**Joint Committee on Fisheries and Aquaculture**  
**40th Annual Fisheries Forum, April 25, 2013**  
**State Capitol, Room 447**

**“WATER FOR FISH”**

The occasion of the 40th annual Fisheries Forum provides an important opportunity to step back and assess our progress as a state in protecting fish populations and fishing businesses. We have seen progress in improving fishing gear, in building thriving fishing communities, and in related areas. However, we remain stalled on providing sufficient, clean water for fish that depend on coastal or inland watersheds for at least some of their lives. No matter how many other reforms and advancements we establish, if fish cannot swim, we will fail.

California can take two sets of actions to help redress this problem: one under current law, and one under laws we can start to develop now. First, while the federal Clean Water Act (CWA) directs the State Water Resources Control Board (SWRCB) to take actions that will enhance flows, these mandates are essentially being ignored. CWA Section 303(d) requires the SWRCB to begin identifying waterways with flows too low to support fish populations. This formal listing, which is approved by U.S. EPA, provides an important, unused tool to prevent further damage to already-struggling waterways and fish populations, by: preventing further diversions, supporting waste and unreasonable use hearings, improving opportunities for restoration funding, and compiling a more accurate, statewide database on the dwindling flows available to fish. The SWRCB is currently in the middle of developing its overall list of impaired waters, but the list focuses only on waters impacted by pollutants. We urge the Legislature to express its strong support to the SWRCB for using the CWA to identify waterways that need enhanced flows for fish to survive.

The SWRCB can also take action now to comply with general CWA mandates to incorporate flows in all of its decisionmaking around protecting water quality standards. One of the basic tenets of the CWA is to ensure the “protection and propagation of fish [and] shellfish.” Water rights can be adjusted as needed to meet this mandate. Further, the CWA requires that the most sensitive use of waterways must be maintained – which is often the needs of fish. That is, the state cannot balance away flows that fish must have in the name of some other goal. As U.S. EPA has stated, a project that “does not comply with a designated use of the water [such as fish habitat] does not comply with the applicable water quality standards,” and so must be adjusted to meet the CWA. For example, if science shows that Delta fish need 60% unimpaired San Joaquin River inflow from February through June, the SWRCB cannot bargain those flows down to 35%.  

Once again, we urge the Legislature to indicate its strong support to the SWRCB for applying all of the CWA’s provisions wherever necessary to advance flows.

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1. Linda Sheehan, Executive Director, Earth Law Center, lsheehan@earthlaw.org.
Taking advantage of the flow-related tools in the federal Clean Water Act is something that the state can do now, under current law, to put flows back in the places and at the times that fish need them. California can also begin developing new laws that will protect the inherent rights of fish to the water that they need to swim.

The Delta Vision Blue Ribbon Task Force concluded in 2008 that “Californians must . . . change their relationship toward the environment and water.” Our current legal system treats the environment’s needs as an afterthought to our wants. The Legislature has attempted to address the needs of waterways and fish for flows through a “co-equal goals” approach to water management. However, unless waterways and fish hold rights to the water they need, achievement of this goal will elude us. If water rights are to be the legal system by which water is allocated in this state, then the law must reflect the science and ethics of our integration with our environment: legal water rights for waterways must be developed, allocated, and enforced to support the flow needs of waterways and fish.

We need to “change our relationship toward the environment and water” by recognizing in law the rights of rivers to flow with clean water, and the rights of fish to swim and have the aquatic habitat they need to flourish – not just to avoid extinction, but to thrive. By contrast, we currently relegate ecosystem water needs to a tangential role in state water management, until waterways and fish are at the brink of collapse. That is when the Endangered Species Act hammer falls – abruptly, with little foresight, controversially, and often too late.

We can start now to address this legal imbalance, which will prevent us from reaching even co-equal goals – though ultimately, our water supply needs can only be reliably met consistent with an overarching goal of environmental health. We can begin now to draft changes to our laws to recognize water rights for waterways based on their flow requirements, including the needs of fish, using the science we already have and obtaining the additional science we need. This effort will give fish and ecosystems the legal right to be at the planning table from the beginning, rather than at the end, after the damage is done. Formalizing and effectuating water rights for ecosystems will ensure that waterway and fish needs are considered up front, that planning is effective, and that implementation and enforcement are more clear.

The state is undertaking various processes now that could set state water policy for decades. What is needed is a statewide vision similarly broad in scope that reflects our interconnections with the natural world, and that commits us to actions commensurate with the sweep and importance of these efforts and the challenges before us. Accordingly, we ask that the Legislature take action to advance water rights for waterways and fish, integrated with water quality protection in a holistic regulatory system, as an essential tool to ensure the well-being of the state’s people and environment. This effort will form the foundation of the many other advancements and reforms that the state is undertaking to ensure that fish populations and the fishing industry thrive, and that coastal communities who have built their well-being around the well-being of the fish flourish.

We look forward to working with you to achieve this vision.