



Keeping Northwest California wild since 1977

October 14, 2014

To: Jeanine Townsend, Clerk to the Board  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95812-0100



*Sent via email transmission to [commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)*

**RE: Comments Improvements to the Implementation and Enforcement of Water Rights During Drought Conditions**

Dear Ms. Townsend:

I am writing on behalf of the Environmental Protection Information Center (“EPIC”), a nonprofit organization that works to protect and restore ancient forests, watersheds, coastal estuaries, and native species in northwestern California. EPIC appreciates this opportunity to provide comments and recommendations regarding Improvements to the Implementation and Enforcement of Water Rights During Drought Conditions. We direct our comments specifically toward changes necessary to adequately protect public trust resources.

**The Drought’s Effect on Public Trust Resources**

Northern California’s public trust resources have been seriously imperiled by water diversions during the drought. For example, the Klamath River, which is home to the third largest salmon run on the West Coast and is thought to have the highest potential for complete salmon recovery in the United States, experienced water temperatures consistently higher than the acute stress level for Chinook throughout late summer. The Eel River, another river with historically prolific salmon runs, ran underground at the lower part of the river – an unprecedented event. In dry years when river levels are naturally low, it is more critical than ever that diversions are curtailed to ensure that adequate flows remain in-stream to support fish and wildlife, especially ESA listed Coho and Chinook Salmon. Large-scale diversions and inter-basin water transfers often divert a majority of the water going into rivers, and send it out of the region to facilitate water-intensive agricultural production in regions that have over-allocated their own water supplies. For example, during this past summer, the Trinity River Division was diverting 83% of the water from the Trinity River to the Central Valley Project while the salmon fisheries were in grave danger and beginning to die off, and the Potter Valley Project was diverting water out of the Eel River to wine country, while the Eel River dried up and

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disconnected in several places. It is imperative that the Water Board implement a program that protects public trust resources within the natural water basin, before bailing out other regions and sending water out of the basin.

### **The State Water Board's Authority and Responsibility to Protect the Public Trust**

In the landmark case *National Audubon Society v. Superior Court*, the court articulated the State Water Board's ongoing authority to protect public trust resources. The court described the interrelationship between the public trust doctrine and the California water rights system as an "integrated system of water law," in which the public trust serves the function of "preserving and continuing the sovereign power of the state to protect public trust resources." The court stated that this power "precludes anyone from acquiring a vested right to harm the public trust, and imposes a continuing duty on the state to take such uses into account in allocating water resources." *National Audubon Society v. Superior Court* (189 Cal.Rptr. 346, 1983). The court made it clear that the State Water Board has the authority to curtail water rights in order to protect the public trust. Further, as an agent of the State of California, which holds our rivers in trust for all Californians, the State Water Board has the responsibility to protect these irreplaceable resources.

### **Recommendations for Enhancing the Effectiveness of the State Water Board's Curtailment Process:**

1. ***Formally integrate protection of the public trust into curtailment processes for dry years.*** The California Supreme Court has described the public trust as an interrelated part of the California system of water law. Yet, the public trust is conspicuously absent in the State Water Board's January 1978 "Dry Year Program" and almost entirely overshadowed by consumptive water use concerns in the State Water Resources Control Board Resolution No. 2014-0031. The public trust doctrine must be formally integrated into processes regarding curtailing water diversions during drought, to ensure that this integral part of California water law is considered when making these decisions.
2. ***reduce water diversion within the basin.*** This is no simple task and will only be successful through community cooperation. Quantifying, regulating and reducing water use on big ag and smaller private parcels within the basin, although necessary, will be a challenging and time consuming process. The crisis that the North Coast rivers and fisheries face is happening now and deserves attention. The precedent that was set this year when the Eel, California's third largest river disappeared underground should not be accepted by our community. The fastest way to assure that this never happens again is to create a well-funded collaborative community-wide process to address and reduce water diversion. This process would reward those that cooperate by streamlining the inevitable process of regulation of diversion in the basin. This collaboration and communication must begin now, and those that are not willing to be proactive with water conservation to help preserve the rivers and the fisheries that depend on them will lose the opportunity to address and reduce their impact for the sake of the salmon and be forced to reduce under

forthcoming regulation. This collaborative process should be funded and or initiated by the water board, state and federal agencies, counties, tribes and non-profits.

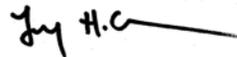
3. ***Develop river-specific metrics that trigger curtailment of all water rights (junior and senior) to protect fish and wildlife.*** These metrics must trigger curtailments early enough to prevent catastrophic events like fish kills, and to allow water users time to plan for the curtailment.
4. ***Develop an environmental enforcement unit.*** Hire people trained in enforcement. Scientists should conduct the research and write reports, but someone who has law enforcement expertise should be on the ground to enforce environmental laws.

Thank you for this opportunity to provide input on this matter. Feel free to contact us if you have any questions or would like further clarification of our comments. Please keep us updated on this matter, and respond by mail how you will integrate our comments into your future operations.

Respectfully,



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