January 18, 2017

Felicia Marcos, Board Chair

Tom Howard, Executive Officer

Leslie F. Grober, Deputy Director, Division of Water Rights

Board Members

State Water Quality Control Board

Via Email
Subject: TEMPORARY PERMIT 21375 Issued to Yolo County Flood Control and Water Conservation District (District) on January 12, 2017 authorizing diversion of seasonally high Cache Creek flows to groundwater storage and subsequent irrigation.

Board Members and Senior Staff,

We write today to share our concerns about the above Project. We have four primary concerns:

1. There is no clear and convincing scientific basis for the Yolo County Flood Control and Water Conservation District's assertion and SWRCB's conclusion, memorialized in the permit, that “The diversion and use of water under this temporary permit will not have unreasonable effects upon fish, wildlife, or other instream beneficial uses within the watershed.”

No scientifically valid basis is presented in the application, the permit or supporting documents for concluding that the seasonally high flows which the District will divert under the permit are not needed in-stream to support Public Trust Resources, including aquatic and riparian ecosystems. The only way to reach such a conclusion in a scientifically valid manner is to develop and include flow criteria, an IFIM study or other valid scientific flow study for the affected portion of Cache Creek, Tule Canal and other affected downstream waterbodies.

The SWRCB Public Trust Division is developing flow criteria for many streams and is developing a methodology which the District can and should use to develop flow criteria for affected sections of Cache Creek, Tule Canal and Yolo Bypass. Because the District appears intent on continuing to seek temporary permits of this nature and is likely to seek a permanent permit for diversion of seasonally high flows at some point in the future, developing flow criteria is reasonable.

Based on the above we make the following recommendations for the Temporary Water Rights for Diversion to Groundwater program going forward:

**Recommendation 1:** The SWRCB should require flow criteria for the affected portions of Cache Creek and other affected natural waterbodies before the SWRCB approves any additional temporary permits to divert seasonally high Cache Creek flows to groundwater storage.

**Recommendation 2:** We urge the Board to require that streamflow criteria be developed and included in all applications to divert seasonally high flows to groundwater storage for irrigation or any other purpose. Flow criteria can be expeditiously developed at reasonable costs using the SWRCB’s flow criteria methodology which is coming on-line soon.

2. Consultation with CDFW by the District was not completed and the recommendations from CDFW to SWRCB staff were ignored.
The Application states that:

“During the process for TP21365, the District met with Marylisa Lynch at the California Department of Fish and Wildlife (CDFW) and provided information on the proposed project. During that process, the District did not hear back on CDFW's concerns or permit terms; however, the District understood that CDFW was okay with the temporary permit moving forward. District staff left voicemails with Marylisa Lynch and James Rosauer of CDFW and have not received a call back to-date, but is operating under the assumption that they are again okay with the temporary permit moving forward.”

The Applicant does not provide a time frame and, therefore, it is impossible to determine if the District provided CDFW staff with sufficient time to analyze the proposed project and prepare comments or recommendations. To address this situation we make the following recommendation:

**Recommendation 3:** In order to allow CDFW sufficient time to review proposed projects under this SWRCB Program, applicants should be required to provide notice to CDFW at least 2 months in advance of the application submittal date and to include in the application documentation showing that the applicant met this requirement.

3. The SWRCB permit application review process places the burden on CDFW and the concerned public to demonstrate “unreasonable effect upon fish, wildlife, or other instream beneficial uses.”

The Permit issued by SWRCB to the District states in part:

“Division of Water Rights staff consulted with CDFW staff on the project’s potential to impact fish and wildlife. CDFW raised several potential impacts for which a detailed analysis could be necessary depending on the conditions: ecological impacts of reduced variability in the hydrograph in Cache Creek downstream of the point of diversion; impacts on sturgeon passage in the Tule Canal (which becomes the Toe Drain) in the Yolo Bypass from reduced outflow from Cache Creek; and potential stranding of fish in the District’s canals.”

Even though Green Sturgeon is listed as “threatened” pursuant to the federal ESA, SWRCB staff discounted that and the other CDFW concerns because, as stated in the permit, “CDFW staff did not, however, propose any additional terms for the subject temporary permit.”

What this means in effect is that SWRCB staff is placing the burden on CDFW and others with fish and wildlife concerns to prove that a proposed project will negatively impact fish and wildlife. That is the reverse of what SWRCB staff should be doing: because fish and wildlife are Public Trust species belonging to all Californians, the burden of proof should be on those proposing diversion of seasonally high flows to groundwater storage to show that there will be no harmful effects on fish and wildlife.
The need of aquatic ecosystems for seasonally high and periodic flood flows is well established scientifically and has been recognized in at least one California Stream Adjudication Decree, the 1980 Scott River Decree. It is therefore reasonable for SWRCB to require that applicants demonstrate that flows proposed for diversion to groundwater storage are not needed in stream to maintain stream ecosystems and related Public Trust Resources.

By failing to require applicants to demonstrate that a proposed project will not have “unreasonable effect upon fish, wildlife, or other instream beneficial uses” SWRCB staff could inadvertently approve “take” of ESA and/or California ESA species and could be creating future train wrecks when and if citizens bring forward Public Trust concerns backed by science. It is unclear, for example, whether or not the permit granted to the Yolo District by the SWRCB will result in “take” of ESA listed Green Sturgeon.

**Recommendation 4:** Applicants should be required to provide scientific and other information sufficient to support a conclusion that a proposed project will not significantly and unreasonably impact fish, wildlife and/or other components of healthy stream ecosystems.

4. **Staff did not allow sufficient time for the public and other state and federal agencies to review and comment on the application.**

According to the SWRCB website, the Yolo District's application was received by SWRCB on 12/13/2016, notice of the application was issued on 12/27/2016 and the permit was issued on 1/9/2017. Therefore the public and concerned state, federal and local agencies had 13 days during which to review the proposed project and submit objections. Of those 13 days, 4 were weekend days and one was a holiday. Therefore, the public and agencies had 9 work days to read and analyze the documents and develop objections. That is simply not enough time; therefore we recommend:

**Recommendation 5:** In order that those wishing to file objections be provided a reasonable opportunity to do so, the SWRCB should provide a minimum of 30 days between issuing the notice and making a decision whether or not to issue a temporary permit.

**Conclusion:**

Groundwater storage has tremendous potential for California; it is likely that some portion of seasonally high and flood flows can be safely diverted to storage. Storage in the ground has obvious advantages over surface storage, mainly little to no evaporation loss. However, diversion of seasonally high and flood flows to groundwater storage also has great potential to further damage stream ecosystems, including ecologically, culturally and economically important salmon and steelhead stocks and other at risk species. Therefore, we believe the Board and staff should proceed with caution. In particular, we believe permit application and evaluation requirements need adjustment as recommended above in order to assure that seasonally high and flood flows diverted for groundwater storage are not needed in stream to protect and restore
stream ecosystems or to protect at risk, ESA and C-ESA listed species in those watersheds from which seasonally high and flood flows are diverted.

Our Coalition members are concerned because, in the first two years of the groundwater storage program, the SWRCB has granted temporary permits to divert seasonally high and/or flood flows in watersheds for which no flow criteria have been developed and no flow objectives adopted. Furthermore, SWRCB staff has put the burden on CDFW and the public to demonstrate that negative impacts are likely. We believe that approach is not correct and has the potential to result in “train wrecks” involving Public Trust litigation and SWRCB staff indirect involvement in “take” of ESA and C-ESA species.

While we appreciate that this second time around the Yolo District has proposed monitoring needed to determine if the temporary permit will negatively impact downstream water right holders, we note that no similar level of monitoring will be undertaken by the District to determine impacts to fish, wildlife and other stream ecosystem components. The SWRCB should not collude with rendering Public Trust rights and resources to second class status way behind the water rights of downstream folks. We call on

the SWRCB to treat both senior water rights and instream public trust rights and resources as coequal in status as we believe they are under California water law.

Because of the obvious benefits to irrigation interests from diverting seasonally high and flood flows to groundwater storage, it is reasonable to expect that irrigation and water districts proposing such projects will tend to overestimate potential benefits and underestimate potential negative impacts to stream ecosystems and at risk species. For that reason, we recommend that the board enhance application, monitoring and reporting requirements for this new program as specifically recommended above.

We believe that better focused application, monitoring and reporting requirements will assure that the projects permitted by the Board do not become contentious sources of additional conflict and litigation and that the Board's new program is successful, that is, achieves its potential benefits while avoiding further damaging stream ecosystems and at risk species.

Sincerely,

Signed via Email

Felice Pace

for the North Coast Stream Flow Coalition.