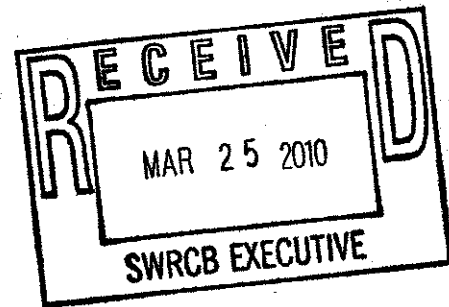


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4/27/10 Board Hearing
AB 2121
Deadline: 3/26/10 by 12 noon

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March 25, 2010



Via Electronic Mail
Chairman Hoppin and Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

Re: Draft Policy for Maintaining Instream Flows in Northern California Coastal Streams
(rev.2/10); proposed policy pursuant to AB 2121

Dear Chairman Hoppin and Board:

The draft Policy for Maintaining Instream Flows in Northern California Coastal Streams (hereafter "the policy" or "draft policy") under review embodies the hard work of many people. Staff have many pressing issues before them, and I am sure some are working over time.

If implementation of the instream flow policy occurs before the listed species fall below the point of recovery, which some say has already passed, it must be an extremely effective policy or the anadromous fish runs of this region will surely become a memory. The comments below are meant to ensure an effective policy and augment the provisions of the draft policy that purport to protect public trust resources, an affirmative duty of the state that the policy correctly acknowledges.

Discretion Improper

In several important instances in the draft policy, the state opts for discretionary language where none is warranted and in fact if were adopted would contradict the affirmative duty that, the draft policy properly acknowledges, lies with the state.

For example, in Section 8.5, the draft policy states that, "[t]he State Water Board has an affirmative duty to protect public trust uses, including fisheries, from the effects of water diversion and use." It goes on to say that, "[i]n the exercise of that duty, the State Water Board may order a party who diverts and uses water to comply with requirements to ensure protection of public trust resources if there is evidence that the diversion or use of water is impacting those resources." (emphasis added).

The word "may" in the second sentence introduces a measure of discretion that does not otherwise exist within the state's duty especially where there is evidence that a diversion is impacting public trust resources. Section 8.5 should properly state that, "the State Water Board will order a party who diverts and uses water to comply with requirements to ensure the protection of public trust resources if there is evidence that the diversion or use of water is

impacting those resources. This change adds consistency to the principle that the state has an affirmative duty to protect public trust resources. The order referred to in this section would presumably be published in permits and licenses and any time there is evidence that diversion or use is impacting public trust resources.

Likewise in Section 2.2, the word "may" should read "will". "Instream flow criteria will be required for proposed water diversions to comply with policy principles."

Section 4.6 suffers from a similar inconsistency. "The State Water Board may retract its approval of a watershed group, project charter, and/or diversion management plan, or direct watershed group participants to comply with a time schedule, if the watershed group does not perform its obligations as specified in the project charter or diversion management plan in a timely manner. " The word "may" needs to be replaced the word "will".

Section 8.4 states that, "[i]f after investigation, the State Water Board determines that a water diversion is wasteful or constitutes an unreasonable use, unreasonable method of use, or unreasonable method of diversion of water, the State Water Board may order a party who diverts and uses water to comply with requirements to abate the waste or ensure the reasonable use of water, method of use, and method of diversion." The word "may" needs to be replaced with the word "will".¹

Section H.2.3 states that, [t]he State Water Board may revoke a permit or license pursuant to Water Code sections 1410 or 1675, respectively. The State Water Board may revoke a permit to appropriate water if work is not commenced, prosecuted with due diligence, and completed or the water applied to beneficial use in accordance with the permit and applicable statutes or regulations. A license may be revoked if the State Water Board finds that the licensee has not put water to a useful or beneficial use, has ceased to put water to such use, or has failed to observe any of the terms and conditions in the license. The word "may" needs to be replaced with the word "will".

To the extent the draft policy introduces agency discretion in an inconsistent manner thereby rendering the policy more lenient than state standards embodied in both its public trust obligations and federal and state law, the draft policy must be made consistent.

If the state wishes to carve out an appropriate area of discretion (see under Seasonal Diversions), it should be very precise and narrow.

Season of Diversion

Just as site-specific studies may extend the season of diversion (2.2.1.1), so the policy must explicitly state that, if and when a winter rain pattern dictates, the state shall shorten the season of diversion. It is not clear from the draft policy that the state agencies will retain this discretion.

¹ Section 2.2 states that plans shall be reviewed and approved by the Deputy Director. Strike the words "and approved" as unnecessary and presumptuous.

An explicit reference to the state's duty to avoid harm to listed species and their habitat could reconcile the sections that explicitly permit diversions between December 15 and March 31 with sections 2.1(1); 2.2.1.2, and sections and Appendix C.1.0. For example, 2.2.1.2 states that the minimum bypass flow requirement "prevents water diversions during periods when stream flows are at or below the flows needed for spawning, rearing, and passage." This could, in very dry years, conflict with the permission to divert during the diversion season. State discretion in this situation, based upon weather patterns and the needs of the listed species, must be express.

Enforcement

A regulation dependent upon subjective criteria and a will to enforce does not satisfy the mandatory requirement to maintain instream flows. The proposed regulation touches on this issue in a constructive manner.

"Timely and appropriate enforcement is critical to the successful implementation of the policy and to ensure that instream flows in north coast streams are maintained." (Section 8.0). In addition in its criteria for enforcement, the policy rightly discusses the importance of first weighing the injury threatened by violations.

"The first step in enforcement prioritization is to determine the relative weight of the violation. The criteria for prioritization used in the policy area should be applicable statewide and focus on watershed conditions, the injury—or potential for injury—from the violation, and the project characteristics." (Section 8.2; emphasis added).

The injury or harm that carries the most weight should be defined as potential harm to listed species or their habitat. Activities that pose actual or potential threats to listed species or their habitat must, strictly speaking, be a violation of the regulation.

In the context of legalizing illegal activities, introducing discretion in almost every phase of the enforcement program is a serious problem and will NOT discourage bad acts. Generally speaking, a deterrent must be backed up. One approach is to establish strong mandatory minimums. Again, leaving the penalties up to the discretion of the majority of the Board is a failed model and must be changed if recovery efforts are to succeed. Deterrence can be an effective tool and must not be emasculated and essentially left out the state's tool bag by rendering it subject to discretion. In fact, such discretion sends the wrong message that in fact alleged violators will ultimately be able to seek leniency.

In reality, one of the most effective means of enforcement and which needs to be included in this regulation is real time monitoring posted to an accessible website. Not only does this approach encourage significant voluntary compliance, it provide a means to deter acts - that is avoid the harm all together, it allows any one including resource agencies to track usage, respond to problems in a meaningful time frame, and it provides important information to biologists.

Klamath and Eel River Systems

AB 2121 establishes that instream flows in coastal streams must be maintained. Although important and heavily used rivers systems, the Klamath and Eel Rivers are not covered by this draft policy. AB 2121 states, that "[t]he board may adopt principles and guidelines for maintaining instream flows not described in paragraph (1) [placing limits on which river systems are included], as part of state policy for water quality control adopted pursuant to Article 3 (commencing with Section 13140) of Chapter 3 of Division 7, for the purposes of water right administration." The board should do so insofar as the Eel and Klamath basins have historically supported anadromous fisheries, suffer from low flows, over appropriation, and illegal diversions that result in huge TAKE of protected species. There is no justification for leaving them out of a process meant to deal with just such serious and chronic problems.

Illegal Diversions, Appropriations, Unreasonable Use, and Storage

Rivers and streams are already over appropriated and addressing the unpermitted, unlicensed, and otherwise illegal water usurping activities must not involve preferential treatment. It must be based upon science and fairness. Streamlining a permitting process that favors the wealthy who can afford consultants to do the paper work, engineers, and lawyers over the long-time residents and hard working Californians, with legal, and reasonable riparian uses is to hand over the river and tributaries to the influence of agri-business that has little regard for fish recovery if such might mean leaving otherwise valuable water in a watercourse.

Ground Water

As properly defined in the draft policy, groundwater is the primary source for perennial streams. Yet it receives no treatment in this draft policy. Closely connected ground water needs to be factored into the calculations including the cumulative effects analysis.² Intermittent streams also rely on groundwater, and both stream types are critical to recovery of the listed species. Offset wells, the cumulative impacts of many smaller wells, and large capacity wells must be factored into all the equations that purport to provide for adequate instream flows. Please see the works of Deitch, Kondolf, and Merenlender in the Russian River basin. Such an approach will require monitoring and reporting especially in the dry months of the year. Applicants should develop accurate water budgets, and these should receive independent peer review.

² State policy for water quality control shall consist of all or any of the following: (a) Water quality principles and guidelines for long-range resource planning, including **ground** water and surface water management programs and control and use of recycled water. (b) Water quality objectives at key locations for planning and operation of water resource development projects and for water quality control activities. (c) Other principles and guidelines deemed essential by the state board for water quality control. The principles, guidelines, and objectives shall be consistent with the state goal of providing a decent home and suitable living environment for every Californian. (Water Code 13142; emphasis added).

Conclusion

The draft policy is moving the state in the right direction and incorporates many important principles. These principles need to be supported by more clear language and additional consistency, and they also need to be protected from introduction of discretion where such discretion muddies the waters we are all so sincerely attempting to protect.

Thank you for your continued hard work to craft an effective policy. As I am sure you agree, any thing less will fall short of the changes required to pull the listed species back from the brink.

Kimberly Burr
KIMBERLY BURR
Green Valley Creek Restoration Volunteer

cc: Vicky Whitney, Deputy Director-Division of Water Rights
John Buse, Esq. Center for Biological Diversity