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Ms. Tam Doduc, Chair
and Members of the Board
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Re: Comments on the Draft North Coast Instream Flow Policy

Dear Ms. Doduc and Members of the Board:

On behalf of Trout Unlimited (TU) and the Peregrine Chapter of the National Audubon Society (PAS), we submit the following comments for the Policy for Maintaining Instream Flows in Northern California Coastal Streams (Policy).

Together with the law firm Ellison, Schneider & Harris and consultants Wagner & Bonsignore we are submitting Joint Principles that represent shared principles for going forward with this Policy. We also write separately to elaborate on our basis for supporting the shared principles and to set forth additional comments and suggestions.

As the primary outside sponsor of A.B. 2121 we applaud the State Water Board for its progress on the Policy and look forward to working with you to make it final. Although there are a number of improvements that we strongly recommend as crucial to a successful final Policy, the draft represents a significant step forward for water management. In general, it reflects a credible, responsible, and scientifically-based approach.

As all Californians are by now aware, the state's salmon and steelhead fisheries are collapsing. A primary cause is obvious: too many rivers and streams simply lack enough water to support fish. On the North Coast, thousands of diversions operate without mitigation measures to protect fish. At the same time, the state's water rights administration remains largely broken, failing to function for either water users or fish. It is time to turn things around.

By itself, this Policy will neither end North Coast water disputes nor bring about the recovery of salmon and steelhead. But with the suggestions that follow, we believe it could be an excellent start.

Our comments are organized as follows. Section I is the Executive Summary. Section II provides background on TU/PAS and A.B. 2121. Section III states our specific comments and recommendations on the Draft Policy.

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I. **EXECUTIVE SUMMARY**

The Principles stated in Draft Policy Section 2.2 are correct. They are substantive, as implementation of the water code. The principles are (1) water diversions shall be seasonably limited; (2) water shall be diverted when flows are higher than the minimum flows required for spawning and fish passage; (3) water shall be diverted in a manner that maintains the natural flow variability; (4) onstream dams shall be limited and conditioned to protect natural resources; and (5) cumulative effects caused by multiple diversions shall be avoided.

The Draft Policy proposes three strategies for processing a water right application: standard Regionally Protective Criteria; site-specific studies; and the “watershed approach.” These strategies are sound. It is also appropriate to include guidelines for fish passage and fish screens, standards for restricting onstream dams, measures for gravel and large woody debris augmentation, and a description of the procedural mechanics for obtaining a permit. The draft Policy’s approach to these topics is generally appropriate; we suggest a number of recommendations designed to improve it further.

We recommend a somewhat different configuration of formulas for the Regional Criteria. We also recommend providing guidance for those pursuing site-specific studies, and adding more definition to the watershed approach.

We agree that the proposed regional criteria for minimum bypass flow (MBF) and maximum cumulative diversion (MCD) would be protective. The MBF and MCD regional criteria attempt to span a wide range in watershed sizes. In the smaller watersheds, generally watersheds less than 5 square miles but particularly those less than 2 square miles, the proposed regional criteria would also cause large numbers of applicants to pursue case-by-case variances through a procedure that remains somewhat undefined. We believe it is possible to reconfigure the criteria in a way that reduces the need for—and helps focus—site-specific studies, while delivering scientifically-valid standards for aquatic resources. We also revisit the MBF and MCD framework, adopted first in the NMFS/CDFG 2002 guidelines and revised in this recent proposal in a manner that generally assigns biological functions to MBF and physical functions to MCD. We suggest a framework, based on the scientific record, for a staged diversion rate that could result in greater water supply reliability and at least as much protection for fish. Our latest proposal is not fully defined, but we offer it here for your consideration. We look forward to discussing it with you. (*See* Bill Trush, McBain & Trush, Draft A.B. 2121 Instream Flow Policy: Framework Proposal for Defining Stream Management Objectives, April 30, 2008, attached to these comments as Exhibit 1. (“MTTU 2008”).

The inclusion of a “watershed approach” in the draft is a significant, positive step. We will recommend ways to make it stronger, and to emphasize watershed-based management throughout the Policy. Trout Unlimited is one of the stakeholders who co-developed the concept for a watershed approach, which in its essence will permit a number of diverters to work with stakeholders and regulatory agencies to establish stream flow objectives for individual streams and to prepare management plans to accomplish those objectives. By focusing on physical

solutions and coordinated management, the proposal promises better protection of stream flows and improved water supply reliability.

On March 19, 2008, TU joined with more than 15 vineyard operators in Sonoma County to announce “Water & Wine” and to investigate the potential for watershed approach pilot projects in Dry Creek Valley, Alexander Valley, and Knights Valley. Those investigations are moving forward as we speak.

More recently, TU secured authorization from the State Coastal Conservancy for a \$600,000 grant, which we will match with \$600,000 of other funds, to prepare feasibility studies for physical solutions as part of an additional 4-7 watershed approach pilot projects statewide. We are gratified that SWRCB and DFG both supported that proposal. We are grateful for the State Water Board’s inclusion of the watershed approach in the Draft Policy and with the agency’s incorporation of core principles from the approach in its Draft Strategic Plan.

In a few respects we believe the Policy must be improved. First, the Policy should take a broader and longer view of its mandate. As drafted, it is a credible attempt to establish principles and guidelines *for processing new water right applications*. But this is a narrower topic than that prescribed by A.B. 2121, which requires “principles and guidelines for maintaining instream flows” for “water right administration.” (Water Code § 1259.5.)

There are thousands of diversions within the policy area that currently operate without safeguards to protect fish and will not be affected by the policy, either because they have a permit or license, because they operate unlawfully with no real incentive to do otherwise, or because they are operated under basis of a riparian or groundwater right.

Without factoring these diversions in to its calculations, the State Water Board will be unable to accurately estimate the cumulative effects of a pending application for an appropriate right. More fundamentally, without actions to encourage those diverters to improve their practices, the State Water Board is unlikely to accomplish its statutory mandate of “maintaining instream flows.” This is particularly true because existing summertime diversions may account for the greatest threat to the recovery of the species.

Some of the actions needed to fully maintain instream flows may remain outside the scope of the final Policy. Others can be put in motion now. We recommend these in particular.

- First, provide additional guidance and definition for the “watershed approach” and for similar methods to promote watershed-based management. We include suggestions for further action.
- Second, provide incentives for stewardship activities that go above and beyond the requirements of the law, including specifically incentives for water users to switch from dry season diversions to properly conditioned storage of rainy season water. We propose measures to accomplish this result.

- Third, mandate universal monitoring and reporting of both diversions and stream conditions by all water users. Monitoring and reporting in California lags far behind that of other Western states; we provide specific recommendations for improvement.
- Fourth, include provisions for regional monitoring and policy effectiveness monitoring, plus provisions to review the Policy after five years to see if it is on track toward maintaining instream flows in the administration of water rights. We propose a method for funding this program.
- Fifth, identify specific measures to bring “non-filers” into the water right system.

There is one final point. Without adequate funding and staffing, any Policy—no matter how well developed—is likely to fail. The State Water Board should assess and publish an account of the proposed schedule for implementing the first five years of this Policy and the resources required for that task. We believe that water users as well as conservation objectives would benefit from this information.

After more than 15 years spent advocating for more effective water rights administration, **Trout Unlimited’s bottom line is straightforward.** We will support adjustments to the regional criteria that will make them a better strategy for diverters, including exceptions for some of the smallest projects—but only those amendments if accompanied by universal monitoring and reporting of diversions and stream flows, a policy effectiveness monitoring and review program, incentives for positive stewardship, means to bring unauthorized diversions into the water right system, and a solid framework for pilot projects to implement the watershed approach.

II. **BACKGROUND**

A. Trout Unlimited and Peregrine Audubon

As you know, Trout Unlimited was the chief proponent of A.B. 2121, which was authored by Senator Kuehl and signed by Governor Schwarzenegger. We have a longstanding interest in California water policy and law. Trout Unlimited is the nation’s oldest and largest coldwater conservation organization, with approximately 150,000 members nationwide and almost 15,000 in California. The group’s mission is to protect, conserve, and restore North America’s native trout and salmon resources.

TU volunteer Stan Griffin was among the first to recognize the growing problem of unauthorized dams and highlight the pernicious cumulative effects of surface water diversions on tributaries within the region. Throughout the 1990s, Mr. Griffin and others doggedly insisted that the Board account for public trust resources in its permitting decisions.

Peregrine Audubon is the inland Mendocino County chapter of the National Audubon Society (NAS), a nation-wide conservation organization supporting a membership of approximately 550,000 through more than 500 local chapters. NAS has over a 100-year legacy of

action, advocacy, and research. NAS was the lead plaintiff in the Mono Lake Cases, which established the first precedent that the public trust doctrine applies to the State's decisions in the allocation of water resources.

On October 27, 2004, TU and PAS filed our "Petition for Timely and Effective Regulation of New Water Diversions in Central Coast Streams," ("Petition") which remains pending before the SWRCB and other agencies. (The 70 page Petition, its 31 attached exhibits, and comments presented at the Board's March 17, 2005 workshop on the Petition are available at www.waterrights.ca.gov/coastal_streams/tupetition.html and are incorporated herein.) In the Petition, we exhaustively documented how water diversions along the north central coast have cumulatively contributed to the sharp decline of Coho salmon and steelhead fisheries within the Petition's geographic scope, which mirrors that of A.B. 2121. We demonstrated that the failure by the SWRCB, DFG, and other agencies to act on illegal diversions constitutes a systematic failure to discharge the agencies' duties under the Water Code, Fish and Game Code, and public trust doctrine. And we proposed numerous, specific recommendations for reform.

With leadership from Art Baggett and helpful assistance from Victoria Whitney and her staff, TU and PAS later joined a stakeholder working group to develop recommendations for reform. That group, known informally as the North Coast Water Rights Working Group, consists of representatives for winemakers and grape growers, water developers, urban water users, other conservation groups, state and federal water agencies, and local governments. The concept for the "watershed approach" to water rights, as well as the procedural recommendations set forth in the joint principles submitted with Wagner & Bonsignore and Ellison, Schneider & Harris, are a result of that effort.

Trout Unlimited also serves on an informal ongoing water right procedures working group convened by Ms. Whitney to pursue the SWRCB Strategic Plan objective to "reengineer" the water rights process.

B. Cooperative Projects with Water Diverters

Trout Unlimited is also pursuing stewardship partnerships directly with agricultural water users. On March 19, 2008, we launched "Water & Wine," a cooperative program that works with grape growers and wine makers in Northern California Wine Country to enhance instream flows and salmon habitat through (a) coordination of water management and diversions, (b) physical projects (e.g., switching from summer diversions to off-stream storage and use of rainy season water), and (c) habitat restoration projects. More than a dozen water users have indicated their interest in participating in the program. (*See Exhibits 4, 5.*)

We have been working actively with these water users, the Sonoma County Salmonid Coalition, resource agencies, the University of California, and other stakeholders to develop Watershed Approach pilots within Sonoma County based on several criteria: the feasibility of salmonid restoration, the degree of stream and estuary habitat impairment by diminishing flows, and the extent of landowner interest in collaboration. The committee is assembling existing data

on streams to select and begin analysis for pilot projects and expects to choose specific streams for pilot projects in the near future.

Just last week, the State Coastal Conservancy authorized up to \$600,000 for Trout Unlimited to pursue what we call the Coastal Streamflow Stewardship Project to implement 5-8 “watershed approach” pilot projects in coastal areas including but not limited to the Policy area. Both the SWRCB and DFG supported that grant proposal and have been working with TU and our partners to identify pilot streams.

C. Lack of Stream Flow Hinders Salmon and Steelhead Recovery

When TU and PAS filed the Petition in 2004, we noted that coho salmon and steelhead fisheries were threatened with extinction. The cumulative effects of legal and illegal water withdrawals and unscreened diversions were considered a major cause of the species’ decline, as NOAA Fisheries highlighted in the federal ESA listings for Coho salmon and steelhead, and as the California Department of Fish and Game indicated in its Coho Salmon Recovery Strategy. (See e.g., 62 Fed. Reg. 24,588, 24, 592 (May 6, 1997); 61 Fed. Reg. 56,138, 56,141 (Oct. 31, 1996); Petition at pp. 13-18 and citations therein.) In the Recovery Strategy, DFG found that, “A substantial amount of coho salmon habitat has been lost or degraded as a result of water diversions and groundwater extraction...” (DFG, Coho Salmon Recovery Strategy, pp. 3-11, 3-13.) The situation has not improved.

Rather, the status of salmon and steelhead has only declined since 2004, as demonstrated by the coast-wide collapse of the salmon fishery and ban on commercial and recreational fishing off the California and Oregon coasts this year. While the causes of the collapse are complex, the message it sends is clear: the future of California fisheries depends on our ability to address the threats to salmonid survival and to improve habitat and stream flows conditions throughout their historic range.

The status of the fisheries directly affects the cultural and economic well-being of communities across California. The economic contribution of recreational and commercial fishing is enormous. Recreational fishermen in California spent \$2 billion in 2006, and California earns more state and local tax revenues from sportfishing than any other state--over \$336 million in 2006. (American Sportfishing Association, Sportfishing in America: An Economic Engine and Conservation Powerhouse (2008).) Some estimate the direct value of fishing for salmon alone at \$255 million.

Numerous plans for salmonid recovery in California have identified the deleterious effect of water diversions on salmon and steelhead survival, including the Coho Salmon Recovery Strategy (at 3-11, 3-13) and the California Wildlife Action Plan. The plans recommend actions for recovery but do not compel action. As a result, although stream flows have been consistently identified as a limiting factor for salmon and steelhead recovery, few successful examples of stream flow enhancement exist.

Coho salmon and steelhead spend at least one year in fresh water before moving to sea. Stream dewatering and loss of habitat as a result of water diversion during the summer months are especially problematic for those fish. (*See* R2 Task Force Report, Appendix D, pp.13-18; National Marine Fisheries Service, DRAFT Habitat Restoration and Conservation Plan for Anadromous Salmonid Habitat in Selected Tributaries of the Russian River Basin, Nov. 16, 2007.) Within the Russian River watershed in Sonoma County, the SWRCB has listed seven tributaries to the Russian River as “Fully Appropriated” during the drier summer and fall months, and the 1997 SWRCB report indicated that a basis for listing the entire Russian River watershed as fully appropriated from April 1 through December 14. (SWRCB, Proposed actions to be taken by the Division of Water Rights on pending water right applications within the Russian River Watershed, 1997.)

As the November 16 NMFS report states, many of the pending applications have already been built without adequate safeguards for protecting summer streamflow for fish:

“Constructed projects with pending permits do not have permits; they have not undergone environmental review that addresses cumulative impacts of numerous diversions, and they are operated without permit terms requiring minimum bypass flows below the points of diversion, structures for facilitating bypass flows, limitations on maximum rates of diversion, or seasonal limits to avoid diversions during the sensitive low flow season, especially May through November when precipitation is usually minimal” (at 89).

As the report notes, these diversions, combined with riparian and stream-side pumping from wells, are of special concern during summer months. (*Id.*)

The Draft Policy R2 technical analyses also points to summer flows as a big issue (R2 Task Force Report, Appendix D, pp.13-18).

The Substitute Environmental Document (SED) discloses that there are 284 pending applications for 518 dams, all but a couple dozen of them previously constructed. (SED App. E, pp. 7-8; NMFS 2007, p. 89.) In addition, it estimates that there are an additional 1,253 “non-filer” dams, for a total of 1,771. (SED App. E, p. 13.) Of those, 308 are on Class I streams. (*Id.*, p. 16.) The maps locating these impoundments speak louder than any words. (*See* SED App. 7E, Figure 7D, Figure A.2 (permitted and pending impoundments) and A.6 (estimated “non-filer” impoundments).)

There are an unknown number of other diversions under a riparian or pre-1914 right. The State Water Board has 861 statements of diversion and use on file. (SED App. E, p. 7.) However, the State Water Board estimates that 90 percent of riparian and pre-1914 rights go unreported. (Steve Herrera, cited in NMFS 2007, p. 89.)

There are an unknown number of “non-filer” diversions from subterranean streams flowing through known and definite channels, although the administrative record for this Policy includes draft maps delineating such streams within the Policy area. There are an unknown

number of diversions from non-jurisdictional groundwater, many of which also affect stream flows.

As TU/PAS, DFG, NMFS, and other interests have pointed out many times, the State Water Board lacks a method for finding out how many existing diversions exist but go unrecorded in its water right data base. (*See* Petition, ¶ 154.)

III. **TU/PAS COMMENTS AND RECOMMENDATIONS**

For ease of reference, we organize these comments by section (although not sub-section) in the Draft Policy.

A. Policy Section 1. Introduction

The Draft Policy states that it “establishes principles and guidelines for maintaining instream flow for the protection of fishery resources.” (Policy, p. 2.) That is the correct purpose, but the probable effect of the policy will not achieve that purpose. The policy will not adequately address the cumulative effects of diversions under existing licenses, permits, or other claims of right; and it will not motivate non-filers to come into the water right system.

a. Statutory Purpose

Assembly Bill 2121 requires the State Water Board to adopt “principles and guidelines for maintaining instream flows” from the Mattole River to San Francisco and northern San Pablo Bay, as part of state policy for water quality control “for the purposes of water right administration.” (Stats. 2004, ch. 943, § 3 codified as Water Code § 1259.4(a)(1).)

As the first section of A.B. 2121 makes plain, a major impetus for the statute was the 2002 NMFS/DFG Joint Guidelines, which were the first fish protection guidelines for the north central coast and were considered by the legislature “the minimum necessary conditions to preserve a level of stream flow that ensures that anadromous salmonids will not be adversely impacted by diversions.” (*Id.* § 1(c).) The legislature noted that the State Water Board has not formally adopted the Joint Guidelines even though adoption “would significantly advance” fish protection in the state. (*Id.* § 1(d).) Therefore, the legislature directed the State Water Board to adopt the Joint Guidelines or something similar. (*Id.* § 1(e) [“The adoption of these joint guidelines is necessary for the protection of fishery resources even if these guidelines are required to be amended from time to time.”].)

The Joint Guidelines contained standard terms and calculations for minimum bypass flow, season of diversion, maximum diversions and the evaluation of cumulative effects, the location of onstream dams, and other guidance. The Draft Policy contains similar standard calculations, which it terms Regionally Protective Criteria. Some water users would prefer that the final Policy dispense with standard terms and calculations entirely. Plainly, that approach would fail to comply with the intent of the legislature. On the other hand, if the Final Policy

includes standard criteria in this form and those criteria are based on a solid scientific foundation, then the Policy will be responsive to a primary purpose of the statute.

b. Draft Policy Focus: New Permits and Petitions

But A.B. 2121 does not merely say that the State Water Board should adopt the Joint Guidelines or something similar. And it does not say that the mandate is to develop guidelines “for processing new water right permits or petitions.” The carefully crafted language of the statute did not stop there. Instead, Water Code § 1259.4 requires a policy for “water right administration” sufficient “for maintaining instream flows.” (*Id.* § 3; Water Code § 1259.4(a)(1).)

Therefore, while Trout Unlimited and Peregrine Audubon generally support the framework set forth in the Draft Policy, as far as it goes, we are concerned that it takes an unduly constricted view of the task at hand— “water rights administration” “for the maintenance of instream flows.” As we stated in our Joint Principles with the water consultants, we believe the Policy should take broader view of its charter.

The California Environmental Quality Act (CEQA) requires that the SED analyze and disclose to the public detailed information about Policy’s consequences, to evaluate ways to mitigate those impacts, and to consider feasible alternatives that could lead to better results. (Pub. Res. Code § 21061; *Laurel Heights Improvement Ass’n v. Regents* (1988) 47 Cal. 3d 376, 391.)

The draft SED correctly stated the Policy’s purpose. “In general, implementation of the Policy will protect the environment by ensuring that water rights are administered in a manner that maintains instream flows in the area covered by the Policy (Policy Area).” (SED, p. 1.)

Nevertheless, all alternatives analyzed in the SED focused exclusively on the question of whether and how to issue permits for new water rights and process a narrow class of new petitions for change. (SED, pp. 40-47.) The draft Policy and SED generally do not address questions such as how to encourage people with valid rights to engage in proactive stewardship activities; how to get people who should file applications or petitions to file one; how the State Water Board could collect information about stream flows and existing diversions by unauthorized diverters, diverters with a non-registered riparian or pre-1914 right, or diverters of connected groundwater—all of which is necessary to make an informed decision on a new permit; what the Board intends to do to ensure compliance for those who do have a valid right; how to improve the application process; or any of the other topics that would generally be considered administration of water rights.

For instance, the SED contains some discussion of what it terms “non-filer” surface water reservoirs, and identifies 1,253 estimated to exist, to go with 518 unauthorized dams with pending applications. (SED App. E, pp. 9, 13.) The SED does not contain a discussion of the consequences of the decision whether to allow unauthorized diversions to continue unchecked, or evaluation of an alternative that would require “non-filers” to file an application, or another

that might require them to cease diversions without a permit. Likewise, the Draft Policy includes a menu of enforcement actions that might be taken to encourage non-filers to submit an application or require them to cease the diversion, but it does not state whether the agency intends to take any of these actions.

The SED and Draft Policy take a similar approach with diversions from subterranean streams flowing through a known and definite channel, and with unauthorized direct diversions that cannot be discerned from an aerial photo. That is, the policy alternatives assume that such diversions would be subject to the Policy if an application is filed, but there is no analysis of alternatives that might identify such diversions or encourage them to file. Nor does it disclose sufficient data to make informed decisions about pending applications. Unlike “non-filer” diversions from surface reservoirs, the SED does not disclose how many “non-filer” diversions from subterranean streams or unauthorized direct diversions there might be.

There is no discussion at all about diversions based on a riparian, pre-1914, or percolating groundwater right, even though such diversions plainly affect instream flows and the ability of the agency to make informed decisions. (*See* SED, p. 16.) The SED analysis treats such diversions as thoroughly beyond the influence of the SWRCB—except, ironically, as methods to avoid complying with the Policy. (*See* SED, p. 49.) This is unfortunate not only because it understates the scope of the agency’s constitutional obligation but also because it underestimates the opportunity to create incentives for positive stewardship.

c. The Need for a Broader Approach

As a result of this framing of the question, the draft SED may fail to disclose or avoid foreseeable environmental consequences in at least two ways.

First, the Division of Water Rights needs information about existing diversions in order to make sound decisions on new permits. Unfortunately, we lack more information about existing diversions than we have. As it stands, existing procedures and the proposed Policy application process go to elaborate lengths to prepare daily hydrographs of unimpaired flows, hydrographs impaired by existing diversions of record (including complicated formulas to prorate and adjust those records), and hydrographs including the project. Then the Policy proposes elaborate formulae for calculating standard terms.

But the estimates of cumulative effect leave out the majority of the water diverted in most coastal basins—water extracted by “non-filer” reservoirs, water extracted by unauthorized direct diversions, water extracted by unauthorized diversions from subterranean streams, water extracted by under basis of riparian or pre-1914 right without a statement of diversion and use, and water extracted from non-jurisdictional groundwater that affects surface flow. Even considering only surface water reservoirs visible with aerial photos, the SEP’s data indicates that there are almost as many unauthorized diversions as there are valid appropriative rights. (1,771 compared to 2,144; *See* SED App. E, p. 7, 16.)

To be sure, some Water Code considerations focus on the protection of senior rights, and may not require this data. But that is not the end of the analysis. Other provisions of the Water Code, the public trust doctrine, and CEQA all demand consideration of cumulative effects—the incremental effects of the proposed project viewed together with the effects of past, current, and probable future projects. (*See, e.g., Pub. Resources Code § 21083(b); CEQA Guidelines § 15130(a)-(b);*¹ *National Audubon Society v. Superior Court of Alpine County* (1983) 33 Cal.3d 419.)

In the comments that follow, we suggest realistic near-term actions to improve this analysis. In particular, we recommend measures to collect better information about diversions and stream flows. We also recommend a Policy Effectiveness Monitoring and Review program to test whether decisions made under the Policy have the predicted effect. (*See Recommendations on Policy Section 10*).

Assuming the State Water Board believes that the SEP and Policy as amended for final adoption adequately consider and avoid cumulative effects without better information about the diversions discussed above, the responses to comment should explain the basis for that belief and describe a mechanism to validate that hypothesis.

There is a second way the draft SED and Policy might fail to fully disclose foreseeable environmental consequences. Specifically, neither the draft Policy nor the SED explain the decision to focus exclusively on new permits and petitions, or how that decision will result in water rights administration sufficient “for maintaining instream flows.” This is particularly troublesome because existing diversions during the dry season months are perhaps the biggest threat to salmon and steelhead.

We are not arguing that the State Water Board should have reopened existing permits or initiated a public trust proceeding to investigate other diversions. There are other actions that the Policy could take to improve summer flows and help the State Water Board fulfill its statutory mandate. We suggest a number of them here, such as with an increased emphasis on watershed-based management, incentives for voluntary stewardship, and a work plan to bring “non-filers” into the fold. (*See Recommendations on Sections 4, 11, and 12*.)

The State Water Board may have reasoned that conditioning pending and yet-to-be-filed permits for existing but unauthorized diversions is sufficient to fulfill the A.B. 2121 mandate and protect the public trust. The agency may also be planning additional action, unstated in the Policy, to bring “non-filers” into the water right system. If that is indeed the State Water Board’s reasoning, the agency should say so, and explain how such actions will fulfill its statutory obligations.

¹ This mandate assumes even greater importance for a program-level environmental review such as this. (*See Guidelines § 15168(b)(4)* (program EIR allows agency to “consider broad policy alternatives and program-wide mitigation measures” at an early stage when the agency has greater flexibility to deal with cumulative impacts).)

Recommendations

1. *Reframe the Policy to take a broader view of its mandate to improve the administration of water rights within the Water Code's context of balancing multiple beneficial uses of water (including agricultural, municipal, domestic, industrial, and instream beneficial uses), protecting the public trust, and providing for water quality control. (See TU/PAS & WB/ESH Joint Principles ("Joint Principles"), attached as Exhibit 2, p. 2.)*
2. *Advance the SWRCB's objective to reengineer and improve the water right process to produce scientifically and technically sound decisions, and to promote transparency and accountability. (See 1/25/08 draft Strategic Plan, p. 25; TU/PAS & WB/ESH Joint Principles, pp. 4-5.)*
3. *Prepare Response to Comments that state whether and on what basis the agency concludes that the Policy, as amended, will lead to sound decision-making and the avoidance of cumulative effects when processing new water right permits and petitions, given the absence of information about unauthorized diversions, unreported riparian and pre-1914 diversions, diversions from jurisdictional subterranean streams, and diversions to groundwater.*
 - 3.1. *Prepare a work plan to test, validate, and if necessary re-evaluate this conclusion as part of the Policy Effectiveness Monitoring and Review program.*
4. *Prepare Response to Comments that state whether and on what basis the agency concludes that the Policy, as amended, will lead to "water rights administration" sufficient "for maintaining instream flows" as mandated by the statute.*
 - 4.1. *Prepare a work plan to test, validate, and if necessary re-evaluate this conclusion as part of the Policy Effectiveness Monitoring and Review program.*

B. Policy Section 2. Policy Framework

a. Development of Instream Flow Criteria

The Draft Policy states that the State Water Board considered the 2002 NMFS/DFG Joint Guidelines. (Policy, p. 2.) The Draft Policy proposes three basic non-exclusive strategies for processing water right applications and petitions: (1) incorporating "Regionally Protective Instream Flow Criteria;" (2) completing site-specific studies to support a variance from the Regional Criteria; and (3) as a group with watershed-based site-specific studies and a coordinated water diversion and stream flow plan. (*Id.*)

We support this framework. (*See* Joint Principles, p. 3.)

b. Principles for Maintaining Instream Flows

Draft Policy Section 2.2 identifies five principles for the maintenance of instream flows. (Policy, pp. 2-3.) The five principles are intended to guide permit terms and conditions under any of the Policy's three strategies. They are: (1) water diversions shall be seasonably limited; (2) water shall be diverted when flows are higher than the minimum flows required for spawning and fish passage; (3) water shall be diverted in a manner that maintains the natural flow variability; (4) onstream dams shall be limited and conditioned to protect natural resources; and (5) cumulative effects caused by multiple diversions shall be avoided. (*Id.*) They are substantive, as implementation of the Water Code.

We support the adoption of these principles. (*See* Joint Principles, p. 2.)

c. Regionally Protective Instream Flow Criteria

The Draft Policy

Draft Policy Section 2.3 defines Regionally Protective Instream Flow Criteria for season of diversion, minimum bypass flow (MBF), and maximum cumulative rate of diversion (MCD). (Policy, pp. 3-6.) As compared to the Joint Guidelines, the Regional Criteria differ in a few significant ways. The Regional Criteria assigns responsibility for protecting biological functions to the MBF criterion and responsibility for protecting physical functions to the MCD criterion. Partly for this reason, as compared to the Joint Guidelines, the draft criteria yield a significantly higher MBF calculation, particularly in the smallest watersheds, and a somewhat larger maximum diversion, particularly in larger watersheds. The draft criteria yield more water for diversion in many locations, particularly in large watersheds or small watersheds located far above the point of anadromy, but less water in the smallest watersheds where the upper point of anadromy is nearby. These small watersheds have the highest concentration of pending applications and "non-filer" reservoirs. The season of diversion would also begin October 1, rather than December 15.

The scientific work behind the draft policy represents a significant advance in our understanding of these issues. The reasoning and the analysis is, for the most part, very solid. If the State Water Board were to adopt the draft criteria, they would have to be considered protective.

At the same time, if the agency were to adopt the draft criteria, we would also have to assume that large numbers of applicants would pursue site-specific studies and seek a variance. Since the guidelines for site-specific studies and the process for seeking a variance remain somewhat undefined, the situation might look fairly similar to what we have today. It would not be catastrophic—as many unauthorized diverters apparently believe—but we might see less movement beyond the status quo than we think possible.

Defining the Management Objective

For this reason, we are keen to do two things: develop further guidance for site-specific studies, and consider whether a re-alignment of the regional criteria might result in standards that could be a better option for more applicants and equal or exceed the draft's protections for fish.

In Dr. Bill Trush's commentary, he attempts not to define a better formula, but to identify a better management objective. Doing so would serve both purposes.

The approach put forward here is not a final product. But we believe it offers a promising avenue for the State Water Board to pursue for applicants proceeding by either path. We look forward to discussing it with your staff and with responsible agencies.

The approach begins with articulation of two flow thresholds. The first is the flow that fills the active channel, where most spawning takes place. (*See* MTTU 2000.) The second flow, which he calls the winter baseline flow, is the flow that keeps riffles flowing, sustains juvenile rearing habitat, and prevents redds from de-watering.

The first management objective is to retain flows between those two depths. Flows above the active channel (spawning) flow get too fast. Flows below the winter baseline (wetted riffle) flow impair basic biological functions. His proposed framework seeks to direct most diversions to times when flows are above the spawning flow, reduce (but not necessarily eliminate) diversions when flows are between the spawning flow and wetted riffle flow, and try to avoid diversions below the wetted riffle flow. Doing so would protect spawning opportunity and success, sustain rearing habitat, and maintain high stream productivity.

The paper also suggests calculations to estimate these two flows and proposes that we refine the calculations over time. For the active channel spawning flow, he revises the 10% exceedance flow approach from MTTU 2000. Compared to the 10% exceedance flow, the new calculation would result in somewhat higher specified flows in watersheds smaller than about 6 miles and somewhat lower flows in watersheds larger, in a manner that is responsive to the R2 analysis. For the winter baseline wetted riffle flow, we suggest the February Median as a potential calculation.

The important thing for purposes of these comments is not the formula so much as the concept. With site-specific studies, one could estimate the flows fairly precisely. With a watershed approach, one could estimate the threshold flows with site-specific studies and also design a diversion schedule by reference to those flows at particular points of interest.

Second, Dr. Trush notes that a variable diversion rate based on a percentage of daily ambient flows would offer the most finely tuned way to optimize diversions and stream flows. (He mentions one water manager who is ready to test a variable diversion rate system. Above a particular point of interest, a fill and spill reservoir also corresponds to a percentage of ambient flow, proportionate to drainage size.) Therefore, he would define the management objective in those terms. For diversions that cannot precisely match a percentage of ambient flows, the

imperative is to approximate the management objective as closely as possible with terms and conditions such as a bypass flow and rate of diversion limitation.

The final component of the framework is to define what levels of deviation from the management objective are acceptable, in order to make decisions on water right permits and to determine appropriate mitigation measures. He does so by proposing that we define three levels of impact: no impact; impacts presumed acceptable with standard terms and conditions; and impacts that might be acceptable but require additional studies.

Examples and Comparison to Draft Policy Alternatives

The Trush commentary also provides a few examples. For instance, because diversions accounting for less than five percent of daily ambient flow would have no discernable impact, such diversions could be exempt from further diversion limitations. For example, if a retrofit fill and spill reservoir was in a location where cumulatively no more than 5% of the drainage area above the upper point of anadromy was behind a fill and spill dam, it would not require a bypass flow pegged to the spawning (active channel) flow. If it were on a class III stream, it would be fully exempt. If it were on a class II stream, the bypass flow would be set to the lower wetted riffle (winter baseline) flow.

Similarly, a diversion below the upper point of anadromy could adopt a variable pumping rate if feasible, and set the rate at a level that would not harm fish. For those who do not have that option, standard terms for minimum bypass flow (set at the active channel level) and a rate of diversion limitation would apply so as to approximate the defined management objective. For the rate of diversion standard term, we propose the MTTU 2000 calculation.

All of the standard calculations—the “regional criteria” in Policy terms—are adapted from alternatives analyzed in the record. As compared to the draft regional criteria, the realigned variables in MTTU 2008 would establish a lower minimum bypass flow in smaller watersheds, with a somewhat more rigorous cumulative effects test and rate of diversion limitation. But it would also permit quite a few reservoirs in small watersheds to operate without a term requiring the active channel (spawning and migration) bypass flow. Depending on location, they would operate “fill and spill,” or adhere to the lower winter baseline (wetted riffle) bypass flow.

As compared to the Joint Guidelines, the realigned criteria would have a somewhat higher (active channel) minimum bypass flow where it is necessary for spawning and migration, and a similar (wetted riffle) winter baseline flow where it is necessary for other ecological functions; it would also permit a slightly higher number to operate without a minimum bypass term and condition.

As compared to McBain & Trush/Trout Unlimited’s earlier proposal, it features a similar active channel bypass flow for the benefit of anadromous fish, but refines the calculation for estimating active channel flows in the absence of site-specific studies. It also goes beyond the earlier proposal in that it results in a lower (wetted riffle) bypass flow in many circumstances,

and an exception in others. It also provides vehicle to encourage variable rate diversions for those pumpers who seek the most effective means to divert water without harming fish.

In other words, the proposal is more finely tailored to individual circumstances, and responsive to the needs of different streams. We think it will work better for farmers and for fish.

Finally, by defining management objectives rather than flow formulas, the proposed flow objectives function either as a guide to site-specific studies or as a reference point for defining standard regional estimates (the “regional criteria”) and allow for a more consistent policy approach.

Recommendations

5. *Consider the framework proposal for defining management objectives presented in MTTU 2008 and these comments.*
6. *Work with TU/PAS, McBain & Trush, other stakeholders and responsible agencies before the next workshop to assess whether the approach is viable and to determine what additional analysis is needed to make it operational.*
7. *If the approach stated here is not viable, adopt the MTTU 2000 alternative with three amendments:*
 - 7.1. *substitution of the revised regional estimation of active channel flow for the prior 10% exceedance calculation;*
 - 7.2. *adoption of a December 15 to March 31 season of diversion;² and*
 - 7.3. *development of an exception for very small projects. (See Joint Principles, p. 3.)*

d. New Section: Incentives for Stewardship

As noted above, we strongly suggest that the final Policy create incentives for voluntary stewardship, and in particular to support projects designed to enhance summer rearing habitat. Low stream flows during the dry season restrict fish rearing habitat and are considered a potentially limiting factor for salmon and steelhead recovery throughout most of the policy area. (R2 Task Force Report, App. D, pp. 13-18.)

² Although we have stated that a season of diversion is unnecessary for an otherwise properly conditioned diversion we are now persuaded, after discussions with many affected interests and responsible agencies, that adopting a season of diversion is a better approach. If there is to be a season, it should not begin on October 1. Because the agency will get many comments on this point, we do not restate the rationale for that conclusion here. (See, e.g., NMFS comments on the Draft Policy.)

The draft Policy addresses the typical situation in which applications for water rights seek a new diversion above and beyond the existing water withdrawals in a given basin. Trout Unlimited and other groups are also working with landowners who hope to shift the timing of an existing diversion from the most critical dry months to wetter months when diversions are more readily managed to avoid harm to fish.

For example, a landowner might shift diversions from an existing riparian right or a license for direct diversion to the winter months by creating offstream ponds. Where the foregone water remains in the stream by use of a Section 1707 change petition or a functional equivalent, such projects could play an important role in salmon recovery.

Because diversions during low flows may also provide a less stable source of water, projects that shift the timing of diversion to winter months may result in a more reliable supply and lower impacts to fish. For that reason, the Coho Recovery Strategy and the California Wildlife Action Plan specifically recommend actions work with landowners to create off-stream water storage to capture winter stormwater as a way of reducing summer diversions. (Coho Recovery Strategy, p. 9.4-5; California Wildlife Action, p. 261; *See* NMFS 2007, *supra*, p. 92.)

The Policy could advance conservation activities for existing diversions in other ways. For instance, applications for new permits could be packaged with changes to existing permits to create a net benefit for fish and to justify a variance from the regional criteria for the new permit. We propose a number of ways that landowners could support a variance by packaging the application with these beneficial activities and with others, such as barrier removal. Critically, however, we recommend that any alternative mitigation encouraged under our recommended procedure be limited to actions that create a clear and measurable benefit for stream flows.

Recommendations

8. *Create a new Section 2.4 called “Summer Stream Flow Enhancement” in the Policy for measures promoting proactive stewardship activities, including summer stream flow enhancement projects. State that it is the policy of the State Water Board to promote proactive stewardship activities by existing water users to improve stream flows for the conservation of salmon, steelhead and other natural resources.*
9. *Add Section 2.4.1 Priority Processing for Summer Flow Enhancement Projects.*
 - 9.1. *State that the State Water Board will grant priority processing for “Summer Flow Enhancement Projects.” Define “Summer Flow Enhancement Projects” as projects that enhance stream flows (1) by reducing existing diversions during the dry season (2) where there is rearing habitat that would benefit from the foregone water diversion and (3) applicant can ensure that the foregone water remains instream through a petition for change under Water Code section 1707 or a functional equivalent.*

- 9.2. *State that the State Water Board will grant priority processing to Summer Flow Enhancement Projects that are pursued in combination with requests for new water rights where new water rights are needed to change the timing or magnitude of existing diversions and the Chief of the Division of Water Rights finds that the project as a whole is likely to provide a net benefit to instream flows and serve the public interest. In making this preliminary finding of likely benefit, the Chief of the Division of Water Rights may rely on written statements of support for the project by DFG, NMFS, or other state or federal agencies that have participated in or funded the project.*
10. *Add Section 2.4.2 Approval of Summer Flow Enhancement Projects.*
 - 10.1. *State that for Summer Flow Enhancement Projects, Applicant shall propose terms and conditions consistent with the general principles stated in Section 2.2 of the Policy.*
 - 10.2. *State that the State Water Board will approve a Summer Flow Enhancement Project even if the project requires deviation from the regionally protective instream flow criteria, provided the Chief of the Division of Water Rights finds that project as a whole provides a net benefit to instream flows and serves the public interest, after consultation with and concurrence by the Executive Officer of the Regional Board and Chief of the Water Branch, Department of Fish and Game.*
 - 10.3. *State that where the Summer Flow Enhancement Project would not increase the total volume of water to be used annually beyond the Applicant's existing rights, but requires a water right permit for new or expanded offstream storage, then (1) there is a presumption that project provides a net benefit to instream flows and serves the public interest; and (2) the fisheries review by the Division of Water Rights, Regional Board, and DFG shall be intended to confirm that unusual circumstances do not exist to overcome the presumption of net benefit (e.g., the proposed diversion is not blocking fish habitat).*
 - 10.4. *State that in making the net benefit and public interest finding the Chief of the Division of Water Rights is also encouraged to consult with the National Marine Fisheries Service and other resource agencies that may have participated in the development of the project. In making the finding, the Chief may rely on written statements of support of or opposition to the project by those agencies and on other evidence in the record.*

e. **New Section: Interim Operations**

As the SED states, there are 284 pending applications for 518 points of diversion. (SED App. E, pp. 7-8.) The vast majority of these have already been built and continue to operate without a single mitigation measure to protect fish. (NMFS 2007, p. 89.) Of those, most have been pending for more than five years, and many have been pending for more than 10. Under the best circumstances, the Division estimates that it would take about three years to process a water right application.

There are also 1,253 identified “non-filer” reservoirs in the Policy area. An unknown but perhaps significant number of those might be persuaded to file an application. If unauthorized direct diversions and diversions from subterranean streams were included, the number would only grow. The agency has never proposed asking unauthorized diverters to stop diverting while an application is pending.

It stands to reason that there will continue to be large numbers of existing, operational, but unmitigated dams existing along the North Coast. Therefore, the State Water Board could advance a primary objective of the policy if it developed interim conditions.

Recommendations

11. *Amend the Policy to create a new section establishing circumstances, if any, under which diversions will be allowed to continue while an application is pending.*
12. *State that an applicant with an unauthorized diversion will not continue such diversion pending final decision on the application unless it agrees to interim mitigation implemented during pendency of application.*
 - 12.1. *State that interim measures will include, at a minimum, the regionally protective season of diversion and implementation of the terms for monitoring and reporting of both diversions and stream conditions (see Recommendations on Sections 4 and 8).*
 - 12.2. *State that the State Water Board may waive this requirement for interim conditions on a case by case basis if it finds on the basis of information provided by applicant, and DFG concurs, that interim measures would not benefit a Class I stream.*
13. *State that any applicant who fails to either discontinue diversions or abide by the interim conditions will be subject to an ACL complaint for the statutory maximum.*

C. Policy Section 4. Water Right Applications

a. Water Right Procedures

The Draft Policy defines elaborate procedures for processing a water right application, including methods for preparing water availability and instream flow analyses, defining stream classifications, prescribing fish screens and fish passage, and regulating onstream dams. With our history in the North Coast Water Right Working Group, the current Strategic Plan procedures working group, the TU/PAS petition, and TU California protests, we take a particular interest in these matters.

Once the management objectives are defined, one core procedural function is to ensure consistency and transparency of results. In some circumstances it may be preferable to pick a methodology and stick to it than to offer a menu of methodologies that might work, but will lead to different results.

Another core function is to reduce cost and improve timeliness. Many of the recommendations in the Joint Principles are for this purpose. It may be possible to go farther, and create a publicly-available GIS model that could run standard calculations for such things as unimpaired hydrographs and hydrographs impaired by those diversions that exist in WRIMS.

We also suggest developing standard reference designs for bypass designs, screens, and other physical improvements. If feasible, reference designs could cut costs for applicants preparing compliance plans and assure that compliance plans meet with the agency's expectations.

Recommendations

14. *Incorporate the recommendations set forth in the Joint Principles, which would improve protest resolution and focus environmental reviews, and improve efficiency. (Joint Principles, pp. 4-5.)*
15. *Evaluate the potential for the State Water Board in collaboration with a university or other partner to create a common GIS interface to prepare the standard calculations required for water right applicants and stakeholders working on collaborative processes.*
16. *Consider standard reference designs for the construction of bypass structures, monitoring and reporting systems, fish passage measures, and fish screens.*
17. *Where the policy calls for a standard calculation (instantaneous peak flows, unimpaired flow volumes), select a preferred methodology and ask applicants to use it where possible.*

18. *Ensure that the Policy appendices and flowcharts require consideration of all existing and reasonably foreseeable diversions in the cumulative effects analysis, and to ensure that the analysis is not limited to senior diversions.*
19. *State any exceptions to the Regional Criteria explicitly in the Policy, not implicitly through the formulas contained in Appendices. For example, the Draft Policy states that the MCD term is applied at every POD; however, when following the formulas in the Appendix, there are circumstances in which the MCD term does not get applied at the POD.*
20. *Prepare an MOU with responsible agencies defining standing procedures for processing water rights and related permits. (See Petition ¶ 146.)*
21. *Amend Draft Policy Sections 4.1.4 and 4.2 to require consultation with DFG on determinations of upper point of anadromy and stream classification, respectively.*

b. Site Specific Studies to Obtain Variances

Section 4.1.8 of the Policy establishes a mechanism for site-specific studies to obtain variances from the regional criteria. We suggest additional guidance and request consultation with SWRCB staff and responsible agencies so that we and other stakeholders can assist in its development. (See Joint Principles, p. 6.)

We also believe that the variance procedure could be an important mechanism to encourage positive stewardship activities that are not already required by law, such as removal of barriers and mitigation for senior water diversions.

Recommendations

22. *Case by Case Studies. Prepare narrative guidance on how to design site-specific studies and to condition projects to adhere to the principles stated in Section 2.2. (See Joint Principles, p. 6.) Work with stakeholders to prepare this guidance.*
23. *Create a new Section 4.1.9 in the Policy called “Variances Justified by the Inclusion of Stewardship Actions” to set forth additional categories of projects that are not otherwise required for the project that could justify a variance from the regionally protective criteria if they were added to the project.*
 - 23.1. *State that it is the policy of the State Water Board to encourage water right holders to remove obsolete dams and other fish barriers, to impose bypass flow requirements or seasons of diversion on existing water rights, and to engage in other conservation actions.*

- 23.2. *State that the following stream flow-related actions, when added as mitigation to a project subject to this policy may justify a variance from the regionally protective criteria in Section 2.3 of the Policy:*
- 23.2.1. *Addition of a season of diversion to an existing senior water right.*
- 23.2.2. *Addition of a bypass flow requirement to an existing senior water right.*
- 23.2.3. *Addition of a maximum rate of diversion limitation to an existing senior water right.*
- 23.2.4. *Removal of an artificial barrier to the migration of anadromous fish.*
- 23.2.5. *Removal of an onstream reservoir.*
- 23.2.6. *Relocation of a point of diversion to reduce impacts to aquatic resources.*
- 23.3. *State that a variance justified by reliance on these activities may be granted if the Chief of the Division of Water Rights finds after consultation with and concurrence by the Executive Officer of the Regional Board and Chief of the Water Branch, Department of Fish and Game that the project, including these actions, provides a net benefit to instream flows and serves the public interest.*
- 23.4. *State that, in making the net benefit finding the Chief of the Division of Water Rights is also encouraged to consult with the National Marine Fisheries Service and other resource agencies that may have participated in the development of the project. State that, in making the finding, the Chief may rely on written statements of support of or opposition to the project by those agencies and on other evidence in the record.*
- 23.5. *Evaluate the potential to establish an alternative mitigation fund that would support barrier removal, construction of Summer Flow Enhancement Projects, and other stream flow related actions, and the potential for applicants to pay into such a fund as an alternative to undertaking the activities specified above in support of a variance request.*
- 23.6. *Make conforming amendments to other sections of the Draft Policy and Appendices consistent with the recommendations set forth above. For example, Section A.5.13 would be amended as follows:*

A.5.13 Can the project be modified?

... There are numerous ways in which the applicant could modify the project. Examples of project modifications include: reductions in the amount of water collected to storage, reductions in the rate of direct diversion, placing a cap on the maximum rate of diversion, or raising the minimum bypass flow. The applicant may also be able to make modifications to other, senior water rights in order to ensure that the new project, in combination with senior diversions, complies with the regional criteria, or to justify a variance by removing a barrier to fish migration or implementing other activities (see Section 4.1.9). ...

c. Permitting Requirements for Onstream Dams

Section 4.4 contains permitting criteria for onstream dams. The draft Policy's approach to the permitting of and mitigation for onstream dams is generally sound. We endorse the idea to require applications for unauthorized diversions to be filed within a date certain in order to benefit from the Policy's more lenient provisions for old dams.

However, we believe the draft SED understates the adverse consequences of onstream dams and overstates the consequences of removing them. In particular, there are likely to be adverse geomorphic consequences caused by onstream dams that cannot be mitigated with gravel augmentation and minimum flows. (See North Coast Regional Water Quality Control Board's August 25, 2006 comments on the Notice of Preparation.) If the draft provisions remain in place, this approach should be evaluated in the five year review.

In addition, we question whether requirements for fish passage and screens will be viable mitigation for onstream dams on Class I streams. Fish and Game Code sections 1603 et seq. prohibit any diversion that DFG has not conditioned to include a fishway, screen, and other measures necessary to conserve fish and wildlife resources in good condition. At a minimum, permits for these dams should require periodic proof that the fish passage facility is functional.

Recommendations

24. *Adopt the general approach taken in Sections 2.3.5 and 4.4 of the Policy, only if sufficient provisions for monitoring and reporting of diversions and stream flows, and the Policy Effectiveness Monitoring and Review program are included in the policy (See Recommendations on Section 10).*
25. *Amend Section 4.4.1 (onstream dams on Class I streams) so that permits requiring fish passage measures require annual written proof by a qualified professional or by DFG that the fish passage measures are functioning as designed.*

26. *Amend the provision of Section 4.4.2 (onstream dams on Class II streams) allowing new construction of dams on Class II streams under certain circumstances to state that the SWRCB will permit such a dam only with the concurrence of the Regional Board and DFG.*
27. *Amend Section 4.4.4 to state that for proposed projects that include onstream dams, the applicant “shall” be required “to prepare mitigation plans for the eradication of non-native species, gravel and wood augmentation, and/or riparian habitat replacement,” rather than “may,” but that the State Water Board may waive this requirement if it determines that such measures are unnecessary.*
28. *Amend Section 4.4.4 to clarify that compliance plans for onstream projects that include mitigation measures for fish passage, non-native species eradication, gravel and wood augmentation, and/or riparian habitat replacement shall require annual reports demonstrating compliance with such mitigation measures. State also that SWRCB, Regional Board, or DFG may periodically inspect the facility to ensure that such mitigation measures are functioning.*
29. *Amend Section 10 of the Policy to specify that the effectiveness of Sections 2.3.5 and 4.4 will be a subject of the Five-Year Policy Effectiveness Review. Amend Sections 4.4.2 and 4.4.3 to state that any permits for newly constructed dams on Class II or III waters shall contribute mitigation funding to the Policy Effectiveness Monitoring and Review program to support this aspect of the Five-Year Review.*

D. Policy Section 5. Small Domestic Use and Stockpond Registrations

Section 5 addresses small domestic use and stockpond registrations. (Policy, p. 27.) The standard terms include a season of diversion and a prohibition on new onstream dams, but not a minimum bypass flow or maximum cumulative diversion. (*Id.*) (DFG could impose such conditions. *See* Water Code § 1228.3.) We agree that small domestic use and stockpond registrations should be included by the Policy, and we believe that the balance struck here is a good one. (*See* Petition, ¶¶ 147-152.)

We propose an amendment to foster projects such as the Mattole River flow enhancement effort under which rural residential users switch from direct diversions to storage tanks in order to benefit fish. Since they require a new SDU registration to proceed, the amendment is necessary to avoid unintentionally creating a powerful disincentive to the project. This is because it is impractical to fund or locate storage tanks that could allow residents to completely limit diversions to the standard season of diversion. At the same time, even projects that allow forbearance for a shorter but still critical time will improve conditions for fish and should be encouraged. The language we propose was developed jointly with Sanctuary Forest, the sponsor of the Mattole River tanks program.

Recommendations

30. *Amend Section 5.0 of the Policy (Small Domestic Use Provision) as follows:*
- 1. The season of diversion of the registration is limited to December 15³ through March 31. If the project that is the subject of the water rights registration involves demands for water that cannot be met with water diverted during this limited season, an alternative supply of water or appropriation under another basis of right must be available. The alternative source must be used when water diverted within the limited season is no longer available to supply the registered project. Notwithstanding the foregoing, the State Water Board shall extend the season of diversion beyond March 31 if the Department of Fish and Game concurs that (1) the purpose of the appropriation is to allow the registrant the flexibility to divert water for beneficial use in a manner that improves conditions for fish and wildlife, and (2) the registration would allow the registrant to forgo or reduce diversions under other valid basis of right during periods of the year that are most critical to fish and wildlife. This exception does not limit or expand DFG's authority to condition the registration pursuant to Water Code section 1228, et seq.*

E. Policy Section 8. Flow Monitoring and Reporting

Section 8 of the Draft Policy includes flow monitoring and reporting terms for active management systems, but not for passive systems; data is to be reported annually, or as requested. (Policy, p. 30.)

The State Water Board has an ongoing duty to “provide for the orderly and efficient administration of the water resources of the state.” (Water Code § 174.) Its function “has steadily evolved from the narrow role of deciding priorities between competing appropriators to the charge of comprehensive planning and allocations of waters.” (National Audubon Society v. Superior Court of Alpine County (1983) 33 Cal.3d 419, 444.)

As noted above and in our Petition there is an astonishing lack of data regarding diversions and stream flows in coastal areas. This lack of information hinders decision-making on new permits and threatens the viability of any effort to improve the administration of water rights for the maintenance of instream flows. (See Water Code § 1259.4.)

Better individual monitoring and reporting is also necessary to ensure compliance with the terms and conditions of water rights. CEQA requires as much. (See CEQA Guidelines § 15097(a) [mandating that a discretionary approval include monitoring and reporting conditions to assure effective implementation of required mitigation measures].)

³ See Recommendation Number for Section 2.

We have no doubt that most water right holders intend to comply with the law. But water right permits are complicated instruments, and errors are likely. We know that large numbers of water diverters do not know the basis for their right, and it is certain that even larger numbers do not know the details of their permits. (At least one painstakingly constructed and recently issued permit appear to have gone unread.) Add the passage of time—as ranch managers change, property gets sold, and land passes from generation to generation—and the chances of non-compliance grow even higher.

But if water right holders are asked to report information that demonstrates compliance with a certain condition, the likelihood that they will comply with that condition is that much greater. The need for adequate monitoring and reporting is apparent, even if there were no “bad apples.”

In the recommendations that follow, we set forth specific measures to ensure compliance and to obtain data about stream flows and diversions to inform future decisions.

Recommendations

31. *Individual Monitoring and Reporting of Diversions.*
 - 31.1. *Amend Section 8 of the Policy to state that Permits shall require continuous monitoring and recording of water diversions. State that permits for onstream reservoirs may require continuous monitoring and recording of reservoir levels as a means of accomplishing this purpose.*
 - 31.2. *Amend Section 8 to state that Permits shall require instantaneous reporting of diversion information, or reporting at other intervals sufficient to provide for effective compliance monitoring and water management.*
32. *Monitoring and Reporting of Stream Conditions.*
 - 32.1. *Amend Section 8 to state that Permits shall require continuous monitoring and recording of stream flows below points of diversion or at another location determined by SWRCB to be more appropriate.*
 - 32.2. *Amend Section 8 to state that Permits shall require all water diverters holding water rights of cumulative value greater than 100 acre-feet to conduct continuous monitoring and recording of stream temperature information at least one location.*
 - 32.3. *Amend Section 8 to state that Permits shall require instantaneous reporting of stream flow and temperature information (if temperature monitoring is required), or reporting at other regular intervals sufficient to provide for effective compliance monitoring and water management.*

- 32.4. *Amend Section 8 to state that the State Water Board may waive the requirement for individual monitoring and reporting of stream flow information in favor of contribution of funds to the regional Policy Effectiveness Monitoring and Review program where the State Water Board determines that (1) stream flow monitoring and reporting at the POD is not needed for compliance monitoring purposes and (2) contribution to the regional program would provide greater value than information gathered at the POD.*

F. Policy Section 9. Compliance Plans

In the past, the Division of Water Rights has required a compliance plan to be prepared within six months of permit issuance. It should require such a plan before the permit for two reasons.

First, it will avoid circumstances such as have arisen recently in which the applicant and staff have a different understanding of what the permit requires.

More fundamentally, the information contained in compliance plans is necessary to adequately evaluate, disclose, and mitigate the consequences of the project. For instance, different diversion works for offstream storage (a pipe, a streamside well, or a diversion dam) can have dramatically different environmental implications.

Recommendations

33. *Amend Section 9 (Compliance Plans) to state that the State Water Board “shall require applicants and petitioners to submit a compliance plan for the State Water Board’ review and approval, prior to the issuance of a permit. The compliance plan shall identify how the water diverter will comply with the terms and conditions of permits or orders, and shall include a schedule for the construction of any required facilities and the implementation of any mitigation plans.”*
34. *Amend Section 9 to state that permits shall provide that State Water Board, Regional Board, or DFG staff, alone or with NOAA Fisheries staff, have reserved authority to inspect a point of diversion without prior notice. Peace officer status will not be necessary.*
35. *Amend Section 9 to state that permits shall specifically provide that the State Water Board has reserved authority to remedy cumulative impacts on fisheries, riparian habitat, and associated wildlife under applicable law (including ESA), in addition to general reservation to protect public interest. The term will specify the procedures for exercise of this authority, including a duty to periodically assess the cumulative impacts.*

F. Policy Section 10. Policy Effectiveness Monitoring

Draft Section 10 states that the State Water Board “may” develop and implement a policy effectiveness monitoring program. (Policy, p. 31.) The draft states that if it is developed, the agency “may” refer to Chapter 10 and Appendix K of the R2 report. (*Id.*) The Frequently Asked Questions posted on the SWRCB website states that the agency does not have the resources to implement the program.

All of the peer reviews emphasized the importance of monitoring and adaptive management. In that respect, they echoed the peer review from 2002.

To the scientific consultants, effectiveness monitoring was not an afterthought. The ability to evaluate and adapt was an integral part of their recommendations. In the Task 3 Report describing their scientific basis and development of alternatives, the consultants stated: "Given the level of uncertainty in specifying a MCD that is protective of channel and riparian maintenance flow needs, it was concluded that effectiveness monitoring would be key to determining protectiveness in this context, particularly with respect to establishing whether additional water may be diverted" (R2 Resource Consultants, Inc. and Stetson Engineers, Inc., Task 3 Report Administrative Draft (updated March 2008) at 4-28). Similarly, in their discussion of effectiveness monitoring, they write:

“...questions remain as to (1) how implementation of the Policy would actually affect anadromous salmonids over longer time scales, say, in the range of 10 to 20 year time horizons that would correspond to 3 to 6 generations of anadromous salmonids, and (2) whether the currently proposed regionally protective criteria may be relaxed if they are indeed found to be overly conservative. The 10 to 20 year time frame should also be sufficiently long to allow detection of changes in channel morphology and composition of riparian vegetation. Such a determination requires development and implementation of a long-term monitoring program...” (R2 Resource Consultants, Inc. and Stetson Engineers, Inc., Task 3 Report Administrative Draft (updated March 2008) at 10-1).

R2 and Stetson based almost all of the scientific recommendations on the ability to engage in adaptive management. Other alternatives would require it too; this is a necessary consequence of decision-making in the face of uncertainty.

R2 recommended the policy effectiveness monitoring program and designed a framework proposal to implement that program because the consultants understood better than anyone the assumptions that must be made in order to develop any policy of this scale and the uncertainty inherent in such an enterprise. If the assumptions are wrong, or the estimates are confounded by other variables, an effectiveness monitoring program can help the agency find out, and to adjust accordingly. Otherwise, the agency may never know whether its decisions are having the intended effect, and bad decisions would be repeated, again and again.

Effectiveness monitoring should also improve fairness and accountability. Water right applicants have legitimate questions about costs. Over time, people will wonder whether their efforts have been worth it, and decision-makers should be able to answer.

We strongly urge the State Water Board to insist on the Policy Effectiveness Monitoring program.

We understand that the Division of Water Rights has a chronic funding and staffing shortfall. To accomplish this task, we therefore propose a mechanism to fund the program. Permittees can fairly be asked to support the purpose, as part of their ongoing mitigation and monitoring obligation. (*See* Joint Principles, p. 6.) Many stakeholders also stand ready to support additional state funding for that purpose. (*Id.*)⁴

Finally, we note that State Policies for Water Quality Control must be periodically reviewed and updated. (Water Code § 13143.) In the Joint Principles and in this letter we also recommend a periodic five year review of the effectiveness of the Policy. (Joint Principles, p. 6.)

Recommendations

36. *Amend Section 10 of the Policy to state that the State Water Board “shall” develop and implement a Policy Effectiveness Monitoring Program, rather than it “may.” Make conforming amendments to Section 10 consistent with this change.*
37. *Amend Section 10 to state that, five years from the effective date of the Policy, and every five years thereafter, the State Water Board will review the policy and determine whether it should be revised, consistent with Water Code § 13143 (“State policy for water quality control shall be periodically reviewed and may be revised.”). Rename Section 10 “Policy Effectiveness Monitoring and Review,” from “Policy Effectiveness Monitoring.”*
38. *Amend Section 10 to state that the State Water Board will develop the Policy Effectiveness Monitoring and Review Program within one year of the adoption of this policy. Amend the section to state that the State Water Board “will consider” consider the recommendations contained in Chapter 10 and Appendix K of R2 Resource Consultants (2007a) when implementing this program, rather than “may refer to.”*
 - 38.1. *Evaluate the potential for the Policy Effectiveness Monitoring and Review Program to assist permittees with the installation and upkeep of monitoring and reporting equipment so that the water user is responsible only for buying the devices, providing access, calling the Program if the*

⁴ Unlike our colleagues on the joint comment letter, we also believe that enforcement penalties are sometimes necessary, and we believe that where such penalties are assessed, payment to a supplemental environmental program to fund policy effectiveness monitoring would be a commendable alternative.

instrument goes down, and ensuring that data is reported as required (if Program staff does not do this as well).

- 38.2. *Consult with stakeholders and other resource agencies in the design of this program, and to evaluate the potential for university students or others to staff the Program.*
39. *Amend Section 10 to state that the State Water Board shall require mitigation payments with new permits to fund the Policy Effectiveness and Review Program.*
40. *Amend Section 10 to state that permits shall provide representatives of the Policy Effectiveness Monitoring and Review Program access to permittee property as necessary, pursuant to procedures set forth in the program.*
41. *Amend Section 10 of the Policy to state that the State Water Board will make all reports of diversions and stream flows available in a publicly accessible online form within two years.*
42. *Amend Section 10 to state that the State Water Board will provide for online electronic reporting of diversions and stream flows within two years.*
43. *Amend Section 10 to state that the State Water Board will provide for real-time electronic reporting of diversion and stream flow information and online public access within four years.*
44. *Consult with stakeholders and other resource agencies in the design of this program and to evaluate the potential for universities or other entities to participate in the maintenance and upkeep of this program.*

I. Policy Section 11. Enforcement

We strongly support a written enforcement policy. (See TU/PAS comments for the June 19, 2007 Workshop to Receive Information Regarding Policy Direction on Water Right Enforcement, available at http://www.waterrights.ca.gov/hearings/wrenf_comments.html and incorporated herein.) The alternative—an unwritten and inherently unpredictable enforcement policy—should be unacceptable to all.

Water Code section 1825 provides: “[i]t is the intent of the Legislature that the state should take vigorous action to enforce the terms and conditions of existing permits and licenses to appropriate water and to prevent the unlawful diversion of water.” The agency is obligated to 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 California. (Water Code § 275.) To perform these functions, the State Water Board may: “[i]nvestigate all streams, stream systems, portions of stream systems, lakes,

or other bodies of water,” and “[a]scertain whether or not water heretofore filed upon or attempted to be appropriated is appropriated under the laws of this state.” (*Id.* § 1051.)

In general, the draft Policy’s discussion of compliance assurance, prioritization, and enforcement actions is sound. But the Policy does not state whether the State Water Board intends to take any of these actions. The Policy also fails to articulate a plan for bring known “non-filers” into compliance. Nor does it articulate a plan to identify or bring into compliance illegal diversions that aren’t reservoirs.

We worry that it will not do enough to reestablish a functioning water rights system. As it stands, current practices punish water right applicants – especially those who seek to play by the rules. Most water diverters want to uphold the law. Because of the application backlog, however, prospective water users must wait many years between the time they file a water right application and the time they receive a decision from the agency. Applicants who seek a water right before diverting water, as the law requires, are punished most of all. Predictably, some people choose to divert first and seek a permit later. When those people are discovered diverting water without a permit, the agency almost always allows them to continue diverting water provided only that they file a water right application and pay annual fees. As a result, the most conscientious landowners remain in application limbo while watching competitors profit for having failed to file an application in the first place.

The current system threatens fish, wildlife, and other public trust resources. Most of the pending applications are for projects already constructed. Moreover, they operate without any interim conditions to protect instream beneficial uses.

Last, the current system severely impairs the SWRCB’s ability to properly evaluate and condition applications. The practice of applying for a water right after constructing a diversion and beginning operations, instead of before, makes the agency’s job harder. Decisions to impose terms and conditions requiring a project retrofit, or removal and relocation, are more difficult to make and implement than the same decision applied to new construction.

The recommendations that follow are intended not to extract punishment or to harm water users, but to ensure that unauthorized diverters are brought into the water right system, to protect beneficial uses, and to level the playing field so that water users who attempt to play by the rules will no longer be at an unfair disadvantage.

Recommendations

45. *Amend Section 11 of the Policy to state that Division of Water Rights staff will work with DFG, the Regional Boards, and other agencies to adopt within 1 year of the Policy a program and schedule for completing a systematic investigation of Policy area streams to identify unauthorized diversions, including those not viewable from aerial photos.*

46. *Amend Section 11 to state that State Water Board intends to bring all “non-filer” owners of existing diversions into the water right system. State that the State Water Board will (1) deliver notices to owners of identified non-filer reservoirs to file a water right application or demonstrate the existence of an adequate basis of right and (2) process applications for non-filer reservoirs in a timely manner.*
47. *For unauthorized reservoirs identified in the SED, deliver notices within 6 months of the adoption of the final Policy, and publish a schedule for processing their applications.*
48. *Complete and publish maps delineating the boundaries of subterranean streams flowing through known and definite channels within the policy area. Work with diverters within those boundaries to bring them into the water right system. Publish a schedule for doing so.*
49. *Amend Section 11 to state that the State Water Board will issue a cease-and-desist order (CDO) against any unauthorized diversion for which the property owner has received notice to file an application or demonstrate an adequate basis of right, but did not file a timely permit application within 1 year of the notice. Publish a schedule for doing so.*
50. *Amend Section 11 to state that the State Water Board shall amend the standard form of application to require representations under oath, and with appropriate proof of the date when any existing diversion subject to the application began, and how much water has been stored or diverted. Amend the application.*
51. *Amend Section 11 to state that the State Water Board will issue an administrative civil liability (ACL) complaint against any unauthorized diverter who fails to file an application for a water right within one year of the final adoption of this Policy, and state that this ACL penalty will be substantially greater than any ACL complaint issued for a unauthorized diverter who filed an application during that period.*
 - 51.1. *Develop and state the standard amount of an ACL for those who filed an application and those who did not, within one year of the Policy’s adoption.*
 - 51.2. *Identify the circumstances, if any, under which the State Water Board will impose an ACL for diverters with pending applications as of the date the policy is adopted.*
52. *Amend Section 11 to state that no permits for applicants with ongoing unauthorized diversions shall be granted while an enforcement proceeding for that applicant is ongoing.*

53. *Amend Section 11 to state that payment to a Supplemental Environmental Project (SEP) fund for the Policy Effectiveness Monitoring and Review Program is the preferred means to settle the ACL complaint.*

J. Policy Section 12. Watershed Approach

The Draft Policy Section 12 proposes that a watershed approach may be a viable alternative to individual processing of applications under the regionally protective criteria. (Policy, p. 40.) It calls for flexibility in cost sharing, real-time operations, and implementation of mitigation measures, provided that the results comply with the principles states in Draft Policy section 2.2. (*Id.*, p. 41.) We agree that a watershed approach is an appropriate alternative to the ordinary processing of applications and indeed will have significant potential to improve environmental benefits of water rights administration in the North Coast.

We also request that the State Water Board provide further definition to the essential elements of a watershed approach in its final Policy. In March 2007, TU joined ESH to submit a joint recommendation to the State Water Board to include a Watershed Management option in the Draft Policy. (*See Exhibit 3.*) We stand by those recommendations, and we request that the Board include a statement of essential elements for a watershed approach consistent with that paper. (*See Joint Principles*, pp. 3-4.) Below, we submit recommendations to further refine the proposal.

A watershed approach, if adopted by the Final Policy, will implement and may not amend the Water Code and existing rules. As a result, the State Water Board may grant a permit under this approach only in compliance with the minimum requirements for such approval, including findings that water is available for appropriation by the applicant, and that the diversion as mitigated will protect other beneficial uses of the affected water. Further, the State Water Board must comply with the California Environmental Quality Act in making its decision on the application. As a result, the watershed approach does not change the individual nature of the permit, or the individual obligation to comply with the permit terms and conditions. Instead, the approach has two potential benefits. First, it will encourage permit applicants to cooperate in the environmental reviews and hearings on their applications. Second, it will authorize the new permittees to cooperate with existing diverters to jointly manage their diversions, mitigation measures, or both.

Recommendations

54. *Add a statement recognizing that a right issued under watershed approach is individual to the diverter.*

a. Definition of Watershed Group.

Policy Section 12.1 provides that a watershed group is a group of diverters in a watershed who enter into a formal agreement to manage the water resources of a watershed. (Draft Policy, p. 41.) We support this definition. We recommend that the Final Policy further elaborate on the

eligibility requirements, which plainly must be more than the mere existence of such a formal agreement.

The membership in the agreement and Project Charter should include a critical mass of pending applicants in a given watershed, as well as existing diverters if (as we recommend below) the charter addresses coordinated operation of new and existing diversions. Since the watershed approach is unprecedented, we do not recommend that the Draft Policy set a specific percentage or other quantified threshold for participation by pending applicants. Instead, the Group Charter should show that the membership will be sufficient to achieve the goals, responsibilities, and tasks proposed in the Group Charter.

Further, the agreement and Project Charter should provide for meaningful participation by conservation groups, other community groups (such as the Farm Bureau), and other stakeholders who have direct interests or capacity to contribute to the goals and tasks of the Watershed Group.

Recommendations

55. *Require that the Project Charter demonstrate that the membership will be sufficient to achieve the goals, responsibilities, and tasks proposed in the Group Charter, taking into consideration diversions by non-member diverters (whether pending applicants or existing diverters).*
56. *Require that the agreement and Project Charter provide for meaningful participation by non-diverters, including conservation and other community groups.*

b. Project Charter

Draft Section 12.2 requires that the applicants submit a Project Charter that states goals, tasks, and responsibilities, as well as the key contents of required technical documents and schedule for their submittal. (Draft Policy, p. 41.) The State Water Board must approve the charter before work formally commences under it. We support these elements and recommend one further.

A Watershed Group should generally include diverters under existing rights (whether appropriative, pre-1914, riparian, or correlative), not just pending applicants, in order to permit coordinated operation of water diversions. A group limited to pending applicants will generally have limited capacity to influence overall water management in any watershed where existing diversions are already substantial.

Further, a Watershed Group should generally have as its goals both coordinated implementation of mitigation measures and coordinated operations. Otherwise, the group's tasks will be limited to the coordinated processing of applications, or implementation of non-flow

mitigation measures, which are unlikely to be the primary strategy for protection of aquatic resources.

Recommendations

57. *Require that the membership of the Watershed Group include on a voluntary basis existing diverters under all claims of right, as well as pending applicants, unless the Project Charter demonstrates that a more limited scope will be sufficient to achieve the goals, responsibilities, and tasks proposed in the Group Charter.*
58. *Provide that the goals for a Watershed Group include coordinated implementation of mitigation measures as well as operations, unless the Project Charter demonstrates that a more limited scope will be sufficient to achieve the overall purpose (stated in Policy Section 12.1) of effective management of water resources and protection of environmental quality.*

c. Required Technical Documents

Policy Section 12.3 provides that the Watershed Group will submit study results and other information which show compliance with the substantive requirements for approval and otherwise are sufficient for the environmental reviews of the pending applications. (Draft Policy, pp. 41-42.) The policy also provides that any group which proposes to coordinate operations of water diversions will submit a watershed management plan that provides for such coordination of operations and mitigation measures, monitoring and reporting, and a certification of financial capacity. (*Id.*, p. 42.)

As recommended above, coordinated operations should be the rule, not the exception, for such a group and thus for the plan scope. As stated in our comments on Section 8, the monitoring should address habitat conditions affected by the diversions, not just compliance with bypass and other requirements of the terms and conditions. Further, the plan should specify reporting not just for new permits, but for all diversions included in the membership. It should also include provisions for internal governance and dispute resolution.

Recommendations

59. *Require that the watershed management plan include: (i) provision for coordinated operations, unless the Project Charter demonstrates that a more limited scope will achieve the purposes stated in Policy section 12.1; (ii) objectives for flow and other habitat conditions to be monitored, (iii) specific reporting procedures for all diversions included in membership, not just new permits; and (iv) provisions for governance and dispute resolution.*

c. Approval of Technical Documents

Policy Section 12.4 provides that the State Water Board will review and approve these technical documents before issuing permits or approving petitions. (Draft Policy, p. 42.) It does not specifically state that these documents will be considered an element of the pending applications and thus will be subject to comment by other parties and ordinary hearing. It also does not address how the State Water Board will conduct the CEQA review. We believe that the hearings and CEQA reviews for applications subject to a Project Charter should generally be coordinated or indeed consolidated. Under this structure, common issues will be addressed once for all such applications, while issues idiosyncratic to individual applications will be addressed in a discrete manner (such as a specified hearing date, or subsections in the CEQA document).

Recommendations

60. *Provide that hearings and CEQA reviews of applications subject to a Project Charter will be coordinated or consolidated.*

d. Water Right Permit and License Terms

Section 12.5 provides that a permit or license for a diversion under a Project Charter will include a special term for assessing the effectiveness of the watershed management plan in meeting the requirements of the policy. (Draft Policy, p. 42.) We believe that it should also include a special term regarding coordinated operations which will occur as long as the Project Charter is in effect. For example, a term for minimum flows on a stream could be stated in the alternative: X cfs at the POD if the diversion is operated on a stand-alone basis (e.g., if the Project Charter is retracted under Section 12.6), or a specified range of variance around Y cfs at another location, in coordination with other diversions (e.g., as long as the charter is in effect).

Further, Section 12.5 provides that a special term will require a biological assessment every five years to evaluate the condition of fish and fish habitat in the watershed. (Draft Policy, pp. 42-43.) We support this requirement. As stated above, we also recommend that the water management plan be required to proposed and the special term specify, the objectives for fishery and habitat condition, as well as the methods to monitor and assess whether these objective are being achieved.

Recommendations

61. *Provide that hearings and CEQA reviews of applications subject to a Project Charter will be coordinated or consolidated.*
62. *Require that the watershed management plan propose, and a special term require, statement of the objectives for fishery and habitat conditions and the specific methods to monitor and analyze achievement f those objectives.*

e. Retraction of State Water Board Approvals

Section 12.16 of the Draft Policy provides that the State Water Board may retract its approval of the Project Charter and related documents, if the tasks (whether preparation of technical documents, or implementation of special) are not being timely or adequately performed. We recommend that the State Water Board use a range of procedures, including ACLs, to address and correct such non-performance. Retraction may be an unnecessary or counterproductive remedy for unintentional and infrequent non-performance.

Recommendations

63. *Provide for a range of remedies to address non-performance of the watershed management plan.*

K. Policy Implementation; SWRCB Staffing and Budget

In the TU/PAS Petition, we requested that the State Water Board adopt a clear time schedule for processing water right permits and completing its watershed investigations. We noted that uncertainty and delays in water right processing combine with chronic budget shortfalls to create a vicious cycle that erodes confidence in the agency's capacity and undermines the rule of law.

We believe that demonstrating the agency's interest in restoring a functioning water rights system and a time schedule for change will result in additional resources to get the job done. We know that our groups and many other stakeholders have an interest in seeing the agency adequately staffed and funded and this Policy implemented.

Recommendations

64. *Publish a schedule for implementing the Policy concurrent with final adoption. The schedule should include, among other things, estimated times for carrying out the following tasks:*
- 64.1. *Processing currently pending applications.*
 - 64.2. *Identifying unauthorized diversions, including direct diversions and diversions from a subterranean stream flowing through known and definite channels.*
 - 64.3. *Delivering notice to identified "non-filer" diversions to either file an application or demonstrate an adequate basis of right, and processing those applications.*
 - 64.4. *Initiating and completing CDOs and ACLs, if any.*

- 64.5. *Collecting adequate information about riparian and groundwater diversions to inform water availability and stream flow studies necessary to administer the permitting program.*
65. *Publish an estimate of the staff and budget resources required to implement A.B. 2121 according to this schedule and to carry out SWRCB's other statutory duties.*
66. *Evaluate the potential to work with stakeholders and outside institutions to prepare an independent audit report on staff and budget requirements necessary to carry out the law.*

IV. **CONCLUSION**

There is nothing easy about administering water rights in the West. The Draft Policy is a credible and admirable undertaking meant to solve a complex problem that goes back many decades. We close by restating our most fundamental point, which drives our engagement with all parties on these issues—we remain committed to the task of solving this complex problem, and we will work with you and with water diverters to deliver meaningful progress in the region.

Thank you for your consideration of our comments.

Sincerely,



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**Exhibit 1 - Dr. Bill Trush, McBain & Trush, Draft A.B. 2121 Instream Flow Policy:
Framework Proposal for Defining Stream Management Objectives, April 30, 2008
("MTTU 2008")**

**Exhibit 2 - Comment letter by TU-PAS and WB-ESH stating joint principles, May 1, 2008
("Joint Principles")**

Exhibit 3 - TU/ESH Watershed Approach white paper, March 2007

Exhibit 4 - TU Water & Wine press release, March 19, 2008

Exhibit 5 - TU Water & Wine booklet, March 19, 2008