

May 5, 2006

Attn: Song Her, Clerk to the Board
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814



RE: Comments on the Scott River TMDL

These comments are being made on behalf of the Siskiyou County Farm Bureau. **It is our position that you adopt the Amendment for the Scott River as is.** Per communications with staff from the North Coast Board, it is our understanding that the State Board will be addressing the issues of timelines and flows at the June 7th meeting.

PROCEDURE

- 1) According to your own policy, the State Board's options, at this point, are to either approve the amendment as submitted or to return it to the North Coast Regional Board for further consideration. (Water Code 13245)
- 2) If the State Board sends the amendment back to the Regional Board, once it is returned you may either approve or, after public hearing **in the affected region**, revise and approve such plan.

TIMELINES

- 1) The timelines presented by the Regional Board are reasonable and practical.
- 2) To shorten the timelines would not allow for adequate time to ensure success:
 - a. Accurate & complete planning must be done;
 - b. Funding must be located and secured;
 - c. Permits must be acquired;
 - d. Projects can then be implemented.
- 3) Many of the objectives stated in the Scott River Amendment are being addressed or have been prioritized by the Scott River Watershed Council and Siskiyou RCD. However, those that have not yet been addressed will require time to develop properly, with supporting science and appropriate projects to address the needs. (See attached "Scott River Project Summary.")
- 4) To shorten the timelines would lead to a "rush" to address objectives.

- a. Planning would be hasty;
- b. Science would not be utilized to tailor projects appropriately;
- c. Funding, if secured in short order, would likely be wasted.

FLOWS

- 1) The State Water Resources Control Board referenced Judge Robie's decision (CO44714 CA Court of Appeals – Third Appellate District) in regards to the Board's ability to modify water rights to provide additional flows to meet the water quality objectives. However, Judge Robie's decision has limited, if any, application to the Scott River.
 - a. Judge Robie's decision cites two cases supporting the State's right to impose conditions on the *control, appropriation, use or distribution of water* in a Federal reclamation project. **This DOES NOT apply to the Scott River. There is no Federal reclamation project present.**
 - b. Judge Robie's decision makes reference to the State Board's ability to modify existing water permits to implement water quality objectives. It also refers to the 1914 Water Commission Act which provided the current process for applying for an appropriative right to "surplus water." (California Water Code, Section 1202.) **The California Statute of 1911 that declared water was the "property of the people," was held to apply only to "surplus water."** That is water that was available *for use over and above that which was already private property vested as a private riparian right, previously vested appropriate right, or as a federally "reserved" riparian right.* (Palmer v. Railroad Commission, 167 Calif. 138 Pac. 997, 1914) **The court held that this declaration was not and could not be retroactive and could not operate to divest private property rights already vested at the time it was enacted.**
 - c. While some of the water rights on the Scott River are permitted, the majority are vested pre-1914 appropriative and riparian water use rights. They are a right of property and not a license or permit. **A "vested" right is a covenant that cannot be resumed, annulled or later modified by the grantor through legislation or otherwise.**
 - d. The water rights of the Scott River are adjudicated, Scott River Adjudication decree No. 30662 of the Superior Court of Siskiyou County, January 30, 1980. Siskiyou County Superior Court retained continuing jurisdiction. **The State Water Board would and could not conduct water rights proceedings.**

- e. As the majority of water rights in the Scott are vested property rights, any regulation of the use of those rights would constitute "police powers." There are three requirements, established by the United States Supreme Court, that would allow for regulations.
 - i. Proximate Cause – Said activity must produce a foreseeable risk of injury, and that the injury must be directly caused by the activity.
 - ii. Essential Nexus – Said activity must be connected to the conditions of use imposed by the regulation and elimination of the use is considered injurious.
 - iii. Rough Proportionality – There must be a proportionality relationship to the anticipated impact of the activity and the exactions imposed by permit conditions.
- 2) According to the Staff Report for the Action Plan for the Scott River Watershed, the primary Human-caused factor affecting stream temperature is increased solar radiation, resulting from reductions of shade provided by riparian vegetation. Further, the report indicates that diversions of surface water leads to relatively small temperature impacts in the main stem of the Scott River. **Therefore, regulation to increase flow would not be supported by the evidence.**

Once again, it is our position that you adopt the Amendment for the Scott River as is. Thank you for the opportunity to comment on the Basin Plan Amendment for the Scott River Watershed.

Sincerely,

Jeffrey N. Fowle
Director, Siskiyou County Farm Bureau
TMDL Liaison

APRIL 18, 2006 SCOTT RIVER PROJECT & FUNDING SUMMARY

PROGRAM: Project Name:		Project Cost	Total Program Cost
Organizational & Administrative			
OA: Organizational & Administrative Structure		484,000.00	
TOTAL PROGRAM COST			484,000.00
Fish Passage			
FP: Improve known diversion barriers		550,000.00	
FP: Investigate and improve non-diversion barriers		770,000.00	
FP: Consultation on gravel dam removal		165,000.00	
FP: Replacement of gravel dams with vortex weirs & headgates		660,000.00	
FP: Fish screen maintenance		23,100.00	
TOTAL PROGRAM COST			2,168,100.00
Fish Habitat - Instream and Riparian			
Instream			
MA: Identification of spawning areas		220,000.00	
MA: Anadromous fisheries investigations		550,000.00	
MA: Anadromous fisheries database		55,000.00	
FH: Contingency plan for dry & critically dry years.		22,000.00	
FH: Evaluation of floodplain connectivity.		55,000.00	
FH: Evaluation of artificial beaver dam establishment.		27,500.00	
WQ: Improve/establish stream crossings		330,000.00	
FH: Instream woody debris placement.		165,000.00	
FH: Instream gravel recruitment and introduction.		88,000.00	
	SUBTOTAL	1,512,500.00	
Riparian			
FH: Inventory & evaluation of riparian conditions.		22,000.00	
WQ: Evaluate & improve riparian plantings		33,000.00	
WQ: Riparian exclusion fencing		495,000.00	
WQ: Bioengineered streambank stabilization		1,100,000.00	
	SUBTOTAL	1,650,000.00	
Effectiveness monitoring			
MA: Develop plan to monitor effectiveness of restoration		181,500.00	
MA: Evaluate effectiveness of restoration through biological monitoring		440,000.00	
	SUBTOTAL	621,500.00	
TOTAL PROGRAM COST			3,784,000.00

Fish Habitat Protection - Upslope

H: Upslope fuel reduction.	66,000.00
WQ: Correct road erosion	880,000.00
WQ: Review & update sediment studies	165,000.00
SUBTOTAL	1,111,000.00

Water Supply

WS: Upland water consumption model	165,000.00
products/crops	44,000.00
WS: Range forage improvement	132,000.00
WS: Efficient irrigation systems	1,980,000.00
WS: Dedicated water for instream flows (Water Trust)	110,000.00
WS: Water leasing (Water Trust)	254,100.00
SUBTOTAL	2,685,100.00

Water Quality Monitoring

MA: Assessment of water quality/quantity	291,500.00
MA: Assessment of aquatic food quality	93,500.00
MA: Water quality, fish populaton, habitat database	82,500.00
SUBTOTAL	467,500.00

TOTAL PROGRAM COST

4,263,600.00

SCOTT GRAND TOTAL

10,699,700.00

PROJECT TYPES: MA - Monitoring & Assessment

FH - Fish Habitat OA - Organizational & Administrative Structure

FP - Fish Passage WS - Water Supply

H - Wildlife Habitat WQ - Water Quality