

May 1, 2008

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DIV. OF WATER RIGHTS  
SACRAMENTO

Via Email to AB2121Policy@waterboards.ca.gov

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

Re: **Comment Letter - AB 2121 Policy: Joint Instream Flow Policy Comments of Trout Unlimited, Peregrine Audubon Society, Wagner & Bonsignore Consulting Civil Engineers, and Ellison, Schneider & Harris LLP**

Ms. Niiya:

The conservation organizations Trout Unlimited and the Peregrine Audubon Society (TU/PAS) and the Wagner & Bonsignore water resource engineering firm and the Ellison, Schneider & Harris law firm (WB/ESH) submit these joint comments on the State Water Resource Control Board's (SWRCB) Draft North Coast Instream Flow Policy (Draft Policy). TU, who sponsored AB 2121 and with PAS filed a Petition for Timely and Effective Regulation of water diversions in the AB 2121 policy area, and WB/ESH, who together represent over 100 water right applications within the North Coast region pending before the SWRCB, have collaborated over the last three years to develop joint recommendations to improve the SWRCB's administration of water rights for the consideration and maintenance of instream flows.

TU/PAS and WB/ESH understand the complexities of the North Coast region, and we are concerned that the Draft Policy will not accomplish its objectives. Although TU/PAS and WB/ESH will be submitting separate comments on the Draft Policy, we believe that it is important for the SWRCB to understand the many areas in which we agree before the SWRCB considers revisions to its Draft Policy. We also recommend that the SWRCB direct staff to meet with stakeholders to further develop these joint recommendations and direct staff and stakeholders to report back to the Board as soon as possible, and no later than the July 2 Board workshop.

Both TU/PAS and WB/ESH consider the following set of shared principles to be mutually dependent, and we do not necessarily support each individual principle in the context of a policy that does not advance the other principles. (For instance, TU/PAS do not support a small project exception unless the policy includes scientifically-based regional criteria and both individual and policy effectiveness monitoring. Similarly, WB/ESH do not support adoption of regional criteria that include minimum bypass flow and maximum cumulative diversion calculations unless there are small project and de minimus project exceptions from the criteria, the minimum bypass flow and maximum cumulative diversion calculations consider the watershed size, hydrology and ecological resources affected by a given project, the extent of anadromy is based on actual field data, and applicants have a choice between regional criteria, site-specific and watershed permitting approaches.)



Need for a Policy to Comply with AB 2121. TU/PAS and WB/ESH believe that the SWRCB must adopt a policy to comply with AB 2121 (policy). The policy must be adopted soon, because indefinite delays do not serve our mutual goal of having a functioning water right process. We do not agree, however, whether the Draft Policy proposed by the SWRCB is the appropriate foundation for such a policy. TU/PAS believe that the Draft Policy provides a reasonable foundation that can be improved upon. WB/ESH believe that some of the scientific principals and some of the technical analysis that support the Draft Policy is useful, but the approach of the Draft Policy to prescribe regional diversion limitations without site-specific studies is fatally flawed.

The Policy Should Advance Broader Goals. The Draft Policy is principally concerned with conditioning new water right applications and some petitions for change to prevent adverse effects on salmonids and salmonids habitat. TU/PAS and WB/ESH agree that the SWRCB should take a broader view of the policy and its mandate to improve the administration of water rights within the Water Code's context of balancing multiple beneficial uses of water (including agricultural, municipal, domestic, industrial, and instream beneficial uses), protecting the public trust, and providing for water quality control. The SWRCB should adopt a watershed management-oriented policy based upon the principle of preserving fish and other natural resources within the North Coast region while serving the needs of the agricultural, municipal, domestic, and industrial uses which are dependent on the water.

Consistent with this principle, the policy should be based upon following goals:

1. Improve the efficiency, scientific and technical accuracy, and fairness of the water right process.
2. Contribute to the management of natural resources within the watersheds and provide incentives for stewardship, such as encouraging existing diverters to shift to winter offstream storage.
3. Process permits and approve permit changes consistent with the other goals.
4. Facilitate compliance with the Water Code and other laws and regulations.
5. Condition water right applications and petitions in a manner that maintains instream flows needed for the protection of fishery and other resources. In general, as the Draft Policy states, most diversions should be conditioned to a rainy season of diversion, to periods of high flows, to reasonably maintain the natural flow variability, to minimize to the extent practicable the effects of onstream dams, and to avoid significant cumulative diversion effects. (See Draft Policy § 2.2.)

Water Right Application Processing Strategies. The draft policy proposes three basic non-exclusive strategies for processing water right applications and petitions: (1) individually with site-specific studies; (2) as a group with watershed-based studies; and (3) using predefined criteria such as the Draft Policy's "Regional Criteria." We agree that the policy should include additional guidance both for applicants who pursue site-specific studies and for applicants who pursue watershed-based permit processing and resource management.

We disagree about the utility of the regionally protective criteria strategy. TU/PAS believe that the Regional Criteria of the Draft Policy can and should be improved, although TU/PAS do not



recommend adoption of the specific criteria proposed in the Draft Policy. WB/ESH believe that the Regional Criteria should not be adopted because the criteria are too rigid to address the specific factors unique to each watershed and because the criteria are so conservative that most projects cannot satisfy them.

Both TU/PAS and WB/ESH believe that the final policy should provide an expedited permitting process that includes standard terms and calculations for bypass flows, seasons of diversion, maximum cumulative diversions, the location of onstream dams, and the evaluation of cumulative effects, as one of the three strategies to satisfy the principles stated in Draft Policy § 2.2. Specifically, such standard terms and conditions, consistent with the intent of the Draft Policy's criteria, could reduce the level of review otherwise required under CEQA and the public trust doctrine, because they would be presumed protective regionally. However, they would not be the exclusive means to comply with the principles stated in Draft Policy § 2.2, and they would not, by themselves, be sufficient basis for decision on each application which complied with them.

Finally, we also agree that while projects generally should provide a minimum bypass flow, maximum cumulative diversion, season of diversion, and onstream dam limitations, small project and de minimus project exceptions should be developed for these standard terms and conditions. As described below, we request that the Board direct staff to meet with stakeholders to further define these terms.

Watershed Management Approach. In March 2007, TU and ESH submitted a joint recommendation to the SWRCB to include a Watershed Management Alternative in the Draft Policy. We stand by those recommendations. We recommend that the Policy do more to articulate the essential elements to be included in projects proceeding with the watershed approach strategy, consistent with those recommendations.

We believe that the Draft Policy's Watershed Alternative (Section 11) does not provide the utility of the approach we recommended. For all three approaches to permitting, the policy should advance the SWRCB's draft Strategic Plan objective to support a watershed framework to manage and protect water resources in order to satisfy competing environmental, land use, and water use interests by taking advantage of opportunities within a watershed, such as joint development of local solutions to watershed-specific problems, cost sharing, and coordination of diversions. (See 1/25/08 draft Strategic Plan, pp. 3, 8, 11.)

A watershed management framework would be hydrologically focused, recognize the linkages between water quantity and water quality, and require a comprehensive, long-term approach to water resources management that takes system interactions into account. (1/25/08 draft Strategic Plan, p. 3.)

A watershed management framework would not be an alternative to CEQA and public trust review. It would be a holistic strategy to evaluate resource impacts and limiting factors and identify conservation and mitigation opportunities on a comprehensive watershed scale, which are opportunities often missed through traditional project-specific analyses. For example, it may identify off-site mitigation opportunities that provide a higher resource value than mitigation opportunities at the point of diversion.



Where applications are processed individually, the CEQA and public trust review should consider relevant watershed-scale issues wherever possible, and all pending applicants within a watershed should coordinate the CEQA and public trust analyses where feasible.

In addition to the essential elements contained in the March 2007 paper, we are developing additional elements for a watershed approach including governance concepts. We request that the Board direct staff to meet with stakeholders to further define these elements.

Resource Stewardship. TU/PAS and WB/ESH share the concern that the Draft Policy and current water right system do not encourage water users to proactively manage natural resources. The watershed-based policy should encourage stewardship of natural resources. In addition to providing guidelines and principles for processing new water right applications, it should encourage beneficial stewardship activities for existing diversions.

For example, the SWRCB should grant priority processing for projects that enhance streamflows by reducing existing diversions during the dry season and benefit summer rearing habitat. Priority processing should also be given to summer flow enhancement projects pursued in combination with requests for new water rights where new water rights are needed to change the timing or magnitude of existing diversions and the project as a whole is likely to provide a net benefit to instream flows. The SWRCB should approve these projects where the project as a whole provides a net benefit to instream flows.

The policy should also encourage actions such as removal of obsolete dams and other fish barriers, and to improve management of other senior diversions. One option would be to obtain the agreement of an existing senior water rightholder to meet a bypass flow requirement or limit maximum rate of diversion. Another option would be removal of an artificial barrier to migration, or to arrange for removal of an onstream reservoir or for the relocation of a point of diversion to reduce impacts to aquatic resources.

We request that the Board direct staff to meet with stakeholders to further develop resource stewardship opportunities.

Reengineer the Water Right Process. The Policy should advance the SWRCB's objective to reengineer and improve the water right process to produce scientifically and technically sound decisions, and to promote transparency and accountability. (See 1/25/08 draft Strategic Plan, p. 25.) We recommend the following procedural changes to the current water right process:

- The applicant and SWRCB staff should be required to mutually develop a work plan at the start of process.
- The applicant and SWRCB staff should be required to agree upfront to the scope of the environmental impact and water availability studies, and the analytic methodologies for those studies.
- The applicant and SWRCB staff should have an early scoping meeting with protestants and responsible agencies to better inform them of the project. Providing more detailed project information earlier in the process may reduce the number of protests or reduce the scope of the issues in the protests.



- The water availability, CEQA and public trust analyses should consider relevant watershed-scale issues wherever possible.
- Pending applicants within a watershed should coordinate the water availability, CEQA and public trust analyses where feasible.
- Generally, the process must be more transparent for both applicants and protestants.
- The SWRCB should reevaluate the requirement that private applicants enter into a Memorandum of Understanding (MOU) with the SWRCB for the preparation of CEQA and other environmental analyses by a consultant, which has added significant delay to the water right process.
- The SWRCB should establish a process to obtain decisions with an opportunity for appeal on key issues before final action on the applications and petitions is taken.

Biological Study Guidelines. The policy should include more guidance than the Draft Policy for applicants conducting site-specific biological studies, whether for individual or group application processing. The Policy should include narrative criteria for assessing biological resource impacts and establishing appropriate minimum bypass flow, cumulative diversion, and onstream dam limitations. A narrative criterion is a description of the desired biological or hydrological condition to be protected or impact to be avoided, such as the minimum stream flow necessary to maintain salmonid spawning at the point of diversion. We believe that these criteria should be tailored to address the specific features of projects within the region and the potential impacts caused by those projects. The narrative criteria should function to screen smaller projects with lesser impacts into an expedited review process from larger projects with greater effects into a more involved evaluation process. We have discussed concepts for narrative criteria. We request that the Board direct staff to meet with stakeholders to further develop such criteria.

Small Project Exceptions. We believe that many projects located in small watersheds above the limit of anadromy can be permitted without causing a significant effect on the environment and fisheries. We believe that many pending projects could be exempt from minimum bypass and rate of diversion limitations, or from other terms. We will continue to work on a specific proposal and we request that the SWRCB direct staff to meet with us and other stakeholders to discuss exceptions.

Monitoring and Reporting. The Policy should require monitoring and reporting of diversions and stream conditions in order to improve decision making and foster a results-based regulatory system that promotes efficiency and effectiveness. We agree that an enforceable monitoring and compliance plan should be established, funded, and implemented.

Policy Effectiveness Monitoring and Review. A Policy Effectiveness Monitoring and Review program should be established, funded, and implemented in the policy. Emphasis should be placed on collecting data through field monitoring to evaluate the effectiveness of the policy and whether the policy may need to be modified. Effectiveness monitoring should focus on evaluating the effectiveness of every aspect of the policy. Five years from the effective date of the policy, and every five years thereafter, the SWRCB should review the policy and determine whether it should be revised. We agree that permittees should provide funding for the Policy Effectiveness Monitoring and Review program as part of their ongoing mitigation and monitoring requirements, and we also



support additional state funding for that purpose. WB/ESH do not support funding the program through enforcement penalties.

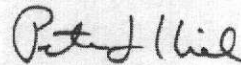
Funding and Staffing. TU/PAS and WB/ESH support additional funding and staffing for the Division of Water Rights. We agree that budget constraints have contributed to the non-functioning water rights system and are likely to do so in the future absent additional resources. We recommend that SWRCB set forth a schedule for carrying out the policy and publish an assessment of the resources required to carry out its statutory obligations, including the policy.

Conclusion. We strongly encourage the Board to consider our joint recommendations. We believe that staff working with stakeholders over the next couple of months can produce substantial improvements to the policy.

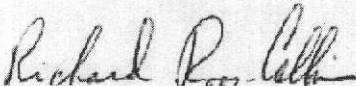
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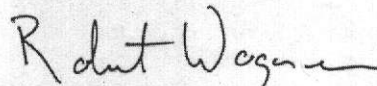
Brian J. Johnson  
Director, California Water Project  
Trout Unlimited



Peter J. Kiel  
Ellison, Schneider & Harris L.L.P.  
2015 H Street  
Sacramento, CA 95811-3109  
(916) 447-2166  
(916) 447-3512 (fax)



Richard Roos-Collins  
Natural Heritage Institute  
100 Pine Street, Suite 1550  
San Francisco, CA 94111  
(415) 693-3000  
(415) 693-3178 (fax)  
Counsel for Trout Unlimited and  
the Peregrine Chapter of the National  
Audubon Society



Robert C. Wagner, P.E.  
Wagner & Bonsignore Consulting Civil  
Engineers  
444 North Third Street, Suite 325  
Sacramento, CA 95814  
(916) 441-6850