

State of California
State Water Resources Control Board
DIVISION OF WATER RIGHTS
P.O. Box 2000, Sacramento, CA 95812-2000
Info: (916) 341-5300, FAX: (916) 341-5400, Web: http://www.waterrights.ca.gov

PROTEST – APPLICATION

Based on Environmental Considerations, Public Interest, Public Trust, and Other Issues.
(Protests based on INJURY TO PRIOR RIGHTS should be completed on other side of form)

APPLICATION 31932

1. I, (We) Center for Biological Diversity
of 351 California St. #600, San Francisco, CA 94104, (415) 436-9682 x320 have read carefully a copy
of, or a notice relative to, Application 31932 of Martin Schepergerdes
to appropriate from unnamed spring tributary to Bear Creek thence South Fork Eel River
at a point SW¼ of NE¼ of Section 30, T21N, R15W, MDB&M

2. I, (We) protest the above application on:
 ENVIRONMENTAL ISSUES, ETC.:
The appropriation will not best conserve the public interest, will have an adverse environmental impact and/or will adversely affect a public trust use of a navigable waterway. *
a. Public interest protests should clearly indicate how the appropriation will affect the public.
b. Environmental protest should identify specific impacts and provide supporting recitals on issues such as: plants, animals or fish affected, erosion, pollution, aesthetics, etc.
c. Public trust protests must identify the navigable waters to be affected and how the project will impact public trust values. Protests of a general nature (not project specific) or opposed to constitutional or legislated state policy will not be accepted. A request for information or for studies to be conducted is not a protest.

OTHER ISSUES, ETC.:
The appropriation will be contrary to law, will require access rights, will not be in the State Water Resources Control Board's jurisdiction, or concerns other issues.

Facts and, if applicable, points of law which support the foregoing allegations are as follows: (1) incomplete application;
(2) South Fork Eel Wild and Scenic river prohibition on diversions (3) South Fork Eel fully appropriated;
(4) no CEQA review; (5) violation of public trust doctrine; (6) likely harm to endangered species; (7) failure to demonstrate beneficial use and no harm. (8) Impairment of Water Quality of Clean Water Act 303(d) listed water
(See attached letter for details)

3. Under what conditions may this protest be disregarded and dismissed? Proposed diversion is prohibited by Wild and Scenic
(Conditions should be a nature that the applicant can address and either accept or submit mitigating measures.)
and Fully Appropriated River status of South Fork Eel. Beyond these prohibitions, applicant must submit a complete
application, fully comply with CEQA, demonstrate beneficial use and no harm, fully protect endangered
species and other public trust resources, and accept fully protective permitting conditions.

4. A true copy of this protest has been served upon the applicant by mail

* For the purpose of filing a protest, navigable waters include streams and lakes that may be seasonally navigable in small recreational watercraft.

Date: July 17, 2012

Notes: Attach supplemental sheets as necessary. Protests must be filed within the time specified in the notice of application

Adam Lazar Personally or by mail
Protestant(s) or authorized representative sign here
Type or print name and title of representative, if applicable
Adam Lazar, Staff Attorney
Street address
351 California St. #600, San Francisco, CA 94104
City and State
(415) 670-0797 x320
Telephone number

ATTACHMENTS TO PROTEST of APPLICATION 31932

- A. Detailed Explanation of CBD Protest of Application 31932 (July 17, 2012)
- B. California Attorney General Opinion 76-7 (1976)
- C. State Water Resources Control Board, List of Fully Appropriated Streams (1998)
- D. California Department of Fish and Game, Coho Salmon Recovery Strategy (2004)
- E. Historical Review of Eel River Andronymous Salmonids, With Emphasis on
Chinook Salmon, Coho Salmon and Steelhead (2010)
- F. Cal. Dept. Fish and Game, Draft SONCC Coho Salmon Recovery Plan, Chapter
41 (2012)
- G. California Department of Fish and Game, State and Federally Listed Endangered
and Threatened Animals of California (January 2011)
- H. Humboldt County Department of Health and Human Services, Blue-Green Algae
Warning (Summer, 2011)



*By Electronic Mail
(Copy by U.S. Mail to Applicant)*

July 17, 2012

Mark Matranga
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000
mmatranga@waterboards.ca.gov

**RE: WR Application 31932 (Martin Schepergerdes; tributary to South Fork Eel)
Detailed Explanation of Protest Claims (Attachment "A")**

Dear Mr. Matranga,

This letter provides detailed explanations for the Center's protest of Application 31932, a proposed diversion from a tributary of Bear Creek thence south fork Eel River. The application proposes diverting 7.3 acre-feet per year (AFY) to storage and thence to bottle for export out of county. As a result, the proposed diversion will result in the loss of 7.3 AFY from the south fork of the Eel, a state and federally-listed Wild and Scenic river and 303(d) impaired water, and the home of several threatened and endangered species.

Explanation of Protest Claims

1. Incomplete Application

The Application is missing many required components, including:

1. Water availability analysis, including a list of all existing rights to diversion by appropriation and riparian rights (Water Code § 1260 (k)), along with proof of notification of said existing diverters.
2. A detailed map which would indicate its proposed point of diversion. Absent such a map, the project application lacks full disclosure, is incomplete, and cannot be approved. (Water Code § 1261)
3. Photographs of project site.
4. Information reasonably obtainable from California Department of Fish and Game (Water Code § 1260 (j))

See also Water Code §§ 1375, and SWRCB “A Guide to Water Rights Appropriations.” Without these missing elements, this application is incomplete, and cannot be approved.¹

2. Wild and Scenic River Prohibition: The proposed diversion will result in the loss of up to 7.5 AFY from a tributary to the South Fork of the Eel river. The South Fork of the Eel is a designated Wild and Scenic river under both state and federal law, and both the federal and state acts prohibit interference with the free-flowing, natural character of designated rivers. Because the proposed diversion is likely to affect the free flowing natural character of the South Fork of the Eel, and such character has been legislated to be the highest beneficial use of the water of rivers so designated, and further, state agencies may not issue permits which interfere with this purpose, the proposed diversion is prohibited.

The South Fork Eel River is classified as a wild and scenic river under both state and federal law. California Public Resources Code § 5093.53 (d). Under the Act, state agencies including SWRCB and CDFG may not approve a permit for water rights, nor approve a permit for the take of an endangered species, on a wild and scenic river, as these permits would degrade its free flowing, natural character. *See* California Attorney General Opinion SO 76-7 (Attachment B). The proposed diversion will take up to 7.5 acre-feet from Bear Creek, which will in turn deprive the South Fork Eel of 7.5 acre-feet. This loss of 7.5 AFY from the South Fork Eel would negatively impact the river’s free flowing character, and as a result, SWRCB and CDFG may not issue a permit for the proposed diversion.

A permit for the right to water by appropriation must demonstrate beneficial use. Cal. Water Code § 1375. But the wild and scenic rivers act designates the free-flowing, natural character of designated rivers as the highest and beneficial use.

3. South Fork Eel is a Fully Appropriated Stream: The SWRCB considers the South Fork Eel river to be fully appropriated. (SWRCB List of Fully Appropriated Streams, Attachment C). The Water Board may not issue a permit for appropriative rights from a river already designated as fully appropriated. Cal. Water Code § 1206. Therefore, the Board’s approval of the present application for additional appropriative rights on a tributary to the South Fork Eel is proscribed by the South Fork Eel river’s fully appropriated status.

4. No CEQA Review: No environmental review has been conducted for the proposed diversion, yet such review is required to be conducted by the Water Board pursuant to the California Environmental Quality Act (CEQA), Public Resources Code § 21000 *et seq.* Because the diversion is likely to produce significant environmental impacts on the South Fork Eel, preparation and approval of a full Environmental Impact Report (EIR) under CEQA is required

¹ The Applicant also describes the project as already being “80% complete,” declaring in essence that it has nearly completed construction of the proposed project prior to obtaining Board approval and prior to conducting review under CEQA. The Protestant requests an investigation of what the applicant has constructed and whether there have been violations of CEQA and/or Water Code prohibitions on project development without respective permits and approvals. If such an investigation finds that the proposed project is already operating, an enforcement action is requested.

prior to approval of the diversion. Further, the proposed diversion has not been demonstrated to be consistent with the SWRCB Instream Flow Policy for North Coast Streams, through CEQA review or otherwise.

The state Supreme Court has repeatedly held that CEQA must be interpreted to “afford the fullest possible protection to the environment.” (*Save The Plastic Bag Coalition v. City of Manhattan Beach*, 52 Cal. 4th 155, 175 (2011); *Wildlife Alive v. Chickering*, 18 Cal. 3d 190, 206 (1976)). CEQA also serves “to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action.” (*Laurel Heights Improvement Ass’n v. Regents of Univ. of Cal.*, 47 Cal. 3d 376, 392 (1988) (“*Laurel Heights I*”).

CEQA applies to all “discretionary projects proposed to be carried out or approved by public agencies.” (Pub. Res. Code § 21080(a).) A “project” is “the whole of an action” directly undertaken, supported, or authorized by a public agency “which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.” Pub. Res. Code § 21065; CEQA Guidelines § 15378(a). The proposed diversion meets the standards for a “project” under CEQA.

Where, as here, there is a fair argument that the proposed project may have a significant effect on the environment, preparation of an EIR is required. (Public Resources Code §§ 21100, 21151; CEQA Guidelines § 15064(a)(1); *Save The Plastic Bag Coalition*, 52 Cal. 4th at 171; *No Oil, Inc. v. City of Los Angeles*, 13 Cal. 3d 68, 82 (1974).)

Until the applicant has fully complied with CEQA, with the Board acting as lead agency, the application may not be approved. *See also* SWRCB Guide to

5. No Public Trust Resource Analysis: No public trust resources analysis has been performed on the proposed diversion, but the Water Board is tasked with the responsibility to make such an analysis when the application presents a serious risk of endangering such resources. *See National Audubon Society v. Superior Court of Alpine County* (“*Audubon*”) 33 Cal. 3d 419, 434 (1983). The *Audubon* case held that the State Water Resources Control Board had a duty to ensure public trust protections in its oversight of the water rights process, while “surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.” *Audubon*, 33 Cal. 3d at 441. In the South Fork Eel, rare and endangered species including coho salmon are likely to be harmed by the proposed diversion during low flow periods as there are no minimum bypass flows proposed, nor, as a prerequisite to such protections, have the applicant, the Water Board, or the Cal. Dept of Fish and Game made any serious inquiry as to the necessary rate of such flows to protect the public trust resources. (*see* Cal. Water Code § 1257.5, permitting minimum flow requirements.) When the SWRCB issues a water rights order, it is charged with “an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses *whenever feasible*.” *Id.* at 446; emphasis added. Normally, this duty is exercised by the Board through conducting a public trust resources analysis in conjunction with the California Department of Fish and Game. Until the responsible state agencies issue such a public trust

resources analysis and ensure adequate resource protection, including but not limited to minimum bypass flows, and prescribe them as requirements for the appropriation, the SWRCB has not met its duty to protect public trust resources under the law.

6. Endangered Species Analysis and CDFG Consultation for Coho Salmon

(Note: much of the following information would be available from the California Department of Fish and Game (CDFG), but applicant has not set forth all of the information reasonably available from CDFG in its application, in violation of Cal. Water Code § 1260(j). This information would be reasonably expected, at minimum, to include documents describing the South Fork Eel and Bear Creek as habitat for coho and Chinook salmon as well as CDFG's prohibition on issuing permits which interfere with the natural, free-flowing character of state listed Wild and Scenic rivers.)

The South Fork Eel and its tributary Bear Creek contain coho and Chinook salmon which are listed under the federal Endangered Species Act (ESA) and California Endangered Species Act (CESA). California Department of Fish and Game, State and Federally Listed Endangered and Threatened Animals of California (January 2011) (Attachment G) The Eel river, including the South Fork, are analyzed in the CDFG 2004 Coho Salmon Recovery Strategy. (CSRS) § 6.1.12, page 6.23, (Attachment D.) Unlike other parts of the Eel, coho salmon were recently confirmed in the South Fork Eel and its tributaries. *Id.* As a result, maintaining productive habitat in the South Fork Eel and its tributaries is essential to recovery of the coho. Problems with the current habitat of the South Fork Eel and its tributaries include high summer temperatures, limited pools, limited escape cover, high sedimentation, limited spawning gravel, large debris accumulations, grazing in riparian areas, and barriers to fish migration. CSRP § 6.1.12.3,4 and 5, page 6.24-6.25.

The National Marine Fisheries Service (NMFS) issued a draft Coho Salmon Recovery Plan that included the South Fork Eel river in January 2012. (Attachment F). This study describes the coho salmon population in the South Fork Eel as at “moderate risk of extinction given the moderate population size and probable negative population growth rate.” (NMFS Draft Coho Salmon Recovery Plan at p. 41-5). The draft plan identifies many of the stressors on coho salmon described in the previous paragraph, listing the stress impact for most of these factors as “high,” and specifically rated diversions as a “high” threat to coho salmon at all life stages but one. *Id.* at 41-7 and Table 41-3. These problems inhibiting salmon recovery are likely to be exacerbated by the proposed diversion and create the conditions for “take” of the species, in violation of state and federal law.

While salmon and steelhead used to be abundant in the South Fork Eel, these species have declined to historic lows. *See* Ronald Yoshiyama and Peter Moyle, Historical Review of Eel River Anadromous Salmonids, With Emphasis on Chinook Salmon, Coho Salmon and Steelhead (2010) (Attachment E). According to this study, “the general indication from very limited information on the overall abundance of coho salmon in the Eel River system is that substantial declines in population levels have occurred over the decades—viz., estimated coho salmon numbers were 14,000 fish in the mid-1960s (CDFG 1965c), 4,400 fish in the mid-1980s (NMFS

2005, citing Wahle and Pearson 1987) and about 2,000 fish by the early-1990s (Brown et al. 1994).” *Id.* at p.26; *See also* pp. 16, 23 (coho salmon historically present in South Fork Eel); p. 20 (Chinook salmon historically present in South Fork Eel); p.25 (Chinook and coho salmon at 20 percent of counts in 1940’s by 1975, last year recorded (as of 1998), with only 300 adult coho salmon in system as of 1991). Today, the South Fork Eel still has a significant but limited population of coho salmon.

The proposed diversion is likely to harm coho salmon and cause destruction or “take” of these species in the South Fork Eel. Moreover, Bear Creek, the tributary from which the proposed diversion will occur, is listed as a Key Stream in the State of California’s Coho Recovery Strategy due to its importance for coho habitat. (CSRS, Appendix D, page D.6.) The heightened status of Bear Creek for coho recovery makes proper analysis and mitigation all that much more critical and necessary before a permit can be issued. Bear Creek is listed as having low flows in summer months and water temperature of 23 degrees Celsius—poor habitat conditions that will be exacerbated by the proposed diversion. (*See* Yoshiyama and Moyle, Attachment E, at p. 44.)

The take of an endangered species is prohibited under CESA absent an incidental take permit. California Department of Fish and Game must normally be consulted and approve the diversion’s consistency with CESA protection of endangered species and issue an incidental take permit, but because Fish and Game Code § 5093.96 *prohibits* CDFG from entering into an agreement on any project which may impact the free-flowing character of the South Fork Eel due its wild and scenic designation, no such permit may be issued, and the diversion is prohibited by CESA.

7. Beneficial Use and No Harm Findings

The applicant has not demonstrated a likelihood of beneficial use as required for water rights by appropriation, nor has it made a demonstration of no harm to other riparian and appropriative diverters as required for interbasin transfers of water. Beneficial use must be demonstrated for a permit to be issued under California law. Cal. Water Code §§ 1253, 1257. Because the stated use is to bottle and transport the water, interbasin transfer is presumed and a demonstration of no harm is required to existing rights holders in the basin.

8. Impaired Status of South Fork Eel

The South Fork Eel is currently listed as “impaired” pursuant to the Clean Water Act due to excessive water temperatures. 33 U.S.C. § 1313(d). Water quality problems are causing massive algae blooms in the South Fork during summer months, killing several dogs in recent years and prompting health officials to issue warnings against swimming in parts of the river. (*See* Humboldt County Department of Health and Human Services, Blue-Green Algae Warning, Summer, 2011, Attachment H). As the Humboldt County Department of Health and Human Services has noted in these advisories, “[e]xcessive water diversions can increase water temperatures and reduce flows.” *Id.*

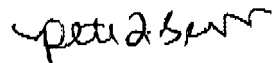
In addition to swimming, algae blooms and temperature related problems also negatively affect salmonids, acting contrary to the fundamental goals of the Clean Water Act – ensuring our

waters are “fishable” and “swimmable.” 33 U.S.C § 1251. The applied-for additional water diversions will only add to these problems and elevate water temperatures further, particularly if taken from a cold, headwater source such as the spring at stake here. Because temperature pollution is already degrading beneficial uses of the South Fork, any further degradation necessarily rises to a level of significance and is precluded by the Clean Water Act.

Conclusion

The Water Board may decline to issue a permit where, in its judgment, the proposed application will not best conserve the public interest. Cal. Water Code § 1255. The present application improperly attempts to secure the right to bottle and export water from a fully appropriated, state and federal listed wild and scenic river—a river considered crucial for recovery of endangered species—without conducting a CEQA analysis, a public trust analysis, a beneficial use analysis, a water availability analysis, or even including a map or photos of the project. For all of these reasons and more, the proposed diversion does not best conserve the public interest and should be denied accordingly.

Sincerely,



Peter Galvin
Conservation Director
Center for Biological Diversity
Whitethorn, California



Adam Lazar
Staff Attorney
Center for Biological Diversity
San Francisco, California

ATTACHMENTS TO PROTEST
(sent by email to SWRCB and by CD to Applicant)

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