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April 15, 2005

Mr. Arthur G. Baggett, Jr., Chair
State Water Resources Control Board
Division Of Water Rights
P.O. Box 2000
Sacramento, CA 95812-2000

Re: Petition of Trout Unlimited and the Peregrine Chapter of the National Audubon Society for Timely and Effective Regulation of New Water Diversions in Central Coast Streams, dated October 27, 2004

Dear Mr. Baggett:

This is to offer written comments regarding the referenced petition following the State Water Board's workshop of March 17, 2005. For background, our engineering firm presently represents some 150 water right actions pending before your board. The three principals in our firm, Robert C. Wagner, Paula J. Whealen and Nicholas F. Bonsignore, have each been engaged in the administration and processing of appropriative water rights since the 1980s. We represent approximately 300 clients statewide and have been involved with virtually every detail of the water right process in California including major adjudications, issues involving groundwater, riparian, and pre-1914 rights.

The State Water Board appears to have lost sight of one of its primary responsibilities, which is to allocate the water resources of the state to the highest and best use. The State Water Board through the Division of Water Rights has abdicated its leadership role in defining what constitutes the highest and best use of water, at least in the Central Coast region. The issuance of only seven permits in 2004, while approximately 700 applications are pending, and the State Water Board's failure to adopt and circulate environmental documents prepared pursuant to the present MOU process, underscores the State Water Board's apparent hesitancy to take the lead in the Central Coast.

The filing of the subject petition by Trout Unlimited and the National Audubon Society (Petitioners) purportedly seeks to remedy this situation by offering a list of recommendations. While we believe that some of their recommendations have merit, we do not entirely agree with the proposed approach outlined in the petition. Some of these recommendations will flood the State Water Board with a new wave of insignificant filings, which will not be processed due to staff limitations, and result in a continuation or worsening of the present backlog.

It is clear from our past dealings with Trout Unlimited that it seeks to curtail all new diversions in the Russian River Watershed (and perhaps in all coastal streams), regardless of whether or not a project will have an adverse impact. In one instance, Trout Unlimited opposed and continues to oppose the issuance of a permit, even after the Department of Fish & Game determined that a Streambed Alteration Agreement would not be required, and NOAA Fisheries withdrew its protest.¹ Based on past experience, Trout Unlimited's stated intention of improving the water rights process is highly suspect.

We believe that State Water Board's Division of Water Rights does not require new procedures and methodologies to fix its present problems. The necessary protocols exist. They simply need to be implemented in an effective manner that best utilizes the talents of the Division's limited staff. It is possible to reduce the backlog, provide effective administration and protection of water rights, protect the environment, and do all of these things in timely manner provided the State Water Board chooses to act instead of react.

The following comments pertain to specific paragraphs within Chapter VI of the Petition regarding Requests for Relief.

Paragraph 198 – Interagency Memorandum of Understanding (MOU)

We disagree that an interagency MOU is required. Procedures already exist for complying with CEQA. Those procedures need to be implemented in a timely manner. The proposed interagency MOU appears to address the Petitioner's concerns expressed in Claim 2 (page 46) that State agencies do not have adequate procedures for coordinated environmental review. We disagree. Under current procedures, when the State Water Board is the lead agency under CEQA, other regulatory agencies (DFG and NOAA Fisheries in particular) are given many opportunities to participate in the preparation of the environmental document. These opportunities include:

- Contact by the Applicant prior to filing an application to address Items 2 and 3 of the State Water Board's Environmental Information Form.
- Receipt of the State Water Board's Public Notice of the water right application by mail, with an opportunity to file a protest or comments within 40 to 60 days of the date of Notice.
- Consultation with the Applicant towards a mutually agreeable resolution of a protest.
- Consultation with State Water Board staff to identify points of interest for the preparation of a Water Availability Analysis.

¹ See State Water Board file for Application 30933.

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- A pre-CEQA field meeting with State Water Board staff, Applicant, and the environmental consultant.
- Review and comment on the administrative draft Initial Study and draft environmental document.
- Review of the adopted draft environmental document circulated through the State Clearinghouse.

We are unaware of any other permitting process that allows other regulatory agencies at least "two bites at the apple", the first being the protest process and the second being the CEQA process. The issue is not that there are no adequate procedures for environmental review. The issue is that the procedures that are in place are not executed in a fair and timely manner.

Paragraph 200 – Modification of the State Water Board's MOU

Consistent with our opposition to an interagency MOU, we disagree that the State Water Board's MOU should be modified in coordination with an interagency MOU. Interagency procedures already exist for complying with CEQA. Those procedures need to be implemented in a timely manner.

Paragraph 201 – 3-year Time Limit for Processing

Despite our interest in seeing our clients' water right actions processed more expeditiously, we do not believe that imposing an unconditional time constraint on the State Water Board is appropriate. However, there are a number of procedures that could be performed more expeditiously, which collectively would shorten the processing period. The State Water Board should review its allocation of resources with a priority of timely processing of petitions and applications. The recent inaction of the State Water Board has left applicants in limbo and generated a potentially insurmountable backlog.

Paragraph 202 – Guidelines for Review of Permit Applications

The proposals listed in Paragraph 202 (A through G) take a "one size fits all" approach to permit issuance, and appear to limit the discretionary authority of the State Water Board and trustee/responsible agencies. While some or all of the proposed amendments may be applicable to some projects, they are an overkill approach to many small, high-in-the-watershed applications. Further, the Petitioners are proposing across-the-board mitigation before the significance of any potential impacts has been identified. For many smaller projects the amendments proposed are unnecessarily burdensome.

Paragraph 203 -- Enforcement Actions

We concur with Alan Lilly's statements at the March 17 Workshop, specifically, if the State Water Board decides to step up its enforcement actions as proposed by the Petitioners, then both legally and politically it also needs to step up its processing of water right applications and petitions. The timely issuance of permits and Board Orders would have multiple benefits including 1) legalizing existing unauthorized diversions, 2) conditioning such diversions to protect environmental resources and public trust interests through a cooperative rather than an adversarial procedure, and 3) bringing order to the administration of water rights in a region that is presently in disarray.

Specific to the Petitioners' proposed actions, Items A through C are largely being implemented by the State Water Board already to the extent feasible under present budget constraints.

The Petitioners' proposed Items E and F *presume* that all unauthorized diversions result in an adverse environmental impact. Rather than hunt down and penalize unauthorized diverters, the State Water Board should expeditiously process applications to permit, and spend its limited enforcement budget on compliance with the terms thereof. It is noted that over the last six to ten years the State Water Board has conducted compliance "sweeps" in the region. The results of these efforts have produced numerous new applications and petitions, many of which remain buried in the State Water Board's backlog of some 700 pending applications and 300 pending petitions. This policy represents a poor use of the State Water Board's resources, and should not be repeated in the future.

The Petitioners' proposed Item H, which bases assessed civil liabilities (ACLs) on an arbitrary index from another region of the state, makes no sense. The petitioners have provided no basis for valuating ACLs in the manner proposed.

Paragraph 204 -- CEQA Review for Small Domestic Use and Livestock Stockpond Registrations

Many small domestic and stockpond registrations are for small ponds on ephemeral and intermittent streams that are situated high in the watershed, well above the most upstream point of anadromy. Many of these ponds collect runoff from an insignificant amount of contributing tributary drainage area relative to the location of sensitive fish habitat, often far downstream.

The Petitioners' proposal to subject small domestic use and livestock stockpond registrations to CEQA review is contrary to state law, and would be counterproductive to the Petitioners' expressed intent of expediting the State Water Board's processing of pending actions. The registration process was developed under the Water Rights Permitting Reform Act of 1988. The Legislature declared that "it is in the public interest to provide a timely, efficient, and economic procedure for the acquisition of rights to

appropriate water for small domestic use . . . and for livestock stockponds . . .”² The Petitioners’ proposal is contrary to all of these objectives.

If the State Water Board is to get back on track, the Petitioners must recognize that not all projects are bad projects, and that by and large these registrations, as well as comparably small applications for permits, have an insignificant potential impact on the environment. Trout Unlimited and DFG, in particular, have been unmovable in their refusal to resolve protests, even in instances where it is obvious that there will be no adverse impacts to sensitive fishery resources. The expense incurred by small diverters to address unsupported allegations of impacts to fishery resources through the CEQA process poses an unnecessary burden on applicants and registrants, and is a potential unnecessary project killer.

REMEDIES FOR APPLICATION BACKLOG, PROCESSING, AND RESOLUTION OF UNPERMITTED DIVERSIONS

We believe that the water rights processing problem can be solved within the existing rules and regulations of the State Water Board and without additional legislation, and with only slight realignment of priorities. Recognizing that budgetary constraints have had a profound affect on State Water Board staff, we offer the following suggestions as an open dialogue to developing workable solutions to the current problems:

Suspend compliance and enforcement activities until the backlog is resolved. Some of the Division’s most qualified engineers are engaged in “hunting down” unauthorized diverters, and permittees and licensees who are non-compliant. While it is true that compliance and enforcement are necessary functions, the State Water Board has gotten very little return for its recent past efforts in this regard. There aren’t likely to be any large unauthorized diversions that aren’t already known. The previous efforts in this regard have, however, generated many new applications and petitions, mostly for insignificant deficiencies.

Approve all pending petitions for time extensions. While this pill may be hard for Trout Unlimited and others to swallow, the fact is that there is little to be gained by scrutinizing requests for extensions of time with the same level of effort afforded to a new application.

Implement “triage” on the backlog. Some of your senior staff have very good decision-making abilities; they should be afforded the opportunity to exercise discretion in certain cases and decide that a project’s approval is warranted without additional studies. Many pending applications and petitions involve facilities that have existed for decades (some predating enactment of the ESA and CEQA) that for all intents and purposes are now part of the base line condition and should not be subject to exhaustive environmental review.

² California Water Code Section 1228.1.

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Some changes are insignificant and could be processed administratively. Many petitions are for changes in place of use or point of diversion where there is no meaningful change or potential impact. In some cases, a point of diversion is located only a few hundred feet from its "permitted" location. In other cases, the place of use was depicted decades ago on an old USGS quad map, and is now being compared to coordinates obtained by a Global Positioning Satellite system. These types of inconsequential changes could be readily approved administratively.

Direct staff to review draft Initial Studies and Negative Declarations in a timely manner. This can be facilitated by giving greater deference to the CEQA consultant. CEQA consultants are considered qualified by virtue of the State Water Board executing the MOU with them. Staff should not rewrite, re-evaluate, and re-study every aspect of every document, nor solicit casual comments from trustee and responsible agencies. Draft documents should be readily reviewed by staff for conformance with the requirements of CEQA, and then officially circulated through the State Clearinghouse in accordance with statutory time frames. To our knowledge, none of the draft documents prepared under current MOU process have been circulated.

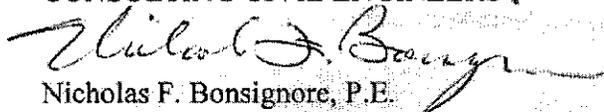
The recent directive by the State Water Board to issue requests for MOU's on all pending applications and petitions was incredibly short-sighted. The staff is already unable to effectively handle and conclude environmental processing for active MOU's. The State Water Board's directive that all pending applicants and petitioners enter into an MOU means that the staff's work load for administering MOU's will increase ten-fold or more within six months. Until such time as the State Water Board has its present backlog resolved, we believe it should *rescind its requirement* for new MOU's, and instead allow pending applicants *the option* of entering into an MOU if they so desire.

We understand that not everyone will be pleased with the process or the decisions you undertake to resolve the backlog problem. However, it is clear that there has been very little progress, and just about everyone is frustrated. We would like to participate in a program or series of round table meetings designed to develop a workable solution. We respectfully request that you consider the weight of our comments in light of the 150 actions we have pending with the Division of Water Rights.

Thank you for your time and for the opportunity to express our views.

Very truly yours,

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