

April 26, 2008

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State Water Resources Control Board

Re: AB 2121, Draft Policy

If I must confine my comments on the Draft Policy to a critique of the content of the Draft itself, so be it. I need not cite chapter and verse of the Draft because these are plain and simple facts.

In reading the Substitute Environmental Document associated with the Draft Policy I discovered a number of omissions of testimony that disagree with the conclusions of the Division of Water Rights (Division). In particular, there is a loss of information regarding "Potential Indirect Impacts on Municipal, Industrial, and Agricultural Water Use and Related Impacts on Other Environmental Resources. Quite the opposite of what the Division claims, the loss of, or cost of retrofitting existing farm ponds, and the extreme cost of permitting new farm ponds will cause:

1. Loss of agricultural production capacity for crops and livestock
2. Loss of Williamson Act Status
3. Subdivision of property
4. Land use changes from agricultural toward suburban and urban uses
5. Loss of wildlife habitat

Within the Draft Policy itself, the claim that mature salmonids need water deeper than 9 inches to navigate a stream is simply mistaken. I've personally observed many fully grown salmonids navigate, upstream and downstream, court and "play" in water only 5 inches deep. I measured the depths with a ruler and I got my feet wet doing it. But then, these were Russian River fish, not Washington or Oregon fish (those originally theorized about by the consultants). Basing Instream Flow requirements on the formula chosen by Division is a needlessly harsh and arbitrary decision, and certainly doesn't reflect reality in this part of the Policy area.

Cost estimates submitted by Draft Policy consultants in various appendices, for everything from application consultants to bypass construction, were unrealistically low even at the time the Draft Policy was released for comment. By the time these rules are implemented, such estimates will be ridiculously low. For the 300 plus applications currently stalled by (often irrelevant) protests, cumulative costs from start to finish will easily exceed \$40-60 million.

Most erroneously, this Draft Policy would impose the strictest possible standards on a large 5 county area without any proof of the validity of its assumptions. There has never been a small watershed sized project to verify whether these formulae even create the stream flows the consultants insist are necessary. Nor has there ever been any study confirming the claim that implementing these regulations will improve conditions for ESA listed fish.

The costs and difficulties proposed by the policy, will be borne solely by the Water Permit Applicant, and are so far out of line with even the theoretical benefits, the net result will be two-fold.

First, property owners will just stop applying for a permit to impound or divert water. Some will even drop pending applications as a result of the tortuous demands of the Division. While the DWR may take credit for a reduction in the backlog of applications as a consequence of dropped applications, there will be no increased Instream Flow. People will still divert, but they just won't apply for the water right. The Division already confesses they cannot enforce the laws with regard to thousands of "illegal" diverters statewide. According to Division staff, there are over 1,000 such diversions in the Policy area alone. This Policy will add to those numbers without actually addressing the issues.

Secondly, and even more seriously, this misguided Policy will result in some water users discontinuing their use of winter-impounded water. They will instead, revert to their riparian rights to the tributaries or pump from the ground during the summer months. The result will be increased loss of salmonid juveniles due to lower water levels and higher water temperatures. The Division actually admits to this possibility in the Draft Policy, but apparently doesn't think it serious enough to temper their regulation back to a reasonable position. It seems that small farms will not be the only victims of death by regulation. The fish they are trying to save will suffer the same fate.

It is truly unfortunate that the instructions for comment on the Draft Policy limit submissions to those pertaining to the content of the Draft Policy itself. As a result, legislators, administrators, and the general public may never learn what a travesty this Draft Policy is until it tragically becomes a real Policy. They may never know of the extraordinary influence that Trout Unlimited has exerted over the Division of Water Rights for over 15 years. They may never understand that the Division apparently stalled processing Applications by accepting invalid or irrelevant Protests. They may never know of the outrageous costs and delays the Applicants have had to endure at the doorstep of the Division. They may never ask why applicants receive so much grief while the scofflaws go unregulated.

Worse yet, people will not learn how or why the AB 2121 Legislation (which enables this Draft Policy) was snuck through the Assembly as a trailer to another bill, bypassed discussion and review, and passed by a 3 vote majority at 3:00 a.m. People won't find out why the Division has spent \$1.5 million on the consultants (plus the Board

only knows how much money on staff time) but cannot afford further workshops to educate the public about the Draft Policy.

And last, they may never understand why permit Applicants feel like “water boarding” is not just a CIA interrogation technique, but also a punishment for Applicants who attempt to follow the law. I sincerely hope the Division has not become so entrenched in the position outlined in the Draft Policy that they waste more time and money trying to justify buying a “bum steer”. Limiting public comments to “Draft Policy content” only appears to serve the purpose of obscuring how badly flawed was the process of developing the Draft Policy.

The sad truth is that we do need a policy for Instream Flows, but we need one that works. This Policy needs to be scratched. Let Applicants return to the standards of the Draft GUIDELINES, which were already “conservative” in the words of Steve Herrera. This Draft Policy simply doesn’t accomplish the real goals of AB 2121, to streamline the application process and improve conditions for the fish. Rather it snarls the application process while inflicting unjustifiable grief on property owners and salmonids alike. As a lifelong conservationist, I am sorry to see this turn of events. It is very, very sad.

Respectfully,

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