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Humboldt
Baykeeper

March 18, 2009

Inland Empire
Waterkeeper

The Honorable Fran Pavley, Chair and Members
Senate Natural Resources and Water Committee
State Capitol, Room 4035
Sacramento, CA 95814

Klamath
Riverkeeper

Monterey
Coastkeeper

Re: Comments on March 10, 2009 Hearing: "Overview of California
Water Rights Laws"

Orange County
Coastkeeper

Dear Chair Pavley and Committee Members:

Russian
Riverkeeper

On behalf of the California Coastkeeper Alliance (CCKA), which represents 12 Waterkeepers from the Oregon border to San Diego, I welcome the opportunity to submit these comments arising from your March 10th hearing. I was pleased to attend this extremely informative hearing and speak in public comment. These written remarks expand upon those comments and offer suggestions for future examinations of California water law that we ask this Committee to explore. In brief, we respectfully request the Committee to further address:

San Diego
Coastkeeper

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- full implementation of existing laws and policies related to water rights;
- development of additional laws and policies as recommended by the hearing panelists;
- development of laws and policies for "new" water sources that, among other things, ensure that such sources are sustainable from a climate change perspective; and
- development of formal water rights for ecosystems generally, and for fish populations immediately.

San Luis Obispo
Coastkeeper

Santa Barbara
Channelkeeper

Santa Monica
Baykeeper

Ventura
Coastkeeper

We touch on each of these issues below, and we look forward to expanding upon them further with you to develop – as one panelist described – "laws to match our rivers."

THE STATE MUST FULLY IMPLEMENT EXISTING WATER LAWS

As the Committee members discovered through the presentations and subsequent questions at the hearing, California faces uniquely complex and difficult challenges in ensuring a sustainable supply of clean, abundant water throughout the state. These challenges are not insurmountable, though they cannot be met without first reconciling California's "water management" governance façade with the reality of how little we truly know about how water is used and moved in the state. As was admitted repeatedly during the hearing, implementation of *existing* water law is impeded severely by the following facts, among others:

- The face value of water rights in the state exceeds the amount of actual water by a minimum of six times, a figure that is likely significantly higher given the dearth of information on riparian and pre-1914 appropriative rights.
- California’s state water agencies cannot report on how much water is actually being used, where it is being used, where it is being diverted to, how much is being diverted, or how many diversions are illegal.
- Where it does have such data, the State Water Board estimates that the number of illegal diversions is over 40% of the number of active permits and licenses, the use of which also fails to comply with the law in many cases. Enforcement authority and resources are extremely limited, and violations rarely if ever receive a meaningful state response.
- The state has no information on the status of many water rights; *i.e.*, whether they are active or may have expired due to lack of use.
- Implementation of the state mandate to prevent “waste and unreasonable use” of water (Water Code Section 275¹ and Article X, Section 2 of the California Constitution²) have been sparse to virtually nonexistent, leaving California’s water management to be driven down an unsustainable path by “first in time” and “use it or lose it” conventions.

Full implementation of existing law is essential if California is to responsibly address the water challenges before us. We cannot solve our water problems without defining the scope of them and gathering the information needed to identify the most productive solutions. We also cannot solve them without enforcing the law rigorously and immediately against violators who illegally take the public’s water. This is true for both water supply and water quality, which go hand-in-hand in protecting this critical resource. These common-sense conclusions nonetheless have been vociferously opposed by some who reap the benefits from the current, flawed system at the expense of other users, including the state’s collapsing salmon populations. Opposition to basic, responsible water management functions, however, will lose the stranglehold it has had on California water policy as our collective, substantial water bill becomes due and payable. We urge the Committee to take action to remedy these significant data and enforcement gaps as quickly as possible, so that we may take prompt, effective action in the face of growing water shortages.

¹ Water Code Section 275: “The department [of water resources] and [the state water resources control] board shall take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state.”

² California Constitution Article X, Sec. 2: “It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which the owner's land is riparian under reasonable methods of diversion and use, or as depriving any appropriator of water to which the appropriator is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained.”

ADDITIONAL REFORMS ARE NEEDED TO CLOSE GAPS IN THE LAW THAT PREVENT CALIFORNIA FROM ACHIEVING SUSTAINABLE, LOW-ENERGY WATER USE

Key Recommendations from the Hearing Panelists Will Advance Sustainable Water Use Significantly

In addition to seeking full implementation of existing water laws, suggest to this Committee that we as a state also must re-think “business as usual” and consider new, core water law reforms that will allow us to successfully plan for sustainable, low-energy water use for ourselves and our environment. Several such reforms were suggested by some of the panelists at the March 10th hearing. We ask the Committee to investigate the following sound proposals at greater length:

- Mandate, with enforcement tools, the reporting needed to determine the scope, rate and method of all surface water and groundwater diversion and use statewide;
- Actively review water use in the state through the lens of Water Code Section 275 and Article X, Section 2 of the California Constitution, and amend water law, regulations and policy as needed to ensure that the mandates of these provisions are met;
- Develop and implement an effective, mandatory process to regulate the use of groundwater throughout the state;
- Implement a sustainable funding stream for state oversight of water diversion and use;
- Enact the public trust doctrine in the state Constitution; and
- Consider “bundling” permits (flow, storage, water quality) to ensure that the use of water protects water quality as well. Water should be as clean, or cleaner, when returned to the public after its use than before its diversion.

These reforms share a foundational assumption that the *correlative rights doctrine*, currently associated with riparian surface water and overlying groundwater rights, should be considered as extending to all of California water law. As noted by the panelists, the rights of all water users (including ecosystem use) in California are in reality correlative, or linked, particularly as water available for use grows scarcer. As demands grow and supply shrinks in the face of climate change and other challenges, we will all need to better share the water regardless of the source of our rights, which is consistent with this doctrine. The call for “statewide sharing” made by some of the panelists is also consistent with Water Code Section 275, Article X, Section 2, and the mandates of the public trust doctrine.

The jurisprudence, or philosophy, of law behind all of these mandates and doctrines calls for the statewide, equitable, shared distribution of a scarce resource such that reasonable and beneficial uses thrive, and wasteful and unreasonable uses do not. This jurisprudence respects the inherent rights of all to exist, thrive and evolve, a goal that in application may allocate more or less water than users currently claim. It necessarily includes environmental uses, if only because it is the lack of attention to the limits of the natural environment that have brought us to the crossroads we now face. This foundational jurisprudence, discussed further below in the context of water rights for ecosystems, and should underlie all of our deliberations on water reforms.

Laws and Policies for “New” Water Sources Should Address State Climate Change Initiatives to Ensure Uses and Sources Are Sustainable.

“New” water supplies, such as from recycling and local stormwater capture, were only briefly mentioned at the hearing, and merit more attention as the Committee’s work unfolds. The Governor’s Climate Action Team found that climate change could reduce California’s snowpack one-third by 2060. Developing sustainable, local water supplies and any associated rights now (and protecting the health of the waters we have) are essential to planning for adaption to the inevitable natural supply cuts.

As discussed further below, “new” water supplies create intriguing law and policy questions with regard to the rights assigned to such water, particularly if it is stored. These questions should be addressed in conjunction with an evaluation of the overall sustainability of the “new” water supplies, particularly in light of state mandates to avoid waste and unreasonable use. Our water supplies should be energy-efficient to avoid exacerbating the problems associated with climate change and to meet the state’s greenhouse gas reduction goals. The effects can be significant; for example, the California Energy Commission found that water management consumes 19% of the state’s electricity every year. If our water sources are not sustainable from an energy and climate change perspective, they will not be sustainable from water supply perspective.

In an August 2008 report,³ the Los Angeles County Economic Development Corporation ranked conservation and “local stormwater capture” as the most cost-effective, energy efficient, relatively immediate water sources. By contrast, ocean desalination using current technology ranked lowest on the list of water supply strategies in terms of greenhouse gas emission impacts (“surface storage” ranked lowest overall). The state’s AB 32 Scoping Plan promotes several water strategies as energy-efficient alternatives that can create “new” water and that should be encouraged. However, it conversely does *not* discourage energy inefficient (*i.e.*, “unreasonable”) alternatives that can quickly use up and exceed the energy credits from new, energy-sustainable water sources.

California can and should focus its investments, and prioritize its water rights, on water supply solutions that advance the state’s critical climate change goals rather than impede them. Millions of acre-feet of water can be “created” swiftly and at relatively low cost through conservation, local stormwater capture and tailored recycling. Investigations also should be made into “green” desalination, such as of brackish groundwater using alternative energy sources. State law and policy, including water rights, should both encourage energy efficiency and discourage energy inefficiency in water investments, consistent with preventing the waste and unreasonable use of the water used in those investments.

³ LAEDC, *Where Will We Get the Water? Assessing Southern California’s Future Water Strategies* (Rev’d Aug. 14, 2008); available at: http://www.laedc.org/sclc/studies/SCLC_SoCalWaterStrategies.pdf.

Effective Water Planning Must Include Formal Water Rights for Ecosystems

Climate change, a growing population and other factors have increased demands on water and reduced supply. Our water ecosystems generally, and our fish populations in particular, have suffered as a result. Fishing and environmental groups have been forced to sue under the Endangered Species Act (ESA) on behalf of endangered and threatened fish such as Sacramento River winter and spring run chinook salmon and steelhead, delta smelt, and longfin smelt, who need more water than the state is providing in order to survive. The San Francisco Chronicle editorialized on March 16th that “[s]almon may live a hazardous life at sea where forage is scarce, but none of the young fish will ever get there if salmon-rearing conditions in the Sacramento and scores of other rivers and creeks aren't protected.” The editorial concluded that “[u]nless this commitment is found, an iconic fish - and the human industry built around it - could slowly die out. California can't allow its native salmon to be a memory.”

While ESA is an invaluable tool to try to save species on the brink, it is a poor proxy for sustainable water planning. Court-ordered reductions in water deliveries, which are disruptive at best to agriculture and municipalities and devastating at worst, will most certainly increase without meaningful reform, as more species become threatened and endangered. Unless California is willing to write off fish for our children and grandchildren, including the iconic salmon, we need a system that allows us to plan effectively for the water needs for *both* Californians and ecosystems. The current legal system does not do that.

Water rights – with the reforms touched on above – could potentially be an effective way to allocate water for human use. However, a major flaw in the current system is that there are no parallel water rights for ecosystems. This means that ecosystems do not have a seat at the table when adjudications or other water rights evaluations take place. The ecosystems' needs are addressed only indirectly, through such methods as conditions in permits, requirements to prevent “waste and unreasonable use,” and the public trust doctrine. None of these otherwise important tools have been enforced in any meaningful way, in part because they are not on par with actual water rights. As a result, ecosystem water needs are consistently relegated to a tangential role in state water planning, until the ecosystems or their non-human inhabitants are at the brink of collapse. That is when the ESA hammer falls – abruptly, with little foresight, and often too late.

We suggest to this Committee that the dangerously well-trod path of “use, overuse, environmental decline, then hasty and unplanned reaction” can be broken by granting ecosystems, including fish, the right to be at the planning table from the beginning at a level equal with other users, rather than at the end when the damage is done. If water rights are to be the measure by which water is allocated in the state, then ecosystems also must be granted water rights, enforced as needed by independent guardians ad litem. Formalizing the rights of ecosystems in law on par with other uses will implement the desired jurisprudence of respect for the inherent rights of all to exist, thrive and evolve in this state.

There is growing precedent for this path. Communities around the United States already are passing local laws that create an “enforceable right of natural communities and ecosystems to exist and flourish” within the community's boundaries. California can raise the

bar, with state water laws that grant enforceable water rights to ecosystems, allowing us to better plan our collective, chosen, sustainable water future.

The process for calculating ecosystem water rights could begin immediately with the needs of fish, which could act as a proxy for ecosystem health until the larger needs of our water ecosystems are determined. Rights could be accounted for through such options as reviewing unexercised rights, assessing rights associated with “new” water, making “waste and unreasonable use” determinations, conducting adjudications, and taking advantage of other available strategies. Finally, the state could develop a process for selecting and funding independent, accountable guardians and guardians ad litem to implement and enforce such ecosystem water rights, based on long experience with guardians in other legal contexts.

Climate change and other stressors have served as a wake-up call that “business as usual” cannot ensure a healthy California for long. Indeed, the current collapse of the Delta’s native fish populations may well portend the water “train wreck” that one panelist warned will come if we do not “get our house in order now.” Our existing water rights system is based on increasingly outdated assumptions about California’s natural water supply, which unfortunately is changing rapidly due to human inattention to our impacts on the larger environment. Let us not make that mistake again. We urge the Committee to recognize in law what exists in fact – that our state as a whole, including our water ecosystems and fish, cannot be healthy without formal recognition of the water rights and needs of all.

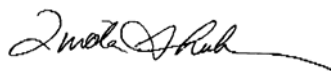
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Though there are numerous water challenges facing us as a state, we can choose to see challenge as opportunity, which Thomas Edison wryly noted is “missed by most because it is dressed in overalls and looks like work.” Spending more money without reform will not solve our water problems, as attested by the billions spent to date with little effect. A serious commitment to working for major reform, along with the will and funding to achieve it, are essential if we are to live within our natural water budget.

As we described in our comments to the Little Hoover Commission last year on their review of State Water Board governance, is relatively easy to get caught up in the minutiae of the state’s increasingly complex water problems and policies. We urge this Committee instead to see the larger picture – ensuring clean, abundant water for all reasonable and beneficial needs, including healthy flows that support living, thriving waterways.

We look forward to working with the Committee to take on this task and protect the water and waterways of California, for all the life that benefits from it. Thank you for the opportunity to provide these comments.

Best regards,



Linda Sheehan
Executive Director