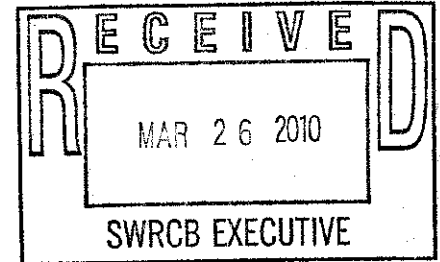




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(510) 770-9764 www.cacoastkeeper.org

March 26, 2010

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



VIA ELECTRONIC MAIL – commentletters@waterboards.ca.gov

Re: **Comment Letter – AB 2121 Policy**

Dear Chair Hoppin and Board Members:

The California Coastkeeper Alliance represents 12 Waterkeeper groups spanning the coast from the Oregon border to San Diego. The Alliance and its member Waterkeepers work daily to protect and enhance clean, abundant water flows throughout the state, for the benefit of Californians and California ecosystems. We welcome this opportunity to provide comments on the State Water Resources Control Board's (Board) proposed Policy for Maintaining Instream Flows in Northern California Coastal Streams (Policy). In particular, we would like to provide specific comments on the Enforcement sections of the Policy.

We support the Policy's commitment to the use of administrative civil liability authority, cease and desist orders, and revocation of permits and licenses to help achieve needed waterway flows. We particularly welcome the reference in Appendix F to working cooperatively with other agencies, especially the Department of Fish and Game (DFG), whose wardens have unique enforcement and inspection authority that will leverage the Board's enforcement activities significantly. Further attention should be given in the Policy to lessons learned from past efforts to develop pilot, coordinated enforcement strategies with DFG, and more description provided as to how the wardens can become more integrated partners in this effort.¹

¹ See, e.g., SWRCB Report to the Ocean Protection Council (Dec. 2008), page 9 ("the Los Angeles Regional Water Board is initiating a pilot enforcement effort working in association with Department of Fish and Game (DFG) law enforcement (wardens). This pilot program is intended to improve surveillance and enforcement of water quality in cases where DFG wardens in the field detect violations"). Available at: http://www.opc.ca.gov/webmaster/ftp/pdf/agenda_items/20090423/05_water%20board%20report/SWB_5yearstratplan_update2008.pdf.

We also support the Board's assertion of its authority to amend permits and licenses to address Water Code Section 275 ("waste and unreasonable use"), and its acknowledgement of its affirmative responsibility to protect public trust uses of waters. With respect to the latter, the Board has a range of tools available to address violations of the common law public trust doctrine, in addition to the statutory enforcement tools referenced in the Policy. We ask that the Policy further explore the range of actions that the Board can and will take to implement and enforce the public trust doctrine in light of existing case law.

An area where we have particular concerns, however, is the Policy's relative lack of attention to uncovering and addressing currently-illegal diversions (*i.e.*, non-filers). This is an issue we raised in our joint May 2008 comments to the Board (attached for reference). For example, the Policy states in Appendix F that the Board "will monitor for compliance by requiring self-monitoring reports." This begs the question of how the Board will track compliance of those diverters who not only fail to file self-monitoring reports, but also fail to file even for licenses for their diversions. As the Board testified at the March 2009 Senate Natural Resources and Water Committee hearing on water rights, California currently cannot report across the state on how much water is actually being used, where it is being used, where it is being diverted to, how much is being diverted, or how many diversions are illegal. The Board testified further that where it does have such data, it is estimated that the number of illegal diversions is over 40% of the number of active permits and licenses. The Policy cannot achieve success in safeguarding the public trust unless it brings *all* diversions, particularly non-filers, into the region's overall assessment, implementation and enforcement effort. We urge the Board to develop and incorporate into the Policy a specific enforcement strategy to identify and act on such illegal diversions, an effort that is critical to the Board's achievement of its statutory mandate of "maintaining instream flows."

One piece of this enforcement effort will be to ensure that the enforcement database referenced in Section 8.2 is posted online in a user-friendly fashion, so that the public can track progress towards identifying and addressing violations. Licensed and permitted diversions should similarly be posted online in a user-friendly fashion, so that the public can identify whether local, known diversions properly appear in that database. In this way the public can be more effective stewards of local waterways, and ensure that those properly using the waters of the state are not penalized by the actions of illegal diverters.

Another concern related to enforcement that we noted in our May 2008 joint letter is that the Policy fails to discuss the actual removal of the thousands of known illegal diversions and dams that already exist. At a minimum, the Policy should commit the State Water Board to assess and post on its website its proposed workplan for addressing these illegal diversions and dams within a set time frame, and to provide a calculation of the resources required for these tasks so that funding can be properly planned for and allocated.


The connections between ground and surface water also need to be addressed in the Policy's enforcement provisions. Pumping of ground water can adversely affect river flows, creating *de facto* diversions. The Policy should specifically include enforcement strategies that address instream flows impacted by groundwater pumping, in order to ensure that AB 2121's goal of maintaining instream flows is fully achieved.

Finally, we have concerns with regard to the "case-by-case exception" proposal in Section 9.0 of the Policy. In regulating water rights in California, the Board has a duty to protect public trust resources, ensure reasonable use of water, maintain necessary stream flow levels, and assess the availability of water for appropriation. The Board must necessarily carry out these tasks on a watershed basis due to the dynamic nature of hydrologic systems. A watershed's hydrologic table is the sum of its parts, and aggregate diversions have a tremendous effect on public trust resources throughout a particular stream system. The exception process in Section 9.0 focuses on the applicant's proposed diversion, without clear attention to the larger impacts of the request. Accordingly, the Policy should specifically require that applicants present detailed information on the watershed-wide impacts of their proposals, including a consideration of illegal diversions in the area, to ensure that the cumulative impacts of such proposals receive appropriate attention.

* * *

Thank you for allowing us the opportunity to comment on the Policy, and in particular on its enforcement provisions. We commend the Board on its efforts to protect waterways and their inhabitants throughout the North Coast and California, and we look forward to working with the Board to achieve the Policy's goal of ensuring and maintaining the instream flows needed for waterway health.

Sincerely,



Linda Sheehan
Executive Director

cc: Nancy Foley, Department of Fish and Game
Craig J. Wilson, Department of Fish and Game
Amber Mace, Ocean Protection Council

attachment

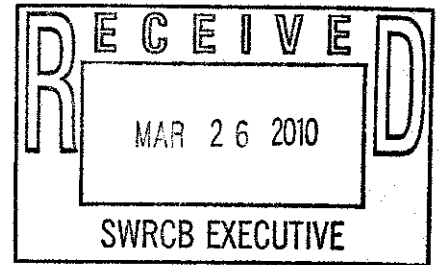
ATTACHMENT:

**Comment Letter from Defenders of Wildlife, Russian Riverkeeper and
CCKA to SWRCB, "AB 2121 Policy" (May 1, 2008)**



May 1, 2008

Ms. Karen Niiya
Senior Engineer, Division of Water Rights
State Water Resources Control Board
1001 I Street, 2nd Floor
Sacramento, CA 95814



VIA ELECTRONIC MAIL – AB2121Policy@waterboards.ca.gov

Re: Comment Letter – AB 2121 Policy

Dear Ms. Niiya:

Defenders of Wildlife, Russian Riverkeeper and the California Coastkeeper Alliance (which represents 12 Waterkeeper groups spanning the entire coast) are conservation organizations involved in the preservation of anadromous fish species and aquatic habitats. Collectively, the three groups represent over 120,000 members statewide and have regularly advocated for increased stream flows in California rivers. We welcome this opportunity to provide comments on the proposed Draft Policy for Maintaining Instream Flows in Northern California Coastal Streams (AB 2121 Policy or Policy).

The recent closure of the salmon fishery in California is a wake-up call that California's water rights system desperately needs an upgrade, and the Policy is an important start. We acknowledge and appreciate the significant level of analysis and work that clearly went into the proposed Policy. We provide comments below on the details of the Policy, but must mention up front that without adequate funding and staffing, any Policy—no matter how well developed—is likely to fail. The Water Rights Division ("Division") currently has a backlog of over 500 pending water right applications and over 600 pending water transfer petitions. This backlog creates tremendous lag in the process of administering water rights. Water users are often left frustrated, frequently initiating diversions without State Water Board permission. Public trust resources are ultimately left unprotected due to lack of oversight. The Policy does nothing to tackle this implementation and enforcement roadblock. This is of particular concern in light of the fact that the Policy fails to discuss the removal of more than 1771 illegal diversions and dams that already exist. At a minimum, the Policy should commit the State Water Board to assess and post on its website its proposed workplan for implementing the first five years of this Policy and for addressing these illegal diversions and dams, and to provide a calculation of the resources required for these tasks.

In regulating water rights in California, the SWRCB has a duty to protect public trust resources, ensure reasonable use of water, maintain necessary stream flow levels, and assess the availability of water for appropriation. The Division must necessarily carry out these tasks on a watershed basis due to the dynamic nature of hydrologic systems. A watershed's hydrologic table is the sum of its parts, and aggregate diversions have a tremendous effect on public trust resources throughout a particular stream system. Therefore, as an integral part of this Policy, the SWRCB should continuously consider the effects of regulated activities across entire watersheds.

To effectively protect public trust resources, the Division should in particular assess water availability for entire watersheds and the aggregate effects of all diversions on fish and wildlife. A majority of the applications in the Division's backlog are for water rights on the North Coast where a particular stream system may contain dozens of unauthorized diversions. The cumulative effect of these diversions, some smaller than ten acre-feet per year ("afy") and some in excess of 1,000 afy, is a decrease in stream flow levels and an increase in sediment levels, both of which adversely affect threatened Coho, Chinook and Steelhead fisheries.

In addition to these overarching comments, Defenders of Wildlife, Russian Riverkeeper, and California Coastkeeper Alliance submit the following recommendations for bolstering the effectiveness of the Policy:

The SWRCB Should Draft Additional Policy Provisions to Effectively Protect Public Trust Resources

A broad perspective is necessary to assure continued maintenance of stream flows and protection of public trust resources. We make the following suggestions, intended to help create an effective, watershed-focused Policy:

- Ground and surface water are connected to each other and as a result, pumping ground water can adversely affect river flows. Therefore, the SWRCB should conduct studies of subterranean streams to determine the areas where groundwater extraction may affect surface flows. The SWRCB should publish these analyses and related maps for use by groundwater users, permittees, decisionmakers and the public.
- The SWRCB should require all water users on a watershed to continuously monitor diversions and stream flows, and to report the data to the SWRCB continuously as it is being gathered. This system will allow the SWRCB to monitor stream flow levels across entire watersheds and give it the flexibility to make efficient management decisions.
- The DFG-NMFS Draft Guidelines recommend a season of diversion from December 15 through March 31. However, the Policy has stipulated a season beginning in October. The SWRCB asserts in the Policy that the earlier date is still protective of fishery resources (Page 3). However, evidence to the contrary exists. The DFG-NMFS Draft Guidelines notes that the SWRCB's own water rights proceedings for the Russian River, Navarro River, and Napa River watersheds confined diversions to the period from December 15 to March 31. This period is the time of highest winter flow

and the time when water withdrawals would be least likely to adversely affect fisheries resources. Additional water withdrawals between September 1 and December 15 may unnecessarily and significantly affect salmonids, because that is a time when flows are relatively low, and high flows are infrequent and sporadic.²

- The section entitled "Principles for Maintaining Instream Flows" (page 2 of the Policy) is well-balanced and generally effective. The following additional principle should be incorporated into this section to increase effectiveness: "Dams and other structures creating a barrier to fish passage that are currently permitted will be reviewed to determine if they pose a threat to salmonids, other fish and wildlife, necessary habitat, and water quality." In addition, these principles should be used to formulate the Minimum Bypass Flow calculations outlined on page 4.
- There are thousands of diversions within the Policy area that currently operate without safeguards to protect fish and that will not be affected by the Policy, either because they have a permit or license, because they operate unlawfully with no real incentive to do otherwise, or because they are operated under basis of a riparian or groundwater rights. Without factoring these diversions in to its calculations, SWRCB will be unable to accurately estimate the cumulative effects of a pending application for an appropriative right. More fundamentally, without actions to encourage those diverters to improve their practices, the SWRCB is unlikely to accomplish its statutory mandate of "maintaining instream flows." This is particularly true for existing summertime diversions, which may account for the greatest threat to the recovery of fish populations. The Policy cannot achieve success in safeguarding the public trust unless it brings in *all* diversions, particularly non-filers (see above regarding enforcement).
- The "Watershed Approach" outlined on page 41 reflects the need to address water holistically. We support watershed-based management of water quality and flows. However, the definition of "Watershed Group" should be changed to allow and ensure the involvement of interested stakeholders and environmental groups other than diverters in management decisions. It is necessary to include groups whose mission is the protection of public trust resources to, at a minimum, assist the understaffed SWRCB in overseeing public trust management. The Policy should also flesh out the monitoring requirements for Watershed Groups and require continuous monitoring with instantaneous transmittal of data.
- The Policy should mandate universal monitoring and online reporting of both diversions and stream conditions by all water users. Monitoring and reporting in California lags far behind that of other Western states and must be improved.
- The Policy should specify requirements for monitoring to assess Policy effectiveness, and include provisions that will allow the State to accurately assess the effectiveness of the Policy every five years, to see if it is on track to maintaining flows in the administration of water rights.

² Draft Guidelines for Maintaining Instream Flows to Protect Fisheries Resources Downstream of Water Diversions in Mid-California Coastal Streams, DFG-NMFS, 2002, page 5.

The SWRCB Should Implement Review Procedures for the Policy and Individual Permits

No provision currently exists within the Water Code or the SWRCB's regulations requiring a review of outstanding permits and licenses. Although the hydrographs of many North Coast streams and tributaries change from year to year, and will change more rapidly in coming years due to climate change, there is no mechanism for reviewing a water right once issued to determine ongoing water availability. Effective management of salmonids requires the flexibility to make immediate decisions regarding stream flows. The Policy will not be effective unless the SWRCB receives real-time, instantaneous monitoring data to enable review of the Minimum Bypass Flows and Maximum Cumulative Diversions.

The SWRCB should also review the Policy as a whole after five years to determine its effectiveness. This review should be conducted in collaboration with the California Department of Fish and Game and the National Marine Fisheries Service and should be based on certain parameters of success, including the following:

- Steelhead and Salmon population and survivability trends for the 5-year period.
- Success in achieving the Minimum Bypass Flow and Maximum Cumulative Diversion criteria.
- Ability of the SWRCB to make efficient management decisions.
- Ability to maintain stream flows on watersheds where numerous variances have been issued.

The SWRCB Should Include Conservation Measures in the Policy

Under current standard permit terms, permittees may be required to implement a water conservation plan. 23 CCR § 780. Features of the plan may include but are not necessarily limited to:

- Reclaiming a portion of the water allocated,
- Using reclaimed water provided by another entity,
- Reducing agricultural tailwater or return flow,
- Suppressing evaporation losses, and
- Installing efficient water measuring devices.

The SWRCB includes the aforementioned permit term in all permits. However, the conservation plan is not mandatory and often is not required. It is imperative that the Policy mandate conservation measures. Restrictions on bypass flows and diversion amounts are appropriate, but those alone will not maintain adequate stream flow levels. Demand-side restrictions are crucial, particularly during seasons when flows are insufficient to provide adequate water supplies while maintaining anadromous fish habitat.

In implementing conservation measures, attention should be paid to the net impact of the measures on flows overall. During the summer of 2007, as flows on the Russian River dipped to extremely low levels, the SWRCB issued Order WR 2007-0022. This order

required Sonoma County Water Agency ("SCWA") to implement conservation measures to reduce diversion amounts 15 percent from July to October. Despite this stringent mandate, actual reductions in pumping did not occur. The SCWA and its contractors claimed to have achieved a 21% reduction in pumping from the Russian River. However, the demand reduction was actually less than half of that due to groundwater pumping in lieu of direct diversions. The *net effect* of that action was the dewatering of many smaller tributaries along the Russian River, including Foss Creek.

Conservation measures are entirely appropriate for diversions within the geographical scope of the Policy. The SWRCB should *require* conservation plans for water right applications on the North Coast, rather than simply conditioning permits with the possibility of a future conservation requirement that the regulatory agencies and permittees will need to scramble to meet rather than plan for. Water users in the municipal, industrial and agricultural sectors can realize tremendous and cost-effective net reductions in water use by implementing new technologies such as high-efficiency drip irrigation. Additionally, modest changes to landscaping can help save significant net amounts of water. Conservation plans are integral to the maintenance of instream flows and should be included and mandated in the Policy.

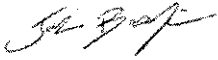
The SWRCB Should Provide More Details to Prevent Over-Use of Variances in the Policy

The Policy opens up a potentially serious loophole by not clarifying the circumstances that would merit a variance. The Policy states that "variances from [the] regionally protective criteria may be obtained if site specific study demonstrates that less restrictive criteria is protective of fishery resources for a specific diversion and its watershed." The Policy is structured to provide general guidelines for maintaining instream flows to protect salmonids. Thus, the Policy should, by default, specifically reflect the needs of any salmonids occurring in watersheds within its geographic scope, and flesh out the circumstances under which such a variance would be appropriate. The SWRCB should also remain vigilant in considering applications for variances so that the exceptions to the Policy "do not make the rule." It is to be expected that, due to the growing scarcity of water, many applicants will request variances, and each will argue that their request is insignificant. The variance provision should be clarified to ensure that variances remain the rare exception, rather than the rule.

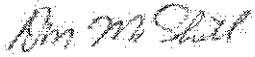
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Thank you for allowing us the opportunity to comment on the Policy. We commend the SWRCB on its effort to protect salmonids and public trust resources on the North Coast and throughout California, and look forward to working with the SWRCB to strengthen the Policy further and ensure its full implementation and enforcement.

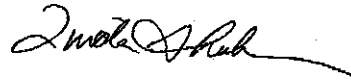
Sincerely,



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