



May 1, 2008

Ms. Karen Niiya
Senior Engineer, Division of Water Rights
State Water Resources Control Board
1001 I Street, 2nd Floor
Sacramento, CA 95814

VIA ELECTRONIC MAIL – AB2121Policy@waterboards.ca.gov

Re: Comment Letter – AB 2121 Policy

Dear Ms. Niiya:

Defenders of Wildlife, Russian Riverkeeper and the California Coastkeeper Alliance (which represents 12 Waterkeeper groups spanning the entire coast) are conservation organizations involved in the preservation of anadromous fish species and aquatic habitats. Collectively, the three groups represent over 120,000 members statewide and have regularly advocated for increased stream flows in California rivers. We welcome this opportunity to provide comments on the proposed Draft Policy for Maintaining Instream Flows in Northern California Coastal Streams (AB 2121 Policy or Policy).

The recent closure of the salmon fishery in California is a wake-up call that California's water rights system desperately needs an upgrade, and the Policy is an important start. We acknowledge and appreciate the significant level of analysis and work that clearly went into the proposed Policy. We provide comments below on the details of the Policy, but must mention up front that without adequate funding and staffing, any Policy—no matter how well developed—is likely to fail. The Water Rights Division (“Division”) currently has a backlog of over 500 pending water right applications and over 600 pending water transfer petitions. This backlog creates tremendous lag in the process of administering water rights. Water users are often left frustrated, frequently initiating diversions without State Water Board permission. Public trust resources are ultimately left unprotected due to lack of oversight. The Policy does nothing to tackle this implementation and enforcement roadblock. This is of particular concern in light of the fact that the Policy fails to discuss the removal of more than 1771 illegal diversions and dams that already exist. At a minimum, the Policy should commit the State Water Board to assess and post on its website its proposed workplan for implementing the first five years of this Policy and for addressing these illegal diversions and dams, and to provide a calculation of the resources required for these tasks.

In regulating water rights in California, the SWRCB has a duty to protect public trust resources, ensure reasonable use of water, maintain necessary stream flow levels, and assess the availability of water for appropriation. The Division must necessarily carry out these tasks on a watershed basis due to the dynamic nature of hydrologic systems. A watershed's hydrologic table is the sum of its parts, and aggregate diversions have a tremendous effect on public trust resources throughout a particular stream system. Therefore, as an integral part of this Policy, the SWRCB should continuously consider the effects of regulated activities across entire watersheds.

To effectively protect public trust resources, the Division should in particular assess water availability for entire watersheds and the aggregate effects of all diversions on fish and wildlife. A majority of the applications in the Division's backlog are for water rights on the North Coast where a particular stream system may contain dozens of unauthorized diversions. The cumulative effect of these diversions, some smaller than ten acre-feet per year ("afy") and some in excess of 1,000 afy, is a decrease in stream flow levels and an increase in sediment levels, both of which adversely affect threatened Coho, Chinook and Steelhead fisheries.

In addition to these overarching comments, Defenders of Wildlife, Russian Riverkeeper, and California Coastkeeper Alliance submit the following recommendations for bolstering the effectiveness of the Policy:

The SWRCB Should Draft Additional Policy Provisions to Effectively Protect Public Trust Resources

A broad perspective is necessary to assure continued maintenance of stream flows and protection of public trust resources. We make the following suggestions, intended to help create an effective, watershed-focused Policy:

- Ground and surface water are connected to each other and as a result, pumping ground water can adversely affect river flows. Therefore, the SWRCB should conduct studies of subterranean streams to determine the areas where groundwater extraction may affect surface flows. The SWRCB should publish these analyses and related maps for use by groundwater users, permittees, decisionmakers and the public.
- The SWRCB should require all water users on a watershed to continuously monitor diversions and stream flows, and to report the data to the SWRCB continuously as it is being gathered. This system will allow the SWRCB to monitor stream flow levels across entire watersheds and give it the flexibility to make efficient management decisions.
- The DFG-NMFS Draft Guidelines recommend a season of diversion from December 15 through March 31. However, the Policy has stipulated a season beginning in October. The SWRCB asserts in the Policy that the earlier date is still protective of fishery resources (Page 3). However, evidence to the contrary exists. The DFG-NMFS Draft Guidelines notes that the SWRCB's own water rights proceedings for the Russian River, Navarro River, and Napa River watersheds confined diversions to the period from December 15 to March 31. This period is the time of highest winter flow and the time when water withdrawals would be least likely to adversely affect fisheries resources. Additional water withdrawals between September 1 and December 15 may unnecessarily

and significantly affect salmonids, because that is a time when flows are relatively low, and high flows are infrequent and sporadic.¹

- The section entitled “Principles for Maintaining Instream Flows” (page 2 of the Policy) is well-balanced and generally effective. The following additional principle should be incorporated into this section to increase effectiveness: “Dams and other structures creating a barrier to fish passage that are currently permitted will be reviewed to determine if they pose a threat to salmonids, other fish and wildlife, necessary habitat, and water quality.” In addition, these principles should be used to formulate the Minimum Bypass Flow calculations outlined on page 4.
- There are thousands of diversions within the Policy area that currently operate without safeguards to protect fish and that 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 rights. Without factoring these diversions in to its calculations, SWRCB 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 SWRCB is unlikely to accomplish its statutory mandate of “maintaining instream flows.” This is particularly true for existing summertime diversions, which may account for the greatest threat to the recovery of fish populations. The Policy cannot achieve success in safeguarding the public trust unless it brings in *all* diversions, particularly non-filers (see above regarding enforcement).
- The “Watershed Approach” outlined on page 41 reflects the need to address water holistically. We support watershed-based management of water quality and flows. However, the definition of “Watershed Group” should be changed to allow and ensure the involvement of interested stakeholders and environmental groups other than diverters in management decisions. It is necessary to include groups whose mission is the protection of public trust resources to, at a minimum, assist the understaffed SWRCB in overseeing public trust management. The Policy should also flesh out the monitoring requirements for Watershed Groups and require continuous monitoring with instantaneous transmittal of data.
- The Policy should mandate universal monitoring and online reporting of both diversions and stream conditions by all water users. Monitoring and reporting in California lags far behind that of other Western states and must be improved.
- The Policy should specify requirements for monitoring to assess Policy effectiveness, and include provisions that will allow the State to accurately assess the effectiveness of the Policy every five years, to see if it is on track to maintaining flows in the administration of water rights.

The SWRCB Should Implement Review Procedures for the Policy and Individual Permits

No provision currently exists within the Water Code or the SWRCB’s regulations requiring a review of outstanding permits and licenses. Although the hydrographs of many North Coast streams and tributaries change from year to year, and will change more rapidly in

¹ Draft Guidelines for Maintaining Instream Flows to Protect Fisheries Resources Downstream of Water Diversions in Mid-California Coastal Streams, DFG-NMFS, 2002, page 5.

coming years due to climate change, there is no mechanism for reviewing a water right once issued to determine ongoing water availability. Effective management of salmonids requires the flexibility to make immediate decisions regarding stream flows. The Policy will not be effective unless the SWRCB receives real-time, instantaneous monitoring data to enable review of the Minimum Bypass Flows and Maximum Cumulative Diversions.

The SWRCB should also review the Policy as a whole after five years to determine its effectiveness. This review should be conducted in collaboration with the California Department of Fish and Game and the National Marine Fisheries Service and should be based on certain parameters of success, including the following:

- Steelhead and Salmon population and survivability trends for the 5-year period.
- Success in achieving the Minimum Bypass Flow and Maximum Cumulative Diversion criteria.
- Ability of the SWRCB to make efficient management decisions.
- Ability to maintain stream flows on watersheds where numerous variances have been issued.

The SWRCB Should Include Conservation Measures in the Policy

Under current standard permit terms, permittees may be required to implement a water conservation plan. 23 CCR § 780. Features of the plan may include but are not necessarily limited to:

- Reclaiming a portion of the water allocated,
- Using reclaimed water provided by another entity,
- Reducing agricultural tailwater or return flow,
- Suppressing evaporation losses, and
- Installing efficient water measuring devices.

The SWRCB includes the aforementioned permit term in all permits. However, the conservation plan is not mandatory and often is not required. It is imperative that the Policy mandate conservation measures. Restrictions on bypass flows and diversion amounts are appropriate, but those alone will not maintain adequate stream flow levels. Demand-side restrictions are crucial, particularly during seasons when flows are insufficient to provide adequate water supplies while maintaining anadromous fish habitat.

In implementing conservation measures, attention should be paid to the net impact of the measures on flows overall. During the summer of 2007, as flows on the Russian River dipped to extremely low levels, the SWRCB issued Order WR 2007–0022. This order required Sonoma County Water Agency (“SCWA”) to implement conservation measures to reduce diversion amounts 15 percent from July to October. Despite this stringent mandate, actual reductions in pumping did not occur. The SCWA and its contractors claimed to have achieved a 21% reduction in pumping from the Russian River. However, the demand reduction was actually less than half of that due to groundwater pumping in lieu of direct diversions. The *net effect* of that

action was the dewatering of many smaller tributaries along the Russian River, including Foss Creek.

Conservation measures are entirely appropriate for diversions within the geographical scope of the Policy. The SWRCB should *require* conservation plans for water right applications on the North Coast, rather than simply conditioning permits with the possibility of a future conservation requirement that the regulatory agencies and permittees will need to scramble to meet rather than plan for. Water users in the municipal, industrial and agricultural sectors can realize tremendous and cost-effective net reductions in water use by implementing new technologies such as high-efficiency drip irrigation. Additionally, modest changes to landscaping can help save significant net amounts of water. Conservation plans are integral to the maintenance of instream flows and should be included and mandated in the Policy.

The SWRCB Should Provide More Details to Prevent Over-Use of Variances in the Policy

The Policy opens up a potentially serious loophole by not clarifying the circumstances that would merit a variance. The Policy states that “variances from [the] regionally protective criteria may be obtained if site specific study demonstrates that less restrictive criteria is protective of fishery resources for a specific diversion and its watershed.” The Policy is structured to provide general guidelines for maintaining instream flows to protect salmonids. Thus, the Policy should, by default, specifically reflect the needs of any salmonids occurring in watersheds within its geographic scope, and flesh out the circumstances under which such a variance would be appropriate. The SWRCB should also remain vigilant in considering applications for variances so that the exceptions to the Policy “do not make the rule.” It is to be expected that, due to the growing scarcity of water, many applicants will request variances, and each will argue that their request is insignificant. The variance provision should be clarified to ensure that variances remain the rare exception, rather than the rule.

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Thank you for allowing us the opportunity to comment on the Policy. We commend the SWRCB on its effort to protect salmonids and public trust resources on the North Coast and throughout California, and look forward to working with the SWRCB to strengthen the Policy further and ensure its full implementation and enforcement.

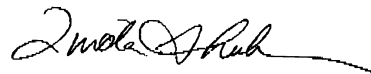
Sincerely,



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