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August 25, 2006

VIA ELECTRONIC AND FIRST CLASS MAIL

Karen Niiya
Division of Water Rights, State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812
KYNiiya@waterboards.ca.gov

Re: Notice of Preparation of Substitute Environmental Document for North Coast Instream Flow Policy

Dear Ms. Niiya,

Trout Unlimited (TU) and the Peregrine Audubon Society (Peregrine) provide these comments in response to the “Notice of Preparation of a Draft Substitute Environmental Document” for the proposed North Coast Instream Flow Policy issued by the State Water Resources Control Board, Division of Water Rights on July 19, 2006. We provide brief comments below, but incorporate herein our “Petition for Timely and Effective Regulation of New Water Diversions in Central Coast Streams” (Oct. 27, 2004) (Petition), *available at* <http://www.tucalifornia.org/CentralCoastPetition.pdf>, for the State Water Board’s consideration in developing the scope of the Substitute Environmental Document (SED).

We filed the Petition to seek reform of the water rights system – beginning with review of applications for water right permits and ending with compliance – as necessary to protect steelhead and coho salmon fisheries, riparian habitat, and birds and wildlife dependent on such habitat, in good condition. We expressed serious concern that the coho and steelhead fisheries within the North Coast are threatened with extinction, due in large part to water diversions. We also expressed concern that, despite the significant impact to fisheries, the State Water Board does not have written guidelines (namely, policies which guide substantive review of water right permit applications) for the purpose of deciding how much water is divertible for water supply, and how much must remain to protect the coldwater fisheries in good condition. We claimed that this is inconsistent with state law which provides that the State Water Board may approve a permit application for unappropriated water, only on conditions that protect fish and wildlife as a beneficial use of water (*see* Water Code § 1243) and prevent impairment of water quality standards (*see id.*, §§ 1243.5, 1258). *See* Petition at ¶¶ 156-161.

One of the remedies we requested was that the State Water Board adopt guidelines for the substantive review of permit applications. We agreed that the Draft “Guidelines for Maintaining Instream Flows to Protect Fisheries Resources Downstream of Water Diversions in Mid-California Streams” (2002) (NMFS-DFG Draft Guidelines) should be the starting point for the Board’s adoption of substantive guidelines, but requested that the Board consider the following amendments and any others agreed to by, what is now called, the North Coast Water Rights Working Group.

- (A). The guidelines will apply to modified as well as new permit applications.
- (B). Each permit will specify management objectives for fish and associated riparian habitats in the reach affected by a diversion. The objectives will be measurable either directly or through an indicator, or by indicators of riparian health such as canopy, standards for which have been developed for timber harvest practices or as determined through stream surveys and GIS analysis. The management objective for a given reach will be sufficient to maintain or restore a functional range of naturally occurring spawning and rearing habitat where salmonids can exist. Similarly, management will also be for protection or restoration of functional riparian systems and associated wildlife.
- (C). The design of each storage or diversion facility will, without active intervention (such as an operator’s control), limit diversion to the allowed maximum and allow the required bypass flow. A licensed engineer will certify the adequacy of such design.
- (D). Each point of diversion will include continuous monitoring and reporting of diversion, or (if infeasible) an alternative that provides the functional benefit.
- (E). Each point of diversion will include real-time monitoring and reporting of physical conditions necessary to achieve a quantifiable management objective for the affected reach, such as inflow, outflow, water quality conditions, depth or width of wetted channel, or some combination.
- (F). State Water Board or RWQCB staff, alone or with DFG or NOAA Fisheries staff, will have reserved authority to inspect a point of diversion without prior notice. Peace officer status will not be necessary.
- (G). State Water Board will have reserved authority to remedy cumulative impacts on fisheries, riparian habitat, and associated wildlife under applicable law (including ESA), in addition to general reservation to protect public interest. The term will specify the procedures for exercise of this authority, including a duty to periodically assess the cumulative impacts.

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As stated above, rather than restating our comments on enforcement and other relevant issues, we request that the Board consider our Petition in developing the scope of the SED. We also expect to file more specific, supplemental comments in the future, both in our capacity as Petitioners and in our capacity as participants in the North Coast Water Rights Working Group.

Thank you for this opportunity to provide comments. We look forward to working with the State Water Board in its efforts to reform the water rights system as necessary to protect the steelhead and coho fisheries and other public trust resources associated with these waters.

Sincerely,



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On behalf of

TROUT UNLIMITED and
PEREGRINE AUDUBON SOCIETY