

February 13, 2003

VIA FACSIMILE AND FIRST CLASS MAIL

Humboldt Bay Municipal Water District
828 Seventh Street
P.O. Box 95
Eureka, California 95502
Attention: Carol Rische, General Manager

**Re: Proposal to Export Mad River Water from Humboldt Bay via Bag-
and-Tugboat Operation**

Dear Sirs and Mesdames:

We represent a rapidly growing coalition of citizens' groups that are vehemently opposed to the project proposed to the Humboldt Bay Municipal Water District to bag water from the Mad River and tow it by tugboat from Humboldt Bay to unspecified points to the south. The conceptual proposal presented by Aqueous, Inc., and its principal, Mr. Ric Davidge, contained few specifics. It did make extravagant promises of the ease with which the project could be implemented and benefits would accrue to the District, its customers, and the local economy. Upon careful consideration you will find that the Aqueous proposal is fatally flawed in a number of ways and faces considerable regulatory hurdles before it could even begin to be implemented.

Due to these intractable concerns, we strongly oppose the Aqueous proposal and urge you to reject any proposal to export water away from the Mad River or any other watershed in Humboldt County. In our opinion, the Aqueous proposal cannot pass legal muster under the required environmental and other regulatory reviews to which it is subject. We intend to scrutinize every stage of those regulatory processes and to take any deficiencies we perceive to court, if necessary.

Below is a preliminary overview of some of the salient faults with the Aqueous water bagging proposal and of the regulatory requirements that must be fulfilled before the Aqueous proposal could be implemented. This summary is only a taste of the complex and controversial economic, environmental, and social problems that the water bagging proposal promises to raise. That these obstacles have not even been acknowledged, let alone addressed, by Aqueous should give you pause before proceeding in any way with this risky, controversial proposal.

The Risk of Losing Control of Local Water Resources

If a deal could be consummated, HBMWD might well find that the long term contract will prevent it from regaining the water for local uses that may become necessary or that may prove to be far more locally beneficial.

For a deal to be attractive enough to potential customers, and therefore to Aqueous, it would have to be long term and almost certainly would include renewal provisions that the Water District might not be able to escape.

If Aqueous's potential customers demand that the actual water rights themselves be transferred to Aqueous or themselves, as Monterey has indicated it would demand, then the HBMWD's loss of control would be beyond doubt.

In addition, you must beware of entering into a business transaction with an entity that lacks any serious assets of its own and that is likely to be controlled, if not owned, by foreign-based multinational corporations. As has been increasingly noted by many commentators, and as was noted by the California Coastal Commission with regard to Mr. Davidge's failed water bagging proposals for the Gualala and Albion rivers, there is a very serious risk that water export deals with international parties could well be removed from the scope of California law and regulation. All local control over the terms of the transaction, and thus over the fate of Mad River water subject to the transaction, would be sacrificed. Instead, the procedures and requirements of international trade agreements such as NAFTA and the GATS would govern and decisions about local Humboldt Bay area water resources could be made by remote international bodies like the WTO.

You should think long and hard before proceeding any further with a proposal that carries so grave a risk of loss of control over local water resources as Aqueous's does.

State and Federal Regulatory Obstacles

The water bagging proposal would require petitioning the State Water Resources Control Board for a permit to change the place and purpose of use for the water that Aqueous proposes to purchase from the HBMWD. Cal. Water Code § 1701. Because of the volume of water involved, the proposal will be considered a major petition for change. Therefore, it will be subject to all the public notice, protest, evidentiary hearing, and other requirements under the Water Code. *See* § 1701 *et seq.* This petition will require notice and cooperation with other state and federal agencies. The SWRCB will have to notify and consult with the California Department of Fish and Game, which will consider whether any aspect of the diversion, the proposed change in place of use, or any of the work that may need to be done to alter or upgrade existing infrastructure implicates the permitting requirements under section 1603 of the Fish and Game Code or otherwise threatens any fish or wildlife resource.

Among the issues that the SWRCB will have to evaluate in deciding whether to permit the water bagging proposal is the degree to which the existing diversion of the water in question, as well as

the proposed changes, are consistent with the public trust interests of California. Under National Audubon Soc’y v. Superior Court, 33 Cal.3d 419, 658 P.2d 709, cert. denied, 464 U.S. 977 (1983), the SWRCB will have to reexamine the degree to which the current level of diversion by the HBMWD adequately protects, or best serves, the State’s public interest in the waters of the Mad River. This inquiry will require evaluating the needs of fish and other wildlife species, as well as other instream uses, in the light of present circumstances and updated information about the Mad River watershed and ecosystem. Thus, the SWRCB’s review of Aqueous’s water bagging proposal could result not only in the denial of a permit to change the purpose and place of use but also in a decision to reduce historic levels of diversion and restore water to the river.

You should be under no illusions about the level of scrutiny to which this project will be subjected under the California Environmental Quality Act (CEQA), Cal. Pub. Res. Code § 21000 *et seq.* The magnitude of this proposed project – both in terms of the volume of water being transferred to an entirely different region of California and the extent of bagging, barging, and water conveyance works involved – leaves no question that the project will require a full blown environmental impact report. The CEQA review process is guaranteed to be extensive and controversial because of the unprecedented nature and grave implications of this proposed export of water.

The Proposal Will Not Survive Scrutiny Under the California Coastal Act

The California Coastal Act is directly implicated by Aqueous’s proposal, which would require a coastal development permit consistent with the policies and requirements of the CCA. *See* Cal. Pub. Res. Code § 30000 *et seq.* This new water bagging proposal raises many of the same potential environmental, social, and economic impacts to California coastal resources that led the Coastal Commission to vote unanimously to protest the Gualala and Albion river proposals. Among the harmful impacts that may violate the CCA and that should concern you are: damage to marine, estuarine, and riverine habitat; degradation of the scenic and visual qualities of coastal areas; harm to the geologic stability and geomorphology of Humboldt Bay and to areas within the Mad River watershed or in the vicinity of the delivery point for exported water where infrastructure may need to be built or modified; impairment of commercial fishing and recreational boating; interference with other forms of recreation and public access.

The Proposal Will Be Seriously Constrained or Prohibited by the Resource Management Plan for the California Coastal National Monument

Similarly, the Aqueous water bagging proposal will be subject to scrutiny, restriction, and perhaps prohibition under the Resource Management Plan presently being formulated by the U.S. Department of Interior for the California Coastal National Monument (CCNM) under the National Environmental Policy Act (NEPA), 42 U.S.C. §4321 *et seq.*, and the Federal Land Policy and Management Act, 43 U.S.C. § 1701 *et seq.* Unavoidably, much of the Aqueous water bagging operation would occur within, or pass through, the CCNM. Local, state, regional, and national citizens’ groups already have raised potential harmful impacts on marine habitat and species and other protected values of the CCNM from water bagging operations like those

proposed by Aqueous, and those concerns will be addressed in the DOI's planning process, which will extend over the next few years.

The Proposed Export of Water Is Beyond the Scope of the HBMWD's Authority

It is our understanding that under its existing charter, articles of incorporation, and/or by-laws the HBMWD does not have authority to export water away from its service area and the Mad River watershed. In order to increase the scope of its authority to enable it to engage in such export, the District would have to go through the process of amending its charter, articles of incorporation, and/or by-laws. Such an amendment process would open the HBMWD up to public review and comment on this and possibly other potential charter revisions beyond its control.

The Proposal will Face Stringent Federal Permitting Requirements and NEPA Review

The Aqueous water bagging proposal also will require permitting under section 407 of the federal Safe Harbors and Rivers Act, 33 U.S.C. 401 *et seq.*, and may require a permit under section 404 of the federal Clean Water Act, 33 U.S.C. § 1251 *et seq.* Accordingly, the U.S. Army Corps of Engineers will need to scrutinize the project under those acts and the applicable regulations, and may either deny a permit or impose serious/burdensome restrictions on project operations that make the proposal impracticable.

The permitting process under either or both the Safe Harbors and Rivers Act and the Clean Water Act also implicate the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* Under NEPA, the Aqueous proposal will require a full blown environmental impact report given the magnitude of the natural resources affected and the controversy raised by the proposal. Under NEPA, the federal Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, and Marine Mammal Protection Act, 16 U.S.C. § 1361 *et seq.*, the Army Corps of Engineers will have to consult with the National Marine Fisheries Service and the U.S. Fish and Wildlife Service regarding potential impacts to listed species that may include protected shore and sea birds, salmonid fish species, and marine mammals. Despite the blithe assurances offered by Aqueous that no protected wildlife species would be affected by its proposed operations, we believe the opposite is true. Mr. Davidge made similar mistaken predictions regarding his defunct water bagging proposals for the Gualala and Albion rivers.

In considering whether to proceed with the Aqueous proposal you also must consider the question of potential, indeed likely, liability under the CWA, ESA, and MMPA. As discussed elsewhere the bag and tug boat technology Aqueous is relying on are still largely untested. No water bagging and barging operation has ever been attempted in the north Pacific. As you know, the north Pacific is characterized by extremely rough seas during much of the year when Aqueous will be attempting to fill and transport its bags between Humboldt Bay and unspecified points to the south, including Monterey and San Diego. There is little doubt among serious people that these unwieldy tug-and-bag combinations will be subject to accidents, including a serious possibility of running aground. Should one of the tug boats spill diesel fuel within the Bay Aqueous and the HBMWD could face liability of an unauthorized discharge under the

CWA. *See* 33 U.S.C. §§ 1342-1343. Should the water bagging operations result in the unauthorized take of any species protected under the ESA or MMPA, Aqueous and HBMWD could face liability under those statutes as well.

Another federal regulatory hurdle that has been ignored by Aqueous when making claims that it may deliver Mad River water to Monterey, is the need to comply with the restrictions under the National Marine Sanctuary Act, 16 U.S.C. § 1431 *et seq.*, on various maritime activities in order to protect the Monterey Bay National Marine Sanctuary, 15 C.F.R. pt. 922. The failure to even recognize that such legal and regulatory constraints apply to Aqueous's proposal illustrates the carelessness and unreliability of that proposal.

None of these significant regulatory hurdles have been acknowledged, let alone addressed, by Aqueous in its rosy presentation to the HBMWD. As the authority charged with responsible management of local water resources, however, you cannot afford to be as careless as that outside speculator.

Likely Negative Impacts to Local Economy

By transferring the water that Aqueous proposes to export, the HBMWD would foreclose any potential development that the same water could support locally. In this connection, it is essential that you think in the long term and not only in the immediate future. The project is unlikely ever to be approved, and if it were it would not be for several years. Meanwhile, it is quite possible that economic and social forces within California and throughout the nation and the Pacific Rim may shift so as to encourage commercial and/or residential development in the Humboldt Bay area. Such changes might well occur long before the termination of the long term contract Aqueous and its customers would demand. If the water has already been committed to Aqueous and its customers, it would not be available to support such growth and the economic opportunity would get pushed to the south with the water, to the detriment of Humboldt Bay area businesses and residents.

The construction of a water bagging and tugboat mooring facility in Humboldt Bay and the continuous presence of these massive heavy duty diesel tugboats and the colossal water bags would seriously harm tourism in the Humboldt Bay area and along coastal region from Arcata south. The beauty of the Humboldt Bay area and its coastline are renowned throughout California and far beyond. The large mooring and bagging operation that the proposal would require in the harbor would have to be brightly lit around the clock to meet the project's operational needs and the ever present tugs would produce constant diesel exhaust fumes and auditory alarms. That visual, auditory, and olfactory intrusion on the local area will be further aggravated by the constant parade of giant tug boats towing conspicuous bladders the size of three football fields through the bay and down the coast. These impacts certainly will negatively impact tourism, water and coastal recreation businesses in the Humboldt Bay area and along the coastline to the south

Further, because they will be so unwieldy and massive, the tug boats and water bags are likely to impair other maritime activities in and around the Bay, including commercial fishing and recreational boating. This also will negatively impact the health of the local economy.

Likely Negative Impacts to Local Environment

Exporting water from the Mad River as proposed would bring a whole host of environmental problems, posing a danger to the Mad River and its estuary, to Humboldt Bay, and to points all along the coast that would be passed while the water is in transit. Many of these environmental problems are foreseeable, but given the untested nature of this proposal, there are undoubtedly many more that cannot be contemplated at this time.

As a result of excessive logging and gravel extraction, the Mad River currently suffers from severe degradation, and was recently listed as “impaired” under section 303(d) of the Clean Water Act by the North Coast Regional Water Quality Control Board because excessive temperature pollution prevents the attainment of its designated beneficial uses.¹ 33 U.S.C.A. § 1313(d). Given the current degraded conditions of the Mad River, any additional impacts are significant and cannot be tolerated. This proposal would do just that, however, removing a substantial amount of water from a nine mile stretch of the Mad River and its estuary.

Nonetheless, the Water District is attempting to disguise this withdrawal as a neutral or benign proposal, playing a shell game with semantics to claim the withdrawal would consist of “excess industrial” water. To the contrary, nature does not consider this water to be “excess industrial” water, as it currently flows down the river and into its estuary. The listing of the Mad River under § 303(d) of the Clean Water Act occurred while this “excess” water was not being withdrawn from the river. Thus, even with that quantity of water being left in the river, the water in the Mad River is considered impermissibly impaired under the Clean Water Act. It is beyond doubt that resuming the withdrawal of that water would further degrade water quality in the Mad River and cause other undue environmental effects.

The Mad River estuary is also seriously degraded today, although it provided critical spawning, rearing, and feeding habitat for a myriad of species not very long ago. Indeed, as recently as the mid-1980s, the river and its estuary supported thriving salmon and steelhead fisheries. The proposed water withdrawal would add to the negative impacts existing in both the Mad River and its estuary, impeding their recovery and otherwise harming numerous native species. These include many species listed under the federal Endangered Species Act, such as the coho salmon, chinook salmon, steelhead, tidewater goby, western snowy plover, and bald eagle.² Many other

¹ The Mad River is also listed under § 303(d) due to excessive sediment pollution as well.

² There is some evidence that the cessation of this water diversion has benefited some species. For example, chinook salmon populations have declined precipitously in the Mad River, but a slight upward trend in its population has been noted in the Mad River in recent years, 64 FR 50405, while the “excess” water in question here was not being withdrawn from the river.

species would also suffer harm, including the coastal cutthroat trout, green sturgeon, osprey, and numerous migratory birds. There is growing momentum to restore the Mad River and its estuary to a healthy state. This water bagging proposal would undermine and effectively preclude those restoration efforts.

Humboldt Bay also would be severely impacted. This is one of the most biologically important estuaries on the West Coast, hosting 141 invertebrate species, 110 fish species, and 251 bird species. More than two-thirds of the oysters harvested for human consumption in California originate in Humboldt Bay, and it is also heavily utilized for fishing, crabbing, water sports, and other activities that rely on clean water.

The proposal would put these resources at great risk, with oil spills and other potential impacts looming in the project proposal. Humboldt Bay is well known for being one of the most perilous passageways on the West Coast, regularly presenting extremely dangerous waters to shipping traffic. Two large oil spills have already occurred in just the last six year, both having profound negative impacts on Humboldt Bay and the species it harbors, including marbled murrelets, coho salmon, brown pelicans, and other species that perished in these tragic events. The proposal includes one shipment per day of 13.2 million gallons of Mad River water at all times of year, something that would be impossible to accomplish safely due to the rough nature of Humboldt Bay and the north Pacific's coastal waters. Despite the risks, the tremendous pressure to make the project cost effective would likely force the project proponent to operate at times when it was not safe to do so.

It should be remembered that the large 6500 horsepower tugs used in the waterbagging operation would carry a great deal of diesel fuel. It is virtually certain that at some point heavy seas will result in one or more of these tugs being run aground or up on the rocks, and when that occurs a massive quantity of diesel fuel will spill into the Bay and coastal waters. Thus, even without throwing caution "to the wind," there is a great likelihood that this operation would cause an oil spill, and that is a gamble not worth taking.

The environmental impacts of the proposal would not stop there. For example, it would also have negative impacts on the geomorphology of Humboldt Bay, and runs the risk of creating a large underwater "explosion" if one of the giant "bladder" bags were punctured. Such an explosion would create a range of potential problems and would threaten to disrupt the natural balance of Humboldt Bay by suddenly introducing a massive amount of freshwater into its waters and creating other negative impacts.

The Aqueous Proposal Is Unviable as a Business Proposition

Apart from the exacting, layered regulatory review processes through which it must navigate, and the serious economic and environmental problems it raises, the Aqueous water bagging proposal simply is not a viable business enterprise for two discrete reasons. First, the physical and economic requirements of the actual operations have been badly underestimated. Second, Aqueous itself has neither the track record nor the wherewithal to actually implement the project.

To begin with, there is no existing U.S. manufacturer, as required by the Jones Act, of the water bags needed for the project. The only company that has explored the possibility of making these water bags is Albany International, but Albany International stopped even test manufacturing such bags some time ago. To start manufacturing these enormous bags from scratch for this project alone will entail staggering unit costs up front, something for which Aqueous has no financial resources.

Similarly, the rare U.S. built and owned 6500 horsepower tugs that would be required for this project are extremely costly to buy or lease, and none of them are found on the West Coast. Indeed only very few exist even on the East Coast. Finding and arranging for the purchase or lease of an adequate number of these vessels would be logistically difficult and very expensive. In addition, our research indicates that Aqueous likely will not be able to obtain the necessary insurance for its unwieldy, and thus risky, tugboat-and-waterbag combinations. Thus, it appears that even the most basic requirements for this proposal – the waterbags and the tugboats to tow them – will be completely uneconomical to provide.

Further, an initial review of the barest costs of loading the bags, operating the boats, and towing the waterbags to and from potential delivery points in central and southern California shows that these costs will far outstrip any even remotely plausible price Aqueous could hope to obtain for the water it seeks. Indeed, conservative estimates of fuel, crew, and equipment requirements for the proposed operations indicate that the cost of delivering Mad River water to the potential markets Aqueous has mentioned would be two to three times as expensive as the current cost of desalination. (Remember, too, that there are other competing alternative sources of water, such as agricultural transfers, that could undercut the cost by an even greater margin.) In view of the staggering costs and the unmet logistical requirements of the proposed water bagging operations, Aqueous's "conceptual" claims about the viability of its proposal and the financial benefits that HBMWD would reap from approving the project are simply implausible.

Aqueous has no customers lined up. It has claimed to be in negotiations with San Diego and Monterey dating back to its failed water bagging project on the Gualala and Albion rivers. However, representatives from those two potential markets have both indicated that they have not engaged in serious, concrete discussions with Aqueous or Mr. Davidge. Apparently, he has pitched his idea to them just as he has to you, but they have been skeptical and have waited to see if there is any substance to his imaginings. In particular, they have been dubious about Mr. Davidge's ability to secure the necessary rights and regulatory approvals to provide them with a reliable source of water – doubts which we think you will agree are well founded.

You should also assess your proposed business partner with a dispassionate, critical eye. Only months ago Aqueous, Inc., went by the name Alaska Water Exports, Inc., and was pushing an equally ill-conceived version of the same water bagging proposal down the coast on the Gualala and Albion rivers. Regardless of their name changes, Mr. Davidge's business entities lack meaningful revenues, assets, or a significant number of employees. The same is true of the foreign corporate shell he has created for Alaska Water Exports and Aqueous – World Water,

S.A. None of these corporate entities has any apparent track record of successfully implementing or carrying out any operation even remotely like this one. Indeed, they appear not to have engaged in any concrete water transactions at all.

The greatest claim to potential substance that World Water, and thus Aqueous, seem to have is the presence on its board of directors of representatives from transnational entities based in Saudi Arabia, Japan, and Norway, which do have financial resources and *may be* interested in investing in a viable water export project. It seems clear, however, that these potential international backers have not committed to any investment and are waiting to see if any of Aqueous's proposals prove to be viable. This is hardly an adequate financial foundation on which to erect so chancy and speculative a project as Aqueous's Mad River water bagging proposal. We suggest that you would not be well advised to offer the HBMWD and the local area up as guinea pigs for Aqueous's experimentation.

The Promised Economic and Job Benefits are Illusory

The only company that can manufacture the kind of bags needed for the proposal has withdrawn from even test manufacturing of such bags. Further that company is based on the East Coast and already has West Coast facilities, which it would almost certainly use if it even decided to manufacture the bags on the West Coast. Thus, the assertion that the Humboldt Bay area could gain jobs from a bag manufacturing plant is misleading.

Similarly, Aqueous's suggestion that its proposal would lead to many new jobs in the area for tugboat crew members is misleading. The heavy duty tugboats that would be required for the water bagging and towing operation do not currently exist on the Pacific Coast and few exist on the East Coast. A review of their requirements indicates that the most reasonable home port for them on the Pacific Coast would be the Puget Sound – not Humboldt Bay. True to this logic, Mr. Davidge has said that Aqueous has been scouting for tugboat operators in the Seattle/Puget Sound area, not Humboldt Bay. Tugboat captains based in the Puget Sound are almost certain to crew their boats with sailors they know from their home port. Accordingly, you must take Aqueous's loose suggestions that its proposal would create local jobs in your area with a grain of salt.

We think the apparent lack of substance to the promise of job creation from this water bagging proposal ought to make you doubt the likelihood of such benefits from the proposal. Should you proceed with Aqueous's proposal in part on the expectation that it could lead to a significant increase in local jobs, you and the working people of the Humboldt Bay area would be bitterly disappointed.

Conclusion

Given all of the above considerations, there is scant reason for the Humboldt Bay Municipal Water District or its customers to give Aqueous's proposal any serious consideration. Aqueous's reason for pursuing the project is obvious: if the proposal succeeds it would amount to a

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boondoggle for Aqueous and its potential international financiers, access to cheap water from the Mad River that they can then sell for enormous profit on the world market.

You should reject this deceptive overture from an unqualified and apparently uninformed business partner because: (1) it could result in your losing control over vital local water resources; (2) it could cause serious local economic and environmental harms; (3) it will not pass muster under the considerable state and federal regulatory reviews that it must face; and (4) it could lead to liability for the HBMWD.

Sincerely,

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Tom Marking, Manager
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Honorable Wes Chesbro, California State Senate
Honorable Patricia Wiggins, California State Assembly
Honorable Patty Berg, California State Assembly
Honorable Mike Thompson, U.S. House of Representatives