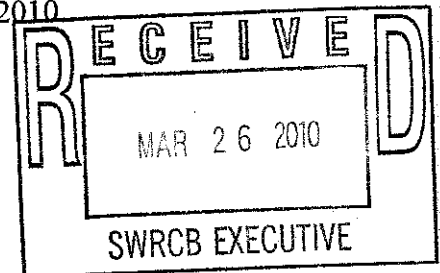


**California Sportfishing Protection Alliance**  
"An Advocate for Fisheries, Habitat and Water Quality"

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March 26, 2010

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



(via e-mail)

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

Dear Ms. Townsend:

The California Sportfishing Protection Alliance (CSPA) offers these comments on the Final Draft Policy for Maintaining Instream Flows in Northern California Coastal Streams, as released and noticed on February 18, 2010. CSPA appreciates the determination of the Board and staff to complete a policy, as well as the opportunity to comment on the product.

CSPA applauds the decision to reduce the season of diversion for covered permits as proposed in earlier drafts to the period from December 15 to March 31. The reduction of the season of diversion is appropriate, and is essential for the protection of adult Chinook salmon, and juvenile coho and steelhead in particular.

CSPA continues to have four major areas of concern with the Final Draft Policy. These concerns have to do with monitoring and reporting, cumulative effects, enforcement, and policy evaluation.

**Monitoring and reporting**

CSPA is encouraged that: "In 2010, the State Water Board will begin requiring that all annual progress reports of permittees and licensees be submitted electronically. The annual reporting of Statements of Diversion and Use will also be required to be submitted electronically. These reports will be posted and made available for public review on the

Division of Water Rights' electronic water right information system posted on the Division's web page. Recent amendments to the Water Code provide for penalties for failure to report the diversion and use of water." (Board response to CSPA comment 25.0.64). However, the timestep of both the reporting and the monitoring of diversions needs to be improved. As stated, the Board, effectively, proposes an annual timestep for monitoring and reporting. This would provide important information about the availability of water for permitting purposes in a given stream or river. However, it will not allow the Board, resource agencies or the public to evaluate whether public trust resources are being protected.

The Final Draft Policy (5.0) does not require covered permits to monitor and report passive bypass systems. It only requires data logger reporting of other covered diversions, apparently on an annual basis through a vaguely defined process.

In recent Board discussions and draft proposals on frost control, the Board proposes to require real-time monitoring and reporting of streamflows and diversions in the Russian River in watershed, though only in the frost control season. As the Board has understood in the limited context of frost control, cumulative impacts most frequently do not take place on an annual timestep. Indeed, the very approach embodied by the Final Draft Policy, and by previous drafts, is to allow operation of diversions on a formulaic basis that assures that essential lifestages of anadromous fishes are being protected. Many diversions in the Policy area take place largely during and immediately after high flow events; as the SED demonstrated, cumulative diversions during those short windows take place at the some of the greatest points of vulnerability of anadromous fish. The vulnerabilities include not only stranding (the principal concern elaborated regarding direct diversion for frost control), but also migration, holding, spawning, and incubation. The timestep for migration in particular is often very short.

The Policy is structured to allow a very tight operation of already stressed watersheds in order both to allow out-of-stream uses and also to protect instream values. As the SED showed, there is little room for error. Migration opportunities are limited, and excessive diversion can often reduce them to one or two opportunities for spawners to reach spawning habitat, or else eliminate a year's opportunities altogether. If Russian River frost control diverters can organize real-time, web based reporting of diversions for about three months out of the year, it should not be too burdensome to ask Policy-affected diverters, or indeed all diverters in the Policy area, to be able to do the same.

The Final Draft Policy does not require existing permits in the project area to monitor and report diversions. Nor does it improve stream gauging on a watershed-wide basis. It is impossible to evaluate the cumulative effects of any new diversion if existing diversions are not accounted for. A section should be added to provide a road map and a timeline for correcting these deficiencies as well.

The Policy should set forth a plan to make such reporting both economically feasible and obligatory in a defined period of years. If necessary, the Board should consider a

legislative request for funding to specifically support technical equipment that will be needed by the new Board enforcement personnel authorized by Senate Bill X7 8.

In the meantime, the Policy should also set forth interim measures that can begin to address the problems that inadequate gauging and reporting pose for addressing cumulative effects on fisheries. For example, hourly gauge data loggers could be required for each new diversion. All existing diversions should be catalogued, and hourly gauge data logger should be required for each previously existing diversion within a certain number of years. Stream gauges at critical points could be analyzed and, where absent, installed. Finally, a team of auditor/hydrologists could be hired to review the combined data after the fact and identify problem areas.

### **Cumulative effects**

There is no definition of what the Policy means when it requires that an applicant who pursues a site-specific evaluation of a proposed diversion must "demonstrate the proposed diversion, in combination with other senior diversions, will not adversely affect the instream flows needed for fishery resources" (C.1.2.4; p. C-10). The placement of the burden of proof on the applicant is appropriate, but it is not appropriate not to have a clear objective standard. The decision appears to be left to the discretion of the Board. This defeats the purpose of a policy. It also appears to be the door through which various applicants will seek to limit their responsibility for cumulative effects, and through which the Board will be asked to overlook them.

Unless a clear objective standards for the protection of fishery resources are elaborated, site-specific analyses and requests for variances in general, and this section in particular, will become the hub of activity around which applicants under the Policy center their response to it.

### **Enforcement**

The enforcement plan (8.0) is little more than a statement of good intentions. A system to audit those diversions that are reported is not defined; it is not even included as part of the Policy. The Policy should describe with greater specificity how it plans to make use of the new enforcement personnel that were added to the Board under Senate Bill X7 8. It should also describe the tools that enforcement personnel will need to effectively bring willing parties into compliance, deter parties from not complying, and shut down the intransigent parties who refuse to comply.

### **Policy effectiveness monitoring**

The State Board, in response to comment 27.0.11, states: "Unfortunately, due to uncertainties in State funding as a result of the State budget crisis, the State Water Board cannot guarantee that future funding will be available for the Effectiveness Monitoring Program." This statement suggests that evaluating the effectiveness of policy is not an integral part of the policy. However, it is not a luxury, or an extra, to determine whether

the policy is effective in protecting public trust resources, especially those fishery resources in the North Coast region that are so gravely imperiled. An Effectiveness Monitoring Program must be elaborated and executed as part of the policy. Its omission from the policy must be corrected.

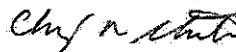
**Future application to existing permits and licenses**

A number of water users and their representatives argued in comments on the previous draft of the Policy that the Policy should not be extended to current permits or licenses. They suggested that unfair potential economic hardship might arise, and that previous planning and development was based on existing permits and licenses.

Existing permits and licenses are not license to violate the public trust. As a policy, it makes more sense to have a comprehensive, objective standard, for levels and rates of diversion, and for reservoirs and diversion works, than it does to address individual water rights one license (or one lawsuit) at a time. The Board should consider ways in which it might use or adapt the Policy to improve conditions for anadromous fish as these conditions are affected by existing water rights.

Thank you for the opportunity to comment on the Final Draft Policy for Maintaining Instream Flows in Northern California Coastal Streams.

Respectfully submitted,



Chris Shutes  
Water Rights Advocate  
California Sportfishing Protection Alliance