kill.

Background Information

USGS flow data shows that many of the Scott River's hydrologic metrics are worsening over time, including: annual minimum daily flow, annual minimum monthly flow, and the number of days per year with flows less

than 10, 20 and 40 cfs. Annual precipitation does not appear to have changed over the period of record¹, but future long-term climate-related reductions in snowpack are expected to add stress to the system (USGS “Scott River near Fort Jones” gauge graphic, attached; Van Kirk and Naman, *Relative Effects of Climate and Water*, 2008, 1048).

Historic flows and water rights data link dewatering to adjudicated water rights that pull surface flows from the river with little return (Van Kirk and Naman, 2008, 1045-1048; NCRWQCB, Scott River TMDL, 2005, 1.16-1.17; SWRCB, Scott River Adjudication, 1980; NOAA, Coho Recovery Plan, 2012, 36.12, 36.17-18). Exacerbating the issue is extraction of interconnected groundwater, which depletes available subsurface flow necessary to maintain the river particularly during summer months, reflecting the seasonal occurrence of irrigation related groundwater pumping (NCRWQCB, 2005, 4.7; S.S. Papadopoulos & Associates Inc., *Groundwater Conditions in Scott Valley, California*, 2012, 32, fig. 6.4; NOAA, 2012, 36-11, 36-18).

The long history of critically low flow in the Scott River is well documented by the Region 1 North Coast Regional Water Quality Control Board and scientific studies (NOAA, 2012, 36.1-24; Van Kirk and Naman, 2008, 1045; Department of Fish and Wildlife, *Stream Flow Needs for Anadromous Salmonids in the Scott River Basin*, 1974, 25-27).

The Scott River has steadily exhibited significant declines in the populations of fish associated with the river’s cold water salmonid fishery, a major beneficial use (NOAA, 2012, 36.1-24; NCRWQCB, 2005, 2.4-2.6; Department of Fish and Wildlife, 1974). The anadromous fish populations (including CESA and ESA listed coho salmon) have been in dramatic decline due in large part to low stream flows (NOAA, 2012, 36.7, 36.11; Department of Fish and Wildlife, 1974; Van Kirk and Naman, 2008, 1047-48). Juvenile coho salmon need cool, clean water that flows unimpaired from the headwaters to the ocean; however, miles of Scott River coho spawning and rearing habitat are typically dewatered in the summer, stranding juvenile coho other salmonids (NOAA, 2012, 36.7; direct observation by Karuk field crews). According to a NOAA report, “Water diversions for agricultural practices, groundwater extraction, cattle grazing, residential/domestic water use, and flood control have diminished surface flows and greatly reduced or eliminated access to and use of historical coho salmon habitat in the Scott Valley” (NOAA, 2012, 36.1).

Legal Authority

We believe that the following laws, among others, provide you the legal authority to curb water diversions now and prevent imminent fish kills:

- 1) The Public Trust Doctrine provides the SWRCB with authority to restrict water rights and water diversions when it is necessary to protect public trust resources. See in particular *National Audubon Society vs. Superior Court*, 33 Cal.3d 419 (1983).
- 2) Department of Fish and Game Code Section 5937 requires diverters to leave enough water instream below a dam or diversion structure to keep fish in “good condition.”
- 3) Both the California and Federal Endangered Species Acts provide authority to limit diversions that result in “take” of an endangered species, jeopardize the continued existence of an endangered species, or adversely modify critical habitat.
- 4) The Reasonable Use Doctrine – Article X, Section 2 of the state Constitution and Water Code Section 275 – prevents the “waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion

¹ The period of record includes every hydrologic year from 1941 to 2009. Data courtesy of the USGS “Scott River near Fort Jones” gage, available at: http://waterdata.usgs.gov/nwis/dv/?site_no=11519500&agency_cd=USGS&referred_module=sw.

of water in this state.” In particular, the Constitution states 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.” By their own language, these provisions encompass both surface water and groundwater withdrawals, and so must be applied to the groundwater pumping impacting the Scott.

Complete dewatering of a river through either surface water or ground water diversions must be deemed “unreasonable,” particularly where this dewatering threatens the viability of threatened and endangered species.² This authority is “self-executing,” which means that the SWRCB may take independent action to address violations of the Doctrine. Indeed, the Water Code indicates that the agencies “*shall*” [not “*may*”] take all appropriate proceedings or actions” to implement this mandate. (Emphasis added.) In light of the emergency nature of the imminent fish kills, in this case the “appropriate” action is to immediately apply the agencies’ authority to “limit” the “right to water” to only reasonable uses; *i.e.*, uses that will ensure the continued viability of threatened and endangered fish populations.

5) The Scott River Decree provides the U.S. Forest Service with a “first priority right to stream flow in tributaries to the Scott River for instream uses within the Klamath National Forest, including but not necessarily limited to fish, wildlife, recreation, and aesthetic enjoyment . . .” (See Page 14 of the Scott River Decree, page 30 in PDF of the decree at http://www.californiaresourcecenter.org/sswatermasterdistrict/ScottRiverDecree_30662_1980.pdf).

The Scott River Decree also provides the U.S. Forest Service with an instream water right on the main stem of the Scott River. (See Page 12 of the decree, page 28 in the PDF.)

We request that the SWRCB investigate these provisions of the decree and determine whether they are being satisfied. A good discussion on the matter of the USFS water right in the Scott River can be found at <http://scottriver.blogspot.com/2013/03/scott-river-forest-service-water-right.html>.

6) The terms of Department of Fish and Wildlife 1602 permits may require diverters to leave instream flows adequate for the protection of fish populations.

Request for Emergency Action

Given the imminent threat of fish kills on the Scott River and the obligations of SWRCB and DFW pursuant to the aforementioned legal authorities, we request that you use your existing legal authority to curb water withdrawals in order to augment in-stream flows on an emergency basis.

Specifically, we request that you send an advisory to Scott River water right holders stating that they must take immediate collective action that results in minimum in-stream flows throughout the Scott River of 30 cfs and flows in Scott River tributaries adequate to prevent additional harm to fish populations. This flow is supported by previous technical reports and is consistent with the legal water right granted to the US Forest Service for the purposes of protecting fisheries resources (Department of Fish and Wildlife, Stream Flow Needs for Anadromous Salmonids in the Scott River Basin, 1974, 17; Scott River Decree, 1980, section 45).

Our attached Emergency Plan highlights what specific actions, in order of priority, we believe can be taken to achieve flows that would help Scott River fish populations survive the summer.

² Complete dewatering of water sources is also not a reasonable use of water from the perspective of sustainable agriculture uses as well, and should be examined by the Water Board on a longer term basis; *i.e.*, in addition to this immediate request for emergency flows.

If Scott River water users cannot accomplish this through collective action by August 25th, we request that you take appropriate emergency enforcement action to curb water diversions as necessary to attain the aforementioned conditions.

We request that you seek cooperation between SWRCB, DFW and the Department of Water Resources to ensure that emergency flows are provided. We also respectfully request a report from DFW and SWRCB about the emergency actions taken within the next 30 days.

Thank you for your attention to this critical issue. We welcome any alternative proposals you may have that will prevent the dewatering of the Scott River and a resulting fish kill this summer. We will contact you shortly to discuss this matter.

Sincerely,

Leaf Hillman
Natural Resources Director
Karuk Tribe
leafhillman@karuk.us

Bill Jennings
Executive Director
California Sportfishing Protection Alliance
bjennings@calsport.org

Glen Spain
Northwest Regional Director
PCFFA and IFR
fishlifr@aol.com

Linda Sheehan
Executive Director
Earth Law Center
lsheehan@earthlaw.org

Konrad Fisher
Executive Director
Klamath Riverkeeper
konrad@klamathriver.org

Sara Aminzadeh
Executive Director
California Coastkeeper Alliance
sara@cacoastkeeper.org

Attachments: 2013 Scott River Emergency Plan

**CC: Senator Wesley Chesbro
Senator Noreen Evans
Representative Doug LaMalfa
Representative Jared Huffman
California State Water Resources Control Board**

Data References:

- California State Water Resources Control Board, Scott River Adjudication, Decree No. 30662 (January 30, 1980), available at:
http://www.californiaresourcecenter.org/_sswatermasterdistrict/ScottRiverDecree_30662_1980.pdf.
- Letter from Linda Sheehan, California Coastkeeper Alliance *et al.* to Jeffrey Shu, State Water Resources Control Board (August 2010), Scott River attachments, available again upon request.
- NOAA's National Marine Fisheries Service Southwest Regional Office, Draft SONCC Coho Recovery Plan (January 2012), available at:
http://swr.nmfs.noaa.gov/recovery/soncc_draft/SONCC_Coho_DRAFT_Recovery_Plan_January_2012.htm.
- State of California Department of Fish and Game, Stream Flow Needs for Anadromous Salmonids in the Scott River Basin, Siskiyou County: A Summarized Report (1974).
- State of California North Coast Regional Water Quality Control Board, Staff Report for the Action Plan for the Scott River Watershed Sediment and Temperature Total Maximum Daily Loads (December 7, 2005), available at:
http://ofmpub.epa.gov/waters10/attains_impaired_waters.show_tmdl_document?p_tmdl_doc_blobs_id=61165.
- S.S. Papadopoulos & Associates Inc., Groundwater Conditions in Scott Valley, California, Report prepared for the Karuk Tribe, Happy Camp, California (2012).
- Van Kirk, Robert W. and Seth W. Naman, Journal of the American Water Resources Association, vol. 44, No. 4, Relative Effects of Climate and Water: Use of Base-flow Trends in the Lower Klamath Basin, 1035-1052 (August 2008), available at:
<http://www.fws.gov/arcata/fisheries/reports/technical/Van%20Kirk%20and%20Namen%20Base%20flow%20Trends%20JAWRA.pdf>.
- USGS "Scott River near Fort Jones" gage graphic, below.
- Photographic evidence of low flows in Scott River, below.

2013 Emergency Plan to Save Scott River Salmon and Steelhead

Introduction

This is an emergency plan to save coho, Chinook, and steelhead in the Scott River and its tributaries in late summer and fall of 2013. This plan is part of an on-going assessment of stranding of juvenile salmonids (Chinook, coho, and steelhead) in the Scott Valley watershed of Siskiyou County, California that began in 2011, continued in 2012, and continues in 2013. The Scott River is a major tributary of the Lower Klamath River below Iron Gate Dam, the upstream boundary for anadromous fish in the Klamath watershed. Having a Mediterranean climate, with little summer precipitation, the Scott River and its tributaries are prone to drying up in summer as snow melt wanes from the surrounding Scott and Marble Mountains and irrigation and groundwater diversions have expanded in recent decades. Twenty to forty percent of the stream channels (up to twenty miles of salmon rearing streams) dry up between the end of May and the end of summer each year depending on snowpack. This year, 2013, is a critically low snowpack year. It is the second lowest snowpack in the Mt. Etna record since 1951. Poor hydrologic conditions coupled with the failure to regulate water diversions and ground water pumping put Scott River fish populations at risk for strandings and fish kills.

The general low-flow patterns in the Valley this summer have led to extreme conditions that require a series of emergency actions if there is to be any hope of saving this year's fish broods. The tributaries and the main-stem are drying up. Generally, many of the ten major mountain tributary streams flow continuously all summer, despite only a few having sustained flow to the main-stem Scott River. The main-stem generally has a discontinuous flow through the Valley by late summer, but so far this year it has remained continuous. Low summer flows are a consequence of ebbing snowmelt, coarse alluvial deposits at the head of tributary valleys and major mine tailings, as well as municipal and agricultural surface water diversion and groundwater pumping. Earlier than normal drying is a consequence of the critically poor snowpack in the mountains around the Valley.

The following plan includes a list of proposed voluntary actions on the part of all the parties involved. If landowners are not cooperative, we urge state and federal agencies to use existing regulatory and statutory authorities to ensure necessary actions are taken to protect fisheries.

Plan Elements

The key elements of the plan are water supply use restrictions, added water supply, and short-term and long-term habitat improvements. Where these elements are unsuccessful CDFW will consider fish rescues as a last resort; however, fish in need of relocation are often already stressed by warm water, overcrowding, lack of forage, little cover, and in some cases disease.

CDFW will be hard pressed to relocate these fish to areas holding healthy fish, so every effort should be made to successfully implement these actions.

Water Supply Actions

- **PRIORITY ACTION 1:** Limit diversions from main-stem Scott from Farmers Ditch downstream to SVID Young's Dam including these two diversions and others (all D2 Decree diversions including 193, 194, 198, and 203 that divert directly from the river). These diversions reduce the surface flow of the Scott main-stem below the Tailings (RM 51.5) downstream to Fort Jones (approximately RM 31) or below. Surface flow is either affected directly or indirectly (interruption of underground stream-flow passing through Tailings reach).
- **PRIORITY ACTION 2:** Limit diversions from East Fork, South Fork, Sugar Creek, and French Creek, all streams that contribute to main-stem above, within, and below Tailings, thereby benefitting main-stem refuge flow below Tailings, as well as refuge reaches above Tailings and in the lower portions of each of these creeks (e.g., all B7 diversions such as diversion #81 B7 on main-stem East Fork).
- **PRIORITY ACTION 3:** Limit diversions from Etna, Patterson, Big Slough, and Kidder Creeks that contribute to subsurface inflow of spring seepage to main-stem Scott below Young's Dam, as well as local refuges in each of these creeks. Refuges occur in Etna Creek (from town upstream), Patterson Creek (one above and one below Hwy 3), Big Slough (entire middle and lower slough and spring seepages), and Kidder (one above and one below Hwy 3).
- **PRIORITY ACTION 4:** Limit diversions from Lower Mill and Lower Shackelford Decree groups. These diversions directly take flow from the several cfs remaining in the Shackelford-Mill refuge. These diversions likely also reduce spring seepage to main-stem Scott at mouth of Shackelford. In some cases these diversions have ditch or irrigated pasture warm-turbid return flows that further stress the refuge habitat.
- **PRIORITY ACTION 5:** Limit ground water pumping under Schedule C of adjudication. Also limit ground water extraction where allowed as options under Schedules B and D. Groundwater pumping may or may not be linked directly or indirectly to the main-stem Scott or tributaries in summer.
- **PRIORITY ACTION 6:** Add to surface flow of main-stem and tributaries by pumping groundwater into stream channels to sustain flow and cool streams.
- **PRIORITY ACTION 7:** Where possible, increase available flows by diverting surface water from above alluvial fans in ditches to refuges in tributaries or main-stem below alluvial fans. An example of such an action is Shackelford Ditch that brings water from upper Shackelford Creek to lower Mill Creek refuge.

Habitat Actions:

- HABITAT ACTION 1: Brush bundles should be added to all known refuges in habitats lacking cover that otherwise would be conducive to coho juveniles use for rearing. Coho juveniles prefer pool habitats immediately below riffles that have effective cover from predators, sun, and currents. Riffles provide oxygen (essential at these high summer rearing temperatures >20C), food, overhead cover, and hyporheic, cool, through-gravel flow. Adding brush should increase preferred habitat area, thus reducing crowding, and increase growth and survival. Even the better refuge reaches in the Valley could use additional cover. The main-stem Scott has very little adequate cover.
- HABITAT ACTION 2: Rock weirs can be constructed to focus currents toward cover and to create riffle habitat at key locations in refuges.
- HABITAT ACTION 3: Large wood material (logs and stumps) can be strategically located in refuges to create additional riffle, pool, and cover habitat.
- HABITAT ACTION 4: Riparian trees can be planted to provide shade, cover, large wood, and leaf production (more insect production - fish food), as well as beaver forage.
- HABITAT ACTION 5: Protect existing beaver and their habitat.
- HABITAT ACTION 6: Encourage beaver by placing dam supports in streams and planting abundant riparian forage.
- HABITAT ACTION 7: Relocate troublesome beaver to habitat areas conducive to beaver habitation.

Implementation

The above actions would be implemented with willing water users and landowners. Specific action plans may need approval by CDFW under their expedited coho restoration program. Actions would be implemented in cooperation and support of the Water Trust, RCD, Watershed Council, various landowner organizations and support groups, tribes, federal and state agencies, and Siskiyou County.

However, if landowners are not cooperative, we urge state and federal agencies to use existing regulatory and statutory authorities to ensure necessary actions are taken to protect fisheries.