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c/o Selica Potter, Acting Clerk to the Board
State Water Resources Control Board
Executive Office
1001 I Street, 24th Floor
Sacramento, CA 95814

Subject: Scott TMDL Action Plan for Sediment and Temperature - Additional Comments

Coast Action Group supplied detailed comments to the Regional Board. These comments are in the record. This document supplements comments made to the Regional Board regarding deficiencies and issues of compliance with State legal mandates under State Water Code and CEQA.

Included in this document is discussion of actions that the SWRCB can take to resolve issues related to instream flows, a recognized limiting factor and cause of temperature impairment. Because the flow issues are such a large factor on the Scott River and in the TMDL Action Plan, action take by the SWRCB to remedy this issue will go a long way to attaining legal consistency.

PROBLEMATIC ISSUES

State water law says that a TMDL Action Plan/Implementation plan (Water Quality Control Plan) must contain a description of the nature of specific actions that are needed to achieve the water quality objectives, a time schedule, and a plan for monitoring compliance (State Water Code Section 13242). As a Water Quality Control Plan, the Action/Implementation Plan must be adopted into the Basin Plan (Water Quality Control Plan for the Region).

Currently the Scott River TMDL Implementation/ Action Plan, in many respects, relies on voluntary actions and/or relies on actions that are not clearly defined, or where language is to be developed after the approval of the TMDL by the Regional Board (or SWRCB. This is inconsistent with Cal Water Code that states that actions are to be clearly defined, with timelines for implementation of such actions. Voluntary actions can be submitted as planning documents to be approved by the Regional Board. Such voluntary planning documents must also include compete descriptions of actions to be taken where those actions must be equal to or better than enforceable criteria that has been clearly stated in the Action/Implementation Plan and capable of meeting Water Quality Standards. Such voluntary actions (meeting standards under Cal Water Code)

should be held open as options for attaining targets and to meet Water Quality Standards (as in the case of the Garcia River Action Plan for Sediment).

Reliance on ill defined actions is not consistent with anti-degradation policy:

Voluntary actions sought in the Scott River Implementation/Action Plan not only do not meet Cal Water Code mandates - they are not consistent with the Basin Plan Anti-degradation Policy (which is amended into the Basin Plan and is enforceable):

Basin Plan Anti-degradation Policy: *"Controllable water quality factors shall conform to the water quality objectives contained [in the Basin Plan]. When other factors result in the degradation of water quality beyond the levels or limits established [in the Basin Plan] as water quality objectives, then controllable factors shall not cause further degradation of water quality. Controllable water quality factors are those actions, conditions, or circumstances resulting from man's activities that may influence the quality of waters of the State and that may reasonably be controlled."*

Given the above failures, there is a third area in which the Scott TMDL is not consistent with state environmental statute - CEQA.

If aspects of the implementation plan are not developed for public review prior to approval of the TMDL, but are later to be developed and implemented; this is a violation of CEQA noticing and review policy known as project piecemealing and incomplete decryption of the project.

Due to the factors noted above, reliance of actions yet to be described or unlikely to occur, the State Water Board can not find that the Scott River TMDL Action Plan for Sediment and Temperature meets the requirements of Cal Water Code Section 13242 and the California Environmental Quality Act.

In the case if the Scott River TMDL Action/Implementation Plan for Sediment and Temperature; of the issues not in compliance with Cal Water Code (Section 13242) necessary attributes of a water quality control plan, the most important issue is that of instream flows - maintaining sufficient flows to allow minimal accommodation for the survival of salmonids. The greatest issue not addressed in the Action/Implementation Plan (but to be addressed at some future point that is not stated) is minimum flow maintenance and enforced diversion limitations in the Scott River Basin.

Reliance by the Action Plan, in regards to flow issues, on studies to be done by Siskiyou County, without any actionable or enforceable outcomes associated with any of the language does not meet the specifications of Cal Water Code or the definitions of appropriate project review, as defined under CEQA. Not only are the actions ill defined, the responsibility for flow issues do not reside primarily with the Regional Board. These diversion and flow issues reside within the jurisdiction of the SWRCB/Division of Water Rights.

The issue of minimum flows and enforcement of diversion limitations and water rights license is the responsibility of the SWRCB/ Division of Water Rights. The SWRCB is just not meeting its responsible agency obligations. In fact, the need for the TMDL, for temperature issues, would not have to be dealt with at all if the SWRCB was doing its job.

See analysis of proposed actions from Table 4 of the Action/Implementation Plan - Below

ACTION THAT THE SWRCB CAN TAKE TO REMEDY ISSUE

Correcting this Action Plan inadequacy in dealing with flow issue and legal inconsistency: the SWRCB should remedy the inadequacy by giving the Division of Water Rights directive to address issue. This direction should accomplish the following:

- ◆ State Water Board to adopt instream flow guidelines and support established minimum by-pass flows for the Scott River and its tributaries by use water right administration.
- ◆ Adoption of procedures (relating to compliance, as well as coordination of the several State agencies) to assure effective regulation of water diversions in the Scott River. Such regulation is consistent with the objectives of the California Performance Review, which seeks to improve efficiency, responsiveness and accountability in State Government. See The California Performance Review Report (Aug.3, 2004).
- ◆ Direct the Division of Water Rights to provide (initiate and oversee) study and analysis of water use effects on instream flows of the Scott River during critical low flow periods. Such study should make determinations on the regional risk of cumulative impacts related to diversions and pumping from subsurface flows. The study should develop recommendations which, if adopted as guidelines, would permit development of water supply consistent with salmonid survival.
- ◆ State Water Board develop a compliance program that, on a watershed scale, includes the following features:
 - (A). Installation of stream flow gauging and recording devices at key locations within each stream basin for determining compliance with bypass flow requirements and current level of impairment;
 - (B). Separate schedule for routine, random compliance inspections for each watershed, which is based upon the level of impairment and sensitivity of anadromous salmonid habitat;
 - (C). Requirement that applicants develop and implement measures that will ensure compliance with bypass terms, and a specific recommendation of "passive" bypass facilities; and
 - (D). Procedure for documenting that bypass facilities have been installed and are being maintained.

Note: Taking such action in a TMDL to deal with flow issues has recently been accomplished by the SWRCB - Attachment - San Joaquin TMDL - Flow issues - Below

♦ The SWRCB should memorialize the current Threatened & Impaired Rules (from the current Forest Practice Rules) into the Scott Action and Implementation Plan. The Regional Board based the Action/Implementation Plan for timber harvest on the employment of these regulations - as a minimum standard for logging operations. These rules sunset in December 2006 and may not be re-authorized by the Board of Forestry. See - **Analysis of Proposed Actions - from Table 4 of the Basin Plan Amendment**

JURISDICTION - State Water Resources Control Board

The people own the state's waters. See Water Code § 102. Use of that water is of public concern. See id. § 104. All waters shall be managed for the greatest public benefit. See id. § 105.

The State Water Board has exclusive jurisdiction to issue, condition, or rescind post-1914 appropriative water rights. See Water Code § 1250 et seq. It also regulates other rights, including pre-1914 and riparian, to prevent waste or unreasonable use. See id. §§ 100, 275; California Constitution, Article X, section 2.

More generally, the State Water Board is responsible to "provide for the orderly and efficient administration of the water resources of the state." Water Code § 174. The State Water Board "shall exercise the adjudicatory and regulatory functions of the state in the field of water resources." Id. It shall take "all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water" in California. Id. § 275. To perform these functions, the State Water Board may: "(A) Investigate all streams, stream systems, portions of stream systems, lakes, or other bodies of water; (B) Take testimony in regard to the rights to water or the use of water thereon or therein; and (C) Ascertain whether or not water heretofore filed upon or attempted to be appropriated is appropriated under the laws of this state." Id., § 1051. Its function "has steadily evolved from the narrow role of deciding priorities between competing appropriators to the charge of comprehensive planning and allocations of waters." National Audubon, 33 Cal.3d at 444.

As required by the public trust doctrine, the State protects the trust uses of navigable waters fishing, navigation, commerce, and environmental quality to the extent feasible in water rights and other regulatory decisions. See National Audubon, 33 Cal. 3d at 437, 441. The State Water Board may reexamine prior diversions to determine whether they should be changed to protect the public trust uses of the affected waters. See id. at 446.

The State Water Board may adopt guidelines and procedures to implement applicable laws and rules. See Water Code § 275. It may formulate and adopt state policy for water quality control. See id. § 13140.

CEQA Mandates

The State Water Board is a public agency subject to CEQA. See Pub. Resources Code § 21063. It is the lead agency in a water rights proceeding, even though other public agencies have concurrent jurisdictions.

CEQA's environmental review requirements apply to State Water Board actions (in this case TMDL and Action Plan approval is a functional equivalency issue - CEQA mandates still apply) and discretionary projects. See Pub. Res. Code § 21080(a). CEQA generally applies to "discretionary projects proposed to be carried out or approved by public agencies...." Id. The statutory definition of "project" includes an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies. See id. § 21065.

In this case the Action/Implementation Plan relies on policy and actions yet to be described and not clearly defined. Thus the impacts and effectiveness of these actions can not be addressed by the public or other responsible agency (including the both the SWRCB and the Regional Board. Thus, public and other responsible agency have been denied a full description of the project/action to be taken and adequate assessment of impacts or affects of the project/action.

The Regional Board, and State Board, analysis of Alternatives consideration is inadequate under CEQA. The consideration of Alternatives must consider feasible, less damaging alternatives. Feasible alternatives were presented by interested parties and are in the record. These alternatives (some included in this paper) offer reasonable solutions and outcomes to issues in question. Reasonable analysis of these alternatives has not be accomplished by the Regional Board and/or State Board.

FISHERY RESPONSIBILITY

Two State reports illustrate that the ESA listings result from inadequate regulation of water rights within the Petition's Geographic Scope. In 1988, the California Advisory Committee on Salmon and Steelhead Trout, created by law in 1983 to develop a conservation and restoration strategy for salmon and steelhead fisheries (see Fish and Game Code § 6900 et seq.) found:

"The effort to maintain adequate streamflow for fish is also seriously hampered by the existing system for considering, granting, and enforcing the conditions placed on diversion permits. These activities are the responsibility of the State Water Resources Control Board (SWRCB). More than 13,500 [in 1988] permits have been granted, but

only 500 (less than 4%) have bypass flow requirements for the protection of fish life. A recent survey conducted by the SWRCB indicated that more than 35% of the permittees were diverting more water than their rights authorize, indicating poor enforcement. Furthermore, there is the equivalent of only one staff person to handle all of the field inspections.”

California Advisory Committee on Salmon and Steelhead Trout, Restoring the Balance (1988 Annual Report), p. 25 (emphasis in original). Second, in 2003, DFG found that:

“A substantial amount of coho salmon habitat has been lost or degraded as a result of water diversions and groundwater extraction....In some streams the cumulative effect of multiple small legal diversions may be severe. Illegal diversions are also believed to be a problem in some streams within the range of coho salmon....Many of the watersheds where coho salmon are present have been developed and flows have been regulated and significantly reduced compared to natural flows.”

Guidelines for Substantive Review of Water Right Permit Applications

The State Water Board may approve a permit application on proof that (A) water is available for diversion and (B) the diversion will be put to reasonable and beneficial use. See Water Code § 1240. It may establish streamflow and other conditions as it deems necessary to protect fish and wildlife resources. See id. § 1257.5. It will consider the Basin Plans applicable to the affected stream and may subject the permit to those conditions necessary to implement the plan. See id. § 1258; see also id. § 1243.5. A.B. 2121 requires consideration of such plans. Id., § 1259.4(a)(2).

A.B. 2121 requires that, by January 1, 2007, the State Water Board shall adopt instream flow guidelines for these coastal streams in accord with water quality standards for the purpose of water rights administration. See Water Code § 1259.4(a)(1). Prior to such formal adoption, the Board may consider the 2002 Joint Guidelines. Id. § 1259.4(b).

Under Water Code section 1052, the State Water Board may impose an Administrative Civil Liability (ACL) up to \$500/day of unauthorized diversion. This is a form of civil penalty, subject to judicial review, for trespass on this public property. Pursuant to Water Code section 1055.3, “[i]n determining the amount of civil liability, the board

Analysis of Proposed Actions - from Table 4 of the Basin Plan Amendment

Roads & Sediment Waste Discharges:

Reliance on voluntary actions. Site specific plans to be developed on an “as needed basis”. No dates for compliance specified for “as needed” compliance plans and actions, no specifications or default language (description) for baseline actions to comply, waits to after discharge takes place to initiate action by the Regional Board.

Evaluation and development of Caltrans actions and NPDES will occur at some future date. If need program and language will be developed in 2 years. No specifications or default language (descriptions) of baseline actions for compliance are present. Stormwater Plan to be reviewed at some future date - not disclosed.

Roads – County of Siskiyou: MOU with Siskiyou County on road management. No specifications or default language (descriptions) of baseline actions for compliance are present. Stormwater Plan to be reviewed at some future date - not disclosed. No final implementation dates noted - though development of a schedule is proposed.

Grading Ordinance - County of Siskiyou: “The Regional Water Board encourages the County to develop a comprehensive ordinance addressing roads, land disturbance activities, and grading activities....” Encouragement with no timeline, language or specifics on what must be addressed and when.

Temperature & Vegetation

Reliance on voluntary actions. No dates for completion of actions or descriptive language are developed for plans and actions, no specifications or default language (description) for baseline actions to comply, plan waits to after discharge takes place to initiate action by the Regional Board.

Water Use – Water Users

Reliance on voluntary actions for conservation practices. The Regional Board requests the County, “ in cooperation with other appropriate stakeholders” to do a study on the affects of ground water pumping on instream flows. The County, along with the “stakeholders” is resistant to such study and implementation of practices that would maintain sufficient instream flows to protect fish. Such study, with development of protective guidelines, is very unlikely to be developed.

This issues is really under the authority of the SWRCB, Division of Water Rights - see discussion above.

No enforceable program is described under this issue.

Timber Harvest – Private & Public

No dates for completion of actions or descriptive language are developed for plans and actions, no specifications or default language (description) for baseline actions to comply with TMDL targets. Reliance is on the general permitting process, subject to mult-agency review. All Scientific reports and EPA and NOAA findings indicate that such application of the Forest Practice Rules, as administered by CDF, do not protect the beneficial uses of water.

NOTE: This TMDL Action/Implementation Plan relies on the Forest Practice Rules, known to both the Regional Board and the SWRCB to not sufficiently protect the beneficial uses of water. Also, reliance in based on Threatened & Impaired Rules that may, or may not remain as an enforceable part of the Timber Harvest Plan management process. This TMDL Action/Implementation plan states, "If current laws and regulation governing timber harvest (e.g., the Forest Practice Rules) are changed in a manner that reduces water quality protections, the Regional Board will use its authorities to maintain at a minimum the current level of water quality protection." This language is not sufficient to assure maintenance of the Threatened & Impaired Rules that are now in place. The SWRCB must take action to ensure maintenance of the minimum standards of the Threatened and Impaired Rules by incorporating them into the Scott Rive TMDL Action/Implementation Plan for Sediment and Temperature. The Threatened and Impaired Rules were put in place as minimum operational standards to protect beneficial uses and meet water quality standards. This regulation is interim and sunsets in Dec. 2006. Failure of the Board of Forestry to re-authorize these rules needs to be addressed by the SWRCB through the MAA/MOU process.

The U.S. Forest Service & U.S. Bureau of Land Management are requested to develop an MOU to address timber harvest management issues. Dates are not set for completion and enforceable language and description of actions is missing and not reviewable by the public.

Grazing Management Practices

The U.S. Forest Service & U.S. Bureau of Land Management are requested to develop an MOU to address grazing management issues. Dates are not set for completion and enforceable language and description of actions is missing and not reviewable by the public. Such language and interim management guidelines should be provided for grazing practices.

Grazing Activities- private lands: Reliance is on voluntary application of standards that have not been disclosed. Dates are not set for completion and enforceable language and description of actions is missing and not reviewable by the public. Such language and interim management guidelines should be provided for grazing practices.

We hope these comments help to clarify and improve upon issues

Sincerely,

For Coast Action Group

Attachment - San Joaquin TMDL - Flow issues

Language edited show only to flow issues.

September 26, 2005
STATE WATER RESOURCES CONTROL BOARD
MEETING SESSION - DIVISION OF WATER QUALITY
November 16, 2005

SUBJECT

CONSIDERATION OF A RESOLUTION APPROVING AN AMENDMENT TO THE WATER QUALITY CONTROL PLAN FOR THE SACRAMENTO RIVER AND SAN JOAQUIN RIVER BASINS TO CONTROL FACTORS CONTRIBUTING TO DISSOLVED OXYGEN IMPAIRMENT IN THE STOCKTON DEEP WATER SHIP CHANNEL

3) Control of Oxygen Demand Conditions Controlled by Low Flow Conditions

The Central Valley Water Board requests that:

- a) The State Water Board consider amending water rights permits for existing activities that reduce flow through the DWSC to require that the associated impacts on ENOD conditions in the DWSC be evaluated, and that their impacts reduced in accordance with the Control Program for DO, Stockton DWSC;
- b) The State Water Board consider requiring evaluation and full mitigation of the potential impacts of future water rights permits or water transfer applications on reduced flow and ENOD conditions in the Stockton DWSC;
- c) Agencies responsible for existing water resources facilities that reduce flow through the Stockton DWSC should evaluate and reduce their impacts on ENOD conditions in the DWSC in accordance with the Control Program for DO, Stockton DWSC;
- d) Agencies responsible for future water resources facilities projects, which potentially reduce flow through the DWSC, should evaluate and fully mitigate the potential negative impacts on ENOD conditions in the Stockton DWSC.

By 2009, the Central Valley Water Board will consider all of the implementation actions and studies taken under this Control Program for the next phase (Phase 2) of this TMDL. Phase 2 will account for the quantifications of sources, and transformation of oxygen demanding substances, and require source control based on the studies. Phase 2 will also account for the success of the non-load related implementation actions such as aeration and any changes in flow or DWSC geometry that reduce ENOD.

Resolution No. R5-2005-005 authorizes the Central Valley Water Board Executive Officer to make minor, non-substantive corrections to the language of the amendment, if needed, for clarity or consistency. State Water Board staff's review of the proposed amendment identified items in the amendment that needed clarification. The Central Valley Water Board Executive Officer has made the non-substantive clarifications to the amendment (Attachment 2).

POLICY ISSUE

Should the State Water Board approve the amendment in accordance with the Staff Recommendation below?

STAFF RECOMMENDATION

That the State Water Board:

1. Approves the amendment to the Basin Plan as adopted under Central Valley Water Board Resolution No. R5-2005-0005, and as corrected by the Regional Board Executive Officer (Attachment 2).
2. Authorizes the Executive Director to submit the amendment, as approved, and the administrative record for this action to OAL and the TMDL to USEPA for approval.

DRAFT September 26, 2005

Revised October 11, 2005
STATE WATER RESOURCES CONTROL BOARD
RESOLUTION NO. 2005-

APPROVING AN AMENDMENT TO THE WATER QUALITY CONTROL PLAN
FOR THE SACRAMENTO RIVER AND SAN JOAQUIN RIVER BASINS TO CONTROL
FACTORS CONTRIBUTING TO DISSOLVED OXYGEN IMPAIRMENT IN THE
STOCKTON DEEP WATER SHIP CHANNEL

WHEREAS:

(Attachment 1) amending the Basin Plan by establishing a control program for factors contributing to the dissolved oxygen impairment in the Stockton Deep Water Ship Channel (Control Program for DO, Stockton DWSC). The Control Program for DO, Stockton DWSC includes, as part of its implementation requirements, a Total Maximum Daily Load (TMDL) directed to the point and nonpoint source discharge of pollutants that contribute to the DO impairment.

(Attachment 2).

7. The Basin Plan amendment, including the TMDL, can be implemented in part through actions involving the regulation of flow and water supply operations. The State Water Board does not concede that it is required under the federal Clean Water Act to submit the parts of this Basin Plan amendment that involve the regulation of flow and water supply operations to the USEPA for approval. In the view of the State Water Board, any use of flow and modifications of water supply operations to implement the Basin Plan amendment is not subject to USEPA approval.

THEREFORE BE IT RESOLVED THAT:

The State Water Board:

1. Approves the amendment to the Basin Plan as adopted under Central Valley Water Board Resolution No. R5-2005-0005, and as corrected by the Regional Board Executive Officer (Attachment 2).
2. Authorizes the Executive Director to submit the amendment, as approved, and the administrative record for this action to OAL and the TMDL to USEPA for approval.