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August 14, 2009

The Honorable Daniel Hancock, Chair and Commissioners
Little Hoover Commission
925 L Street, Suite 805
Sacramento, CA 95814
VIA ELECTRONIC MAIL

Re: Little Hoover Commission Water Rights Advisory Committee Meeting, August 18, 2009 - Comments

Dear Chair Hancock and Commissioners:

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 responses to the questions raised by the Little Hoover Commission's (Commission) advisory committee meeting on water rights. CCKA and its member Waterkeepers advocate regularly at the local, regional and state level in support of clean, abundant water flows in our waterways and sustainable water supplies. Our comments to the Commission on overall water governance issues dated June 23rd are attached and incorporated by reference.

CAN THE EXISTING WATER RIGHTS STRUCTURE BE IMPROVED? HOW?

The face value of water rights in the state exceeds the amount of actual water by an unknown amount, but the general consensus is that it is many times over.[1] Moreover, any paper allocation figures calculated to date are almost certainly far too low given the dearth of information on riparian and pre-1914 appropriative rights. We strongly believe that a water rights structure that gives out more water than actually exists needs to be improved.

Our comments to the Commission dated June 23rd (attached) introduce the need to improve the state's water rights structure in order to ensure long-term, sustainable water supplies and healthy aquatic ecosystems. The last phrase is key – water rights reform should serve the specific policy goal of ensuring long-term, sustainable water supplies and healthy aquatic

[1] *See, e.g.*, State Water Resources Control Board, "Water Rights within the Bay/Delta Watershed" (Sept. 26, 2008), copy separately provided to the Little Hoover Commission.

ecosystems, as opposed to provide near-term fixes for unsustainable uses. As an example, one issue of critical importance to the water rights discussion is the current death-spiral of salmon populations in the state. Salmon are being greatly impacted both by surface water withdrawals and groundwater withdrawals. The latter often reduce surface water stream flows important to salmon, given the close hydrologic links between groundwater and surface water in many critical salmon habitats. Water rights reforms should address this issue and ensure healthy habitats and thriving fish and wildlife populations, as well as sustainable flows for human uses.

There are a number of specific reforms that should be made. First and foremost, groundwater use must be regulated through the water rights process. California holds the embarrassing distinction of refusing to issue groundwater use permits, despite steadily increasing groundwater pumping. Water Code Section 102 states that *all* water within the State is the property of the people of the State. Groundwater cannot continue to be blindly pumped without recourse; California must join the rest of the states and bring groundwater management into the 21st century. This was discussed at length by the LAO in a thoughtful analysis last fall.[2] However, the Governor has vetoed three times legislation merely to *measure* groundwater usage, saying that a state-run system would be too expensive and cumbersome – though one would argue such a system is certainly not more expensive than disappearing groundwater tables.

More broadly, California needs a legal system that allows the state to plan effectively for the water needs for Californians *and* California ecosystems. In other words, water must be shared among people and ecosystems if there is to be sufficient water for future uses. Effective sharing among people and their surrounding environment will require laws that reflect that policy goal. The current "first in time, first in right" culture is inapposite to the long-term goal of ensuring that sufficient water is available for real needs. To ensure full implementation of this goal, 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 by independent legal guardians representing the ecosystems. This issue is discussed further in our attached June 23rd comments.

We also believe that much progress can be made in the near term by significantly improving implementation and enforcement of the state's existing water rights structure. For example, one of the bills in the package of "Delta bills" before the Legislature now, Preprint Senate Bill No. 2 (Pavley),[3] would significantly improve monitoring and enforcement mandates associated with water use and diversion in the state. These types of reforms, some of which are available to the Water Board now but remain idle, would improve the implementation of water rights laws and better protect the health California's waterways and water supplies. In addition, the state must begin to use its powerful tool of "waste and unreasonable use" hearings under Water Code Section 275 and California Constitution Article X, Sec. 2 to examine whether water rights are being held under the law only for needed (*i.e.*, not "wasteful" or "unreasonable") uses.[4]

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[2] CA Legislative Analyst's Office, "California's Water: An LAO Primer," Ch. 6 (Oct. 2008), available at: http://www.lao.ca.gov/2008/rsrc/water_primer/water_primer_102208.pdf (LAO Report).

[3] Formerly SB 229; available at: http://www.assembly.ca.gov/acs/newcomframeset.asp?committee=26 (under "2009 Proposed Delta/Water Legislation").

[4] *See, e.g.*, LAO Report, *supra* note 2.

WHY DOES THE STATE WATER RESOURCES CONTROL BOARD HAVE SUCH A BACKLOG OF WATER RIGHTS APPLICATIONS?

It is noteworthy that the focus of this question is solely on applications for new uses of water, rather than on both applications and enforcement/evaluation of existing water rights. This limited focus illustrates the nature of the hole that we as a state are digging ourselves into with respect to water issues. The question's unexpressed assumption is that the key measure of the State Water Board's effectiveness is how fast it is doling out the water. This assumption must be identified and challenged if we are to create a water system that doesn't dry up the well.

The short and obvious answer to the question about the current application backlog (which the Water Board actually is working down) is that the program is grossly underfunded. This underfunding has led to numerous elements of the water rights program being under- or un-implemented, not just applications for water uses. For example, as noted in our prior letter:

- The State Water Board 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 Board estimates that the number of illegal diversions may be 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 275 and Article X, Section 2 of the California Constitution) has been essentially nonexistent, leaving California's water management to be driven down an unsustainable path by "first in time" and "use it or lose it" conventions.

Of course, enforcement of water rights laws and administration of "waste and unreasonable use" hearings face political hurdles that are often much higher than the simple funding issues that most applications face. Hence, agency efforts have tended to be clustered around getting more water out to people, rather than ensuring that users do not waste it/use it unreasonably or that streams enjoy sufficient flows. An examination as to the reasons that the Water Board is behind on those efforts would likely provide far greater insight into needed reforms than simply focusing on applications, which are largely slowed by funding constraints.

IS THERE A SENSE OF COMPETING MISSIONS AT THE STATE WATER BOARD WITH RESPECT TO WATER RIGHTS AND WATER QUALITY? IF SO, IS ONE MISSION GIVEN GREATER PRIORITY OVER THE OTHER?

A brief bit of history is needed to respond to this question, though the overarching answers are "there doesn't appear to be" and "yes." The State Water Rights Board (created by the Legislature in Extraordinary Session in 1956) and the State Water Pollution Control Board (created by the 1949 Dickey Act) were joined by legislation in 1967 to form the current State

Water Resources Control Board. This joinder occurred just before the 1969 Porter-Cologne Water Quality Control Act which, along with the 1972 federal Clean Water Act, established the foundation for the state's current water quality protection programs.

The Legislature merged these two agencies because it recognized the unavoidable problems with two separate entities addressing water quality and supply issues, which are inherently intertwined. As the matter was being debated in 1966, the California Assembly Interim Committee on Water wrote that:

> [w]hen the State Water Rights Board approves an application to appropriate water, it is not necessarily concerned with the downstream effect on water quality. . . . A prime example of this deficiency occurred in the application of the Bureau of Reclamation to appropriate waters in the Delta. After having recognized the need to protect water quality as a part of the rights of existing Delta water users the Water Rights Board found itself unable . . . to protect those rights.[5]

The state Attorney General's office similarly noted the linkages between water supply and water quality, stating that "[n]ow that we have the water for our present needs, we must ensure that we can continue to drink this water, swim in it, fish in it, use it industrially, agriculturally – and recreationally."[6]

The State Water Board does appear to work to address both its water quality and water rights mandates, recognizing that the exercise of water rights depends on whether the water is clean enough for the intended uses, and conversely understanding that deteriorating water quality is exacerbated by disappearing flows. There does not appear to be a bias in theory at the Board toward one program area over another.

However, it is also true that the water quality programs receive far more attention and funding than the water rights initiatives. Over 15 times more PYs are assigned to water quality programs than to water rights, along with approximately 50 to 75 times more funding (depending on the level of bond allocations in a particular year).[7] The main reason for this discrepancy is likely the fact that the water quality program is fueled in large part by federal mandates under the Clean Water Act, which are enforceable by citizen suits. The water rights program has no similar federal driving force behind it. If the Clean Water Act-related programs were stripped away, the Water Boards' state-only water quality programs would likely be similar in scope to its state water rights programs.

Accordingly, one way that this discrepancy might be addressed is by using existing law to fold water rights and flows into federal Clean Water Act programs. For example, a number of waters identified as "impaired," or seriously polluted, under Clean Water Act Section 303(d)

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[5] California Assembly Interim Committee on Water, "A Proposed Water Resources Control Board for California," pp. 25-26, fn. 151 (1966), *cited in* Littleworth, Arthur and Eric Garner, *California Water II*, p. 187 (2nd ed. 2007).
[6] Editorial, *Los Angeles Times*, "Water: Public vs. Polluters," p. E8 (Feb. 12, 1969).
[7] State Water Resources Control Board Budget, 2007-2010, available at: http://www.ebudget.ca.gov/pdf/GovernorsBudget/3890/3940.pdf.

could be made healthy through mandated increased flows, perhaps implemented by "waste and unreasonable use" hearings on the water rights to the impacted waterways.

"Waste and unreasonable use" hearings could also be conducted in conjunction with state water quality requirements (*i.e.* apart from the federal Clean Water Act mandates) to increase the profile of both sets of tools. For example, the state could examine whether water used to irrigate agricultural lands that then produce toxic runoff is a "waste" or "unreasonable use" of the public's water, and subsequently adjust the user's water rights and/or mandate pollution controls. Though such efforts would quite likely be resisted by those who would be newly regulated, it is up to the State to choose whether to implement the law for all, or ignore it for a few.

Finally, as discussed in detail our June 23rd comments, the state ultimately will need to take a step back and examine more carefully the foundational assumptions on which the current water rights system rests. The current governance system separates out environmental water needs and relegates them to second tier status, below essentially all human uses. This directly conflicts with ecological science and associated ethics that demonstrate that the needs of humans and their environment cannot be separated. The law must reflect the science: legal water rights must be developed and allocated to ecosystems to ensure their continued survival and to allow people to better plan for their own water use. It is only through thoughtful foresight and leadership, implemented and enforced fully through the state's water rights laws, that the state will be able to achieve a sustainable relationship with water.

IS THE WATER RIGHTS PROGRAM ADEQUATELY FUNDED TO CARRY OUT ITS MISSION?

This question is relatively straightforward. The Water Rights Division, among other things, must:

- "Allocate the unappropriated waters of the state to ensure the use of water in accordance with state laws.
- Maintain a record of title of appropriative water rights initiated and maintained since 1914, including those for stockponds, livestock and small domestic use ponds.
- Maintain records of water diversion and use under riparian and pre-1914 rights, stockpond water rights, groundwater extractions in four southern counties, and cessation of, or reduction in, extractions of groundwater by use of water from a contributory source.
- Enforce permit and license terms and conditions, abate illegal diversions, protect public trust resources, and prevent waste or unreasonable use under all rights.
- Assist the courts in determining existing rights to surface water throughout the state through court reference and statutory adjudication proceedings, and in determining rights to groundwater through the groundwater adjudication process."[8]

To perform these tasks in a state boasting the world's eighth largest economy, one that also hosts the largest estuary on the West Coast, California has allocated annually only 82.5 PYs

[8] Governor's Budget 2009-2010, Water Rights Program Description, available at: http://www.ebudget.ca.gov/StateAgencyBudgets/3890/3940/program_description_20.html.

and well below $12 million in expenditures.[9] Even the exceedingly low water rights fees that the Board must issue to support this small program are challenged annually in court by those who would use the waters of the state for their benefit.

If laws designed to protect the waters of the state were fully implemented – in particular the existing public trust and "waste and unreasonable use" provisions – the state's waterways would undoubtedly be far healthier than they are today, and users would be able to better plan their future water availability and use. At the current level of funding, however, the Water Rights program simply cannot perform even the basic permit writing and enforcement tasks, let alone take on important water management efforts, which continue to wait for much-needed attention.

Government reorganization, such as moving the Water Rights program to another agency, cannot solve the program's starvation funding diet. It is particularly noteworthy in this regard that the Administration proposes spending upwards of $10 billion on water bonds while simultaneously funding the Water Rights program – which could solve many of our water struggles if fully implemented – at a mere *0.1%* of that (excluding the debt service costs, which would increase the difference even further). Funding must be commensurate with the magnitude of the tasks facing the Water Board; the current budget clearly fails that test.

IS THE WATER RIGHTS PROGRAM IN THE RIGHT PLACE? ARE THE REASONS IT WAS MOVED FROM THE DEPARTMENT OF WATER RESOURCES STILL RELEVANT? IF THE STATE WATER PROJECT HAD BEEN THE SOURCE OF THE CONFLICT, COULD THE WATER RIGHTS PROGRAM BENEFIT FROM BEING RELOCATED TO DWR? WHAT ARE THE PERSPECTIVES FROM THE WATER CONTRACTORS, DWR AND THE STATE WATER BOARD?

CCKA believes that the water rights program is in the right place. Before we discuss this position, though, we would like to make a quick clarification to the second question above: the water rights program was never "moved from the Department of Water Resources." The Department of Water Resources and the State Water Rights Board (the precursor to the State Water Resources Control Board, as noted above) were created together in the same legislation by special session of the Legislature in 1956.[10] That legislation moved the water rights program from other agencies directly to the new State Water Rights Board, not the new DWR. In doing so, the Legislature recognized that DWR would hold water rights and operate water project facilities, but an independent Water Rights Board was necessary to administer the state's water right functions and avoid conflicts of interest.[11]

There has been a fair amount of debate as to whether the State Water Project should remain within DWR. Putting aside the merits of that debate for the sake of this discussion, even

[9] State Water Resources Control Board Budget, 2009-2010, available at: http://www.ebudget.ca.gov/pdf/GovernorsBudget/3890/3940.pdf.
[10] Statutes of California, 1956 Extraordinary Session, Ch. 52 (April 1956), available at: http://192.234.213.35/clerkarchive/.
[11] *See* http://www.swrcb.ca.gov/about_us/water_boards_structure/history_water_rights.shtml.

if the State Water Project were moved out of DWR, we can no benefits from relocating the water rights program to DWR. That is, even if the conflicts issues were removed, the coordination problems that were addressed by the joinder of the State Water Rights and Water Pollution Control Boards would simply resurface if water rights were split off from the State Water Board to DWR. Layered on top of that would then be the cultural differences between the agencies, along with the still-unsolved and significant funding, political and other challenges that have blocked full administration of California's water rights laws. We see no benefit from creating more rather than fewer obstacles to implementation of water rights reform.

As to the last question, we are curious as to the reason behind the request for perspectives solely from "water contractors, DWR and the State Water Board." Presumably fishing organizations, conservation groups, environmental justice groups, tribes, and the general public also have important perspectives that should be considered by the Commission, especially since the Water Code dictates that "[a]ll water within the State is the property of the people of the State." As with several of the questions above, this question appears to presume that the existing water rights structure, which is weighted heavily towards maximizing water allocations for immediate human use with relatively little consideration of longer-term sustainability, should be the foundation for a "solution." We believe that a more comprehensive and ultimately successful analysis would not take the status quo as the starting point. Rather, it should flow from an objective search for a governance system that will support a sustainable water relationship between humans and the environment, one that ensures the long-term well-being of all. The range of potential solutions arising from that objective baseline may or may not resemble the current governance structure or system of water allocations. Hopefully, though, it will lead us to a workable governance system that ensures long-term, sustainable water supplies and healthy aquatic ecosystems throughout the state.

* * *

Thank you for the opportunity to submit these comments. We look forward to working with you to ensure that the state establishes a water governance system that protects the water and waterways of California for all the life that benefits from them, now and in the future.

Best regards,

Linda Sheehan
Executive Director
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cc: Edward Hard, Little Hoover Commission, Edward.Hard@lhc.ca.gov

attachment

ATTACHMENT:

COMMENTS OF CCKA TO LITTLE HOOVER COMMISSION
DATED JUNE 23, 2009

CALIFORNIA COASTKEEPER ALLIANCE
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June 23, 2009

The Honorable Daniel Hancock, Chair and Commissioners
Little Hoover Commission
925 L Street, Suite 805
Sacramento, CA 95814
VIA FACSIMILE AND ELECTRONIC MAIL

Re: "Strategies to Improve Water Governance in California"

Dear Chair Hancock and Commissioners:

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 on the Little Hoover Commission's (Commission) investigation into improving the efficiency, transparency and accountability of California's water governance system. CCKA advocates regularly at the state level in support of clean, abundant water flows in our waterways and sustainable water supplies.

CCKA agrees with the invited speakers at the April 23rd hearing that California's water governance system is inadequate to meet the challenges of continued growth, climate change, and decades of overdrawn water systems, continued pollution, and wishful thinking about the volume of water diverted. Rather than pulling together to solve these challenges, which are in everyone's interest to resolve satisfactorily, stakeholders to date have worked at cross-purposes, to no one's benefit. The state's hesitancy in charting a clear path to sustainable water supplies, developed in an accountable and effective manner, exacerbates this "all parties for themselves" culture. Only clear leadership, based on science and sound legal principles and informed by full facts, will harness our collective energy and move us, together, toward a result that benefits all.

In brief, we respectfully provide the following recommendations:

- First, we urge the Commission to examine closely and update the foundational assumptions on which the current water governance system rests. The current system separates out environmental water needs and relegates them to second tier status, below essentially all human uses. This directly conflicts with ecological science and associated evolving ethics, which demonstrate that the needs of humans and their environment cannot be separated. The law must reflect the science; **legal water rights must be developed, allocated and enforced to support water needs for healthy ecosystems**.

- Second, specific actions can and should be taken under existing law to support the *needs* – as opposed to wants – of water users, including the environment. While California's water governance system lags far behind most other states in terms of effectiveness and accountability, and essential groundwater regulation has yet to be instituted, still **California's leadership can and must make full use of numerous, existing laws that could lead the state toward significantly enhanced, clean water flows and supplies** while the water rights system is being updated. These include laws prohibiting the "waste and unreasonable use" of water, and laws calling on the state to "exercise its full power and jurisdiction to protect the quality of waters in the state from degradation."
- Finally, at all stages of these efforts, **California must significantly change its relationship with water, by refocusing its attention and water-related investments toward proven conservation, reuse and green development strategies that make the most of every drop and reduce the state's carbon footprint**. The state must move away from continued reliance in massive, failed water infrastructure projects and invest primarily in strategies that will create a truly sustainable water and energy future.

Each of these issues is discussed further below. We look forward to expanding upon these comments further with you and your staff, in support of water laws that reflect and serve our waterways.

WATER GOVERNANCE MUST BE FOUNDED ON WATER RIGHTS FOR ALL USERS, INCLUDING THE ENVIRONMENT

The Commission's Charge Should Be Expanded to Identify a Governance System That Fully Supports the Well-Being of Both Humans and Environment

Thoughtful testimony has already been provided to the Commission on a number of specific water governance strategies, and the Commission has excellent access to the many additional, thorough studies on actions that the state might take to address our collective water challenges. We would be pleased to work with the Commission and its staff on reviewing any such particular proposals. However, our comments today focus primarily on advocating that the Commission start by taking a step back, to allow for a wider view of the problem being addressed and the underlying assumptions that have led the state to the significant water challenges we now face.

This step back involves starting with a look at the Commission's self-described charge as "reviewing governance issues around the supply and management of water resources at the state level." By focusing on the "supply and management of water resources," the Commission runs the risk of seriously limiting its resulting analysis.[12] Californians face water challenges

[12] As an additional issue, it is virtually an impossible task to ensure "efficiency, transparency and accountability" with respect to water issues by limiting the analysis to *state* operations. Given that the existing state water governance system is intricately bound up with federal and local water governance systems, the Commission will succeed only if the governance system is viewed as a whole, rather than piecemeal. Though the Commission may choose to limit its recommendations to changes in state governance, the impacts on the system writ large must be carefully considered in making such recommendations.

unprecedented in the state's history, with climate change and population pressures only increasing the overall sense of urgency. The unrecognized assumptions underlying the articulated problem statement – *i.e.*, that we can "supply" and "manage" our "water resources" out of our current predicament – are in fact what drove us to the urgent discussions at hand. Articulating the problem we are trying to solve with the same language and assumptions that led us to over-use, over-drain, and increasingly pollute our waterways will impede us from envisioning a better future.

Two foundational assumptions in the above-described charge merit examination if we are to comprehensively define the problems to be addressed. First, the assumption that "governance" means "managing water resources" ignores the fact that it is largely our own behavior, not that of the waterways, that we must manage. How we currently view and use water is of enormous importance in how we govern that use. By assuming that our governance system is based on managing the water, and downplaying the greater relevance of managing ourselves, the resulting analysis may unnecessarily devalue and ignore otherwise potentially effective water governance options.

Second, waterways are not by definition our personal "resources" to do with as we please, with no thought to the consequences until the health of the waterways has severely deteriorated. Like the assumption that we must manage our waterways to better behavior, this assumption that waterways are first and foremost our "resources" similarly relegates waterways to second-tier status, when in fact their health is tied closely to our own. The state's waterways flourished before human inhabitants arrived in significant numbers, and their good health has led to our prosperity. Conversely, the ecosystems' declining health is now similarly signaling growing challenges to human welfare. Ecological science, which has evolved primarily over the last several decades and was in its pre-infancy at the time our water laws were being developed, shows increasingly that our own health and welfare is inextricably *and equally* bound up in the health and welfare of the state's natural ecosystems. This information should be reflected in the Commission's charge, to ensure that a comprehensive assessment is made that protects both human and environmental health.

A clear understanding of the problems we are trying to solve, and the assumptions that we are making in solving them, is essential to ensure that we identify the full range of governance options and select the most effective from among those. **We recommend, therefore, that the Commission expand its charge to address more generally the issue of *developing a governance system in California that will support a sustainable water relationship between humans and the environment, one that ensures the long-term well-being of all.***

To Ensure the Well-Being of Humans and the Environment, Legal Water Rights Must Be Allocated and Enforced on Behalf of the Environment

Current, generally unstated (indeed, unrecognized) Pinchot-vian assumptions about controlling the environment for the "service of man" formed the foundation for 20th-century water governance. These assumptions are now so ingrained in our water governance system that we take them for granted as truth. But they were and are merely assumptions, and in fact now

directly conflict with modern science that demonstrates that "[w]hen we try to pick out anything by itself, we find it hitched to everything else in the universe." To be effective, the law must reflect modern ecological science and its ethical precepts, about which Muir presciently wrote. Just as a state cannot pass a law against gravity, so it cannot effectively rely on a water governance legal system that ignores the science of ecosystem relationships, which necessarily include the ecosystems' human inhabitants.

The steep decline in Bay-Delta Estuary health and accompanying statewide water supply challenges, exacerbated by anthropogenically-caused climate change, bear witness to the increasing need to recognize in law the scientific links between ecosystem and human health. Despite hundreds of millions in public funds spent on restoration efforts, sentinel fish populations are now crashing so fast that scientists are throwing up their hands in despair. As a result, 2008 marked the first year in California's history that salmon fishing was shut down, a closure inauspiciously continued into 2009. And still rivers that feed the Estuary continue to be over-allocated and over-drawn, with no clear path for making hard decisions about water "rights" that may soon be as dry as the paper they are printed on.

Science now shows that to live sustainably, which means *within our limits*, we must respect the role of thriving ecosystems in ensuring our own welfare, and in particular we must respect the benefits that we receive from healthy waterways. The statement of the Winneman Wintu tribe that "the salmon are our relatives, are sacred, and necessary for the continuation of life"[13] reflects this scientific and ethical baseline. Having ignored this baseline as a state for so long, it is not particularly surprising that our many years of draining the rivers and poisoning our wells have come back now to impact us directly. The environment can absorb such actions up to a point, but eventually will react. A potentially critical mistake may have been in assuming that we can continually innovate our way out of any difficulties arising from such environmental reactions. Given our recent track record, that is a bet that California cannot afford to make. We need to take a new path that reflects modern science and sensibilities.

One key step in implementing this new direction is to re-examine and update our "environmental protection" laws and policies to reflect modern scientific and ethical principles that respect the rights and benefits of healthy ecosystems. Because they have generally been based on the mistaken "people-over-nature" foundation, and on outdated assumptions about our ability to "manage" our environment, our unidirectional water laws have had one-way results – toward more environmental degradation. Because their foundations generally were flawed, their good intentions have been relatively easily thwarted, leading to our current predicament. Even the Endangered Species Act (ESA), which respects all creatures' rights to exist, is only used to try to save species on the brink of extinction. ESA is a poor proxy for sustainable water planning, and has resulted in disruptive, court-ordered changes in water deliveries that serve neither people nor environment. Moreover, even where ESA is used properly, such as in the recently-released NMFS biological opinion regarding the impacts of Central Valley pumping operations on endangered and threatened species,[14] legislative attempts to erase those gains

[13] *Available at*: http://www.earthjustice.org/news/press/2008/judge-tosses-biological-opinion-for-salmon-and-steelhead-in-california.html.

[14] *See* http://swr.nmfs.noaa.gov/ocap.htm (further illustrating the far-reaching impacts of our actions, the NMFS opinion finds that Central Valley water pumping is in fact driving *killer whales* to extinction).

predictably occur as the people affected by poor state planning and laws attempt to eviscerate ESA's mandates.[15]

Currently, ecosystem needs are addressed only indirectly, through such methods as conditions in permits, requirements to prevent "waste and unreasonable use," Water Code Section 1707 water transfers, the public trust doctrine, and ESA application. None of these otherwise important tools are actual water *rights*, and all mistakenly assume that that the larger ecosystem can be manipulated to the primary benefit of only one ecosystem inhabitant (humans), with little appreciable overall ecosystem effect. 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.

Unless California is willing to write off fish, whales, and other wildlife for our children and grandchildren, California needs a legal system that allows the state to plan effectively for the water needs for *both* Californians and California ecosystems. The dangerously well-trod path of "use, overuse, environmental decline, then hasty and unplanned reaction" can begin to be broken by granting ecosystems, including fish, the right to be at the planning table from the beginning, at a level equivalent to human water 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 by independent legal guardians representing the ecosystems.**

Formalizing the rights of ecosystems in law on par with other water uses will implement the desired *jurisprudence*, or legal philosophy, 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 and the world already are passing local laws that create an "enforceable right of natural communities and ecosystems to exist and flourish" within the community's boundaries.[16] California can similarly adopt state water laws that grant enforceable water rights to ecosystems, allowing us to better plan our collective, chosen, sustainable water future.[17]

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[15] For example, a recent Rep. Nunes (Visalia) amendment to HR 2847 would have removed funding for court-mandated protections for endangered salmon; it was defeated but only in an extremely close June vote.

[16] *See, e.g.*, Revkin, Andrew, "Ecuador Constitution Grants Rights to Nature," *New York Times*, (Sept. 29, 2008), *available at* http://dotearth.blogs.nytimes.com/2008/09/29/ecuador-constitution-grants-nature-rights/.

[17] In examining water governance, the Commission to date has focused primarily on water supply and water rights issues, but water quality is of equal importance to the health of the state's waterways. For example, the nation's leading researchers have concluded that salmon die when exposed to combinations of pesticides that appear harmless individually, exposing major flaws in our current, pollutant-by-pollutant regulatory system. (*See, e.g.*, Laetz, Cathy, *et al*, "The Synergistic Toxicity of Pesticide Mixtures: Implications for Risk Assessment and the Conservation of Endangered Pacific Salmon," *Environmental Health Perspectives*, Vol, 117, No. 3 (March 2009), available at: http://www.eenews.net/public/25/9960/features/documents/2009/03/03/document_gw_01.pdf; *see also* Goodman, Sara, "Mix of common farm pesticides deadly to salmon – study," *New York Times* (March 3, 2009).) Unfortunately, contaminants on an individual basis regularly exceed safe limits, increasing the danger to salmon and other species further. For example, toxic contamination is so ubiquitous that a USGS study in the Central Valley found nervous system pesticides in all *rainfall* samples collected. (Available at http://pubs.usgs.gov/wri/wri034091/; *see also* http://www.delta.dfg.ca.gov/srfg/news/SJ_Basin_Pesticide.pdf.) Just as ecosystems have the right to sufficient water flows, so do they have the right to clean water flows, an issue that should be examined as part of the Commission's water governance charge.

Water Needs and Sources Should Be Identified to Support Legal Water Rights for Ecosystems

Legal water rights for ecosystems must be paired with identified water sources. Given the significant over-allocation of water rights in the state on paper, and the unknown amount of water diverted under riparian and pre-1914 rights, this task will be complex and take time. It is not, however, insurmountable in light of the numerous existing legal tools that the state could use if it chooses to plan wisely, rather than continue to react to the courts as the effective arbiters of and decisionmakers for the state's water policies.

The process for establishing ecosystem water rights could begin immediately with the needs of fish, which have been extensively studied and could act as a proxy for ecosystem health until the larger needs of water ecosystems are compiled and/or determined. Significant research has been done over the years in assessing overall ecosystem needs, which could be compiled and assessed for key waterways on a prioritized basis. Legal water rights supporting these water needs could then be accounted for through such options as reviewing unexercised rights, making "waste and unreasonable use" determinations, conducting adjudications, working with the federal government regarding effective allocation of federal water rights, assessing rights and sources associated with "new" water, and taking advantage of numerous other strategies. Formalizing water rights for ecosystems in this way will ensure that waterway needs are considered up front, that planning is therefore effective, and that water is shared to the maximum benefit of the state as a whole.

The resultant ecosystem water rights would be overseen and enforced by *independent* (perhaps court-appointed) legal guardians who would act as advocates for their ecosystem clients. The state could develop a process for selecting and funding (*e.g.*, through fees on water diversion and use) such independent guardians to implement and enforce ecosystem water rights. Given the state's long experience with the use of guardians in other legal contexts, extension of the concept to ecosystems should be relatively straightforward.

THE STATE MUST FULLY IMPLEMENT EXISTING WATER LAWS DESIGNED TO PROTECT THE HEALTH OF THE STATE'S WATERWAYS

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 existing "water management" façade with the reality of how little we truly know about how water is used and moved in the state, despite some strong laws that could have led us down a different path. Immediate implementation of *existing* water laws is impeded by the following facts, among others:

- The face value of water rights in the state exceeds the amount of actual water by many times,[18] and any figures calculated to date are almost certainly far too low given the dearth of information on riparian and pre-1914 appropriative rights.

[18] *See, e.g.*, State Water Resources Control Board, *Water Rights within the Bay/Delta Watershed* (Sept. 26, 2008), copy separately provided to the Little Hoover Commission.

- 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 may be 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 275[19] and Article X, Section 2 of the California Constitution[20]) has been sparse to essentially nonexistent, leaving California's water management to be driven down an unsustainable path by "first in time" and "use it or lose it" conventions.

These gaps and deficiencies in implementation must be redressed as soon as possible. Full implementation of existing law is essential if California is to responsibly address the state's growing water challenges. 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 and/or waste the public's water. This is true for both water supply and water quality, which go hand-in-hand.

In addition to seeking full implementation of existing water laws, we suggest that this Commission re-think "business as usual" and consider new, core water law reforms that will allow us to successfully achieve clean, abundant water for ourselves and the environment. Several such reforms were suggested by some of the panelists at the March 10th Senate Natural Resources and Water hearing, "Overview of California Water Rights Laws"; these include:

- 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;

[19] Water Code Section 275 reads: "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."

[20] California Constitution Article X, Sec. 2 reads: "It is hereby declared 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 . . . This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained."

- Enact the public trust doctrine in the state Constitution;
- Mandate, with enforcement tools, the reporting needed to determine the scope, rate and method of all surface water and groundwater diversion and use statewide; 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.

Such reforms elevate the importance of establishing an aware and responsible relationship with water. They share a foundational (though not necessarily explicit) 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. The rights of all water users, including ecosystems, are in reality correlative, or linked, particularly as the amount of clean 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, consistent with this doctrine.

In a broader sense, the jurisprudence that such reforms reach towards, and which we encourage the Commission to adopt, rests in the ***inherent rights of all users – including the larger ecosystem – to exist, thrive and evolve.*** This goal in application may allocate more or less water than individual users currently claim. But it is better to plan ahead for inevitable changes in water allocations than to be forced into them abruptly by continued environmental disrespect and degradation, the results of which we are seeing with the repeated court decisions that have served as the state's *de facto* water "planning" process.

CALIFORNIA MUST INVEST ITS ATTENTION AND FUNDS ON SUSTAINABLE, LOW-ENERGY WATER STRATEGIES, RATHER THAN MORE DESTRUCTIVE, MASSIVE INFRASTRUCTURE PROJECTS

The role of "new," localized water supplies, such as from conservation, recycling and local stormwater capture ("green infrastructure"), in achieving sustainable water governance should merit more attention as the Commission's work unfolds. The Governor's Climate Action Team has found that climate change could reduce California's snowpack one-third by 2060. Developing sustainable, local water supplies and any associated water rights now (and, of course, protecting the quality of the waters we have) will be necessary to our adaption to inevitable natural and other water supply cuts. Such actions are also essential to accounting for the water necessary to support the water rights allocated to the environment.

Our developing water supplies should also 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 generated 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,[21] the Los Angeles County Economic Development Corporation (LAEDC) ranked conservation and "local stormwater capture" as the most cost-effective, energy efficient, relatively immediate water sources. By contrast, as the attached LAEDC chart[22] attests, 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 as a cost-effective, drought-proof, reliable, energy-efficient water source; it also exacerbates the damage done to date to the integrity of California's waterways. The state's AB 32 Scoping Plan promotes conservation, stormwater capture/reuse, and recycling as energy-efficient alternatives that can create *millions of acre-feet* of water "new," local water supplies; these strategies should be significantly encouraged.

California can and should focus its water investments, and prioritize its water rights, on water supply solutions that advance the state's overall water and climate change goals, rather than impede them. 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. Careful attention to the overall impacts of our water investment strategies is essential to achieve our goal of clean, abundant water for both humans and ecosystems as a whole.

CONCLUSIONS

California's water governance system, a complex maze of federal, state, and local statutes, regulations, agreements and contracts, has been cobbled together over many years, often in reaction to court decisions. There historically has been little in the way of statewide leadership and careful water planning; rather, the "rush to water" has resembled most the rush to gold that accompanied it. The task before the Little Hoover Commission will involve embracing this long-missing leadership role on water. To be most effective, the Commission should envision and chart out a planned water future, with a sound foundation rooted in the rights of California ecosystems and their human inhabitants to flourish and evolve. Tinkering with the strands of the existing "governance" system will at best buy a little time, and at worst will seduce participants into believing that action has been taken, while precious time to make meaningful strides towards clean, abundant water ticks by.

Though there are admittedly numerous challenges facing us, 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 to 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 during the State Water Board governance review, is relatively easy to get caught up in the minutiae of the

[21] 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.
[22] *Id*. at 2.

state's increasingly complex water problems and policies. We urge this Commission instead to see the larger picture – ensuring clean, abundant water for reasonable and beneficial needs, including legal water rights that support healthy flows of clean water for living, thriving waterways. We must 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.

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

Best regards,

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