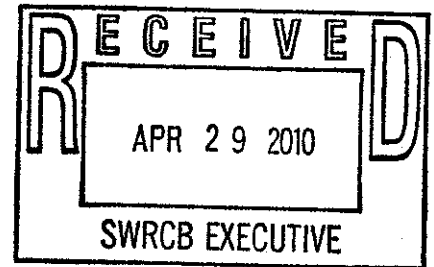


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April 29, 2010

VIA E-MAIL (comentletters@waterboards.ca.gov) AND U.S. MAIL

Ms. Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, California 95814

Re: Comment Letter – AB 2121 Policy

Dear Ms. Townsend:

This firm represents the North Gualala Water Company (“North Gualala”). On behalf of North Gualala, I submit the following comments on the draft “Policy For Maintaining Instream Flows In Northern California Coastal Streams” (the “Draft Policy”) that was posted on the SWRCB’s Division of Water Rights website on April 27, 2010.

1. In response to our previous comment, the Draft Policy has been amended to add a new sentence at the end of the first paragraph of section 2.2.2. This new sentence states:

When a site-specific study has been conducted pursuant to an approved study plan and an approved report of the study has been accepted by the Division, the regional criteria will not be considered for parameters for which proposed site-specific criteria have been developed.

While this new sentence generally addresses our previous comment, the phrase “approved report” does not make sense here, because there is no provision in the Draft Plan for the report to be “approved” before it is reviewed and accepted by the Division. To address this problem, we request that this sentence be edited as follows:

When a site-specific study has been conducted pursuant to an approved study plan and an approved report of the study has been reviewed and accepted by the Division, the regional criteria will not be considered for parameters for which proposed site-specific criteria have been developed.

2. In the fourth paragraph of section 2.2.2, the new Draft Policy contains the following sentence with the indicated edits:

Ms. Jeanine Townsend

8640\North Coast Instream Flow Policy\L042910.wpd

April 29, 2010

Page 2

The State Water Board ~~shall~~may consult with DFG regarding the alternative approach proposal, study plan, and study results.

It is not appropriate for the SWRCB's policy to require such consultation with DFG on all of these matters in all cases. Instead, the SWRCB should maintain its position as an independent decision maker, and the policy should provide that the SWRCB has the discretion to decide whether or not to engage in such consultation on each matter in each case. We therefore request that this sentence be edited back to its prior language, so that it reads as follows:

The State Water Board may consult with DFG regarding the alternative approach proposal, study plan, and study results.

3. In the sixth paragraph of section C.1.0 of Appendix C, the following sentence has been edited as follows:

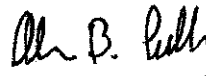
The State Water Board ~~shall~~may consult with DFG regarding the recommendations of the reconnaissance level habitat assessment and the study plan.

To maintain the SWRCB's policy as an independent decision maker, the policy should provide that the SWRCB has the discretion to decide whether or not to engage in such consultation in each case. We therefore request that this sentence be edited back to its prior language, so that it reads as follows:

The State Water Board may consult with DFG regarding the recommendations of the reconnaissance level habitat assessment and the study plan.

Copies of the pages of the new Draft Policy, with these requested changes indicated, are enclosed. Thank you for giving us the opportunity to provide these comments.

Very truly yours,



ALAN B. LILLY

ABL:tmo
Encls.

To ensure maintenance of natural flow variability and protection of the biological functions dependent on it, the maximum cumulative diversion rate is set at the largest value of the sum of the rates of diversion of all diversions upstream of a specific location in the watershed.

The maximum cumulative diversion rate regionally protective criterion is equal to: five percent of the 1.5-year instantaneous peak flow.

For projects located above anadromy, the maximum cumulative diversion rate criterion shall be evaluated at POIs at and/or below anadromy in order to identify the allowable rate of diversion at project PODs. The maximum cumulative diversion rate puts limitations on the cumulative rate of water withdrawal in a watershed, not necessarily the rate of withdrawal at a point of diversion. The rate of diversion limitation for a project is not necessarily equal to the maximum cumulative diversion rate limitation in a watershed. This is because the project's rate of diversion limitation is based on an evaluation of whether the project, together with existing diversions, causes an exceedance of the maximum cumulative diversion rate criterion at points of interest at and/or below the upper limit of anadromy. Guidelines for calculating the maximum cumulative diversion rate criterion and for determining whether a limit on the rate of diversion is needed are provided in Appendix A, Section A.1.8 and Appendix B Section B.5.2.3.

2.2.2 Site-specific studies

~~If the diverter believes that the regional criteria are overly protective for a specific project, the diverter may propose site-specific criteria. The diverter may implement one or more of the regional criteria in combination with site-specific criteria. Site-specific studies may be conducted to obtain site-specific criteria that identify more precisely than the regionally protective criteria the instream flow needs of a particular location. When a site-specific study has been conducted pursuant to an approved study plan and an approved report of the study has been accepted by the Division, the regional criteria will not be considered for parameters for which proposed site-specific criteria have been developed.~~

reviewed and

-Appendix C describes the data and reporting requirements for the initial reconnaissance level habitat assessment, the development of the study plan from the results of the initial habitat assessment, and the reports documenting the results of a site-specific study. Appendix C also provides flow management objectives as guidance for site specific studies. The objectives define acceptable cumulative changes in stage and acceptable minimum depth and velocity requirements for salmonids.

An alternative A-site-specific approach may be proposed to develop criteria for parameters other than a minimum bypass flow, maximum cumulative diversion, or season of diversion. A description of the alternative approach and a study plan shall be submitted to the State Water Board for review and approval prior to commencement of field work and analysis.

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The alternative approach and any proposed site-specific criteria shall be consistent with the principles described in Section 2.1. The State Water Board ~~shall~~^{may} consult with DFG regarding the alternative approach proposal, study plan, and study results. DFG shall be provided a reasonable period of time (not less than 30 days) to review and comment before the State Water Board provides the applicant with written recommendations.

All field work, analysis, and recommendations involving fishery habitat evaluations shall be performed by a qualified fisheries biologist.

2.3 Assessment of the Cumulative Effects of Water Diversions on Instream Flows

The cumulative effects of water diversions on instream flows needed for the protection of fishery resources shall be considered and minimized. This policy requires the evaluation of whether a proposed water diversion project, in combination with existing diversions in a watershed, may affect instream flows needed for fishery resources protection. In addition, the State Water Board must find that unappropriated water is available to supply a proposed project prior to issuing a water right permit. (Wat. Code, § 1375, subd. (d).) This policy requires a water right applicant to conduct a water availability analysis that includes (1) a water supply report that quantifies the amount of water remaining instream after senior diverters are accounted for, and (2) a cumulative diversion analysis to evaluate the effects of the proposed project, in combination with existing diversions, on instream flows needed for fishery resources protection. Applicants may use regional criteria, site-specific criteria, or a combination of the two in the cumulative diversion analysis for assessing whether the proposed diversion affects the instream flows needed for fishery resources. The water supply report and cumulative diversion analysis are described in Appendix A, and guidelines for completing the analyses are provided in Appendix B.

Appendix A, ~~Section~~^{Sections A.1.8.1 and A.1.8.2} specifies exemption criteria for projects on Class III streams. For projects on Class III streams, ~~if above anadromy. If the analysis shows (1) a project can operate without a minimum bypass flow and maximum rate of diversion and still be protective of fishery resources, and (2) that it can operate in a manner that does not negatively affect the winter low flow on Class II streams, the diverter may be able to operate without application of the regionally protective criteria established~~^{the instream flow requirements prescribed by this policy.}

2.4 Onstream Dams

An onstream dam is a structure in a stream channel that impedes or blocks the passage of water, sediment, woody debris, or fish. Onstream dams can directly impact salmonids if they prevent fish passage and block access to upstream spawning and rearing habitats. Onstream dams can intercept and retain (1) spring and summer flows without providing bypass flows, (2) sediments/gravels that would otherwise replenish

Appendix C. Guidelines for Site Specific Studies

C.1.0 Site-Specific Studies for Diversion Season, Minimum Bypass Flow and/or Maximum Cumulative Diversion

This policy implements principles for protection of instream flows for fishery resources through the use of a season of diversion, a minimum bypass flow, and a maximum cumulative diversion rate. The season of diversion allows diversion to occur during periods in which instream flows are naturally high to prevent adverse effects to fish and fish habitat. The minimum bypass flow provides protective streamflows for fish spawning, passage, and rearing, and is implemented in the policy as an instream flow below which no diversion is allowed. The maximum cumulative diversion rate provides a limit on the cumulative rates of diversion of all authorized diverters in a watershed to minimize the effects of water diversion on natural flow variability and the various biological functions dependent on that variability.

The regionally protective criteria provide the applicant the opportunity to show that operation of their project will not cause adverse effects to instream fishery resources without the need for conducting expensive site specific fishery studies. To ensure protectiveness throughout the policy area, the regional criteria were designed to protect sites with the greatest instream flow needs. At some sites, therefore, more than adequate flows may be provided by the regional criteria.

Studies may be conducted to obtain site specific criteria that identify more precisely the instream flow needs of fishery resources. The applicant may propose implementing one or more regional criteria in combination with site specific criteria. Site specific studies consist of a reconnaissance-level habitat assessment, development and implementation of a site specific study plan, and a cumulative diversion analysis.

The studies should be guided by the principles and direction stated in section 2.1 and the definitions of minimum bypass flow and winter low flow contained in section 2.2 and Appendix I. The flow management objectives set forth in Appendix C section 1.1.2 may be used as a guide to preparing and evaluating site specific studies.

Provisions for alternative approaches to site specific studies are described in Section C.1.3.

A reconnaissance-level assessment shall be performed to obtain field data to be used in developing a site specific study plan. ~~To expedite processing, results~~ Results of the reconnaissance-level habitat assessment and the details of the proposed study plan that describes the work that will be performed in the site specific study ~~should~~ shall be submitted for State Water Board review and approval prior to commencement of site specific studies. The State Water Board ~~shall~~ may consult with DFG regarding the recommendations of the reconnaissance-level habitat assessment and the study plan. DFG shall be provided a reasonable period of time (not less than 30 days) to review and

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