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STATE WATER RESOURCES
CONTROL BOARD

2008 MAY -1 AM 11:55

Karen Niiya, Senior Engineer
Division of Water Rights
State Water Resources Control Board
1001, I St. Second Floor
Sacramento, CA 95814

DIVISION OF WATER RIGHTS
SACRAMENTO

May 1, 2008

Dear Ms. Niiya,

Sanctuary Forest is pleased to submit these comments on the State Water Resources Control Board's (SWRCB) December, 2007 Draft Policy for Maintaining Instream Flows in Northern California Coastal Streams ("NCIFP"). Sanctuary Forest is a non-profit land trust dedicated to the conservation and restoration of the Mattole River watershed and surrounding areas. The Mattole River is a stronghold for federal and state listed coho, Chinook and steelhead salmonids. For over twenty years Sanctuary Forest and its many non-profit, federal, state and private partners have made considerable investment and effort towards the recovery and enhancement of Mattole River fisheries, including land purchases, conservation easements, sediment reduction and habitat improvement programs.

As stated in the Introduction of the NCIFP, the focus of the policy is "on measures that protect native fish populations, with a particular focus on anadromous salmonids and their habitat." NCIFP, p. 1. The NCIFP states that water diversions have "resulted in a significant loss of fish habitat in California," and "change the natural hydrologic patterns of streams and can directly result in a loss or reduction in the physical habitat that fish occupy". NCIFP, p. 1. While Sanctuary Forest strongly agrees with these assessments, in general, the draft NCIFP does very little to address these problems in the Mattole River watershed, and actually will make it more difficult for local streamflow conservation programs to address these issues. The NCIFP does not specifically address existing summertime diversions, which have the greatest potential to affect fish habitat in the Mattole River, while at the same time, creates significant obstacles to permitting safe implementation of winter and spring-time diversions, which as explained below, will have very little impact on fish habitat in the Mattole River and are needed to allow for adequate water storage.

Mattole Flow Program

In 2003 Sanctuary Forest established the Mattole Flow Program to improve summer time flows and to restore and enhance healthy instream flows for fish and people. This program has made significant progress. At the core of this program is the concept of storage of wintertime flows and forbearance of summertime diversions whereby Sanctuary Forest provides large capacity water tanks to landowners who use the stored water in lieu of diverting from the river in the summertime, when flows are critical and juvenile fish need water the most. Participating landowners agree to curtail their right to divert under existing water rights, including riparian rights, through a forbearance agreement with Sanctuary Forest.

Many federal, state and local agencies, as well as conservation organizations, are looking at the Mattole Flow Program "storage and forbearance" concept as a model of how to more optimally manage and reconcile human water uses and fisheries needs in streams with low summer streamflows through incentives leading to voluntary and collaborative actions. State, Federal and private foundations have funded the installation of 16 of these tanks and accompanying forbearance agreements in two critical reaches of the Mattole headwaters. This funding includes \$415,153 provided by the State Water Resources Control Board through Integrated Watershed Management Programs.

The primary limiting factor in the Mattole River watershed regarding the recovery and enhancement of salmonids is instream flows for juvenile salmonids habitat during the summer and fall. It is a significant oversight that Section 2.2 of the draft policy makes no specific mention of that need. This issue was not sufficiently considered in development of the NCIFP. Instead the policy focuses on maintaining the wintertime peak flows for fish passage and spawning through bypass requirements. Conserving summer rearing habitat for fisheries is addressed indirectly through restrictions on the season of diversion. Unfortunately, these restrictions applied to the specific hydrologic realities of the Mattole River would have the un-intended effect of undermining Mattole Flow Program efforts to restore healthy instream flows for fish and people. In addition the NCIFP fails to facilitate addressing the impacts of existing water users.

The Mattole Flow Program seeks to enroll existing diverters willing to forbear from diversions during the critical dry period. However, the vast majority of existing and potential participants in the program are riparians but require a new small domestic use registration (SDU) or appropriative water right to provide for seasonal water storage. As written, the draft NCIFP could severely undermine the effectiveness of the Mattole Flow Program by making it difficult (if not impossible) for Sanctuary Forest to help landowners obtain rights to divert to storage and thus difficult (if not impossible) to induce water users into forbearance arrangements. As such, in the Mattole River watershed, the NCIFP may actually impede the overall goal of the policy, namely fishery habitat enhancement and restoration in the North Coast region.

Draft Policy Creates Barriers to Obtaining Small Domestic Use Registrations for Conservation Purposes

The draft NCIFP would generally limit the season of diversion for new SDU registrations to the period from October 1 through March 31. This season of diversion, while intended to protect summer flows by disallowing diversions for six months of the year, does not reflect the hydrologic reality of the dry season in the Mattole River watershed.

Based on the 56 years of records at the Petrolia gage and the 8 years of records from the Ettersburg gage, lowest daily mean flows in the Mattole occur between September 1 and October 15. It is for this reason that SDU registrations already obtained for Mattole Flow Program participants contain these same dates where diversions are prohibited. To further extend this seasonal prohibition on withdraws for the period April 1 to July 1, as would be required under the draft NCIFP, brings no measurable benefit. Mattole River flows don't become measurably impaired by existing diversions in the headwaters until approximately July 1. Up until that date, cumulative existing diversions under all basis of rights are estimated to reduce river flows by a maximum of 5%. This is within the margin of error of our SWRCB approved streamflow monitoring protocols. Please see Attachments A and B for data regarding human impairment and a comparison of proposed and existing seasons of diversion in the Mattole relative to the critical dry period.

The proposed Oct 1st to March 31st season of diversion threatens the feasibility of the Mattole Flow Program by unnecessarily extending the period when water would have to be stored for an additional four months. The Mattole Flow Program provides water storage to landowners and water users that contract to forbear diversions under all other legal basis of right during the critical dry season. The critical dry season on the Mattole is estimated to last a maximum of 105 days, approximately August 1st to November 15th. The Mattole Flow Program prepares landowners for forbearance during this dry season by providing off-stream water storage tanks of sufficient capacity for that period of time. The limited season of diversion proposed in the draft NCIFP would essentially double the water storage requirements of Program participants, and would require the Program to provide double the water storage to facilitate participation. The result is that Program facilities may become prohibitively expensive, increasing tank costs from \$25,000 to \$50,000. Such additional storage also would require additional real estate, which often is not available. Storing water for an eight month period also creates much greater difficulties in maintaining water quality. These practical and economic challenges threaten Mattole Flow Program funding sources and the willingness of water users and landowners to participate in the Program. Yet, the proposed NCIFP restricted season of diversion for SDU registrations would provide no measurable benefit to fisheries because it is out of step with the actual timing of the critical dry period in the Mattole watershed.

Proposed Modifications Allowing SDU's for Conservation Purposes

Sanctuary Forest submits that the concerns raised above could be addressed by a few modifications to Section 5.0 of the draft NCIFP (See Attachment C). These changes

would allow SWRCB to grant SDU permits at variance with the draft NCIFP season of diversion if Department of Fish and Game (DFG) concurs that the purpose of the SDU application is to 1) benefit fisheries and to 2) forgo or reduce diversion under other valid basis of right. This SDU application process continues to depend on the DFG to develop terms and conditions for SDU registrations appropriate to the specific applicant as outlined in Water Code section 1228.3. There is no indication in AB 2121 that the Legislature intended to modify DFG's role in the SDU process. This new language would allow SDU registrations to continue to be an efficient and inexpensive way to permit diversions to storage necessary for Mattole Flow Program participants to enter into a forbearance agreement. Such modifications will also form an incentive for promoting the development of similar programs to benefit fisheries in other affected watersheds.

Sanctuary Forest believes that this conservation variance for the SDU registration process forms an incentive for diverters to limit their season of diversion and store water through an SDU. Creating incentives (or at least removing disincentives) for existing diverters with valid water rights (particularly riparians) who wish to participate in programs to benefit fisheries and wildlife will more successfully bring about desired habitat improvements in the Mattole River watershed and other watersheds than the restrictive approach proposed in the draft NCIFP.

Concerns Regarding Obtaining Appropriate Water Rights for Conservation Purposes

Participants in the Mattole Flow Program are not limited to those who qualify for SDU registrations. There are agricultural, institutional and commercial water users in the Mattole community who would not qualify for an SDU but who are interested in enhancing benefits to summering juvenile salmonids through storage and forbearance. Again, most of such potential participants are riparian users who would need to obtain new appropriative rights that included the ability to divert to storage.

Generally, Sanctuary Forest concerns regarding the process for application of an appropriative right under the draft policy are same as those expressed in regards to SDU registrations: these are 1) the need for variances or exemptions to the standard policy provisions based on the specific hydrology of a watershed and 2) the need to remove disincentives and provide incentives to encourage landowners to store and forbear. Improvements and clarifications are needed in the draft policy to address these issues.

Both sections 4.1.8 and section 13 provide pathways outlining the studies needed to be performed to apply for and the ability of SWRCB to consider and grant exemptions or variances to regional criteria based on the specific hydrology of a watershed. These sections should provide more specifics regarding the due process by which such requests would be evaluated including the timelines by which SWRCB would respond to requests for variance or exemption as well as the recourse for appeal and review. Furthermore we would request that hydrologists be included as qualified to prepare the studies required by section 4.

Section 12 of the draft NCIFP regarding the watershed approach appears designed to provide incentive for diverters in a watershed to work together to manage water resources to achieve the goals of the policy. Sanctuary Forest feels that this section should be strengthened to provide greater incentive for the formation of watershed groups whose purpose is to not only meet the goals of the policy, but to enhance fisheries. Such incentives could come in the form of lower application fees or an expedited review process for group status and water rights applications under the group umbrella. The criteria for defining a watershed group need to be refined. Is there a minimum group size? How many groups can form in any watershed? What constitutes a watershed?

The cost and complication of undertaking the studies necessary to apply for an appropriative right constitute a considerable barrier and disincentive to obtaining such rights for conservation or any purpose. Technical documentation supporting the draft NCIFP suggest that the costs of the studies needed to prepare an appropriative right application is approximately \$15,000. Furthermore there are no timelines for the submission and agency response to an application. The result of these proposed new requirements under the draft policy is to create a system whereby only those who can afford the studies and the time to shepherd the application through the process can develop an appropriative right to water. This is an unjust system that creates a form of economic discrimination. Those of modest means should have the same rights to put the public resource of water to beneficial uses as those who are wealthier. Furthermore, those who are seeking appropriative rights to benefit wildlife should at least be given priority consideration of their application. In its current draft form the NCIFP is unlikely to achieve the intent of AB2121 to improve the application procedure for appropriative water rights.

Conclusion

Sanctuary Forest welcomes development of NCIFP and its goal to protect sensitive salmonids from excessive water withdraws. However the draft NCIFP as written would have dramatic negative consequences for our local efforts to maintain and improve healthy instream flows for fish and people in the Mattole River watershed, and would severely undermine Sanctuary Forest's Mattole Flow Program.

Landowners wishing to participate in the Mattole Flow Program would be discouraged from doing so because of the cost, difficulty or imposed impracticality to obtaining SDU registrations or appropriate rights needed to divert water to storage. Sanctuary Forest seeks a NCIFP that encourages the storage of water and forbearance of water withdraws during the peak low flow season. Section 5 of the draft policy should be modified to encourage the use of SDU registrations to reduce existing summertime diversions that are most problematic for fisheries in the Mattole River and similar watersheds. Sanctuary Forest is committed to working with SWRCB on modifications to Section 5, and other areas of the policy as we have proposed so that incentives are

provided and disincentives are not created for landowners who wish to enhance and restore fisheries in the Mattole and other watersheds through storage and forbearance.

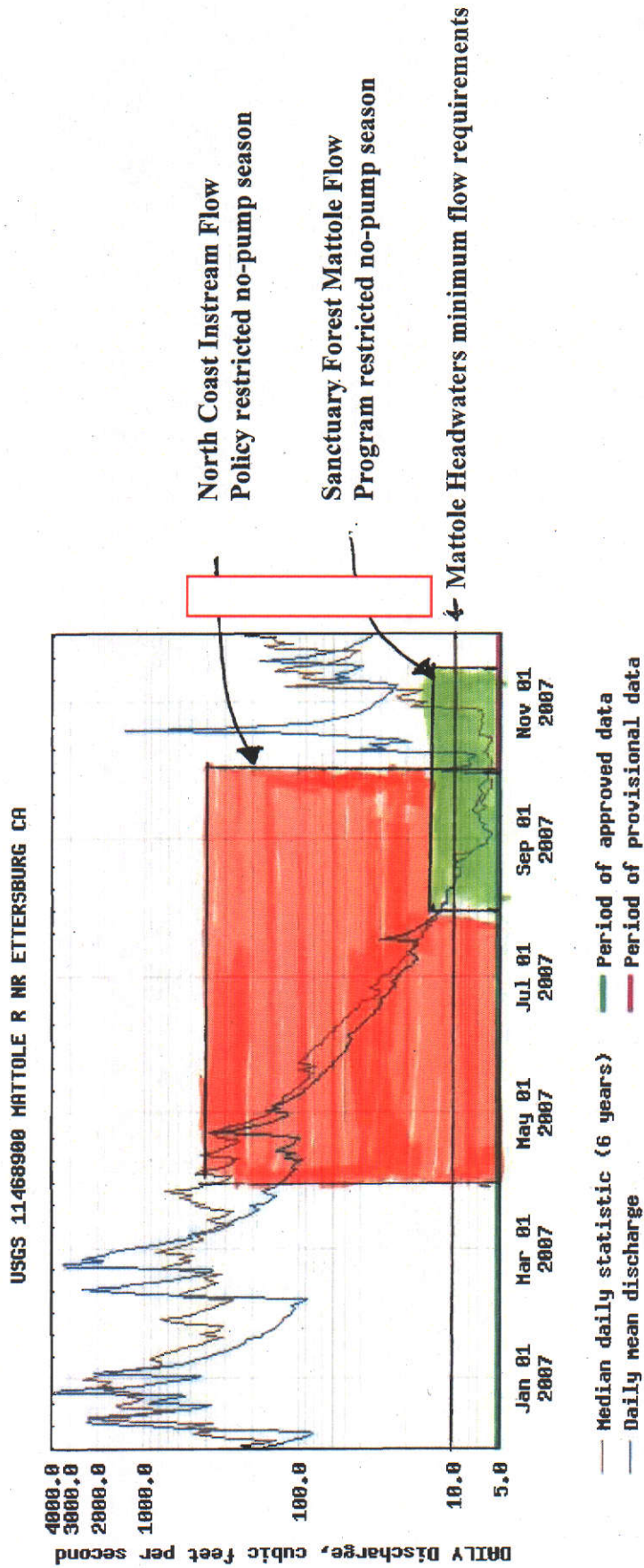
For the rivers and forests,

A handwritten signature in dark ink, appearing to read "Eric Goldsmith", written in a cursive style.

Eric Goldsmith, Executive Director

Attachment A

Comparison of Sanctuary Forest Mattole Flow Program and North Coast Instream Flow Policy



Attachment B

Mattole River Headwaters Comparison of Cumulative Human Use and Streamflows

Sanctuary Forest compared cumulative human use with streamflows to determine when cumulative human use amounts to 5% of streamflow in the Mattole Headwaters. Cumulative human use was estimated at 0.2 cfs and represents 5% of streamflow when flows drop to 4.0 cfs. Analysis of streamflow monitoring data from 2004-2007 indicated that July 1 is the earliest date streamflows would be expected to drop to 4.0 cfs. The human water use estimates and streamflow data are shown below.

Sanctuary Forest prepared water use estimates based on the 2002 North Coast Watershed Assessment Program's Mattole Watershed Assessment (DFG, Et. Al.) with adjustments to reflect local water use practices. The population for the year 2004 is estimated at 300 with 100 households. Water use per household is estimated at 900 gallons per day (gpd) and 90,000 gpd for total residential use in the Mattole Headwaters. The daily use estimates were calculated using the following assumptions for each household: three people using 75 gpd per person; 475 gpd for gardens and lawns; and 200 gpd for leaks and overflow. Agriculture, schools, businesses, public agencies and non-profits also use water. The rough estimate for agriculture is 25,000 gpd and includes all large-and small-scale agriculture. Businesses, schools, public agencies, churches and non-profits groups are estimated to use a total of 15,000 gpd. The estimated cumulative water use per day for households, businesses and others is 130,000 gallons (0.2 cfs).

The estimated cumulative water use for the Mattole Headwaters amounts to 5% of streamflows when streamflows drop to 4.0 cfs. The table below shows the dates for 2004-2007 when streamflows (measured or extrapolated) dropped to 4.0 cfs. The earliest date occurred in 2004 which represents the 3rd lowest flow year in the 55-year record for the Mattole River at the Petrolia station.

2004-2007 dates when Mattole Headwaters streamflows dropped to 4.0 cfs.

Year	Date	Streamflow (CFS)
2004	July 9, 2004	4.0*
2005	September 3, 2005	4.0 *
2006	July 27,2006	4.0 *
2007	July 19, 2007	4.0

*extrapolated from bi-weekly Mattole Headwaters monitoring data 2004-2007

Attachment C

Proposed Revisions to Section 5

5.0 SMALL DOMESTIC USE AND LIVESTOCK STOCKPOND REGISTRATIONS

A person may obtain a right to appropriate water for a small domestic or livestock stockpond use by registering the use with the State Water Board. (Wat. Code, § 1228 et seq.) The State Water Board may impose general conditions on small domestic use and livestock stockpond use registrations. (*Id.*, § 1226.) An appropriation pursuant to a registration within the policy area is subject to the following conditions:

1. The season of diversion of the registration is limited to October 1 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.**
2. No water may be stored or diverted under the registration by means of an onstream dam constructed on a Class I or Class II streams after July 19, 2006.

A registration of water use must include a certification that the registrant agrees to comply with all conditions, including conditions on the construction and operation of the diversion work, required by DFG. (*Id.*, §1228.3 subd. (a)(7).) DFG shall impose conditions consistent with the principles of this policy that are stated in Section 2.2