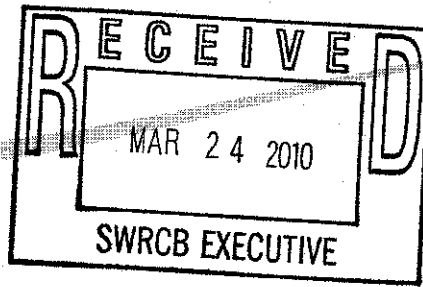


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March 24, 2010

Mr. Charlie Hoppin, Chair
Members of the Board
ATTN: Jeanine Townsend
State Water Resources Control Board
California Environmental Protection Agency
1011 "P" Street
Sacramento, CA. 95814

Sent via E-mail and U.S. Mail

**RE: Proposed Policy for Maintaining Instream Flows in Northern California
Streams (AB 2121)**

Dear Mr. Hoppin:

The Association of California Water Agencies ("ACWA") submits the following comments in response to the State Water Resources Control Board ("SWRCB") staff's proposed policy for maintaining instream flows in Northern California streams ("policy"). As explained below, ACWA believes that the policy would have very significant impacts on the environment and on water users, and would be impractical to implement. ACWA strongly encourages the Board to hold in abeyance any action on the staff's policy proposal, extend the public comment period at least an additional 90 days, and direct staff to redirect its efforts to working with the affected parties to draft a policy proposal that is workable and realistically considers on-the-ground conditions for the waterbodies within the North Coast region.

ACWA represents nearly 450 public water agencies throughout the state of California, including numerous members located within the North Coast region. Statewide, these agencies are responsible for approximately 90 percent of the water delivered to cities, farms and businesses throughout the state. Our members are fully committed to protecting California's water quality and aquatic ecosystems, including fisheries, during the course of their operations.

The California Legislature, in AB 2121, directed SWRCB to "develop principles and guidelines for maintaining instream flows in [north] coastal streams . . . for the purposes of water right administration." (Water Code §1259.4(a)(1).) The Legislature also authorized the SWRCB to adopt similar instream flow principles and guidelines for other

regions of the state. (Water Code § 1259(a)(2).) While the proposed policy is applicable only to the streams located in coastal Northern California, this policy may set a precedent for developing instream flows throughout the state. For this reason, ACWA fully supports the stakeholder recommendation that the policy must “produce a transparent, fair and timely water right process that supports scientifically sound decision-making and actually improves instream flows”. (See May 1, 2008 comments by Kronick, Moskovitz, Tiedemann & Girard, *et al.*)

The SWRCB’s first draft policy (December 2007) was roundly criticized by stakeholders. The 2007 draft was sufficiently problematic that a coalition of environmental organizations (Trout Unlimited, the sponsor of AB 2121, and Peregrine Chapter of the National Audubon Society) and agricultural water user representatives (Wagner & Bonsignore Engineers and Ellison, Schneider & Harris representing their wine industry and other clients) submitted joint recommendations for a new policy to satisfy AB 2121. (See May 1, 2008 and April 30, 2009 joint comments [“TU/Wine Industry Recommendations”].) SWRCB members encouraged this coalition to further develop these recommendations over the course of 2009. The TU/Wine Industry Recommendations provide guidance for improving the water right permitting process. These improvements would significantly reduce the burdens on staff time and resources and provide a pathway for informed, timely decision making. ACWA is disappointed that the SWRCB staff’s February 2010 revised policy does not embrace the TU/Wine Industry Recommendations or address other critical comments submitted on the 2007 draft policy.

The deficiencies of the proposed 2010 policy include the following:

- The policy applies to all applications and changes to existing permits and licenses. However, the Regional Criteria, the principle element of the policy, are so narrow they will only apply to a subset of projects (small agricultural offstream storage). Projects that cannot meet the Regional Criteria will have to conduct site-specific studies in order to request an “exception” or “variance” from the Regional Criteria.
- The Regional Criteria include an inflexible, curtailed winter season of diversion (December 15 to March 31), regardless of the availability of water in all other months of the year; conservative minimum bypass flow equations; and requirements to substantially modify or remove onstream dams on all but the smallest watersheds. Only small agricultural offstream storage projects can conceivably comply with these criteria. No municipal or other diversions requiring a longer season can satisfy the Regional Criteria.
- The Regional Criteria bypass flow criteria are over-conservative, formulaic requirements that are not based on applied science and that do not account for actual conditions in north coast streams. In most instances the bypass flow

requirements would far exceed the amounts of water actually required for instream resources.

- The bypass flow criteria presume that every watercourse within the North Coast region is a uniform textbook stream that can be protected via a series of equations. The policy bypass flow criteria are over-protective by design so that the policy can be described as “protective”. Instead of ensuring a reasonable balance amongst the various beneficial uses as AB 2121 intended, these requirements overstate and prioritize instream flows to the detriment of other beneficial uses of water, regardless whether such constraints are warranted. This State-endorsed reallocation of water could cause waste and unreasonable use in the many instances where there are competing beneficial uses of water.
- As stated above, no project requiring a longer season of diversion—essentially all municipal diversions—can satisfy the Regional Criteria. Existing municipal and agricultural diversions initiated before these new rules will be entangled in the policy criteria when any changes are required to their existing permits and licenses, with significant attendant public expense, including scarce SWRCB resources. Furthermore, analyses by agricultural water users show that even new agricultural projects designed as small winter offstream storage projects cannot meet the Regional Criteria.
- The policy includes recommended site-specific study procedures. The only standard apparently applicable are the “principles”. These principles track, in more general form, the constraints reflected in the Regional Criteria. They likewise prioritize instream flow for fisheries over all other beneficial uses of water. There are no provisions to take into account impacts on other beneficial uses of water, feasibility or other factors. As previously discussed, projects not meeting the Regional Criteria must conduct expensive site-specific studies, but no regulatory certainty is provided. The policy offers no way to predict whether the study results will support a permitting decision by the SWRCB, and on what terms or conditions.
- The need to improve the efficiency of the water rights administration system was one of the driving forces behind the passage of AB 2121. The proposed policy will impede rather than accelerate the process by which North Coast appropriate water right applications and petitions are processed by the SWRCB. The policy includes no improvements to the water right administrative system.
- The policy fails to ensure there is a reasonable balance of the beneficial uses of water – a primary objective set forth in AB 2121, and mandated by the California Constitution.
- By failing to pursue a more reasonable balance among the beneficial uses of water the proposed policy fails to sufficiently assess its enormous economic impacts,

direct and indirect, to the region. While the Substitute Environmental Document ("SED") does discuss some of the direct costs associated with AB 2121, the indirect economic impacts are given inadequate consideration. The indirect costs may, in fact, have a greater impact on the regional economy than the direct costs. For example, the proposed policy, specifically the "minimum bypass flow" and "maximum cumulative diversion rate", will most likely preclude or seriously restrict water development in the smallest drainages by restricting the opportunity to divert water to only portions of extremely wet but comparatively infrequent rainfall events. The result is lost diversion opportunities that would not have adversely impacted instream resources. Project development in small upslope drainages should be encouraged due to the limited potential for impact on flow. Restricting project development and diversion opportunity will significantly increase project costs. This could have significant adverse economic consequences for portions of the North Coast, a concern that was raised by several of ACWA's members but not given serious consideration in the proposed policy.

- The economic impacts of the policy to municipal users are enormous. For most or all municipal users, the Regional Criteria -- even as guidance -- are orders of magnitude distant from what could be reasonably accomplished. For example, very significant environmental and economic impacts would ensue if entire municipal areas are dewatered, or existing reservoirs are required to be reconstructed to bypass flows they are currently unable to achieve. In many instances these municipal diversions are already subject to bypass flows and other fish protection measures.

We encourage the Board to instruct its staff to complete a more extensive assessment of the potential economic impacts associated with this or any subsequent policy proposal for instream flows for the North Coast. This is absolutely essential if the Board truly wants a complete analysis of the potential impacts associated with any policy proposal it considers.

For the aforementioned reasons, ACWA encourages the Board to hold in abeyance any action on the staff's policy proposal, change the April 26, 2010 hearing to a workshop for information gathering purposes, extend the public comment period at least an additional 90 days, and direct staff to work with the affected parties to address these and other critical issues. The result will be a more efficient and effective policy that will best serve all beneficial uses of water throughout the North Coast region.

Sincerely,



Mark S. Rentz
Director of Regulatory Affairs

ACWA Comments
Proposed Policy for Maintaining Instream Flows
In Northern California Streams
March 24, 2010
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Cc: Dan Pellissier, Deputy Cabinet Secretary, Office of the Governor
Victoria Whitney, Deputy Director, Division of Water Rights, SWRCB