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March 26, 2010

Mr. Charlie Hoppin, Chair
and Members of the Board
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

**Re:Com ments on the North Coast Instream Flow Policy (February 2010 Draft)**

Dear Mr. Hoppin and Members of the Board:

On behalf of Trout Unlimited (TU), we submit the following comments for the Policy for Maintaining Instream Flows in Northern California Coastal Streams (Policy).

There are two areas in which we believe the Policy must be improved before it is adopted. Broadly speaking, the two tasks are (1) to better define the cumulative effects standard that will be used to administer water rights, and (2) to require adequate monitoring and reporting of both diversions and streamflows.

Section I of our comments contains a statement of the problems and our suggested approach for the amendments we believe are necessary. Without amendments to address these two issues, Trout Unlimited cannot support adoption of the Policy. We are eager to work with the Chair or his designee to turn these recommendations into specific language for amendments. We are confident that it is possible to make these amendments in a way that improves implementation of the policy, does not delay adoption of the policy, and secures broader stakeholder support for the policy. We will offer specific and concrete suggested amendments to in early April for your consideration.

In other areas, the February 2010 draft of the Policy makes improvements over the previous draft. These sections include the Watershed Approach, Voluntary Modifications of Authorized Diversions for the Enhancement of Fish and Wildlife Resources, Small Domestic Use Registrations, and Enforcement. We also appreciate staff's inclusion (albeit with significant modifications) of a few concepts offered in the TU/Wine Industry recommendations. These include attempts to define slightly different rules for projects that are located above the upper limit of anadromy but contribute flows to insect-producing and fish-bearing reaches downstream. In a few areas, we have recommendations that we think could further improve those sections, and we can also offer specific text amendments on those areas for your consideration.

Section II of these comments addresses other concerns with the CEQA analysis, the scientific and legal rationale for the Policy, and the Responses to Comments.

Thank you again for considering our comments. We look forward to working with you to finish the Policy and to begin its implementation.

## I. Fundamental Concerns With The Policy

### A. There Is No Meaningful Cumulative Effects Standard

The draft Policy does not adequately define a standard for evaluating the cumulative effects of numerous small diversions within the policy area. This is apparent in the review of Daily Flow Studies required for applicants using the regional criteria, and also in the review of site specific studies, as we will discuss in subsections 1 and 2 below.

If an applicant decided to pursue and complete a site specific study, Division of Water Rights staff would be tasked with ensuring that the "proposed diversion, in combination with senior diversions, will not adversely affect the instream flows needed for fishery resources." (Draft Appendix C.1.2.4.) There is no further guidance on the question of what it means not to "adversely affect the instream flows needed for fishery resources." What level of cumulative effects is tolerable?

It is no exaggeration to say that this is the question we have all been trying to answer since at least 1997, and that it is the question the Policy was meant to address.

Trout Unlimited knows as well as anyone that defining an acceptable level of cumulative effects is very difficult. It is not a question that has been answered by the State Board before, and there is no answer that can be lifted directly from the scientific literature. TU and our consultant Bill Trush, along with consultants for the Wine Industry at Wagner & Bonsignore Engineers and Ellison, Schneider and Harris, attempted to define a meaningful and implementable overarching cumulative effects standard in our previous comments, which we called our Flow Management Objectives.

The SWRCB's consultants reviewed our proposal's Flow Management Objectives and concluded that it is not "fully demonstrated" and that it has not been widely tested or applied. That is true. But the draft Policy does not even try to define a comprehensive cumulative effects standard, as the following two sections of this comment letter demonstrate.

The choice for the Board is not between one option (the draft Policy) that is fully demonstrated and tested and another option (the TU/Wine proposal) that is not. The choice is between remaining silent on the principle question the Policy was meant to address and making a good faith attempt to answer it, using the best information available at this time.

#### 1. The Daily Flow Studies Define An Incremental Effects Test

Rather than define a comprehensive cumulative effects framework, the draft orients itself, quite literally, around an analysis of *incremental* effects. With the draft Policy, the rubber meets the road in Appendix B, which defines the actual steps an applicant has to follow to get a decision.

The critical section is Appendix B.5.3.4, which requires applicants to construct Daily Flow Studies. The Daily Flow Studies consist of a spreadsheet analysis that estimates from a historic record the number of days where the daily average flows would have been greater than the calculated Minimum Bypass Flow. (Appendix B.5.3.6 contains the same methodology but is adapted for projects on Class III streams and requires consideration of the number of days that the February Median Flow is maintained on the nearest Class II stream.) Although the analysis starts with unimpaired conditions, the extent of the change from unimpaired conditions—what we would normally call the cumulative effects—does not factor into the decision-making.

Instead, the draft compares the impaired condition *without* the project with the impaired condition *with* the project. If the number of estimated days with daily average flows above the threshold stays the same, the project gets permitted, regardless of the level of pre-project impairment in the watershed. If the number of estimated days decreases by one day, the project does not get permitted, regardless of the level of pre-project impairment in the watershed. This is the definition of an incremental effects test, and it would lead to absurd results.

For instance, the example Daily Flow Study provided with the draft Policy estimates there would have been 93 days over 10 years with a daily average flow exceeding the Minimum Bypass Flow threshold at the example POD. It estimates that there would have been 77 days under existing impaired conditions not counting the project (in other words, senior diverters would cause an estimated loss of 16 days). When the proposed project is added, the Daily Flow Study estimates that there would continue to be 77 days under impaired conditions including the project. Because the comparison of impaired conditions with and without the project did not cause the estimated number of days to change, the project can be permitted.

However, had existing conditions shown 78 estimated days, the proposed project would not be allowed to cause the estimate to drop to 77 days. That project could not be permitted, even though the estimated cumulative effect (77 days out of the original 93, or 83% preserved) would be the same. If existing impaired conditions showed an estimate of 92 of 93 days, the effective cumulative effects test would be 92 of 93 days (99% preserved); if existing conditions showed 40 of 93 days, the effective cumulative effects threshold would be 40 of 93 (43% preserved).[1]

In short, any level of cumulative effects is equally acceptable or unacceptable under the draft Policy, so long as the new project does not change things very much.

Needless to day, the Administrative Record does not contain any information to demonstrate that the existing conditions in each stream within the policy area are sufficient to maintain instream flows for the protection of salmonids and other natural resources. There is also no information in the record that could support a finding to the effect that no additional impairment greater than a loss of one day of average daily flows in any stream within the policy

[1] The level of existing impairment is not the only variable that can change in a way that creates absurd results. The denominator that appears in the spreadsheet is also subject to change (or manipulation) in a way that does not reflect any real difference "on the ground." For example, the applicant might have used a different gauge, a different period of record, and/or different POIs. The next applicant is sure to have at least one different POI (because he or she has a different POD), and will be measured against a different baseline.

area is tolerable. Existing conditions within the policy area vary a great deal. A few streams are effectively unimpaired by water diversions and a great many others are already suffering greatly.

The next absurd result of the draft Policy is that it would allow a second, or a third, or any number of projects that cause a loss of slightly less than one day of change in the spreadsheet, but not even one project that causes slightly more than one day of change in the spreadsheet. Because the issue in the North Coast has always been a problem of "death by a thousand cuts," and there are large numbers of projects that by themselves may not be significant, a policy that perpetuates the problem should be unacceptable to the Board.

In the Responses to Comments of Brian Johnson of 11/12/2009, staff states that the Policy is intended to "preserve the condition that existed at the time of Policy adoption." It states: "Once a pending project is permitted and becomes part of the senior demand, the next pending project to follow will need to pass the same test and will have an appropriate bypass that preserves the condition that existed at the time of Policy adoption." This is not what the draft Policy actually requires. (See B.5.3.4 comparing conditions with and without the project.) The Response seems to assume that the next project will use the same spreadsheet, and will have the same task of ensuring that 77 of 93 days remain. But the next applicant will have a different baseline, because the next project will have a different POD.[2] Therefore, the draft Policy could allow an endless number of small incremental effects.[3]

The Board could close this "loophole" and make the Policy function as the Response to Comments says it does by amending sections B.5.3.4 and B.5.3.6 to require a comparison of impaired conditions at the time of Policy adoption with impaired conditions including the project and all other projects that have been permitted since Policy adoption. But the basic flaw—all existing conditions are considered equal—would remain.

Rather than "preserve the condition that existed at the time of Policy adoption," we would amend the Policy to set a meaningful cumulative effects standard. Put differently, *the orientation of the Policy should not be to preserve existing conditions, but to promote good conditions.*

### 2. The Guidance For Site Specific Studies Does Not Define The Acceptable Level Of Cumulative Effects

The Regional Criteria are intentionally conservative. As a result, most observers believe that a large number of projects will not be able to comply with the Regional Criteria, and a large number of applicants will turn to site specific studies.

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[2] It could also be expected to include other different POIs, a different flow record, a different consultant, a different count of senior diversions (as new riparian statements come in with the new reporting requirements or senior applications are canceled), and so on.

[3] The draft Policy also includes the 5% of the 1.5 year return flow rate of diversion limitation. But as discussed in the next subsection of these comments, we do not believe that limitation can be implemented in its present form because most applicants will not be able to comply with the requirement, and the guidance for site specific studies cannot be used for decision-making.

Guidance for conducting site specific studies is contained in Appendix C. To staff's credit, the February 2010 draft contains much more information about the types of studies that would be acceptable to the Division than did the first public draft. Unfortunately, Appendix C still does not state what criteria would be used to evaluate the site specific studies. It does not define what level of cumulative effects would be acceptable or unacceptable. It is not possible for an applicant or staff to know the circumstances under which a project may be permitted, or denied.

Section C.1.2 describes the studies to be conducted. The results of the study are reviewed according to section C.1.2.4, which states: "The analysis shall demonstrate the proposed diversion, in combination with senior diversions, will not adversely affect the instream flows needed for fishery resources."

The question that Division staff must answer then is: What does it mean to "not adversely affect the instream flows needed for fishery resources"? As noted above, that has always been the question. Trout Unlimited is concerned that after all this time, we will reach the end of the flow chart and find ourselves right back where we started.

The guidance for conducting a site specific study to define a bypass flow is also troubling, although it is more easily fixed. The bypass flow is supposed to be "protective of all habitat types" (C.1.2.4) but the draft does not define what that means. The TU/Wine recommendations included a possible definition of a spawning and migration flow, and we will adjust that based on the comments received by the SWRCB consultants and suggest it as a specific addition to the Policy.

The rate of diversion limitation is more problematic. It is meant to be a geomorphic test. Section 1.2.2 states that the study should show: "how the proposed site specific value does not lead to measurable long term changes in bankfull width and depth, or measurable long term changes to substrate grain size distribution percentiles."

The draft Policy does not say how such a study would be evaluated, and we are not sure that there is any accepted scientific framework for making such an evaluation for small projects. It is not even clear whether R2 and Stetson believed that the 5% of the 1.5 year return flow Regional Criterion itself would result in "measurable" long term changes in bankfull width and depth. According to the "Scientific Basis" report, the Regional MCD Criterion "will likely result in long term adjustment and reduction in channel size," but the potential change is "thought to be minor." (Task 3 Report, Table 5.) The uncertainty associated with the protectiveness of the MCD limitation was considered "to have the greatest uncertainty associated with it in terms of what maximum level of change equates with protectiveness," and it was to be a major focus of the adaptive management and policy effectiveness review monitoring. (Appendix K-21.)

If it is applicant's responsibility to show that any level of cumulative diversions *will not* cause a measurable change in bankfull width and depth or substrate size distribution, the draft Policy may have established an insurmountable threshold for permitting. If the burden is on the Board or a protester to show that a proposed project *will* have such an effect, this hurdle would be insurmountable too, we would expect all small projects to pass muster. It is a sign of the

draft's ambiguity that stakeholders cannot even agree on the likely affect of its adoption, beyond the fact that we both expect continued delays and disputes over studies.[4] We all agree that the site specific rate of diversion standard cannot be applied directly for decision-making.

Either way, the lack of an implementable limit for cumulative diversions in the site specific studies is particularly troubling. First and foremost, it is troubling because the 5% of the 1.5 year return flow criteria is the closest thing the draft Policy has to an overarching cumulative effects limitation. If that limitation remains defined in a way that cannot be implemented in the form of site specific studies, there is nothing else in the Policy that even purports to measure cumulative, as opposed to incremental, effects.

Second, a very large proportion of the applicant pool will need to turn to the site specific study criteria in Appendix C. The existing 5% of the 1.5 year return flow standard will be impossible for many small "fill and spill" projects to achieve. At any POI above which more than 5% of the watershed is behind a fill and spill reservoir, the calculation will show an impairment of above 5% of the 1.5 year return flow. However, not all of these locations will actually cause a reduction of 5% of flows during a 1.5 year flood event, because in a bankfull storm many ponds would be filled and spilling. In addition, it is effectively impossible for many of these projects to be retrofitted to adopt a fixed rate of diversion limitation, unless the stream can be routed around the pond and converted into an offstream reservoir.[5]

These applicants will turn to site specific studies. As with the guidelines for determining bypass flows, we are extremely concerned that they will get stuck at this point, trying to answer the questions we began with.

It may be worth remembering one of the prime motivations for the legislature to enact AB 2121 in the first place. It was intended in large part so that the State Water Board could set clear standards for water rights applications. This would help establish expectations for applicants and enable timely decision-making at the Board. Your staff needs to know when to grant and to deny applications, and how to condition them, so as to eliminate the backlog.

We are concerned that the draft Policy would serve mainly to lock in the status quo at the board, by memorializing how staff actually processes (or does not process) applications. I hope the Chair and other Board Members agree that we can do better than that.

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[4] Agricultural interests believe it was meant to prohibit any processing of applications, and the Response's suggestion that it would preserve existing conditions lends that theory some support. For our part, the otherwise incremental nature of the analysis makes me think staff would probably tolerate an unlimited number of small projects on the rationale that the new 15 or 49 acre foot diversion does not, by itself, cause a measurable geomorphic effect.

[5] This is a major reason why the TU / wine industry recommendations focused on developing recommendations that could use a dynamic rate of diversion limitation. (The other reason, of course, is that it makes sense from a scientific standpoint.)

### 3. The Policy Principles Are Directionally Correct But Insufficient By Themselves For Decision-Making

Appendix C refers applicants back to the Policy "Principles" located in Section 2.1 for guidance. But by themselves, the Principles do not contain actionable guidance. There are two reasons for this. First, they are intentionally written in a general way. For instance, Principle 4 states that "The cumulative effects of water diversions on instream flows needed for the protection of fish and their habitat shall be considered and minimized." That is not necessarily a failing for a "principle," but by definition it is not the sort of guidance that can be used directly by the State Water Board for decision-making.

Second, like the Daily Flow Studies, the Principles lend themselves more readily to an incremental effects analysis than a cumulative effects analysis. In particular, Principle 2 states that "Water shall be diverted only when streamflows are higher than the minimum instream flows needed for fish spawning, rearing, and passage." Because many existing, legal diversions do not operate in this manner, almost every stream within the policy area is already out of compliance with this Principle. Even some newly permitted diversions under the draft Policy would violate this principle, including specifically many diversions located above the Upper Limit of Anadromy.

TU and our wine industry partners were honest about the existence of existing water rights with our proposal. Our proposed cumulative effects framework (including specifically the Flow Management Objectives) allowed for some diversions below the minimum required for salmon spawning and migration, but we would limit those diversions much more severely than diversions that occur when greater flows are in the river.

This was in part a nod to reality: many legal diversions already exist. The extent to which existing legal diversions are operated in a way that keeps fish in good condition is unknown, but the first step is to define an acceptable level of effect. That is what we attempted to do with our recommendations.

Because the TU/Wine Flow Management Objectives would allow some diversions to take place that reduce the frequency of flows at the MBF threshold, SWRCB's consultants noted that our recommendations were theoretically was less protective than the Regional Criteria developed in the Scientific Basis report. Staff at the agency then developed its own procedure for small projects that also departs from the criteria developed in the Scientific Basis. If staff had asked R2 and Stetson to evaluate that small projects rule (they did not), they would have received the same response.

### 4. The Potential For Amendments

In truth, it is not possible to answer whether the TU/Wine Industry proposal is more or less protective than the draft Policy. The draft Policy, as it stands now, measures only

incremental effects, without determining whether the level of existing impairment is acceptable.[6] We attempted to define a level of acceptable cumulative impairment.

Hopefully, the Board will agree that amendments to establish a meaningful cumulative effects standard are necessary. We promise to work with the Wine Industry to recommend specific and concrete amendments that can be made to the Policy so that it can be adopted an implemented. Those amendments will be based on our prior recommendations, but we will review those recommendations in light of the February draft Policy and your consultants' evaluation of our suggestions, and modify them as necessary so that they can coexist with the draft.

### B. Monitoring and Reporting of Both Diversions and Streamflows

Trout Unlimited's second fundamental issue with draft Policy is its treatment of monitoring and reporting of both diversions and flows. Very little is known about existing diversions or stream conditions within the policy area. Most water users do not report anything about their diversions to the State, because they are operating on a riparian claim or illegally. (See May 1, 2007 TU comments for statistics and citations.) Those rights holders that do report diversions typically report only broad information about overall quantities and maximum rates of diversion. The reports tend to be based on educated guesses, rather than actual monitoring and data-logging. It does not include specific facts about the timing and quantity of diversions, and it is not adequate for the Board to make informed decisions.

In addition, very few North Coast streams are gauged for streamflow. In short, neither the supply of, nor the demand for, water in the policy area is well understood.

The draft Frost Protection reasonable use rule recognizes this problem, and it would require continuous recording of the timing and quantity of diversions for frost protection. It would also require a regional program of stream gauges, at least during frost protection season.

The TU/Wine Industry recommendations similarly included meaningful measures to improve monitoring and reporting of both diversions and streamflows. We also made recommendations on Policy Effectiveness Review and adaptive management.

#### 1. Monitoring and Reporting of Diversions

The TU/Wine Industry recommendations included the following recommendation for monitoring and reporting of streamflows:

> Permits shall require continuous monitoring of diversions for each point of diversion and other conditions necessary to demonstrate compliance with permit terms relating to bypass flows, seasons of diversion, and rate of diversion. For purposes of this Section, "continuous" means at time intervals of 1 hour or less. (See Final Responses to Joint Recommendations, Section 8.0.)

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[6] The lone exception is the 5% of the 1.5 year return flow rate of diversion limitation, which is paired with a process to conduct a site specific study to assess geomorphic effects and is not implementable.

We recommended further that monitoring of diversions for direct diversions and diversions to offstream storage would necessarily take a different form than monitoring and reporting of diversions to an onstream dam.

> Permits for direct diversions and diversions to offstream storage shall require monitoring, recording, and reporting the timing and quantity of water actually diverted from the stream (e.g., with an electronic inline flow meter). (Id., at 8.1.1.)

We recommended that "Permits for onstream reservoirs shall require monitoring of reservoir levels, releases from the reservoir to the stream channel, and withdrawals from the reservoir." (Id., at 8.2.1.)

The draft Policy does not include these or any similar provisions for monitoring and reporting of diversions.

In fact, we have been unable to find any reference to this recommendation in the Responses to Comment. (See Final Responses to Joint Recommendations, Section 8.) Instead, the responses appear to have focused on related suggestions to develop a real-time reporting system for diversion and streamflow data, and state that the agency has no budget to implement such a thing.[7] Even if that is true, a requirement that water rights holders monitor and report diversions can still be adopted.

We will suggest a specific amendment to the Policy to incorporate adequate monitoring and reporting of diversions.

### 2. Monitoring and Reporting of Streamflows

The joint TU/Wine Industry recommendations also included a requirement for monitoring and reporting of streamflows. Specifically, we recommended that the Policy require gauging by one of two means: permit and license holders could install their own stream gauges or contribute toward a regional stream gauging program. (See Final Responses to Joint Recommendations, Section 8.3)

The draft Frost Protection reasonable use rule recognizes the importance of stream gauging information, and requires continuous monitoring and reporting of streamflow information during the frost season, and display of that information on the internet at not less than hourly intervals.

Unfortunately, the draft Policy does not include the TU/Wine Industry recommendation for gauging, or something similar. The Responses to Comment do not explain why this is so, other than to reiterate that the agency believes it does not have the funding to implement the

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[7] The joint TU/Wine Industry recommendations suggested that reporting occur as follows. "Diversion data shall be reported with next Progress Report By Permittee or Report of Licensee, or whenever requested by the State Water Board. Permits shall include a term stating that the State Water Board intends to develop and implement a basin-wide program for real-time electronic monitoring and reporting in a standardized format, and that such reporting will be required upon a showing by the State Water Board that the infrastructure is in place to accept real-time electronic reports. It shall not be necessary to amend the permit at that time."

gauging program itself or to develop a program for electronic reporting and display of the gauging information. That should not prevent the Board from requiring it of diverters.

We will recommend a specific amendment to the draft Policy to implement our suggestion.

### 3. Policy Effectiveness Review

If there is one thing that unites stakeholders about the Policy, it is the need to recognize that we do not know all the answers, and that the best approach is to implement the Policy based on what we know now and to adapt as we learn more.

For this reason, the consultants R2 and Stetson Engineers devoted an entire chapter and an appendix in their technical report to designing an adaptive management and Policy Effectiveness Review program. It is not a stretch to say that they did not believe their own scientific rationale to be sufficient without it. (See statement regarding uncertainty in the rate of diversion limitation, above.)

All of the peer reviewers and prominent commenters such as the Department of Fish and Game also strongly supported the Policy Effectiveness Review program, and many stated that they could not support the draft without it. (See DFG comments Attachment A, page 7 regarding 5% of the 1.5 year return flow criterion.)

The program also featured prominently in the consultant's responses to Peer Review. The phrase "effectiveness monitoring" appears 26 times in that document. Many of the peer reviewers had questions about the Policy's approach and noted significant areas of uncertainty. The consultant's standard answer was to state that the comment is noted, and that is why they proposed the Policy Effectiveness Review. For example:

*Comment 5.5 Cumulative Effects, pg 6-7*

> "…there remains a fair bit of uncertainty as to which" MCD "alternative is best in terms of protectiveness. With some qualifications noted…, the MCD2 rate method appears to be protective of the hydrograph, though other rate alternatives may be more so. … it seems that the protectiveness of this element may hinge more on implementation than on which level is actually chosen. The 'success' of any alternative would seem to hinge on close monitoring of diversion rates at all points of diversion. …
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> Comment noted. This comment highlights the importance of an effectiveness monitoring program.[8]

Unfortunately, the draft Policy does not include provisions for Policy Effectiveness Review or adaptive management, although it appears that staff and Board Members seriously

[8] See also Peer Review Comment 5.9.2 Conclusions and Recommendations, pg. 9: "The detailed monitoring plan is one of the best examples I've seen on how to plan and implement adaptive management. If fully implemented, I believe it has the potential to become a showcase example of how to manage instream flows within an adaptive management framework." The consultant's response: "Comment noted."

considered including it in some form. The reason for this is probably that staff felt that they could not ensure that the resources would be available for the task.

We understand that this is the case. However, we strongly believe that it is possible and wise for the Board to state that it is your policy to carry out that program, even if you must also state that your ability to carry it out depends in part on having sufficient resources. This is true of other Policy provisions too. Given the strong stakeholder support for adaptive management and the critical role it plays in supporting the scientific rationale for the policy, we believe that there will also be widespread support for making sure that you have the resources to accomplish the task.

Trout Unlimited will propose specific text amendments for your consideration that reflect this recommendation.

## II. Additional Comments On CEQA and The Scientific Basis For The Policy

### A. The Draft Does Not Adequately Describe The Project Setting or Baseline Conditions

As discussed above, we disagree with the draft Policy's basic orientation, which is to assess incremental effects and "preserve the condition that existed at the time of Policy adoption." The draft and SED also fail to adequately characterize the baseline condition that existed at the time of Policy adoption.

The Division of Water Rights has limited information about existing diversions and stream conditions. Most estimates of demand leave out the majority of the water diverted in most coastal basins—water extracted by "non-filer" reservoirs, water extracted by unauthorized direct diversions, water extracted by unauthorized diversions from subterranean streams, water extracted by under basis of riparian or pre-1914 right without a statement of diversion and use, and water extracted from groundwater that affects surface flow but remains outside the Board's permitting jurisdiction. Even considering only surface water reservoirs visible with aerial photos, the SEP's data indicates that there are almost as many unauthorized diversions as there are valid appropriative rights. (1,771 compared to 2,144; *See* SED App. E, p. 7, 16.)

Notwithstanding data gaps, it would have been possible for the agency to piece together estimates of demand based on the information in its files together with estimates of irrigated acres and residential demand. It would have been possible for the agency to create unimpaired and impaired hydrographs using similar methods as it proposes for applicants.

Unfortunately, the draft does not attempt to quantify existing diversions or streamflows, or to assess existing conditions. It does not determine whether existing conditions are good. It does not compare existing conditions to the Policy "Principles" or the Regional Criteria. If the agency has concluded that existing conditions are sufficient "for maintaining instream flows" as part of state policy for water quality control, it does not disclose how it reached that conclusion. (See Stats. 2004, ch. 943, § 3 codified as Water Code § 1259.4(a)(1).)

### B. The Draft Does Not Adequately Disclose Or Avoid Cumulative Effects

Because the baseline condition has not been adequately characterized and the draft Policy focuses almost exclusively on new permit applications, implementation of the Policy would lead to undisclosed and unmitigated cumulative effects. Lacking adequate information about existing diversions, the analyses required by the Policy will understate cumulative effects. To take one limited example, riparian diverters are senior to new applicants, but very little is known about them. If an estimate for their water use is not included within the water availability analysis merely because they have failed to report their statement of use, the analysis will understate cumulative effects, and those cumulative effects will be very hard to minimize once the permit is granted.

### C. The Water Supply Reports and Cumulative Diversion Analyses Required By The Appendices Will Violate CEQA

As Trout Unlimited stated in our May 2008 comments, CEQA requires analysis of all existing and reasonably foreseeable cumulative effects. Yet the draft Policy continues to focus solely on effects caused by known senior diverters. Following is the relevant Response to Comment.

> Comment 6.0.32: Ensure that the Policy appendices and flowcharts require consideration of all existing and reasonably foreseeable diversions in the cumulative effects analysis, and to ensure that the analysis is not limited to senior diversions. (Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society)
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> Response: Appendix 1 and Figure A-1 describe guidelines for performing water availability analyses. Water availability is based on first in time, first in right and therefore only needs to consider senior rights and the pending project. For the purposes of water availability, only senior diversions plus the proposed project need to be evaluated. *The cumulative consideration of all existing and reasonably foreseeable diversions is a requirement of CEQA, which is a separate evaluation from a water availability analysis.*

We understand that the Water Code allocates water rights on a basis of first in time, first in right, and that CEQA is a separate statute. However, the Board must comply with both the Water Code and CEQA to process an application. Unless the Board modifies the analyses contained in sections B.5.3.4 to include an additional step that evaluates the cumulative effects of all existing and reasonably foreseeable diversions, and not just senior diversions, the analysis prepared pursuant to the Policy will violate CEQA. The Board should continue to process applications on a seniority basis, but it must also disclose cumulative effects as defined by CEQA.

### D. The Draft Does Not Include An Adequate Range of Alternatives, Or Provide A Rational Basis To Explain Its Focus On New Applications

#### 1. The Draft Does Not Explain Its Focus On Processing New Applications

A.B. 2121 does not merely state that its mandate is to develop guidelines for processing new water right permits or petitions. The carefully crafted language of the statute did not stop there. Instead, Water Code § 1259.4 requires a policy for "water right administration" sufficient "for maintaining instream flows." (*Id.* § 3; Water Code § 1259.4(a)(1).)

Although the SED contains some discussion of what it terms "non-filer" surface water reservoirs (estimates 1,253 in existence) and unauthorized dams with pending applications (estimates 518) (SED App. E, pp. 9, 13.), the SED does not discuss the consequences of the decision to allow unauthorized diversions to continue unchecked, or evaluate alternatives that would require "non-filers" to file an application or cease diversions without a permit.

The SED and Draft Policy take a similar approach with unauthorized diversions from subterranean streams flowing through a known and definite channel, and with unauthorized direct diversions that cannot be discerned from an aerial photo. That is, the policy alternatives apparently assume that such diversions would be subject to the Policy if an application is filed, but there is no analysis of alternatives that might identify such diversions or encourage them to file, or to prevent them from diverting.

There is no discussion at all about diversions based on a riparian, pre-1914, or percolating groundwater right, even though such diversions plainly affect instream flows and the ability of the agency to make informed decisions. (*See* SED, p. 16.) The SED analysis treats such diversions as thoroughly beyond the influence of the SWRCB—except, ironically, as methods to avoid complying with the Policy. (*See* SED, p. 49.) This is unfortunate not only because it understates the scope of the agency's constitutional obligation but also because it underestimates the opportunity to create incentives for positive stewardship.

Neither the draft Policy nor the SED explain the decision to focus exclusively on new permits and petitions, or how that decision will result in water rights administration sufficient "for maintaining instream flows." This is particularly troublesome because existing diversions during the dry season months are perhaps the biggest threat to salmon and steelhead.

Even without reopening all existing permits, there are other actions that the Policy could take to improve summer flows and help the State Water Board fulfill its statutory mandate. We suggested a number of them in our original comments. They included an increased emphasis on watershed-based management, incentives for voluntary stewardship, and a work plan to bring "non-filers" into the fold. (*See* Recommendations on Sections 4, 11, and 12.) Some of those suggestions made it in modified form into the draft Policy.

But the draft does not yet explain whether and how the agency has determined that these measures will be sufficient to maintain instream flows. The State Water Board may have reasoned that conditioning pending and yet-to-be-filed permits for existing but unauthorized diversions is sufficient to fulfill the A.B. 2121 mandate and protect the public trust. The agency may also be planning additional action, unstated in the Policy, to bring "non-filers" into the water right system. If either of these paths reflects the State Water Board's reasoning, the agency should say so, and explain how it reached its conclusions.

### 2. The Draft Unlawfully Refuses To Consider Procedural Changes For Processing New Applications

Staff's Responses to Comments refused even to consider the procedural changes included in the joint TU/Wine Industry recommendations. The stated rationale was that process changes for new applications are outside the scope of the Policy. "Although some of these suggestions have merit, they involve changes to the water rights administration process. This is outside of the context of establishing a policy for maintaining instream flows." (See Final Responses to Joint Recommendations, Section 4.)

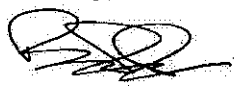
This is ironic, given the heavy focus on new applications in the draft Policy and refusal to consider the effects of existing diversions. It is also plainly incorrect, as the AB 2121 mandate is for "administration of water rights," a deliberately broad term.

These procedural recommendations are more important to the Wine Industry representatives than to Trout Unlimited. For the industry, they are akin to TU's support for comprehensive monitoring and reporting: without changes to that effect, they have stated that they would be unable to support the Policy. Trout Unlimited also supports these recommendations and will propose amendments to implement them in the Policy.

## III. Conclusion

Trout Unlimited has two fundamental concerns with the draft Policy as it is currently written, but we believe both issues can be resolved in a way that improves the Policy and does not require further delay. We are eager to resolve the remaining issues and to work with the State Water Board to begin the Policy's implementation.

Sincerely,



Brian J. Johnson