

October 17, 2002

VIA FACSIMILE AND EXPRESS MAIL

Ed Anton, Division Chief,
Larry Attaway, Applications and Permitting,
Kathryn Gaffney, Engineer,
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, California 95812-2000

Re: Water Rights Application Nos. 31194 and 31195, Gualala and Albion Rivers

Dear Messrs. Anton and Attaway and Ms. Gaffney:

On behalf of the Albion River Watershed Protection Association, Friends of the Gualala River, the Redwood Chapter of the Sierra Club, Public Citizen, Defenders of Wildlife, and the rest of a growing coalition of environmental and public interest citizens organizations, we write to urge the State Water Resources Control Board (SWRCB or Board) to withdraw the notices for Water Rights Applications 31194 and 31195. These facially incomplete and grossly deficient applications were submitted by Alaska Water Exports for appropriative rights to, and the proposed diversion of, water from the Gualala River (Application No. 31194) and Albion River (Application No. 31195). These applications must be withdrawn, or cancelled, because they have not been properly noticed and are not complete under the California Water Code.

Deficiency of Notices:

To begin with, residents of both Mendocino and Sonoma Counties report that notices for Applications 31194 and 31195 have not been published at all in the designated newspapers, let alone to the full extent required by Cal. Water Code § 1312. The applicant's abject failure to satisfy even this most basic requirement of public notice alone is reason enough to withdraw, or cancel, the notices for these two applications. Cal. Water Code § 1317.

The notices, which were jointly posted on the SWRCB's web site and e-mailed on September 13 to people who had requested notification, are defective on their face in other regards, and the applications plainly are incomplete and defective under the California Water Code.

For instance, inquiries made by concerned residents of Mendocino and Sonoma

Ed Anton, Larry Attaway, Kathryn Gaffney
October 17, 2002
Page 2

Counties have revealed that the notices and applications contain an inaccurate address for the applicant, both as to street address and postal zip code. As such they do not comply with Cal. Water Code §§ 1260(a) and 1301(b). This failure is important because it directly undermines the public's ability to comply with the requirements for protests. *See* Cal. Water Code § 1331(e).

The notices also contained incorrect, out of date, maps and information regarding the points of diversion, the lengths and locations of the proposed pipelines. In this regard too they do not comply with Cal. Water Code § 1301(g). Further, the notices contain a description of the "location of the place of use" – San Diego – that does not match the description in the application, which refers loosely to the southern California Coast from San Francisco to San Diego. *See* Cal. Water Code § 1301(i).

The incompleteness and deficiency of the notices and applications has been partially acknowledged by the SWRCB staff in the supplemental "clarification" notice that was posted on the Board's web site on October 3, 2002. That clarification corrected the mix up of maps between notices and the use of an incorrect out-of-date map and pipeline information for the Gualala application (No. 31194). However, it did not recognize or correct any of the other deficiencies in the original notices or the applications themselves. In addition, the supplemental clarification was not mailed or e-mailed to the complete list of people who requested notification. Residents of both Sonoma and Mendocino Counties and other concerned citizens, including me, who are on the notification list did not receive any notification of the "clarification."

Beyond the deficiencies of the September 13 notices and the October 3 supplemental "clarification" notice, there are a number of fundamental facial deficiencies in the applications themselves, which should have precluded their acceptance as complete and which require that they be canceled and the notices withdrawn.

Deficiency of the Applications:

In order to enable the Board to discharge its duties in evaluating an application for appropriate water rights, an applicant is required to provide sufficient information regarding the nature and amount of the proposed use for the Board to make a reasoned determination regarding the permit application. In applications 31194 and 31195, however, Alaska Water Exports has failed to provide any meaningful information in the section entitled Justification of Amount. None of the concrete information required by the application form has been submitted by Alaska Water Exports. Rather, the applicant merely has handwritten vaguely that it plans to sell the water to southern California water utilities, that it has no actual contracts or even firm prospects for such sale yet, and that the population of regions potentially served is in the millions.

This response is so vague and speculative as to be meaningless for purposes of the Board's determination whether the proposed diversion would be in the public interest. The applicant's abject failure to provide meaningful information justifying the amount of water proposed to be diverted renders the applications blatantly and fatally defective under Cal. Water Code §§ 1260

Ed Anton, Larry Attaway, Kathryn Gaffney
October 17, 2002
Page 3

and 1264. This facial deficiency deprives the Board and the public of fundamental necessary information, and undermines the legal integrity of the water rights permitting process. For this reason alone, the Board should cancel Applications 31194 and 31195.

The applications also are incomplete because they utterly fail to answer the questions concerning governmental requirements. For instance, despite the fact that the construction and maintenance of the proposed diversion works will impact county lands and resources and will implicate county regulations, the applicant's only response to the question of whether any county permits are required is a coy "None that we know of. Please advise otherwise." Elsewhere, too, the applications reflect a failure to engage in even the most basic kinds of due diligence regarding governmental requirements and an attempt to foist on the SWRCB the applicant's duty to provide such fundamental information before an application can be meaningfully reviewed. The applicant fails even to acknowledge the need for water quality certification under section 401 of the federal Clean Water Act, and is so lazy as to simply observe that "We are unsure who is responsible for issuing a permit to construct the cistern and pipeline Please advise[,]" and "We would appreciate advice regarding the role of the Coastal Commission and their processes." Given these plain, basic, deficiencies, Applications 31194 and 31195 cannot reasonably be considered complete. Nor are they adequate to enable the Board or the concerned public to reasonably evaluate Alaska Water Exports' proposal.

In addition, the applications are not ripe for notice and consideration because they make plain that Alaska Water Exports does not own any land at the points of diversion on either river and has not taken any step to obtain any right of access to those points of diversion. The applicant has simply failed to make any arrangement with the owners of land near either point of diversion. Instead, the applications vaguely allude to the need to "Apply to the State of California for a State Submerged Lands ROW." Yet Alaska Water Exports has not made any such application, and the SWRCB's clear policy is not to assist applicants in securing access to a proposed point of diversion. The applicant's failure to perform even this most basic form of due diligence or preparation renders Applications 31194 and 31195 speculative and unripe for consideration by the Board, and should lead you to cancel the applications and withdraw the notices.

Further, the applications misrepresent the proposal's work and completion schedule as starting in 2002 and ending in "2004 or earlier." These dates are belied by the fact that the SWRCB's permit review process has only just begun and in-depth environmental reviews will have to be performed before the necessary approvals are obtained and work can even commence. In addition, the passage of State Bill AB 858 means that multi-year studies of the Gualala and Albion estuaries and fisheries will have to be conducted before the Board can make a decision regarding these applications. As a result, both the start and completion dates for work on Alaska Water Exports' proposed project will have to be pushed back by some number of years, and the applications are facially defective under Cal. Water Code § 1260(h).

The applications fail to satisfy the requirements of Cal. Water Code § 1260 because they fail to describe the applicant's proposed water development project in a manner that is adequate to

allow the Board to make an informed and reasoned evaluation of whether the applications would be in the public interest. First, materials from the files clearly reflect the fact that a basic element of the project planned by Alaska Water Exports is a raw water treatment system, but the application does not include any such facility in its description of the diversion works and nowhere in the attached materials is such a facility described with any specificity.

Second, the application covers only an inaccurately narrow piece of the applicant's proposed water development project. In an attachment to the application Alaska Water Exports describes the proposed diversion and export of water from the Albion River watershed as "an integral part of our west coast source development strategy that includes developing multiple sources throughout northern California." Without information describing with meaningful specificity the applicant's total proposed/planned diversion of water from northern California rivers, the Board cannot make an informed, reasoned decision about the propriety of the applicant's applications to divert water from the Albion and Gualala rivers and export that water out of the rivers' watersheds and out of Mendocino and Sonoma Counties.

Third, the applications completely fail to provide any meaningful information about the end point of the water diversion, namely its destination. This blatant omission of fundamental information is obviously due to the fact that Alaska Water Exports does not have *any* destination or end use for the water yet. Until this elemental deficiency is remedied by the applicant the Board should withdraw the notices and consider these applications no further.

The applications are facially defective in that they are littered with illegible or marginally legible handwritten notes, making it difficult in places to even judge what information has been provided. The failure to even bother typing answers reflects a lack of seriousness or commitment on the part of the applicant, which should lead the Board to relieve itself and the public of attempting to meaningfully evaluate these applications until such time as they are properly completed. It also appears that much of the limited information written, or typed, into the application was written in by SWRCB staff in order to do the applicant's work for it. This is apparent from the handwritten annotations of SWRCB staff where the applications have been modified since they were originally submitted in an ad hoc attempt to nudge them over individual hurdles of inadequacy. This practice creates the impression that the Board is aiding the applicant at the expense of the State's and the California public's interest.

Another facial deficiency is the large crucial gaps in the hydrological data for both rivers that are plainly evident in applications and attached materials. No effort has been made to obtain necessary hydrological data and consequently the applications plainly fail to provide "[s]ufficient information to demonstrate a reasonable likelihood that unappropriated water is available for the proposed appropriation," as required by Cal. Water Code § 1260(k).

Deficiency with Regard to Other Required Agency Reviews:

As you know, in addition to the water rights permitting process under the Water Code, these applications and the joint proposal they represent will require in-depth environmental review and a full-fledged Environmental Impact Report/Statement under CEQA and NEPA. However, by

noticing the applications while they are not complete the Board has put itself in a position where it already is in danger of violating multiple requirements under Chapters 2.6 and 3 of CEQA and Articles 5-8 and 13-14 of the CEQA Guidelines regarding the commencement and coordination of these processes with a number of other state and federal agencies.

In addition to the NEPA and Clean Water Act review required of the Army Corps of Engineers, other environmental reviews of this proposal will have to be performed by agencies including the California Department of Fish and Game, the U.S. Fish and Wildlife Service, and the California Coastal Commission. The incompleteness and gross deficiency of Applications 31194 and 31195 deprive the SWRCB and its sister agencies of basic information necessary to identify issues that must be considered in these reviews, and necessary to the public's and the Board's identification and analysis of core issues within the water rights permitting process.

The issues that the public must consider in reviewing, analyzing, and commenting on these applications and joint proposal include but are not limited to: complex aspects of fluvial and estuarine hydrology and geomorphology; impacts to various species of wildlife and plants (including coho salmon, steelhead trout and other threatened or endangered species); impacts to water quality; impacts on water resources required for other protected uses; impacts to the local economies surrounding the Albion and Gualala Rivers (both of which are highly dependent on the tourism and recreation industries); impacts to specially protected federal areas included in the California Coastal National Monument; the range of reasonable and preferable alternatives to the proposed project; and secondary impacts on population growth and commercial development.

Public and Political Controversy and Opposition to the Applications:

Applications 31194 and 31195 were submitted simultaneously and jointly by Alaska Water Exports in support of a two-pronged proposal to divert water from both rivers through large cisterns in the river beds, pump the water through pipelines laid through the river beds and estuaries out to sea, pump the river water offshore into large bags, and tow the river water by heavy duty tug boats to unspecified locations to the south, which may include San Diego. In addition to the serious deficiencies that we already have pointed out in the notices and in the applications themselves, the Board should be aware that Alaska Water Exports' proposal has generated an extraordinary level of public controversy and intense public opposition in California.

The counties in which the Gualala and Albion Rivers are located – Mendocino and Sonoma – have formally opposed the proposal, as has the municipality of Cloverdale. Further, in the passage and signing into law of California State Bill AB 858, both the California State Legislature and the Governor of California have clearly signaled their serious concern over the proposal comprised of these two applications and their determination that the Board not act on these applications before all appropriate information is presented. Even San Diego and other southern California communities have expressed great reservations about Alaska Water Exports' proposal.

Ed Anton, Larry Attaway, Kathryn Gaffney
October 17, 2002
Page 6

There appears to be virtually no support for these applications among the California public. Rather, there is a great deal of concern and opposition throughout both northern and southern California over the proposal's threat to set a very dangerous precedent. Only the out-of-state applicant appears to be eager to see this vague and speculative proposal move forward. The Board owes it to the California public to approach these applications in a deliberate and cautious fashion, especially given their clear design to set a precedent and open a market for private exploitation and export of river water from watersheds.

Conclusion:

Only when, and if, Applications 31194 and 31195 are truly completed can they properly be re-noticed. Further, given the enormous controversy over these applications and the complexity of the environmental, economic, and other issues that must be addressed, the protest period for these applications should be extended to 120 days.

In light of the considerations described above, we urge you to withdraw the defective notices for Water Rights Applications 31194 and 31195. We also urge you to require that all of the deficiencies noted in this letter and any others be remedied by the applicant before those applications be re-noticed. Finally, if the applications ever are properly completed, we urge the Board to notice them for a public protest period of at least 120 days in order to provide an adequate opportunity for public review, comment, and protest concerning this highly controversial and threatening proposal and to fulfill the objectives of the California Water Code.

Because of the time pressure on the public and the fact that the deficiencies noted above are so fundamental to the review process for these applications, we ask that you respond to our request

Ed Anton, Larry Attaway, Kathryn Gaffney
October 17, 2002
Page 7

as soon as possible. Please do not hesitate to contact me by telephone at (505) 751-0351 or in writing through the fax number and at the mailing address in the margin on the first page of this letter.

Very truly yours,

Simeon Herskovits
Senior Staff Attorney
Western Environmental Law Center

Tom Cochrane
President
Friends of the Gualala River

Linda Perkins
Treasurer
Albion River Watershed Protection Association

Margaret Pennington
Chair
Sierra Club, Redwood Chapter

Jane Kelly
California Office Director
Public Citizen

Kim Delfino
California Program Director
Defenders of Wildlife

cc: Arthur G. Baggett, Jr., SWRCB Chair
Peter S. Silva, SWRCB Board Member
Richard Katz, SWRCB Board Member
Gary Carlton, SWRCB Board Member
Celeste Cantú, SWRCB Executive Director
Winston H. Hickox, Secretary of California EPA
Governor Gray Davis
Virginia Strom-Martin, California State Assembly
Patricia Wiggins, California State Assembly
Wesley Chesbro, California State Senate
Michael Reilly, Sonoma County Board of Supervisors
J. David Colfax, Mendocino County Board of Supervisors