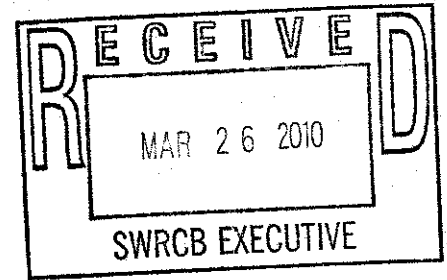


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March 26, 2010

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

Subject: Policy for Maintaining Instream Flows in Northern California Coastal Streams Draft

The *North Coast Stream Flow Coalition, NCSFC, formed this Coalition as of March 5, 2010 with 20 organizations from San Pablo Bay to the Oregon border including the Eel River and Klamath River basin representation.

The goal of AB2121 is to establish guidelines and principles to expedite approvals of water right applications and to ensure that there shall be healthy instream flows in Northern California coastal streams for fish and other wildlife.

The purpose of this letter is to inform the State Water Resources Control Board, SWRCB, Division of Water Rights, DWR, that the NCSFC has a responsibility to our watersheds that sustain us, to collectively inform you that the Policy for Maintaining Instream Flows in Northern California Coastal Streams Draft has deficiencies and gaps that must be remedied in order to protect Public Trust values.

The NCSFC recognizes the amount of time and resources that the staff at the State Water Resources Control Board, SWRCB, Division of Water Rights, DWR, dedicated to producing this current Policy Document, PD, for Northern California coastal streams. Further, we appreciate that the SWRCB strives to improve water quality and quantity and protect and defend the Public Trust Doctrine and values therein.

California's fresh water resources have been abused for centuries bringing aquatic resources to collapse, and in some cases, extinction. There is a culture of lawlessness in the west when it comes to water. Some water users steal water rather than going through a permitting and licensing process. Some water users may file a water right application and all the while they have already taken the water. Some water users use water for other purposes than what they have been permitted. Others demand licensing when they are NOT currently using the water they sought out to use originally then make unreasonable predictions about using the water in the future. We see riparian rights abused constantly!

Groundwater is NOT seen by the SWRCB as enforceable, except with limited criteria, yet we know that groundwater is connected to stream flows. This all leaves the public in a situation in many of our streams where we have lost our right to recreate, swim, boat

and fish which are the obvious links we have to our watersheds and recognized as public trust values. More importantly is the inter-connectivity we share with the entire web of life in our watersheds that ultimately equates to survival of all living things that touch each other in this web. The web is shredding apart because the aquatic links, such as fish, are dying in mass not only from pollution entering the streams but more importantly from a sheer lack of water which is the most devastating limiting factor to life itself. This is a terrible loss to future generations and an immediate urgent need for the SWRCB to implement the spirit and intent of AB2121 expeditiously. Further, we the NCSFC, urge the SWRCB to consider our comments as necessary improvements to close gaps and deficiencies in the Policy Document.

GENERAL

There are improvements in this new iteration of proposed policy to maintain flows in northern Californian coastal stream. It is our view that we should preserve these improvements and push harder on the issues of reliability of the methodology of determining Minimum Base Flows, MBF and Maximum Cumulative Diversion, MCD, enforcement and other elements of the PD that will improve outcomes of this the PD.

Peer Review and Sensitivity Analysis documents assess the Minimum Bypass Flows, MBF, and the Maximum Cumulative Diversions, MCD, analysis in terms of maximum instantaneous diversion on a specific flow regime (stream). The Regional Criteria along with Water Supply Reports/Water Studies and Site Specific Studies review and analysis do not assess the effectiveness of policy implementation criteria and standards that would include subsurface flows.

The Peer Review and Sensitivity Analysis do not consider effects of impoundment and diversion above anadromy.

The PD has no scientific or logical ground to ignore effects of impoundments/diversions of water (hydro-modification) on instream flows necessary to support salmonids in all life stages. The health of a watershed is determined from the headwaters to the confluence or in other words, watersheds have a linear interconnectivity. The PD promises to protect wildlife and fish yet the PD escapes this responsibility by allowing areas of the watershed to have less importance (areas above anadromy) than other portions of the watershed (areas where there is fish). We can not recover/restore these watershed basins unless we see the watersheds as a unit for the entire life cycle of the fish.

Given that streams above anadromy supply the entire basin with both water and food for healthy aquatic ecosystems, what is the scientific basis for the PD determining that streams above anadromy water diversions may not have to meet Minimum Bypass Flows and Maximum Cumulative Diversion criteria? Was this peer reviewed? If so could you provide this information to the public?

When a Watermaster is involved water users must consult with the Watermaster to determine if water is available for use in a stream segment that has been adjudicated. If the Watermaster informs the applicant for water use that there is no water available, then the applicant will know up front that there is NO water available for diversion.

Shall the Division of Water Rights implement a screening process whereby all applicants must first be screened to see if there is a Watermaster involved, so that the

public and the SWRCB does not have to use resources necessary for an application process for a water right permit?

SEASON OF DIVERSION

Section 2.2.1.1 defines the Season of Diversion as December 15-March 31st.

However, Appendix B-6 states that: 'Because the season of diversion specified in the PD is October 1 to March 31st and irrigation of crops in the policy typically does not being before March 31st, senior water rights authorizing direct diversion for irrigation before March 31 do not need to be considered part of the seasonal demand. However, since a post-harvest irrigation may occur between October 1 and October 31, the October demand of senior water rights with an authorized season extending into this period should be included.'

Isn't this language an error or did the PD not correct and take out this language? Can you please clarify as this makes the PD confusing and internally incongruent?

Additionally, the PD allows some diverters to divert water from the streams outside the designated December 15-March 31st seasons. For example on page 4, 2.2.1.1- "Site specific studies may indicate that the season of diversion can be extended into other times of the year."

This incongruence makes the Policy unreliable and not protective of fish and other wildlife.

GROUNDWATER

The PD limits the outcomes of the PD to beneficial uses for fishing, swimming, boating and recreation with particular emphasis on salmonids. Yet, the health of a watershed is defined not by the stream channel itself but by the linear health of the ecosystem and all the wildlife that depend on robust flows that maintain lakes, wetlands, springs, seeps and streams. When groundwater is depleted we see these vital ecological resource areas become dewatered and then ultimately the streams become dry as well.

The PD is almost void of the interconnectivity of groundwater and riparian flows with the exception of 'subterranean nexus' between surface flows and riparian aquifers where the DWR has determined that there is a defined channel and bank. For example, when groundwater depletion is ignored critical habitats such as seeps and springs can dry up and destroy habitats for red legged frogs.

We know that groundwater flows through porous geologic formations underground. We know that groundwater is constantly moving to lower gradients and gradually makes it way to lakes, seeps and springs and eventually to the streams and rivers and ultimately the ocean. The SWRCB ignores the interconnectivity of groundwater to streams and allows the relentless pumping of groundwater with reckless abandonment. To continue to ignore that the health of our streams depends on healthy groundwater reserves destined our watersheds to continued degradation and a hopeless extinction vortex for species.

HYDROLOGY

The PD states that during periods of diversions the bank full stage shall not diminish more than 5% of the 1.5 historical storm peak flows (based on 10 years of data) in order to be protective of fish. The PD recognizes that many streams do not have stream gauges so the PD recommends that water users determine MBF by using the next closest stream gauge. Yet, not all watershed basins are created equal.

All watersheds are not equal in geology, soils, vegetation types, topography and land use.

Is the baseline from which the MBF and MCD methodology constructed reliable? Will it protect fish?

Shouldn't the priority of the PD be to establish reliable data in order to protect fish? Shouldn't the SWRCB put stream gauges in all streams in order to have a reliable baseline of data in order to construct an accurate MBF and MCD per watershed for the protection of fish and wildlife? Couldn't the DWR select watersheds to compare according to similar watershed characteristics?

Why did the PD decide to use the last 10 years of data from stream flow gauges?

In some highly impacted watersheds, shouldn't there have been a discussion about the watershed land use changes in the last 20, 30 or 50 years (depending on availability of stream flow gauge historical data) that have in some cases (Napa River) watershed changes have severely altered the natural hydrograph where deforestation, urbanization, contouring and channelization of streams changes the storm peak flows? Considering these impacts to the watersheds is the 10 year stream flow data to establish the 5% of the 1.5 historic storm peak flows a good baseline?

Accordingly, there will be artificially more water in the streams due to increased runoff (urbanization) at storm peak flows but less water held in storage (subsurface/groundwater) that feeds the streams during low flow months of the year.

Before the DWR approves this PD isn't it vital to investigate and discuss these hydrological problems as it is the basis for determining MBF and MCD?

In highly urbanized watersheds there could be higher spiked (hydrograph) peak storm flows with a fast drop of flows in the winter (false peak flows not conducive to fish migrations) and less stored water in the dry months.

Doesn't this artificial 1.5 storm peak flow then put fish at risk during the summer and fall because too much water got diverted or ran out of the watershed FAST during the winter? The PD fails to discuss this.

The goal of AB2121, passed by the California Legislature in October 2004, is to achieve flow protection for fish and other wildlife and to preserve the Public Trust values for people to have the right to clean flowing water for the enjoyment of swimming fishing, boating and recreation. Yet, the DWR allows the PD to let new applicants choose between the Regional Criteria, Site Specific Criteria and other modeling of their choice. All of these methodologies may not be reliable and could have a large margin of error

that could prove to not be protective of fish and other wildlife but must be. (See by reference to comments submitted by expert hydrologist Dennis Jackson on behalf of Living Rivers Council to the SWRCB DWR regarding this PD.)

What will the DWR do to improve 'reliability' of the PD in order to protect the Public Trust values?

NMFS/DFG JOINT GUIDELINES FOR MAINTAINING INSTREAM FLOWS FOR SALMONIDS

Can the PD project provide a CEQA level comparison of the NMFS and DFG Joint Guidelines?

GEOGRAPHIC AREA COVERED BY THE POLICY DOCUMENT

The Eel River and Klamath River basins have been suffering massive fish kills from low flows. The Legislature should include these rivers in the PD geographic scope to afford these basins expected flow protections and enforcement that are could be provided by an amended PD.

If the PD provides a high protection for aquatic life, (given adequate monitoring, adaptive management, reliable baseline data and enforcement that the AB2121 promises) it would be a mistake to not include the Klamath and the Eel River basins because these large river basins are the stronghold of salmonid anchor refugia in California necessary for the survival of the specie.

WATERSHED APPROACH

While a Watershed Group approach to obtaining a water right permit could expedite the application process for water users in a watershed to obtain their individual permits, it is not clear how the public will know that the Group is within there permitted allowance of water use unless each member of the group has real time flow meters showing electronically what their water use is.

Will this be made available on the World Wide Web for public access?

Will the Division of Water Rights, DWR, guarantee that the public will have easy access to monitoring data?

REQUIRED TECHNICAL DOCUMENTS

"The watershed group shall provide the technical information necessary for the State Water Board to (1) determine water availability, (2) satisfy the requirements of CEQA (if applicable), (3) evaluate the potential impacts of water appropriation on public trust resources, (4) make decisions on whether and how to approve pending water right applications for diverters in the watershed group, and (5) make decisions on whether to approve proposed diversion management plans."

Will the DWR make these studies available to the pubic with easy access?

MONITORING

Will the DWR make groundwater monitoring available to the public for easy access where the DWR has asserted its jurisdiction?

The PD does not require performance standards for water diversions. Why not?

The PD does not require adaptive management. Why not?

ENFORCEMENT

Was the enforcement policy peer reviewed for effectiveness potential?

Given this framework:

"(1) identifying and investigating instances of noncompliance, (2) taking enforcement actions that are appropriate in relation to the nature and severity of the violation, and (3) prioritizing enforcement resources to achieve maximum environmental benefits and compliance with the policy."

The NCSFC recognizes that the SWRCB now publishes the 'California Water Rights Newsletter' (January 2010 first edition) where we are informed that 25 new enforcement personnel have been hired as a result of Senate Bill 8 adopted by the Legislature. We applaud these new actions taken by our elected officials and codified for the SWRCB and the DWR to implement.

However, it must be stated that we the NCSFC, have been monitoring, reporting and advocating for over 10 years for these actions to be taken years ago. Now, our streams are plunged into an extinction vortex where watershed species may not recover. Too many water users take water without permits, change their use without authorization, steal water from riparian zones and transport it across property boundaries, divert water outside of authorized diversion periods, declare that they will use water yet have no current use for it but demand licensing, and use our riparian areas to grab water for their agricultural operations including illegal marijuana cultivation.

The NCSFC wants immediate and sustained relief from the Mexican drug cartels that are stealing our Public Trust resources for illegal cultivations of marijuana. This is not only trepidation of our public resources but a threat to our national security. Perhaps it will take an army of enforcement officers to bring back our streams from the brink of a collapsing aquatic ecosystem.

We suggest that the SWRCB combine it's authority with other State and Federal agencies to take back our fresh water resources from illegal Mexican drug cartels who are cultivating marijuana by means of stealing water from our streams. We demand that our public officials get involved and protect the Public Trust Doctrine and defend our national security by protecting our fresh water sources from foreign and domestic drug

activities that steal water to grow the illegal crop of marijuana. You can not protect our watersheds from dewatering by the drug cartels unless you get boots in the watershed to prevent the marijuana plants from growing off illegal water. Waiting until the tall marijuana plants are spotted from the air means the plants are at maximum growth off the illegal water. You must be pro-active and pull the pipes and pumps from our streams that are sucking the streams dry in order to grow the marijuana plants to begin with.

It is clear throughout the PD, and reaffirmed in the 'California Water Right Newsletters' that all illegal water use may become legal by : 1) filing a simple 'statement' of use 2) filing a water right application. The enforcement department of the DWR may pursue enforcement actions at their discretion. In the PD geographic area, there are 1,777 potentially illegal water diversions. The fact remains that not all illegal water users will file a statement or application. Therefore, there will be numerous continued illegal water diversion making it impossible for applicants applying for water use to be able to determine water availability. Unless, the DWR gets serious about all illegal water use, water right protests will continue because the public will not be able to trust that water availability according to the methodology set out by the DWR is an accurate baseline from which to determine MBF and MCD.

Enforcement can not occur unless real time monitoring devices are in place.

GLOBAL CLIMATE CHANGE

The PD set out the February mean flows where no more than 5% of the 1.5 storm peak flows can be diverted. This is the bases for establishing the Minimum Bypass Flows and the Maximum Cumulative Diversion analysis that drives the Regional Criteria or the Site Specific Criteria that water users must apply to determine if there is water availability in a stream. The February mean is based upon historical records coming from stream gauges and precipitation records. We know that California has long historical records of drought. Global climate change may increase the frequency and duration of droughts in California thereby changing the February mean. This PD does not discuss how the DWR may assert their continuing jurisdiction to set terms and conditions which would put limits on water permits in the event that drought conditions may vastly change given global climate change and this can become a larger limiting factor to water availability.

How does this PD take into account global climate change?

POLICY DOCUMENT ALTERNATIVES

CEQA demands that a full range of alternatives must be considered. The Policy Document fails to discuss the full range of alternatives to the current draft PD.

Shall the SWRCB/DWR prepare an Alternative PD that uses the NMFS/DFG Joint Guidelines to establish MBF and MCD?

In this way the public has the opportunity to understand the issues whereby the SWRCB/DWR selected a NEW methodology over the Joint Guidelines and WHY the SWRCB/DWR chose the preferred project PD.

The NCSFC offers an example of an Alternative to the proposed PD:

**Maintaining Instream Flows for Northern California Coastal Streams Policy
Document Alternative Most Protective of Fish and Wildlife and the Public Trust:**

1) The PD applies above anadromy 2) Maintains consistency throughout the PD that diversions only occur during the December 15-March 31st as the season of diversion 3) The February mean is established using 50 years of historical stream gauge data (or the most protective stream gauge data available) as a baseline for establishing the MBF and the MCD. 4.) All projects past and present must provide reliable monitoring and make the results easily accessible to the public 5) Enforcement of the PD applies to past and present water rights 6) No instream dams are allowed on Class I, II, or III streams for new applications. 7) The most reliable methodology for determining protective instream flows for fish and wildlife is established by gauging all streams and or using gauging data where 'watershed characteristics' are closely related. 8) All terms and conditions of current and new water right permits and licenses limit water diversions during drought conditions and account for climate change.

OTHER

The PD should make it clear that any water right project where the environment is altered and the impacts are significant, anyone commenting on the water right may demand and EIR which is consistent with a water right application process through the DWR.

Thank you,

North Coast Stream Flow Coalition
Chris Malan, Chair

***North Coast Stream Flow Coalition Membership List:**

EPIC-Environmental Protection Information Center
Community Clean Water Institute-
Forest Unlimited
Friends of the Navarro
Friends of the Gualala
Friends of the Eel River
Humboldt Baykeeper
Institute for Conservation Advocacy, Research and Education,
ICARE
Klamath Forest Alliance, KFA
Klamath Riverkeeper
Mendocino Environmental Center, MEC
Maacama Watershed
Friends of Outlet Creek
Pacific Coast Fisherman's Federation Alliance & Institute for Fisheries Resources
Northcoast Environmental Center
Sonoma County Water Coalition, SCWC
Living Rivers Council, LRC
Save Mark West Creek
Willits Environmental Center