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VIA EMAIL AND U.S. MAIL

May 1, 2008

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

Re: Comment Letter re December 2007 Draft Policy For Maintaining Instream Flows in Northern California Coastal Streams

Dear Ms. Townsend:

Please consider the following comments on the December 2007 Draft Policy For Maintaining Instream Flows in Northern California Coastal Streams (the "Policy") and accompanying Draft Substitute Environmental Document.

Section 4.1.2 Water Supply Report

Much of the information required to be submitted as part of the water supply report is overly broad, burdensome, and may not even exist. For example, the policy requires applicants to supply information regarding the demand and season of diversion of riparian and pre-1914 appropriative water right holders and claimants. (Policy pp. 10-11.) This information is supposed to be used in the water supply analysis to demonstrate that there is sufficient unappropriated water to supply the proposed project. (Policy pp. 10-11, A1-4.) Unfortunately, there is no database or other document depository that contains complete information regarding riparian and pre-1914 appropriative water right holders and/or claimants. If no statements have been filed with the Board regarding such claims, it is virtually impossible to determine whether they exist.

The Policy, as currently written, also requires applicants to note on maps the locations of all points of diversion within the watershed between the proposed point of diversion for the project and the river/ocean used above. (Policy p. 12.) This map must also include riparian users and pre-1914 rights. Even if the applicant were to do a field survey of the entire watershed, it would be impossible to identify all riparian users and pre-1914 rights. Again, such information is overly burdensome and nearly impossible to collect.

Section 4.1.4 Determination of the Upper Limit of Anadromy

The Policy defines the upper limit of the anadromy as the upstream end of the range of anadromous fish that currently are, or have been historically, present year-round or seasonally, whichever extends the farthest upstream. (Policy p. 12.) The term "or have been historically" is vague and potentially overbroad. There is no limit as to how long ago anadromous fish had to be present in a certain portion of a stream in order for it to be designated as the upper limit of anadromy. Thus, there may be evidence that anadromous fish inhabited portions of a stream 75 years ago, but have not been present since; yet under the existing policy, that portion of the stream would be considered the upper limit of anadromy.

Further, by tying the definition of upper limit of anadromy to historical presence, the Policy ignores existing physical conditions that may make defining certain portions of waterways as the upper limit of anadromy impractical or nonsensical.

The policy also provides that the upper limit of anadromy may be located on an ephemeral stream. Extending the upper limit of anadromy to ephemeral streams is also highly impractical and has no basis. It is extremely rare that anadromous fish utilize ephemeral streams as habitat, and to the extent such streams are used, it can only be for brief periods. There is thus no apparent basis to include ephemeral streams in the definition of upper limit of anadromy.

Section 4.2.1 Determination of Stream Class by the State Water Board

The Policy provides that the "presence of habitat to sustain fish," shall be used as an indicator to designate Class I streams. (Policy p. 18.) This term is too broad and over encompassing. The Policy should specifically define the indicators of fish habitat, such as vegetation type, soil type, depth, etc., which, if present, would be suitable fish habitat and trigger Class I designation.

Sections 4.4.1 and 4.4.2 Onstream Dams on Class I and II streams

The Policy requires water right applications for onstream dams on Class I and II streams built prior to July 19, 2006, to be submitted within one year after the Policy is adopted. (Policy pp. 22-23.) This time frame is much too short given the significant amount of information and data that must be collected, analyzed, and submitted by applicants under the Policy. The deadline to submit water right applications for onstream dams on Class I and II streams built prior to July 2006 should be extended to two years from the date of the adoption of the Policy.

Section 7.0 Passive Bypass Systems

Under the Policy, the requirements for minimum bypass flow and maximum rate of diversion must be met on an instantaneous basis. (Policy p. 29.) This is a highly impractical requirement that would impose financial burdens on landowners and have virtually no benefit for instream flows. USGS gauges do not have the capability to provide real-time data, meaning that each individual diverter must install additional gauge systems to supply the Board with real time information. With the extensive policies being put in place, there is no need for real time data of flow rates. Individual diverters should not be saddled with this burdensome cost if it will have no practical benefit.

Section 11.1.1 Enforceable Terms and Conditions of Permits, Licenses and Orders

Section 11.1.1 declares that the Board will consider adding terms and conditions to existing water rights or revising ambiguous or inappropriate terms and conditions when analyzing petitions. This policy is extremely vague. There is no description of the types of additional terms and conditions the Board is considering imposing on existing water rights. Nor is any explanation given as to what existing terms and conditions the Board considers ambiguous or inappropriate.

The Board should also consider whether adding terms to existing permits and water rights constitutes a taking of private property.

Section 12.5 Water Right Permit and License Terms

The Policy requires a special term in water right permits and licenses issued to members of a watershed group, which would require the performance of a biological assessment every five years to evaluate the condition of the fish and fish habitat in the watershed.

This is an extremely burdensome requirement, and is not necessary. If minimum flows are being met, no further biological assessment should be required.

Section 12.6 Retraction of State Water Board Approvals

If the biological assessments required for watershed group permit holders show a decline in fish population or degradation of fish habitat, the Policy allows the Board to retract its approval of the watershed group.

This policy is also too broad. The Policy should require a nexus between the diversions of the watershed group and any resulting decline in fish population. As written, the Policy would allow

the Board to revoke approval of the watershed group even if the decline in fish population is due to causes completely unrelated from diversions or other activities of the watershed group.

Draft Substitute Environmental Document

As part of its consideration of the Policy, the Board has drafted a Substitute Environmental Document ("SED") to review and analyze the potential environmental impacts of the Policy under the California Environmental Quality Act ("CEQA"). The Board claims that it is exempt from CEQA's requirement for preparation of an EIR, negative declaration and initial study because the Policy falls under a list of state certified regulatory programs. Certified regulatory programs, however, remain subject to other core CEQA policies, such as the requirement to identify a project's adverse environmental impacts, to mitigate those impacts by adopting feasible alternatives and mitigation measures, and to justify its action based on specific economic, social, or other condition. (14 Cal Code Regs § 15250, 15252; *Sierra Club v. State Bd. Of Forestry* (1994) 7 Cal.4th 1215.) As a CEQA document, the SED wholly fails in this regard.

The SED identifies numerous potentially significant direct, indirect, and cumulative environmental impacts that would result from the adoption of the Policy. Yet, the SED does not contain a single mitigation measure to mitigate these impacts. CEQA requires public agencies to analyze and mitigate, where feasible, all potentially significant direct, indirect, and cumulative impacts caused by the project. (Pub. Res. Code §§ 21002, 21065; 14 Cal Code Regs 15126.2(a), 15126.4(a); *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645.) The SED fails to do this. Thus, the SED is entirely inadequate and must be redrafted to analyze and consider all potentially feasible mitigation measures.

Thank you for your consideration of these comments. Please do not hesitate to contact me with any questions.

Best regards,

Barbara A. Brenner

cc: Michael Davis
Roger J. Hilarides