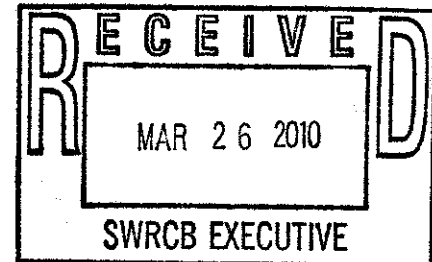




Redwood Chapter P.O. Box 466 Santa Rosa, CA 95402 Ph 544-7651  
March 26, 2010

State Water Resources Control Board  
P.O. Box 2000  
1001 I Street, 14<sup>th</sup> Floor  
Sacramento, CA 95812



Re: Comment Letter --- AB 2121 Policy

Members of the Board;

We appreciate the opportunity to again comment on this very important policy document. These comments on the current draft amplify our earlier submission and suggest improvements we believe are imperative for compliance with the mandate of AB 2121.

### Season of Diversion

The Draft Guidelines adopted by the Department of Fish and Game (DFG) and National Marine Fisheries Service (NMFS) set a fixed season of diversion from December 15 to March 31. As the purpose of this policy is to place the Draft Guidelines in operation, it is rational this key element should be honored as stated. The subject revised draft policy statement has been changed to include those dates, but adds:

*Site-specific studies may indicate that the season of diversion can be extended into other times of the year.*

Although this draft refers to the same fixed season of diversion the added sentence circumvents the clear rule the agencies and legislature has set out. Applicants would now have a venue to argue for ANY range of time for diversions. The sentence should be deleted for several reasons:

- It opens the door not just to new applicants but existing applicants within the AB 2121 geography would certainly petition to expand their season of diversion. The Navarro River has established Special Permit Terms Relating to Monitoring and Compliance that allow diversion only within uniform fixed dates. Adopting permissive provisions in this policy will certainly place agreements such as the

Navarro's back into play. Every existing applicant or license holder could make equitable and legal claims for the same rights petitioning for an enhanced season of diversion.

- The DWR would be required to resolve these contests with hearings, appeals and litigation for which you do not have the staff resources. This draft does not address this staffing need, but as set out below indicates an intention to ignore the problem. This program if it is to be initiated must be supported with significant increases of personnel. We would support the comments of Coast Action Group on this point.
- The problem of enforcement will be greatly magnified by having many different periods where diversions are permitted. Most illegal diversions come to the attention of the Division of Water Rights (DWR) from the public, based on the observations of other landowners. The discovery of 1771 illegal diversions from aerial maps shows that enforcement by the State Board is actually a rare and in this case of illegal diversions, an accidental event.

### Enforcement

We would re-assert our objections in our letter of 30 April 2008 concerning Priority of Enforcement Section 8.2. This section actually describes how violations of the policies will not be enforced. The earlier draft acknowledged that every violation deserves an appropriate enforcement response and then goes on to state that enforcement will in fact be limited, due to a lack of resources. The revised draft below restates the obligation for enforcement and then simply strikes out the acknowledgement of limited resources.

*Every violation deserves an appropriate enforcement response. ~~Because resources may be limited, however,~~ the State Water Board will balance its need to complete its non-enforcement tasks with the need to address violations. It must also balance the importance or impact of each potential enforcement action with the cost of that action*

The draft is now a document that makes it clear that this policy will not be enforced. This is unacceptable. This continues the same attitude that has led to the 1771 illegal dams in the limited area of AB 2121.

Weak enforcement is also the cause of the massive backlog of applications that have been submitted after the fact for dams built on stream blocking fish passage and which are not capable of being retrofitted. We have pointed out the role of the design consultants in this failure of enforcement, as has DFG.

Robert W. Floerke, Regional Manager Department of Fish and Game in his comment to the Board stated:

*However, SWRCB should also consider measures to prevent violations from occurring in the first place, such as improved outreach to local agencies and consultants and other professionals involved with water development and diversion projects. Such outreach should clarify the intent and requirements of the Policy and the consequences of not meeting those requirements. SWRCB should also consider evaluating the feasibility of a certification program for consultants and professionals to ensure they have the necessary training to design and construct projects that avoid or minimize impacts to instream flows.*

The design consultant, rather than writing the regulations, should be a regulated party. Illegal dams should stop where a design consultant is involved, not start there.

If the State Board is unwilling to acquire the needed staff for the water rights program we have in place now, it makes no sense to expand this simple and clear directive of the legislature to implement the Draft Guidelines with a new, complex and untried Watershed Approach that will require extensive administrative resources.

#### Watershed Approach

The current collective project of a new pilot Watershed Approach group on the Navarro River provides a checkered forecast of this untried plan to be imposed on the entire region. Six of the participating applicants who agreed to Draft Guideline conditions on diversions December 15 to March 31 reversed their position and reasserted requested diversions from as early as October 1 to as late as May 31.

One participant later left the group and filed for an individual application for Cakebread Vineyards providing a responsible mitigated negative declaration with terms Division Chief Whitney found to be "consistent with the recommendations in the 2002 Draft Guidelines." Concerning the merits of the pilot program Ms. Whitney's letter of May 27, 2009 to Wagner and Bonsignore stated:

*Division staff disagrees with your characterization of the progress that has been made to date on the Anderson Creek pilot project. However, in the interest of time and our desire to move forward, I will not respond point by point. Instead, this letter highlights the applications within the group that, in staff's opinion, are substantially progressed to the point that they could likely be permitted more expeditiously if processed separately from the watershed effort, much like the Cakebread Vineyards project.*

This Watershed Approach element with the site-specific optional approach would add a major degree of complexity for non-existent staff to administer and enforce and will add to the anarchy of the current environment.

We find this extensive muddling of the Draft Guidelines with the Watershed Approach to be an unacceptable response to AB 2121. The Guidelines need to be implemented now and not tied to an un-tried and unenforceable Watershed Approach within an agency of "limited resources."

There is nothing in AB 2121 that would require the Watershed Approach to be included with this policy. The specific language in AB 2121 allows the Board to simply adopt the 2002 Draft Gridlines, which we believe would be a better alternative than the adoption of this seriously flawed document.

Very truly yours,

Daniel Myers  
Water Committee Chair,  
Redwood Chapter of the Sierra Club