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

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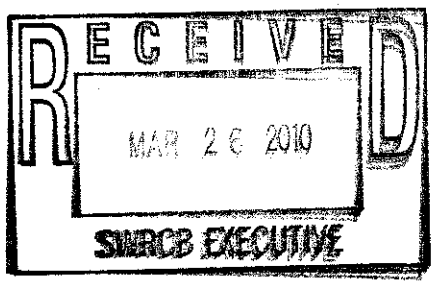
March 26, 2010



Via Email
Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814
commentletters@waterboards.ca.gov

Re: Comment Letter From Living Rivers Council Regarding the State Water Board Proposed Policy for Maintaining Instream Flows in Northern California Coastal Streams

Dear Ms. Townsend:

This office represents Living Rivers Council ("LRC") with respect to the State Water Board Proposed Policy for Maintaining Instream Flows in Northern California Coastal Streams. Living Rivers Council objects to approval of this Policy on the grounds set forth below. This letter incorporates by reference letters to this office from Dennis Jackson dated March 22, 2010, attached hereto as Exhibit A, and March 23, 2010, attached hereto as Exhibit B. This letter also incorporates Exhibits C, D and E submitted under separate cover.

While LRC recognizes the serious technical difficulties the Board must overcome to adopt a defensible instream flow policy for water rights applications, this proposal is an extreme example of "the more things change, the more they stay the same."

A. Historical Background

Beginning in 2002, this office, initially representing the Sierra Club, and later representing Earth Defense for the Environment Now, protested a number of water rights applications on the ground that the Board did not have a valid scientific basis for its calculation of minimum bypass flows. Yet after a decade of work, and several years after the passage of AB 2121, the Board has proposed an instream flow policy that still fails to establish a valid scientific basis for the calculation of resource protection flow criteria, including minimum bypass flows.

Exhibit C to this letter is a June 7, 2002 letter that I wrote to the Board on behalf of the Sierra Club objecting to the approval of water rights Application No. 30627. Exhibit D to this letter is a letter dated June 1, 2002 from hydrologist Dennis Jackson to the Board regarding water rights Application No. 30627. Exhibit E (with sub-exhibits 1 through 12) is a letter dated August 5, 2003 that I wrote on behalf of Earth Defense for the Environment Now to the Board objecting to the

approval of water rights Application No. 31358.

These letters memorialize the history of the Board's efforts to establish minimum instream flows to protect listed salmonid species in the policy area and the existing environmental conditions that require action on this issue. For example, Exhibit E- 3 is a January 28, 2001 letter from Dennis Jackson documenting the significant adverse cumulative effects on salmonids and their habitat in the Napa River drainage from water diversions.

Exhibit E-6 ("Fish Bypass Flows for Coastal Watersheds: A Review of Proposed Approaches for the State Water Resources Control Board prepared by Peter B. Moyle and G. Mathais Kondolf. June 5, 2000") represents the Board's own investigation of impacts of water appropriations on fish bypass flows in the Russian River drainage. This report concludes that environmentally damaging processes at work in that drainage, such as vineyard expansion onto hillsides, which are also pronounced in the Napa River drainage, contribute to adverse impacts on federally listed fish species:

> In the Russian River watershed increasing pressure to develop hillside agriculture (especially vineyards) has led to a proliferation of water rights applications for diversions from headwater streams, which support federally listed coho salmon or steelhead, or support larger streams that do. Similar conditions occur in other coastal watersheds. The State Water Resources Control Board (SWRCB) is presently wrestling with the issue of how to condition permits for water rights to protect ecological resources, a task made difficult by the lack of information on the physical and ecological functioning of these channels, and their influence on downstream channels. For example, proposed methods for determining minimum instream flows in these streams have been developed using stream gauge data - all of which are from larger channels downstream, where scale differences lead to a very different hydrology. Similarly, the need for streamside protection zones along these headwater channels is not widely recognized, because most guidance has been developed for larger channels. In any case, existing institutions are poorly suited to regulating activities that impact these streams. The State Board can decide how much water (if any) should be diverted but has limited authority to regulate land use changes that influence runoff and erosion rates. Similarly, the Department of Fish and Game can put conditions on activities within the stream itself, but has limited authority beyond the stream banks. Land-use decisions are made at the county level, with varying levels of scientific analysis and political concerns influencing decisions. The most advanced county-level ordinance in the region is the Napa County Conservation ordinance, which is now under review in part because of concerns over its effectiveness in addressing the effects of multiple headwater impacts. Moreover, there is presently no mechanism for taking cumulative effects into account.

(Exhibit E-6, p. 1.)

Exhibit D (June 1, 2002 letter from hydrologist Dennis Jackson to the Board regarding Application No. 30627) demonstrated that the Board's then currecnt method for calculating minimum bypass flows did not have a valid scientific basis.

As a result of these and many other comments and efforts by many stakeholder groups in the Policy area, the Board stopped approving new appropriation permits in the policy area; a state of affairs that lead directly to the passage of AB2121.

B. The Proposed Policy

AB 2121, codified as Water Code section 1259.4, requires the Board to "adopt principles and guidelines for maintaining instream flows" in Northern California coastal streams. In response, the Board proposes to adopt a policy for establishing resource protective stream flows that includes the following elements.

1. The proposed Policy does not apply to existing water appropriation permits and licenses, only to certain new applications.

2. The proposed Policy does not apply to applications that do not propose a reduction in stream flow.

3. The proposed Policy does apply to applications that propose a reduction in stream flow.

    a. Such applications must meet "regionally protective criteria" that include:

        (1) A limited season of diversion from December 15 to April 1. (Policy p. 4, § 2.2.1.1.)

        (2) Minimum bypass flows, calculated differently for proposed diversions located within or above the upper limit of anadromy.

            (a) Minimum bypass flows for proposed diversions located within the upper limit of anadromy must be calculated based on the "Mean annual unimpaired flow" which "shall be estimated by one of the following methods: (A) adjustment of streamflow records, (B) using a precipitation-based streamflow model, or (C) another method acceptable to the State Water Board." (Policy p. 4, § 2.2.1.2; p. B-10, § B.5.2.1.)

            (b) Minimum bypass flows for proposed diversions located above the upper limit of anadromy on Class II streams must be calculated based on the February median flow and diversions on Class III streams may use any minimum bypass flow so long as certain conditions are met. (Policy, Appendix A, pp. A-11 – A-13, §§ A.1.8.1; A.1.8.2.)

        (3) Maximum cumulative diversion rate (to protect channel maintenance flows) of 5% of the 1.5 year instantaneous peak flow. (Policy pp. 5-6, §2.2.1.3.)

4. However, if the applicant determines that application of the above "regionally protective criteria" would "over-regulate" beyond the level needed to protect listed salmonids and their habitat, the applicant may elect to conduct "site specific studies" to develop "site specific criteria" to protect the resource. (Policy p. 6, § 2.2.2.)

C. The Proposed Policy Fails to Comply With the State Board's Legal Obligations.

Adoption of this proposed policy would represent a violation of the Board's responsibilities to protect listed salmonids and their habitat under the public trust doctrine, section 275 of the Water Code (providing that the Board "shall take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state") and Article X, Section 2 of the California Constitution (declaring "that the waste or unreasonable use or unreasonable method of use of water be prevented").

1. The Policy Must Account For Existing Diversions.

The proposed Policy does not apply to existing water appropriation permits and licenses. Given the existing severely degraded condition of salmonids and their habitat in the policy area, in large measure due to low stream flow conditions caused by the cumulative impact of both permitted and illegal water diversions, the exclusion of existing water appropriation permits and licenses ensures that existing adverse baseline conditions will continue indefinitely into the future.

As a result, this decision represents a failure by the Board to discharge its duties under the public trust doctrine to protect, or to at least consider the protection of, public trust resources such as listed salmonids and their habitat. Additionally, the Board's failure to either (1) reopen existing permits and licenses to add appropriate resource protective flow criteria as permit conditions; or (2) enforce water code permit requirements against illegal diverters, or to include such programs in the proposed Policy means that Board policies are leading directly to "take" of salmonid species listed under the federal or California endangered species acts in violation of these laws, and will continue to do so if and when the proposed Policy is adopted.

2. The Regionally Protective Criteria Do Not Err on the Side of Resource Protection.

As demonstrated by Dennis Jackson (Exhibit A hereto) , the regionally protective criteria do not meet the Board's self-imposed obligation to "err on the side of resource protection." (Policy p. 4, § 2.2.1.) In fact, Mr. Jackson's analysis demonstrates that the Policy's reliance on "nearby" reference streams to provide data for calculating regionally protective criteria is not scientifically valid. His analysis demonstrates that there is no reason at all to assume that minimum bypass flow and maximum diversion rate calculations based on data from "nearby" reference streams provide any reliable basis for protecting listed salmonids and their habitat.

3. The Policy Accepts Too Much Uncertainty.

The Policy represents a decision by the Board to accept an extraordinary degree of uncertainty as to whether application of the Policy will protect at-risk resources. Any decision by the Board to accept this degree of uncertainty represents an abdication of its public trust responsibilities to protect listed salmonids and their habitat and a violation of section 275 of the Water Code and Article X, Section 2 of the California Constitution.

Indeed, the three types of methods that may be used to estimate "mean annual unimpaired flow" for purposes of calculating minimum bypass flows for diversions located within the upper limit of anadromy (i.e., (A) adjustment of streamflow records, (B) using a precipitation-based streamflow model, or (C) another method acceptable to the State Water Board), all involve great uncertainty. With respect to "adjustment of streamflow records," see Jackson, Exhibit A, pp. 4 – 10. With respect to "using a precipitation-based streamflow model," see Jackson, Exhibit B, pp. 15 – 16 ("the Policy gives no guidance on what metric to use to determine if the Precipitation-Based model has been adequately validated against the reference stream gauge record.") With respect to "another method acceptable to the State Water Board," the degree of uncertainty reaches 100%.

In addition, the wholesale replacement of regionally protective criteria with criteria to be developed in the future on an application by application basis using site specific studies introduces an unknown, but potentially vast degree of uncertainty into any evaluation of the Policy's effectiveness in protecting at risk resources. The Policy's failure to formulate any substantive guidelines for formulation of site specific minimum bypass flow or maximum cumulative diversions or establish standards of protectiveness that the site specific criteria must meet constitutes abdication of the AB 2121 duty to promulgate such criteria and principles.

Moreover, the site specific study option re-introduces the state of affairs that existed before the passage of AB 2121. Thus, the Policy fails to comply with AB2121 because this provision represents a failure to establish "principles and guidelines" as required by this statute.

4. The Policy's Substitute Environmental Document Fails to Comply with the California Environmental Quality Act ("CEQA").

The Substitute Environmental Document for the Policy fails to comply with CEQA for many reasons.

The Policy includes such a vast degree of uncertainty, as described above, regarding the nature of the criteria that will ultimately be applied to permit applications, that the "Substitute Environmental Document" cannot even provide a complete or certain project description.

As a result, from a process standpoint the public is effectively barred from any meaningful review and comment on the environmental effects of the program.

The Substitute Environmental Document contains less than one page of text, at page 72, assessing the potentially significant impacts of implementing the Policy. None of that text qualifies as a fact-based assessment of the Project's environmental effects. Instead, the document blithely offers up the following conclusory assertion: "The proposed Policy establishes criteria for diversion

season, minimum bypass flow, and maximum cumulative diversion. Complying with these criteria will not have direct significant adverse impacts on the environment and, in fact, will benefit aquatic life by protecting the natural hydrology." (Page 72.)

This conclusion is unwarranted for several reasons. First, as described above, the project description is so uncertain that it is impossible at this time to evaluate the effects of permit approvals based on the purported "criteria" established by the Policy. Further, the environmental document simply ignores the fact that, as compared to the existing baseline environmental setting, this Project will lead to *further reductions* in stream flow. As Mr Jackson carefully documents, implementation of the Policy will lead to approvals that further degrade at-risk resources. The environmental document entirely fails to discuss these mechanisms of impact on at-risk resources.

Thank you for your attention to this matter.

Very Truly Yours,

Thomas N. Lippe

List of Exhibits

A. Letter dated March 22, 2010 from Dennis Jackson to Thomas Lippe.

B. Letter dated March 23, 2010 from Dennis Jackson to Thomas Lippe.

C. Letter dated June 7, 2002 from the Law Offices of Thomas N. Lippe to the State Water Resources Control Board regarding Application No. 30627.

D. Letter dated June 1, 2002 from hydrologist Dennis Jackson to the State Water Resources Control Board regarding Application No. 30627.

E. Letter dated August 5, 2003 from the Law Offices of Thomas N. Lippe to the State Water Resources Control Board regarding Application No. 31358, with sub-exhibits 1 through 12:

   1. National Marine Fisheries Service Endangered and Threatened Species: Threatened Status for Central California Coast Coho Salmon Evolutionary Significant Unit (ESU) Final Rule Fed. Reg. Vol. 61, No. 212, page 56138. October 31, 1996

   2. National Marine Fisheries Service Endangered and Threatened Species: Listing of Several Evolutionary Significant Units (ESUs) of West Coast Steelhead Final Rule Fed. Reg. Vol. 62, page 43937. August 18, 1997

   3. Dennis Jackson letter to Tom Lippe. January 28, 2001

4. Cumulative Effects of Conversion of Upland Woodlands and Chaparral to Vineyards Report prepared by Robert R. Curry, PhD. December 24, 2000.

5. Expert Witness Report: Cumulative Impacts on Fisheries Resources from Intensive Viticulture Practices in Napa County, CA prepared by Robert R. Abbot, PhD., and Robert N. Coats, PhD. February 1, 2001

6. Fish Bypass Flows for Coastal Watersheds: A Review of Proposed Approaches for the State Water Resources Control Board prepared by Peter B. Moyle and G. Mathais Kondolf. June 5, 2000

7. Guidelines for Maintaining Instream Flows to Protect Fisheries Resources Downstream of Water Diversions in Mid-California Coastal Streams prepared jointly by the California Department of Fish and Game and the National Marine Fisheries Service. June 17, 2002 (errata note, dated 8-19-02)

8. Dennis Jackson letter to Stephen Velyvis. July 31, 2003

9. Assessing Site Specific and Cumulative Impacts on Anadromous Fishery Resources in Coastal Watersheds in Northern California, SWRCB staff report. January 23, 2001

10. July 25, 2003 protest of Water Application 31358, Robert W. Floerke, Regional Manager of the Central Coast Region of the California Department of Fish and Game

11. Evaluation of Groundwater Impacts from the Proposed Palmaz Winery, HSI Hydrologic Systems. February 8, 2001

12. NMFS California Anadromous Fish Distributions, California Coastal Salmon and Steelhead, Current Stream Habitat Distribution Table. January 2000

Exhibit A