



STATE WATER RESOURCES
CONTROL BOARD

2008 MAY -1 AM 11:55

MENDOCINO COUNTY WATER AGENCY
890 North Bush Street, Room 20
Ukiah, California 95482
(707) 463-4589 fax (707) 463-4643

April 30, 2008

Ms. Karen Niiya, Senior Engineer
Division of Water Rights
State Water Resources Control Board
1001 I Street, 2nd Floor
Sacramento, CA 95814

Subject: Comment Letter – AB 2121 Policy

Dear Ms. Niiya:

Thank you for the opportunity to comment on the State Water Resources Control Board staff's "Draft Policy for Maintaining Instream Flows in Northern California Coastal Streams" (AB 2121 Policy). While we appreciate the fact that considerable effort has gone into the development of the AB 2121 Policy, regrettably, we believe that the AB 2121 Policy, as presently drafted, will not meet the stated objective of protecting endangered salmonid fisheries without unnecessarily restricting water development, and in turn economic development, in Mendocino County. Like so many regions in the west, the physical and social character of Mendocino County is largely determined by the availability of water – the availability of water for instream as well as out-of-stream uses.

We are gravely concerned that adoption of the AB 2121 Policy will have significant land use implications for our County, some more immediate and obvious than others. We are troubled by the fact that these land use impacts are largely ignored or "glossed over" in the Substitute Environmental Document prepared in support of the AB 2121 Policy. Simply stated, we do not see how the State Water Resources Control Board will be able to fulfill its responsibility to reasonably balance the competing beneficial uses of water in Mendocino County if the AB 2121 Policy, as presently crafted, is adopted

Our specific comments, which are intended to supplement the comments that were hand-delivered to you at the April 22, 2008 workshop in Ukiah (copy attached), are as follows:

The proposed AB 2121 Policy precludes water development in small drainages

As illustrated in Table 1, the proposed AB 2121 policy and more specifically, the policy's "Minimum Bypass Flow" criterion, effectively precludes water development in small drainages – drainage areas of one square mile or less - by restricting the "window of opportunity to divert water" to extremely wet but comparatively infrequent rainfall events.

Table 1. Minimum Bypass Flow Versus Drainage Area

Drainage (sq. miles)	(a) Mean Annual Flow (cfs)	(b) Minimum Required Bypass Flow (cfs)	24-hour Rainfall-Runoff Scenario		
			100% Runoff	50% Runoff	30% Runoff
			24-hour Rainfall Total (inches)	24-hour Rainfall Total (inches)	24-hour Rainfall Total (inches)
0.156	0.28	6.4	1.53	3.07	5.11
0.3	0.54	9.0	1.12	2.24	3.74
0.5	0.9	11.8	0.88	1.76	2.93
1	1.8	16.9	0.63	1.26	2.10
2	3.6	24.3	0.45	0.90	1.50
3	5.4	30.0	0.37	0.74	1.24
4	7.2	34.8	0.32	0.65	1.08

Notes:

(a) Mean annual flow based on an average annual runoff rate of 1,300 acre-feet per square mile of drainage area. By comparison, annual runoff in the Russian River, as measured by the USGS "Russian River near Ukiah stream gauge (gauge number 1146100), has historically averaged 1,280 acre-feet per square mile

(b) Computed using revised MBF equation: $Q_{mbf} = 9.4Q_m(DA)^{-0.48}$

For example, in the case of a 0.156 square-mile drainage (i.e., 100 acres) and assuming a mean annual flow of 0.28 cubic feet per second, the resulting Minimum Bypass Flow (Q_{mbf}), as computed by the AB 2121 Q_{mbf} criterion, would be 6.4 cubic feet per second. In order to produce a mean daily flow of 6.4 cubic feet per second from a 100-acre drainage it would need to rain at least 1.53 inches during that 24-hour period, and more realistically, since only a fraction of the rain that falls on the ground becomes surface runoff, something on the order of 3.00 inches of rain in a 24-hour period. 24-hour rainfall events equaling or exceeding 3.00 inches are infrequent even by North Coast standards, and when they do occur they typically result in widespread flooding in low lying areas. Frankly, it is hard to imagine a situation where one could reasonably argue that all of the runoff occurring as a result of 24-hour storm event of this magnitude is needed to maintain salmonid fisheries in any drainage in the North Coast.

The land use implications illustrated by this example are significant and regrettably, not fully vetted in the Substitute Environmental Impact Document. For the most part, Mendocino County consists of comparatively rugged terrain with numerous small drainages and tributary streams. Accordingly, much of the land currently zoned for rural residential and to a lesser extent agricultural purposes is located in comparatively small drainages – drainages in which as illustrated above, surface water supply development would be effectively precluded by the AB 2121 Policy. The net effect is the near exclusion of rural residential development and irrigated agricultural activities from a large fraction of Mendocino County. Needless to say, the social and economic implications of these land use exclusions are not adequately addressed in the Substitute Environmental Document, which as noted earlier, leads us to question how the State Water Resources Control Board will be able to fulfill its responsibility to reasonably balance the competing beneficial uses of water – instream and out-of-stream – in Mendocino County if the AB 2121 Policy, as presently crafted, is adopted

An analysis of the direct and indirect economic impacts of the AB 2121 Policy is needed

As noted in the Substitute Environmental Document and illustrated above, the AB 2121 Policy will restrict water availability and in turn the geographic scope of urban and agricultural activities in Mendocino County. Land values, in areas where the AB 2121 Policy will restrict or preclude the development of surface water supplies, will be impacted and there will be increased competition between urban and agricultural water users for the existing developed or developable water supplies. Much of the developed agricultural water supply in Mendocino County consists of small storage facilities owned and operated by private individuals and entities. For example, within the Mendocino County portion of the Russian River basin there are, excluding Potter Valley, approximately 16,000 irrigated acres that collectively use roughly 18,000 acre-feet of water a year. Roughly 15,000 acre-feet of that total is derived from small privately owned facilities – facilities that will or may be impacted by the AB 2121 Policy.

While we appreciate the fact that the Substitute Environmental Document discusses some of the direct costs associated AB 2121 Policy implementation, we are very concerned that the indirect economic costs, which we believe may be substantially greater than the estimated direct costs, are not quantified. Consequently, it is difficult to accurately compare or balance the potential benefits of AB 2121 Policy implementation and more specifically, the “conservative” instream flow requirements (conservative in the sense that they may at times be more than adequate to protect salmonid fishery resources), against the economic, social and land use impacts that will be incurred as a result of AB 2121 Policy implementation.

The proposed AB 2121 Policy may in some instances promote “unreasonable uses” vis-a-vis the reliance of stream flow as the principal mechanism for the maintenance or enhancement of salmonid habitat

State law prohibits the wasting or unreasonable use of water. For the most part, the wasting of water is typically associated with excessive water diversions by out-of-stream water users. However, the courts have also determined that certain instream activities, such as the use of stored water to transport gravel in support of instream gravel mining operations, can be construed as an unreasonable use of water. We believe that under certain circumstances, particularly in highly modified stream channels (flood control channels and other manmade drainage courses, or natural channels whose morphology has been significantly altered by

anthropogenic activities), there are opportunities to maintain if not enhance salmonid habitat without relying on excessive stream flow appropriations. Stated in other words, the minimum instream flow requirements specified by the AB 2121 Policy may at times constitute an unreasonable use of water because the fish habitat benefits they provide could be achieved through a combination of physical habitat alterations coupled with a lesser stream flow.

The instream flow requirements imposed by the AB 2121 Policy are based on hydraulic/geomorphic/fish habitat relationships associated with natural stream channels and therefore may not be applicable to all artificial or highly modified stream channels. Accordingly, we recommend that the AB 2121 Policy, or any succeeding policy, include provisions that would allow for physical habitat alterations in combination with a lesser stream flow, as opposed to relying on stream flow as the sole means of achieving suitable salmonid habitat conditions.

Similarly, we believe there are instances when the seasonal release of stored water can and should be used as mitigation, perhaps in conjunction with physical habitat alterations, to compensate for the implementation of a lesser minimum stream flow requirement – a minimum stream flow requirement that is less than would otherwise be required pursuant to the AB 2121 Policy. For example, the augmentation of stream flows in a Class I ephemeral stream during the spring, as mitigation for stream flow diversions during the winter.

The proposed AB 2121 Policy largely ignores the ecological benefits provided by water storage facilities

As noted by the Substitute Environmental Document, the water storage facilities on the North Coast – permitted or otherwise – provide lake and pond-based habitats that would otherwise be unavailable to aquatic and wildlife species. In some instances habitat is provided for Federally listed species, such as the Red Legged Frog. We are concerned that the AB 2121 Policy, as presently drafted, provides little guidance with respect to meeting the instream flow requirements of salmonids while at the same time protecting State or Federally listed species that rely on pond-based habitats for their survival. How will the State Water Resources Control Board balance the ecological benefits provided by water storage facilities with the stream flow requirements of salmonids?

How will the proposed AB 2121 Policy apply to diversions of “underflow”

As previously noted, the State Water Resources Control Board reportedly asserts that essentially all of the “groundwater” in the Ukiah Valley, and most if not all of the other valleys in Mendocino County, is “underflow” and therefore subject to the State Water Resources Control Board’s permitting authority. While we vigorously disagree with this interpretation – that essentially all of the water underlying the Ukiah Valley floor is underflow - we do acknowledge that there are instances where “underflow” occurs and is or could be diverted for out-of-stream beneficial uses. Simply stated, how does the AB 2121 Policy apply to underflow, if at all?

The ability for groundwater to serve as an alternative water supply in Mendocino County is grossly overstated

The Substitute Environmental Document correctly notes that implementation of the AB 2121 policy may redirect water users to alternative sources, but is largely silent with respect to the actual availability of alternative water sources. For example, groundwater is identified in the Substitute Environmental Document as a potential source of water in lieu of surface water diversions. However, comparatively little is said about the availability of groundwater in Mendocino County.

As noted in various publications of the Department of Water Resources and the United States Geological Survey, the consolidated rocks of the Franciscan Complex, which dominate the geology of Mendocino County, generally yield little or no water. Mendocino County's groundwater resources are for the most part limited to the greater Ukiah Valley and a few other comparatively small and widely dispersed valleys in the region. However, even here there is a serious question as to the true availability of the groundwater supply, not because of geology but because of the State Water Resources Control Board's assertions that all of the "groundwater" in these valleys is in fact "underflow".

Once again, the land use implications are significant and regrettably, not adequately addressed in the Substitute Environmental Document. The fact is, in many areas of the County, particularly most of the small drainages discussed above, the only viable source of water is surface runoff – which the AB 2121 Policy effectively precludes from development.

Coordination with State and Federal Resource Agencies

The AB 2121 Policy is largely silent with respect to coordination and cooperation with other relevant State and Federal agencies, such as the California Department of Fish and Game, the National Marine Fisheries Service, and the United States Army Corps of Engineers - a serious omission, as past experience has shown that the processing of water right applications has been seriously hindered by the lack coordination/cooperation among the various State and Federal agencies involved. Although the AB 2121 Policy provides some guidance with respect to the development of mitigation plans and procedures for obtaining "case-by-case" exceptions to policy provisions, it is not clear for example, whether the State Water Resources Control Board staff will defer to California Department of Fish and Game and/or National Marine Fisheries staff with respect to the technical aspects and scope of any site-specific instream flow studies an applicant may elect to perform, and more specifically, if or how conflicting agency directives or differences of opinion will be resolved.

Utilize adaptive management approach to AB 2121 Policy implementation

The minimum instream flow requirements specified by the AB 2121 Policy may or may not achieve the stated objective of protecting endangered salmonid fisheries, but as previously discussed, will clearly have significant land use, economic and social impacts to Mendocino County. Given the uncertainty of success, vis-à-vis protection of salmonid fisheries, we urge the State Water Resources Control Board to proceed cautiously and adopt an adaptive management strategy with respect to policy implementation. More specifically, we recommend that the AB 2121 Policy, if adopted, be implemented on a trial basis on a much smaller geographic scale than currently envisioned.

Encourage the development of off-stream storage by providing financial assistance

Many of the land owners potentially affected by the AB 2121 Policy are, as evidenced by their participation in "Fish Friendly Farming" and other land stewardship programs, very interested in and supportive of resource conservation programs. Typically, the failure to implement land stewardship programs is not through a lack of interest, but rather a lack of money. Based on our experience with Proposition 50 and other grant programs, we believe that significant progress toward the protection and enhancement of fisheries resources could be achieved through the implementation of a meaningful financial assistance program. Accordingly, we recommend that the State Water Resources Control Board develop and implement financial assistance programs to assist landowners and other entities with the development of off-stream storage.

Extend the comment period to allow for additional review and analysis of the AB 2121 Policy

We strongly urge the State Water Resources Control Board to provide additional time to review and comment on the AB 2121 Policy. The AB 2121 Policy is simply too complex, and the potential impacts to Mendocino County too significant, to fully evaluate and consider in the time frame allocated.

Once again, in closing, we appreciate the time that has been provided to review and comment on the State Water Resources Control Board staff's draft AB 2121 Policy. For the reasons stated above, we cannot endorse the AB 2121 Policy as currently crafted. However, we remain willing and in fact eager to work with the State Water Resources Control Board to develop workable alternatives.

Sincerely,



Roland A. Sanford
General Manager

Enclosure

Cc: Assemblywoman Patty Berg
Senator Patricia Wiggins
Senator Bob Dutton
Senator Sam Aanestad
Ms. Tam M. Doduc, Chair, State Water Resources Control Board
Mendocino County Water Agency Board of Directors
Mendocino County Board of Supervisors
Mr. Tom Mitchell, Chief Executive Officer, County of Mendocino
Ms. Jeanine B. Nadel, County Counsel, County of Mendocino

STATE WATER PRIORITIES
CONTROL BOARD
2008 MAY -1 AM 11:55
DIVISION OF WATER RIGHTS

**Notes and Questions Regarding the 2008 Policy for Maintaining Instream
Flows in Northern California Coastal Streams
for BOS Meeting, April 22, 2008**

Note: Sections starting with **SWRCB:** " " are quotes from the first few pages of the Policy.

SWRCB: "Protection of fishery resources is in the public interest. The primary objective of this policy is to ensure that the administration of water rights occurs in a manner that maintains instream flows needed for the protection of fishery resources. This policy establishes . . . five principles that will be applied in the administration of water rights."

[NOTE: This Policy covers an area from the Mattole south to San Francisco - Marin, Sonoma, and portions of Napa, Mendocino and Humboldt counties.]

SWRCB: "In developing this policy, the State Water Board considered the 2002 draft 'Guidelines for Maintaining Instream Flows to Protect Fisheries Resources Downstream of Water Diversions in Mid-California Coastal Streams' . . . jointly developed by DFG and NMFS . . . The DFG-NMFS Draft Guidelines were specifically developed to protect and restore anadromous salmonids and their habitat. The DFG-NMFS Draft Guidelines were intended to preserve a level of stream flow that ensures anadromous salmonids are protected from deleterious effects of water diversion."

Water Right Applicant's Perspective:

- The SWRCB rejected the DFG-NMFS Draft Guidelines, a 19-page document, and substituted this brand new Policy. This was after applicants had been told for four years to proceed with complying with the Draft Guidelines.
- This Policy is 43 pages with appendices totaling 49 more pages, several technical memorandums and other documents totaling 700 more pages. It has a single focus - anadromous salmonids; it was developed solely based on the requirements of anadromous fish.
- SWRCB has the job to fairly consider **ALL** beneficial uses of water, including agriculture, wildlife and urban users. This Policy undercuts that mandate.
- The mainstem of the Russian River, Lakes Sonoma and Mendocino are exempt from this Policy. Preserving "a level of stream flow that ensures anadromous salmonids are protected from deleterious effects of water diversion" without dealing with these two major dams and the loss of those tributaries associated with these dams is dereliction of duty. The SWRCB will tell you the lakes and the mainstem are not under their jurisdiction because they are "regulated streams", but does that make it reasonable to target only agricultural ponds and small water districts (e.g., Brooktrails and Pine Mountain near Willits, Redwood Valley County and Willow and Millview Water Districts near Ukiah, Westport, Fort Bragg, Mendocino Township and others)? Small water districts up and down the coast and inland will be affected in their ability to deliver water to their customers. This Policy gives the SWRCB control of a 700-gallon storage tank for domestic use or 7 acre-foot pond used for ag and wildlife but no control over the 70,000 acre-feet of Lake Mendocino.

- Large urban users will not be affected - Santa Rosa will feel no pain - there are no limits to the increase in urban and suburban demand for water - agricultural operations found in small watersheds are the target.

History:

- This Policy (2008) came about because of AB2121 (2004) and a Petition filed by Trout Unlimited and Peregrine Audubon Society (2004).
- The Petition was supposedly filed to help streamline the water rights application process because there is a backlog of applications (now nearly 300), these applications having been stalled for 14 or more years, and many stalled by protests filed by Trout Unlimited as early as 1991 (they were buying time until they could write legislation). Many feel this Policy for this area is a test - the real goal by those who pushed this Policy into being is to rewrite California's Water Code and to reopen all licensed water rights.
- During the development of this Policy, water rights applicants and landowners were denied admission to the meetings which developed these regulations.
- The Division of Water Rights wrote its own Staff Report in 1997 that they felt fairly dealt with the licensing of water rights based on water availability. Trout Unlimited and its legal firm Natural Heritage Institute disagreed and the battle began. The Division then accepted Draft Guidelines written by DFG and NMFS in 2000 (revised 2002). For whatever reason, the Division and Trout Unlimited along with Natural Heritage Institute (TU/NHI) began the process that has led to this 2008 Policy, supplanting the ideas written in the 2002 Draft Guidelines (originally issued in 2000).
- Bottom line, the rules for applicants have changed repeatedly (based on where the pressure is coming from) and applicants have been jumping through hoops to try to comply with each new requirement since 1993 (yes, an application submitted in 1993 is still trying to find its way to some sort of resolution), and at great expense. At each rule revision, provisions became more restrictive.
- We are now faced with a Policy that the SWRCB states as its only goal is to take care of the needs of anadromous fish. The Endangered Species Act is a powerful and needed law, but can be applied where it is not genuinely necessary. Many people do not agree with what this Policy states these needs are. Not all fishery scientists are in agreement. Putting such tremendous regulations and restrictions on the backs of ag water users when the causes of the decline of salmonids are many and even global is unconscionable. Ag applicants and rural people who apply for small domestic use have become an easy target, much easier than taking on large urban users. What this Policy requires landowners to do will not help much to bring salmonids back and this is agreed upon by many professional biologists and hydrologists throughout the Project Area. This Policy needs to be rewritten with input from applicants as well as from agencies and TU/NHI. The Policy must have compromises made that everyone can live with.

The Five Principles of this Policy

SWRCB:

"1. Season of Diversion

"Water diversion shall be seasonably limited to periods in which instream flows are naturally high to prevent adverse effects to fish and fish habitat.

" . . . New diversions cannot be permitted during the late spring, summer, and early fall because instream flows during this period generally limit anadromous salmonid rearing habitat quantity and quality in the policy area. Although the DFG-NMFS Draft Guidelines recommended a season of diversion from December 15 through March 31, an earlier diversion season start date is still protective of fishery resources . . . This policy limits new water diversions in the policy area to a diversion season beginning on October 1 and ending on March 31 of the succeeding year."

Water Right Applicant's Perspective:

- Most applicants can readily accept a set season of diversion beginning December 15 and I might add the vast majority of landowners are not opposed to helping anadromous fish; many landowners are great stewards of the land.
- We all know that there is so little rainfall and runoff between October 1 and December 1 so this extension of the diversion season has no real benefit or meaning. Almost no one will be able to divert in October or November anyway.
- No streamflow will meet the Minimum Bypass Flow (see Item 2 below) requirement unless the watershed is many hundreds of acres.

SWRCB:

"2. Minimum Bypass Flow

"Water shall be diverted only when stream flows are higher than the minimum instream flows needed for fish spawning and passage.

" Adequate minimum stream flows are needed to provide habitat for fish spawning and upstream passage. The minimum bypass flow is the minimum instantaneous flow rate of water that is adequate for fish spawning and passage, as measured at a particular point in the stream. . . . A minimum bypass flow requirement prevents water diversions during periods when stream flows are at or below the flows needed for spawning and passage."

Water Right Applicant's Perspective:

- This Minimum Bypass Flow (MBF) is an applicant's project killer because it is so restrictive, and allows little water to be diverted.
- The MBF is based on an equation that relates bypass flow to watershed area. As the watershed area gets smaller, there is a decreasing percentage of water available for storage. In a 30 square mile watershed, one can divert water for approximately 50 days, but for a ½ square mile watershed, there may be no allowable storage at all during the winter because the bypass flow requirement can't be met (see table at the end of this document which is from the SWRCB Power Point Presentation).
- For existing ponds which are not yet permitted (and maybe for those that are), the Policy will require the construction of a bypass structure and channel that physically

moves water away from the inlet of the pond, around the pond, and must empty below the outlet of the dam. This structure is prohibitively expensive, impractical and unnecessary in small watersheds. Ask staff to draw a picture of one and discuss the cost. It entails hundreds of feet of large culvert or concrete channels, and large concrete boxes and weirs to make sure water goes in the bypass channel until a certain flow volume is going downstream. (The construction of this structure, at least around an existing pond, will probably trigger CEQA involvement.) This Policy prefers that the bypass structure be a "passive" one so the operator may not interfere with flows. Engineering this is complex and it may never have actually been done before. If not a passive bypass structure, the facility must be equipped in such a way as to provide real-time computer controlled monitoring of inflow and outflow rates. This MBF requirement will apply to retrofitting existing dams if not yet permitted and all new dams, onstream or offstream. The excess water above the minimum bypass flow may be used to fill the pond, but see next section.

- For offstream ponds, there will still be the requirement to build a structure and pumping station to limit water going into the pond so that it complies with MBF requirement.

SWRCB:

"3. Maximum Cumulative Diversion

"The maximum rate at which water is diverted in a watershed shall not adversely affect the natural flow variability needed for maintaining adequate channel structure and habitat for fish.

"Adequate magnitude and variability in peak stream flows are needed to meet the habitat needs of anadromous salmonids, including maintaining stream channel geometry, vegetative structure and variability, gravel and wood movement, and other channel features. In this policy these peak stream flows are called channel maintenance flows."

Water Right Applicant's Perspective:

- The Maximum Cumulative Diversion (MCD) sets an upper limit to how fast a pond may fill. All water beyond a certain flow rate must be sent downstream. So the applicant is faced with first allowing most of the water to go downstream because of the MBF, taking a little of what is left, and then permitting all high flows to go downstream because of the MCD. This makes it very difficult to fill even an ordinary sized pond.
- The Policy requires that the landowner actually move gravel that comes into the pond area from above in winter time to another location downstream. He is supposed to shovel it up and transport it back into the creek downstream of the pond or bypass structure. The same is true with large woody debris. These procedures have to be done annually based on a written plan and under the supervision of a professional biologist paid for by the applicant.
- The Policy requires the landowner to remove all non-native vegetation around the stream and pond.
- The Policy requires a complete riparian habitat management plan in and around the stream, and the plan must be written by a professional biologist, once again paid for by the applicant.

SWRCB

"4. Onstream Dams

"Construction or permitting of new onstream dams shall be restricted. When allowed, onstream dams shall be constructed and permitted in a manner that does not adversely affect fish and their habitat.

"Onstream dams can directly impact salmonids if they prevent fish passage and block access to upstream spawning and rearing habitats, intercept and retain spring and summer flows without providing bypass flows, intercept and retain sediments/gravels that would otherwise replenish downstream spawning gravels, intercept and retain large wood that would otherwise provide downstream habitat structure, and/or create slow-moving, lake-like habitats that favor non-native species that may either prey on anadromous salmonids or compete for food and shelter."

Water Right Applicant's Perspective:

- There will never be another dam built on a stream unless the stream is Class 3. A Class 3 stream is by definition intermittent, has a defined channel with a defined bank and has no aquatic non-fish vertebrates, meaning no frogs, no salamanders, and no bottom dwelling invertebrates such as insects and crayfish. This kind of stream has hardly any riparian life in and around it anyway.
- The Policy's supporting documents discuss removal of onstream dams. Does this refer only to unpermitted ones?
- The Policy says the SWRCB can modify existing licenses. Will this lead to the removal of legal, licensed, onstream dams?
- The Policy ignores all benefits to other wildlife, such as migratory ducks and geese, deer, mountain lion, insects, etc. Please have the SWRCB comment on this.
- In many cases, the general topography is too steep to build a pit pond to replace an onstream pond.
- If an applicant does attempt to build an offstream pond, can he get a permit for it?

SWRCB

"5. 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 fish and their habitat 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. . . . The State Water Board must find that unappropriated water is available to supply an applicant prior to issuing a water right permit. 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 rights are accounted for, and (2) an Instream Flow analysis that evaluates the effects of the proposed project, in combination with existing diversions, on instream flows needed for fishery resources protection."

Water Right Applicant's Perspective:

- All these reports and data collection used to be done by the Water Board's engineering and environmental staff. Now the applicant is required to do all research and number crunching, or more accurately, the applicant is now required to PAY for consultants and engineers to do it. The SWRCB will develop a short list of approved and acceptable firms from which the applicant must choose.
- With this Policy, applicants must now hire a hydrologist/engineer and an environmental consultant to prepare documents. Costs, even for small projects, run \$30,000 to \$80,000 for consultant fees.
- Landowners will be forced to pump groundwater or use riparian rights (which dewater streams in summer and harms salmonid habitat) or buy water from water districts. What effect will this have on other water sources and will it get the water it needs?
- For those creeks which empty into the mainstem of the Russian River, the channels will never recover at their confluence with the mainstem unless releases from Lakes Mendocino and Sonoma are modified. These releases seriously interfere with the hydrologic process where a creek joins the mainstem.

Possible Questions to be put to the SWRCB representatives:

1. The Policy was supposed to relieve the backlog of applications.
 - A) How is this Policy less complicated than prior procedures, in other words, will this Policy streamline the application process? Please compare the procedure people had to follow before with what they'll have to do with this Policy.
 - B) How long will it take an application to go through the multi-step process put forth in this Policy? One year? Ten years? Will the SWRCB be held to any deadlines the way an applicant is? What can applicants count on the Division of Water Rights to do? The Division's track record is not very good at this point.
2. If a municipal or rural water district in this county wants to expand and get more water, will it be able to under this new Policy with its restrictions?
3. If a person has to remove an existing dam, what can he do in cases where the ground is too steep to replace an onstream pond with offstream storage, i.e., a pit pond? And if one were able to do this, what are the costs? Also, how difficult will it then be to get a license for a pit pond? Will those rules also be subject to change over and over again?
4. What consideration has been given to the costs to the applicant of implementing this Policy's requirements?
5. An applicant up to this point, that is over the last 12 or 14 years, may have easily spent \$35,000 in an effort to comply with the everchanging requirements in pursuit of a legal water right. That \$35,000 has gone just for consultants. Under this new Policy, this applicant may

have to spend another \$30,000 to \$50,000 in additional engineering work and construction to maintain the minimum bypass flow requirement. Most applicants can't afford to comply with this Policy's requirements. What good will the Policy achieve if people are forced off their ranches and farms?

6. The Policy is clearly written to benefit salmon. How will the Policy positively or negatively affect other wildlife? If a person has to remove a dam, where will the birds and mammals go? Does the SWRCB care about that?
7. What is the role of hatchery fish in the scheme of trying to restore runs? The question needs to be answered because hatcheries have been operating in the Russian River system for 100 years. Even with hatcheries producing tens of millions of fish over the years, salmonids have not flourished.
8. A "Limit of Anadromy" must be established as part of the applicant's data collection requirements. The way the Policy is written, it is up to the applicant to prove a stream is not an anadromous stream rather than for the state to prove it is. There is the assumption that if a stream might be suitable for anadromous fish, it must have been an anadromous stream at some point in time. The historical records are not there for many tributaries in the Upper Russian River. Stream surveys are far and few between. Just what does "historically present" mean with regard to this river system?
9. The Policy focuses exclusively on small stream diversions as a cause of salmonid decline. Have you explored other factors such as: the effects of Lake Mendocino and Lake Sonoma; overfishing in the ocean; changed ocean conditions due to changes in food supply or predators; the effects of urban pollution? It would not be unfair to say it is common knowledge there is a whole list of problems salmonids face. The Klamath system salmonid population crashed in 2004, and the Sacramento River run of chinook crashed this year. How can you blame the small water users in North Coast streams for the salmonid decline here, when the same thing is happening elsewhere and that is obviously not the cause in those other river systems? How does changing the water right procedure here and prohibiting virtually all new diversion in the North Coast relate to the causes of salmonid crashes elsewhere? Both the Klamath and Sacramento Rivers are highly regulated, just like the mainstem of the Russian River so why is all the attention focused on small tributaries and coastal streams? Thus, the real question is how does the SWRCB justify writing such a narrow focus and restrictive Policy when it will likely produce very limited or no results for the Policy's stated goal of protecting salmonid fisheries?
10. In the past, the Division would accept a protest against a project without the protest being specific to the project, and the protest could tie up the application for years. Will the Policy change the protest procedure to one that is fair and equitable to both the protestant and the applicant?

If there is a Power Point Presentation, there will be some numerical tables shown. The following table provided here, titled "Comparison of Bypass Flows", is an important one. It came from the Power Point Presentation that the Division of Water Rights staff gave at the Technical Workshop in February 2008 in Santa Rosa. It compares four mathematical methods that have been considered for calculating what the SWRCB thinks is an acceptable minimum bypass flow.

- The "Upper MBF" method was looked at and rejected.
- The "Lower MBF" method was selected as the method to be used in this Policy.
- The "February Median" flow method was the method used in the 2002 Draft Guidelines, the Guidelines that have now been rejected in favor of this new Policy.
- The "10% Exceedance" method was looked at and rejected.

As you see, in a smaller watershed, the calculated "February Median" bypass flow requirement is smaller than that for the "Lower MBF" method. In real terms, the table says in the sample Dry Creek tributary that has a 1.2 square mile watershed, under the "Lower MBF" calculation method, a user can divert water only when the flow exceeds 10 cubic feet per second (or 10 cfs). Using the "February Median" flow method, one can divert when the flow rate is more than 6.8 cfs.

Likewise in the 4.9 square mile watershed of Huichica Creek, the "February Median" flow method allows diversion after there is a flow present of 7.4 cfs, but the "Lower MBF" method would require a flow exceeding 15 cfs before any water can be diverted. So the "Lower MBF" requirement is twice as restrictive as the "February Median" flow method. The staff will probably say that the "Lower MBF" method allows for more diversion and that is why they chose it. But this is only true in large watersheds. It is *not* true in small watersheds, and small watersheds are where a lot of ponds in this county are located and where people may want to build in the future.

Also, the table doesn't tell us how many days in each diversion season the minimum bypass flow is exceeded for either method, and those are the only days on which an applicant can divert water. For the Dry Creek tributary of 1.2 square miles, it is probably no more than 7 to 10 days each year, and may be less. For the Huichica Creek watershed, the allowable diversion days will be probably be no more than 15 or so. It might be a good idea to ask staff about the number of permissible diversion days in these smaller watersheds under the "Lower MBF" method.

Comparison of Bypass Flows

Site	Upper MBF	Lower MBF	February Median	10% Exceedance
Dry Creek Trib (1.2 mi ²)	18	10	6.8	5.6
Huichica Creek (4.9 mi ²)	37	15	7.4	17
Pine Gulch Creek (7.8 mi ²)	40	14	19	25
Franz Creek (15.7 mi ²)	57	17	15	55

Flows in cfs