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February 27, 2008

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VIA E-MAIL AND U.S. MAIL

Steve Herrera, Permitting Section Supervisor
State Water Resources Control Board, Division of Water Rights
P.O. Box 100
Sacramento, CA 95812

Re: Cal Water's Water Diversion Rights on Bear Creek and Bear Gulch

Dear: Mr. Herrera,

On behalf of California Water Service Company ("Cal Water"), we are writing the State Water Resources Control Board (the "State Board") regarding Cal Water's plan to modify its existing water rights on Bear Gulch Creek in San Mateo County to implement a bypass flow regime to benefit Steelhead and other aquatic species. The bypass flow regime is reflected in a biological opinion (the "Biological Opinion") recently issued by the U.S. National Oceanic and Atmospheric Administration, National Marine Fisheries Service ("NOAA") in accordance with the federal Endangered Species Act. NOAA issued the Biological Opinion after consulting with the U.S. Army Corps of Engineers concerning a Clean Water Act section 404 permit authorizing Cal Water to install a fish screen at one of its diversion facilities on Bear Gulch Creek.

Cal Water diverts water from Bear Gulch Creek at two points of diversion referred to as the Upper Diversion and Station 3. Cal Water intends to change the point of diversion for a portion of its pre-1914 water rights at the Upper Diversion to Station 3 to implement the bypass flow regime. Total diversions from the stream system will not be increased. We do not believe any legal diverter of water will be harmed by this modification, which undeniably will benefit the environment; therefore, we do not believe this change in point of diversion requires a permit modification or approval from the State Board. See Cal. Water Code § 1706. In the event the State Board has any questions, we welcome the opportunity to meet with you and discuss this matter further.

The Biological Opinion is attached as Attachment A.

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1. Cal Water's current water rights

Cal Water diverts water from Station 3 pursuant to License no. 5441. The State Board issued Cal Water License no. 5441 in 1958, with a priority date of 1930 (Permit 5158). A copy of License no. 5441 is attached as Attachment B. Diversions are limited as follows:

- Direct diversions are limited between April 15 to June 1 at a maximum rate of 4.2 cubic feet per second ("cfs").
- Diversions to storage are limited to 140 acre-feet/year, to be collected from December 15 to April 15, at a maximum rate of 5 cfs.

Cal Water diverts water from the Upper Diversion pursuant to a 1901 water rights adjudication. The adjudication acknowledges Cal Water's right to all waters and water rights in Bear Gulch Creek above the Woodside-Portola road without any limitation on the amount of diversion or the rate of diversion. A copy of the adjudication is attached as Attachment C.

Cal Water plans to modify the Upper Diversion dam, which as constructed cannot allow bypass flow until the 12.4 capacity of the water intake system is exceeded. After these modifications are complete, Cal Water will restrict its Upper Diversion intake pursuant to the Biological Opinion, leaving water in the creek that it could otherwise divert pursuant to its pre-1914 water right. Cal Water will recapture some of this water at Station 3, where it will, during certain times of the year, increase its diversion from 4.2 cfs to 9.0 cfs. By diverting this water further downstream, Cal Water will create additional habitat for Steelhead and other aquatic species while still diverting adequate volumes of water for its customers.

2. Cal Water's permit to appropriate high flood flows at the Upper Diversion

Cal Water also holds a 1951 permit from the Board (Permit No. 8816, Application 14313) to divert high flood flows that the Upper Diversion facility cannot currently capture. See Attachment D. The permit limits diversions as follows:

- Direct diversion year round at a maximum rate of 11 cfs.
- Diversion to storage limited to 1380 acre-feet/year.

In 1998, the State Board unilaterally modified Cal Water's permit to divert water from the Upper Diversion to include the following term:

During the season specified in this permit, the total quantity and rate of water diverted and used under this permit and under permittee's claimed existing right for the place of use specified in the permit shall not exceed the quantity and rate of diversion and use, respectively,

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specified in this permit. If the permitte's claimed existing right is quantified at some later date as a result of an adjudication or other legally binding proceeding, the quantity and rate of diversion and use allowed under this permit shall be the net of the face value of the permit less the amounts of water available under the existing right.

See Attachment E. Correspondence indicates that in 1998 the State Board began to question the relationship between Cal Water's pre-1914 water rights and Permit No. 8816. It is unclear what caused this review, some 47 years after Cal Water applied for the permit. It is also unclear whether the staff was aware of prior correspondence in 1987 between Cal Water and the State Board addressing this issue. For example, in connection with a petition for an extension of time to perfect the Upper Diversion permit, Cal Water explained in response to the State Board's questions that the permit was for diverting high flood flows:

The undeveloped portions of the surface supply in Bear Gulch Creek are the high flood flows which exceed the gravity capacity of our existing diversion system. The 1977 addition of the Bear Gulch Water Treatment Plant has permitted useful diversion of a higher percentage of water than has been possible prior to construction of the treatment plant. Further development of our ability to divert flood flows will be a function of the economics of the construction of diverting, pumping, and conveying facilities and the availability and reliability of the supplies imported by the San Francisco Water Department.

See Attachment F.

A timeline of improvements at the Upper Diversion was attached to the petition which explains that in 1951:

California Water Service Company applied to the State Division of Water Resources for rights to divert 3,500 ac. ft. per year from Bear Gulch Creek in addition to its then present rights on the stream.

Id.

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3. Cal Water's 1951 permit does not restrict its pre-1914 water rights

Cal Water has the rights to high flood flows pursuant to the 1901 adjudication but presumably was concerned about losing those rights through non-use. See Cal. Water Code § 1241 (reversion of unused water to the public); Smith v. Hawkins, 110 Cal. 122 (1895) (same). The application for the permit, then, was an effort to secure the right to divert high flood flows in addition to the water the company already diverted.

Board guidance clarifies that an application for an appropriative water right does not supplant an existing right. By reference to Barr v. Branstetter, 42 Cal. App. 725 (1919), the State Board guidance states, "An existing valid riparian or appropriative right will neither be strengthened nor impaired by a permit to appropriate water issued to the owner of such right." See State Water Resources Control Board, Information Pertaining to Water Rights in California 7 (1990), <http://www.waterrights.ca.gov/application/forms/infobook.htm> (hereinafter "1990 Guidance"). Thus, the 1951 permit should not be construed as restricting Cal Water's pre-1914 water rights.

In light of this, we do not understand the basis for the permit condition, because it allocates less water than the amount Cal Water has historically diverted from Bear Gulch Creek. We are told that Cal Water was already diverting more than 11 cfs from Bear Gulch Creek when the State Board issued the 1951 permit. Yet the condition added by the State Board in 1998 states that Cal Water's existing right, if quantified, "shall be the net of the face value of the permit less the amounts of water available under the existing right." Taken literally and in light of the foregoing, the 1951 permit as modified would restrict Cal Water's rate of diversion to less than 0 cfs.¹

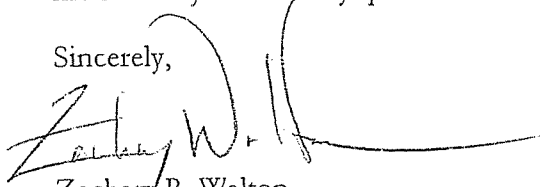
¹ We suspect the condition was added in an attempt to make a permit issued in 1951 consistent with subsequent changes in the State Board's regulations. Specifically, California Code of Regulations title 23, section 731(a) now requires that "[a]ny permit or license issued by the board pursuant to such an application shall contain a condition which will limit the quantity of water appropriated under the permit or license to the face value of the permit or license less any water available under an existing right subsequently determined to exist for the same place of use in any adjudication or other legally binding proceeding." However, this provision did not govern permit approvals in 1951. Significantly, this regulation exists to provide a procedure for appropriators with existing rights to obtain a permit "for an amount of water equal to the total reasonable requirements of a project" when the existing right is insufficient to cover the needs of the project. Id.

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4. **Conclusion**

We would appreciate the opportunity to meet with you to discuss this matter further. We seek the State Board's concurrence that a change in the point of diversion of Cal Water's pre-1914 water right will not harm any legal diverters. We also wish to clarify any ambiguity that may persist concerning the 1951 permit. Please do not hesitate to contact me should you have any questions.

Sincerely,



Zachary R. Walton
of PAUL, HASTINGS, JANOFSKY & WALKER LLP

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Attachments

cc: ✓ Dana Jacobsen
Lynn McGhee

ATTACHMENT A
Biological Opinion