COAST ACTION GROUP P.O. BOX 215 POINT ARENA, CA 95468

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State Water Resources Control Board
Division of Water Quality
P.O. Box 100
Sacramento, CA 95812-0100

Comment: Instream Flow Policy - Northern California Streams

Note: ***Italics used to indicate quotes*** **from** ***the policy document***

OVERVIEW

The State Water Resources Control Board has noticed, for comment, Draft Policy for Maintaining Instream Flows in Northern California Coastal Streams. The proposed policy notes reference and relationship to DFG/NOAA Guidelines for Small Stream Diversion in Northern California (2002). The fundamental reason for the implementation of Instream Flow Policy is for the maintenance of Beneficial Uses - "*with a focus on native fish populations*". This policy also has a noted relationship and focus on water quality:

"Water Code section 1259.4, which was added by Assembly Bill 2121 (Stats. 2004, ch. 943, § 3), requires the State Water Board to adopt principles and guidelines for maintaining instream flows in northern California coastal streams as part of state policy for water quality control, for the purposes of water right administration. This policy implements Water Code section 1259.4."

The Draft Policy, as published for comment by the SWRCB, attempts to address the factors and current conditions that limit the desired level of instream flow necessary to meet the objective of maintaining beneficial uses - including the maintenance of aquatic life and fishery. With the high degree of impairment noted in coastal streams, the flows issue complexity is exacerbated by numerous factors including but not limited to: site conditions (including aggredation and pool depth issue), pre-existing diversion permits (including riparian use), failure to meet desired flow levels, various remedy as flow maintenance prescriptions (by size of watershed), potential for

waiver (exception) of default policy (to be supported by cumulative watershed analysis of all diversion and use). The level of complexity and complicated text of the SWRCB proposed policy results in a document that is somewhat confusing and likely to be difficult to enforce. Comment in this paper will attempt to raise issue for clarification and/or alteration of policy to achieve better performance and perhaps enhance opportunity for attainment of water quality standards limited by flow impairment.

Legal Framework

As noted above; Water Code Section 1259.4 (added by Assembly Bill 2121) requires the SWRCB to adopt principles and guidelines (policy) for maintaining instream flows (as policy for administering water rights - by adopting the Joint CDFG/NMFS Guidelines or developing guidelines that work to accomplish the same task) in northern California coastal streams - as policy for Water Quality Control. Development of such policy must also be consistent with other water code sections and the federal Clean Water Act. Consistency with Water Code Section(s) 13140,13141, 13142, and 13146 is required.

These mandates for Water Quality Control planning require that such policy and planning must include: principles and guidelines for long range planning as well as water quality objectives (flow objectives, targets, and criteria are Water Quality Objectives) at key locations for planning and operation of water resource development projects and for all water quality control activities (Water Code 13142), and all water quality control planning and activity must comply with all state policy for water quality control (Water Code 13146).

Thus, such policy to be adopted for maintaining instream flows must comply with the above noted Water Code and it must also comply, as a water quality control action, with state and federal anti-degradation language as well as Water Code Section 13242 - where such principles and guidelines (policy - as a water quality control plan) must fully describe all actions to take place and necessary to attain Water Quality Standards, provide a time line for compliance with such standards, and monitor and enforce such standards.

The stated proposed policy methodology for making determinations (watershed analysis - linked to permits and analysis related to exceptions) are not linked to the necessary environmental review standards mandated under CEQA. To put it simply, unpermitted/unauthorized diversions and water impoundments, must comply not only the permitting process (both Water Code and DFG Code), they also fall under project analysis demands of CEQA. This holds true for any permitting that would occur under the ‘‘watershed’’ approach or basis, where watershed analysis and resulting conditions applied to a group action to meet minimum flow, or bypass flow, standards would necessarily fall under the required CEQA noticing and responsible agency and public review and comment process.

Recovery Strategy for California Coho Salmon: In light of the fact that the Courts have upheld the listing of California Coho Salmon, under CESA, this policy should reflect, and be consistent with, any and all recommendations and guidelines set forth in the CDFG Recovery Strategy for California Coho Salmon.

Group Permitting: There has been some discussion of the possibility of "Group Permitting" and creating permits on a watershed basis ("Watershed Appoach"). Though analysis can occur, and should occur, on a watershed basis; group permitting would defy the intent of the permitting process to affix specific responsibility on an individual license for diversion - or fish migration impeding instream structure. Group permitting was attempted in the case of WDR (and related waivers) and TMDL compliance venues - where the Office of Administrative Law found that group permitting did not meet the intent of the law and individual responsibility could not be fixed. However, stream, watershed (planning watershed) flow and depth targets (as derived by watershed analysis) can be the basis of a group plan to attain such objectives. Individual criteria (including default standards if such a plan does not meet the desired objectives in a stated period of time) and conditions must be affixed to the individual permit or license application.

There is confusion with the words "Watershed Approach" and "Watershed Group" (defined as group of diverters in a specific watershed). "Watershed Group" should not exclude interested parties and stakeholders. A "Watershed Group" can not hold a license for diversion. As stated above, each individual party seeking a permit for diversion shall have conditions fixed to that party's Water Right License. As the process for flow maintenance determinations, technical documents, studies, assessments, and mitigations shall fall under CEQA, the SWRCB must develop a process by which interested parties can be noticed.

As any "Watershed Approach", or group process, is subject to a mitigation and monitoring and reporting scheme, and where the mitigating conditions may, or may not be accurate, such an adaptive management process indicates the need for periodic review. This review period should be, at a minimum, be 5 years.

PEER REVIEW - COMMENT BY EXPERTS

Coast Action Group supports Comments on Draft Policy for Maintaining Instream Flows in Northern California Streams by Patrick Higgins, March 2008. CAG incorporates this document in these comments by reference.

Recommendations and observations made by Lawrence E. Band in Review of the Scientific Basis for the Proposed "North Coast In-Stream Flow Policy should be considered by the SWRCB. Points made by Mr. Band related to altered flows effects on stream morphology, depth, and fish passage are important and should be considered.

1.0 Introduction

The introduction accurately describes many of the conditions, including impaired stream flow and related conditions of habitat alteration that have lead to salmonid decline. As stated, the draft policy was developed to improve stream flow conditions. It is important to note that impaired flows affect other aquatic species (as beneficial uses). Discussion should include the nexus of all aquatic species and habitat conditions - with relationship to salmonid survival. Steam flow impairment is also related to negative effects and limiting factors associated with the introduction of other pollutants (i.e. sediment, nutrients, and temperature). Again, the nexus of maintaining sufficient instream flows to mitigate pollutant inputs should be explored - as these factors are

linked with salmonid survival. (Note: much of the related and supporting science can be found in the factors discussion in the State's list of Water Quality Limited Segments - 303 (d) list).

The policy seeks to establish "principles and guidelines" for maintaining instream flows for the protection of fishery resources. Why fragment the policy, and its potential, by not considering other beneficial uses connected to flows (as these issue do related to salmonid survival)? The policy does not specify the terms and conditions for water rights licenses, permits and registrations. Would not the policy be easier and more likely to be enforced if such terms and conditions were added to licenses, permits, and registrations.

POLICY FRAMEWORK

General

The draft policy prescribes protection measures to ensure minimum instream flows. Such prescriptions include minimum bypass flows, season of permissible diversion, and maximum cumulative diversion. It is stated that the proposed SWRCB policy for maintaining instream flows and related prescriptions are based on the Joint CDFG/NMFS Guidelines. However the precise recommendations in the Joint CDFG/NMFS Guidelines are not followed.

In general: the policy is so complicated, with inclusion of various competing control measures, exemptions, complicated monitoring and reporting processes, etc.; that are sought for remedy of impaired conditions related to flow might be an unachievable goal as the policy has little chance of being successfully employed due to this basic complexity. Can the policy be simplified to make it more useable and likely to be enforced? Would not adherence to the original Joint CDFG/NMFS Guidelines make issue less complicated?

Does the draft policy meet criteria of being: **1) Understandable, 2) Implementable, 3) Enforceable** ? I know the Board understands, at this point, that these criteria are not met by the current policy language. The job is to fix it - and - fix it so it can work.

Alternatives to prescriptions - with reliance on site specific study to support or justify any waiver. The criteria under which the "studies" are to be accomplished is somewhat unclear. It has not been addressed if these studies are to be reviewed by the public and other responsible agency - or - if they are subject to CEQA or other State of California Resources Code. Implications relative to any "studies" indicate that watershed wide assessment must be accomplished - and - permitting or licensing on the basis of such studies is subject to CEQA. .

Enforcement mechanisms are not thoroughly discussed.

Given all of the above considerations, there are a number of loose ends that need to be addressed to clarify policy to make it effective and enforceable.

NMFS 2001 CRITERIA STILL APPLIES

Please reference: NMFS/James R. Bybee to Mr. Harry Schueller/SWRCB, dated April 18, 2001. This letter, by NMFS, was written to address a SWRCB staff report "*Assessing site specific and cumulative impacts on anadromous fishery resources in coastal watersheds in Northern California*", January 23, 2001.

This document was written to address issue using discussion of subjects and concerns that NMFS has regarding the SWRCB policy proposal - at the time. Subsequently, most of the issues related to diminished flows issues were addressed by the Joint CDFG/NMFS Proposed Guidelines (2000 - and - fixed 2002). This discussion in this letter speaks to all of the issue in the currently proposed policy, and thus should be considered is future policy development or alteration of the currently proposed policy.

The discussion included (short summary): **General Approach** : **Cumulative Impacts** related to numbers of unpermitted/unauthorized diversions (numbers in the thousands), **limitations** for "new" (what time frame constitutes new ? - last 5 years, 10 years, 20 years) onstream storage reservoirs, **limiting the season of diversion** to winter period when stream flow is the highest (Dec. 15 to March 31), providing bypass flows for the purpose of maintaining (recovering) the quality of downstream habitat - and - maintaining a good representation of the natural hydrograph. In general, NMFS argues that the Joint CDFG/NMFS Proposed Guidelines provided better (more useable solutions) by; 1) allowing diversions only when stream flows are higher then the February median - and - maintaining some semblance of the natural hydrograph, 2) restricting diversions to a maximum instantaneous rate of withdrawal - also to maintain a near-natural hydrograph. NMFS is critical of the proposed SWRCB policy which, 1) allows diversion when flows are higher than an established minimum (in this case the February median), 2) would establish the maximum total cumulative volume of water diverted based on estimated surface runoff - in normal years (discounting dry years) - and during a season from October 1 to March 31 - which would allow interception of all early flows needed by salmon (i.e. the early withdrawal season should not occur to January).

Instream Flow Policy - Northern California Streams - Issues from the NMFS 2001 letter are being highlighted to assess sufficiency of the newly (2008) proposed SWRCB flow maintenance policy to addresses issue and to show differences and potential shortfalls in the proposed policy to address issue.

Migration Barriers - Limitations on new (again define new - last 5, 10, or 20 years) onstream dams, solely on basis of migration barrier issues, fails to address the flow needs issue - where the these dams normally fill during the early rain season - limiting critical flows during that period. In this case NMFS speaks strongly against allowing new onstream dams - except on Class III streams and only if the cumulative reduction in stream flow is not seriously (10%) reduced in fish bearing reaches. In addition, existence of such barrier that would preclude fish migration also precludes consideration of the potential to restore salmonids upstream form these unauthorized and illegal structures. This is in conflict with newly (2008) proposed policy.

Season of Diversion - NMFS and the SWRCB seem to agree that the season of withdrawal should be December 15 to March 31 - with instantaneous flows outside the diversion season to be bypassed. This is linked by NMFS to another argument for limiting onstream dams. This is in conflict with the newly proposed policy - allowing October through March diversion.

Bypass Flow - NMFS disagrees with a bypass flow based on the February median flow. Bypass flows must protect all stream functions. "*Bypass flows should not be some minimum value that does not fulfill all stream functions; instead it should be a dynamic fluctuating flow that effectuates all needed steam functions and processes*" (ref: need to protect the natural hydrograph) The new (2008) policy addresses aspects of the flow issue but in a seriously convoluted way. Allowing illegal/unauthorized onstream dams (and diversions) that restrict flows and block migration will preclude attainment of the desired goal - habitat maintenance. NMFS suggests that a depth criterion may be necessary on some streams. This is not considered in the new policy, exception assessment, or cumulative assessment process. NMFS suggests that, both, CDFG and NMFS be included in the depth criterion assessment process.

Cumulative Effects - NMFS argues for the Joint CDFG/NMFS Guidelines to avoid the "flatlining" of stream flows. NMFS argues that cumulative assessment of diversion impacts should include diversions under riparian right (or estimates of diversion under riparian right) - and - should be included in CEQA based cumulative effects analysis. NMFS, again, argues that the proposed period of permitted diversion starts too early. NMFS argues that historic habitats are not protected - nor are stream flows protected above migration restrictions. NMFS argues that assessments should include representative dry years. Lastly - NMFS recommends that assessment, reports, and cumulative effects analysis be presented in understandable form (this can be said for the wording of the new policy - itself). There is a conflict in the new (2008) policy with every issue mentioned in this paragraph.

Stream Flow Estimation - NMFS has some issue with reliance on USGS stream flow data (being uneven and sparse), and the Rational Runoff method. How will the unimpaired flow numbers be derived? The precipitation-based hydrologic model is given more support - but the accuracy of this method is questioned. This is a problem acknowledged by the SWRCB - with the suggestion that enforcement may be the key to the issue; " ***.... a vigorous program to identify unauthorized diversions and bring them into the water rights process would be an important step in the right direction. If the problem is ignored it will only get worse."*** (SWRCB 2000). NMFS agreed with the preceding statement. NMFS recommends a monitoring and research program for developing stream flow estimates. To date (during the last 10 years when this policy was on the table) little progress has been made in this area.

Verification - Variability and uncertainty regarding the adequacy and implementation of any set of guidelines or procedures for regulating stream flow diversions for the purpose of protecting anadromous salmonids - demands verification or adaptive management. A program validating adequacy of such program should be put in place.

Compliance Monitoring - Any policy or program for limiting environmental impacts of water diversions on coastal streams will contribute little protection of fish and wildlife resources if there is inadequate oversight and enforcement of those programs or policy. "*SWRCB must develop a credible compliance, monitoring, and enforcement program to ensure that requirements for bypass flows, rates of withdrawal, and a limited diversion season are met. SWRCB must also bolster its enforcement capability to discourage illegal appropriations of water.* "(NMFS)

Given the above - short - review of issue; it be said that many areas of the newly (2008) proposed policy are not consistent with NMFS concerns voiced in the 2001 letter to the SWRCB Or - that the policy does not meet the criteria of meeting basic standards of being **Understandable (Interpretable), Implementable, Enforceable.**

This discussion, above, related to proposed SWRCB on insteam flows from 2000 and NMFS response (2001) can be applied to the current proposed Stream Flow - Maintenance policy now on deck. There are many open issues that need fixing. This discussion can be applied to that task.

2.1 Development of Instream Flow Criteria

In developing this policy, the State Water Board considered the 2002 draft " for Maintaining Instream Flows to Protect Fisheries Resources Downstream of Water Diversions in Mid-California Coastal Streams" (CDFG/NMFS Draft Guidelines) jointly developed by DFG and NMFS. It is not clear, or has not been discussed, how the currently proposed policy differs from the CDFG/NMFS Draft Guidelines - and - how the proposed policy will, in the end, protect anadromous fish and aquatic life from the deleterious effects of diversion.

Various points of discussion in this document indicate flaws in the proposed policy that need to be addressed. At this point, with the organization of the policy as it is, it is very improbable that this policy will work to recover or protect fishery resources.

2.2 Principles for Maintaining Instream Flows

The statement "*Protection of fishery resources is in the public interest"* leaves out other beneficial uses adversely effected by diversion practices that the policy intends to address. The policy goes on to state "*the primary objective of this policy is to ensure that the administration of water rights occurs in a manner that maintains instream flows needed for the protection of fishery resource*". This statement is inconsistent with other policy statement that existing water rights and license are not to be effected by the flow policy. It is not clear how the policy can be effective without dealing with all diversions (and stream blocking impoundments) - licensed and unlicensed, authorized and unauthorized. Assessment and mitigation procedure accomplished on a watershed basis must consider all water use and related habitat alteration.

This policy establishes the following five principles that will be applied in the administration of water rights (again - are existing rights subject to this flow policy?):

1. Water diversions shall be seasonally limited to periods in which instream flows are naturally high to prevent adverse effects to fish and fish habitat: This would be effective if policy established that diversion is limited to a season of January 1 nor later than the end of March. The intent is to mimic the natural hydrograph. And, storage should be held off stream.

2. *Water shall be diverted only when stream flows are higher than the minimum instream flows needed for fish spawning and passage*: If number one was enforced, then this principle would automatically fall into place.

3. The maximum rate at which water is diverted in a watershed shall not adversely affect the natural flow variability needed for maintaining adequate channel structure and habitat for fish; This supports allowing diversion only during periods of high flow - and - constrained by time periods more stringent than noticed in the policy document. Diversion should probably only occur in December through March.

4. Construction or permitting of new onstream dams shall be restricted. When allowed, onstream dams shall be constructed and permitted in a manner that does not adversely affect fish and their habitat: How is this going to be enforced. What is the cutoff point of dams already (historically) in place? It is very unlikely that onstream dams can be fully mitigated.

5. The cumulative effects of water diversions on instream flows needed for the protection of fish and their habitat shall be considered and minimized: It is not clear how this provision is to be enforced. Criteria and process the will meet instream flow needs and fish migration needs must be defined.

2.3 Regionally Protective Instream Flow Criteria

Variances from these 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.

Criteria for the decision making process that would allow for variance needs to be developed. Does such a process need to meet responsible agency, public review, and CEQA standards? The process must be based on cumulative diversion and fish migration impediments in a planning watershed.

2.3.1 Season of Diversion

Please refer to hydrologic event recording of the past ten years or so. Rain events for the coastal streams do not justify moving the period of diversion from those recommended by the DFG-NMFS Draft Guidelines **- December through March.** An October start is way too early and late March diversion is questionable.

This policy only speaks to ‘‘new’’ diversions. Please define ‘‘new’’ diversion. What if historically permitted diversions (possibly with additional ‘‘new’’ diversions) are limiting flows, and habitat, to the point where fish survival is not supported by flows - how should the policy be

applied? What if there are permitted or unpermitted water transfers out of the basin where flows are not supporting beneficial uses?

2.3.2 Minimum Bypass Flow

We support the concept of minimum bypass flow. It is very important. However, we feel that the concept should be applied to all diversion - "new" and existing. (No less than 60% of mean flow, unimpaired, in watersheds over 290 square miles, and for small watersheds the number is much larger - by formulae).

As you suggest; to establish the minimum bypass flow standard, for any point of diversion, unimpaired conditions must be the baseline. How are unimpaired conditions going to be established for developing the minimum bypass flow standard and any point of diversion? How is the upper point of anadromy to be established? Should not artificially landlocked anadromous fish be considered in the upper limits - where such fish are landlocked by artificial blockage or dam?

The formulae that you have established for determination of minimum bypass flow in the various size watersheds are acceptable - though they may be difficult to actually apply. The Joint CDFG/NMFS Guidelines (2002) standards may be more functional.

What is to occur if a minimum bypass flow is already established and attached to an existing diversion permit? Will the SWRCB enforce this condition? If so, why have they not been doing this in cases where a minimum bypass condition is in place?

2.3.3 Maximum Cumulative Diversion

We support policy that considers magnitude and variability in peak stream flows that are needed to meet the habitat needs of anadromous salmonids, including maintaining stream channel, vegetative structure and variability, gravel, wood movement, and other channel features. We also support the channel maintenance concept of the 1.5-year annual maximum instantaneous peak stream flow as the most effective measure of maintaining variability of discharge to maintain desired channel features - with the maximum cumulative diversion to be five percent of the 1.5-year instantaneous peak flow.

2.3.4 Assessment of the Cumulative Effects of Water Diversions on Instream Flows

The State Water Board must find that unappropriated water is available to supply an applicant prior to issuing a water right permit. This policy requires a water right applicant to conduct a water availability analysis that includes (1) a Water Supply Report that quantifies the amount of water remaining instream after senior rights are accounted for, and (2) an Instream Flow Analysis that evaluates the effects of the proposed project, in combination with existing diversions, on instream flows needed for fishery resources protection.

This policy for assessment of cumulative effects must be accomplished by a qualified person. This assessment must also apply to any requested waiver or deviation from default policy. Such

assessment must be made available to the public and responsible agency for comment under CEQA. When estimating all diversions and quantities of water available for diversion how will unlicensed diversion, or diversion beyond license or permit conditions, be considered? Should not all uses be considered?

Other Limiting Factors related to flow must be Assessed: Failure to address limiting factors appurtenant to and linked to flow regimes is an issue the this proposed policy must consider. For instance, if there has been severe aggregation and sedimentation related to historic land use (e.g. timber harvest, road construction, development, vineyardization, etc.), where habitat requirements have been altered (i.e. holes filled and more water running subsurface); linkage of discussion and policy must be made to address such issue. For example; a stream condition where there was initially existing 5' holes with average flows that provided 7' of depth at the hole, and where currently the hole is now 2' and average flow only now provides 3' of total depth; what policy implications should address such issue? This type of condition and habitat change must be considered in any relevant watershed planning assessment. In addition, linkage of such assessment should include consideration of limiting factors relating to any impaired conditions noted in the State Impaired Waters listing

2.3.5 Onstream Dams

Onstream dams that block fish habitat and/or make maintenance of instream flow minimum bypass conditions impossible to achieve shall be removed. This condition should be applied to all newly (newly would be the last 20 years - and - especially to unauthorized dams built within the near historic range of this policy) built and unpermitted dams and onstream storage facilities. This condition should be considered for historic dams, put in place without permit, that is responsible for any serious impact to fish migration, fishery habitat values, and diminished flows during critical periods.

3.0 POLICY APPLICABILITY

3.1 Fishery Resources Covered by the Policy

This policy is assumed to protect smaller (non-anadromous) fish populations**.** This assumption does not hold true if anadromy is limited by blockage by a dam. All aquatic life must be considered as a beneficial use.

3.2 Geographic Area Covered by the Policy

Geographic area covered by this policy should be expanded to cover a rivers and streams of the Klamath System - Salmon River and its tributaries, Trinity River and its tributaries, Scott River and its tributaries, etc.. It is acknowledged that the Trout Unlimited Petition and resultant legislation, AB 2121, pertains to the geographic area - Mattole River to SF Bay. However, the SWRCB water rights responsibility, and need to address limiting factors related to water rights administration responsibility, are manifest outside the realm of AB 2121. It must be recognized that there is a very serious fishery crisis - where survival of salmon stocks may be dependent on this policy.

3.3 Water Right Actions Covered by the Policy

This policy should be expanded to apply beyond applications to appropriate water, small domestic use and livestock stock pond registrations, and water right petitions to consider existing water rights, misuse of water, and transfers that are seriously limiting instream flows and having adverse effect on the anadromous fishery. .

4.0 WATER RIGHT APPLICATIONS

Applications (prior to January 1, 2000), with condition of water availability analysis, shall be consistent with the CDFG/NMFS Draft Guidelines or subject to policy as written. We agree.

4.1 Water Availability Analysis

Water availability Analysis, as part of application, must consider all uses, including riparian, all authorized use, and all unauthorized use. Such analysis should be made available for public and responsible agency noticing and review (as required by CEQA).

4.1.1 Submittal Requirements

Such analysis shall be completed by a qualified professional and reviewed by SWRCB staff and CDFG, NMFS staff**.**

4.1.1.1 Data Submissions

It is agreed that the data in such submissions shall not be proprietary. Data shall be easily accessible by common programs and formatting.

4.1.2 Water Supply Report

We agree with policy as outlined in this section.

4.1.3 Map Requirements

We agree with policy as outlined in this section.

4.1.4 Determination of the Upper Limit of Anadromy

We agree with the following definition of the upper limit of anadromy:

"The upper limit of anadromy is defined as the upstream end of the range of anadromous fish that currently are, or have been historically, present year-round or seasonally, whichever extends the farthest upstream. The upper limit of anadromy may be located on a perennial, intermittent, or ephemeral stream."

If the historic upper limit of anadromy is blocked by and artificial barrier (or dam), the historic area shall still be considered in the area of anadromy for permitting and analytic considerations.

Site specific studies for making anadromy limit determinations shall be accomplished by a qualified fishery biologist
Such Analysis shall be made available to the public and managing agencies for review and comment.

4.1.5 Fisheries Biologist Qualifications

The area of who is qualified to make anadromy and water availability determinations is a place where policy standards can be a problem. If the ‘‘qualified’’ fisheries biologist standards remain as written, additional wording should be included to incorporate all best available information held by any of the managing agencies (DFG, NMFS, Regional Boards, and SWRCB). This would include all information in related planning documents and EIRs for the area under study.
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4.1.6 Selection of Points of Interest (POIs)

The language included in this section is appropriate.

4.1.7 Instream Flow Analysis

Instream Flow Analysis should include all diversions (cumulatively), including subsurface diversion (from a defined channel), and diversions that are not licensed or permitted (to include water transfers - authorized or unauthorized). Criteria and methodology seem appropriate.

Such Analysis shall be made available to the public and managing agencies for review and comment (under CEQA).

4.1.8 Site-Specific Study to Obtain Variances from the Regional Criteria for Diversion Season, Minimum Bypass Flow and/or Maximum Cumulative Diversion

We believe there will a large number of applications for variance. Similar standards shall apply for qualification of those conducting the studies supporting variance as in sections 4.1.4, 4.1.5, and 4.1.7.

Such Analysis shall be made available to the public and managing agencies for review and comment (under CEQA. Approval of variance is subject to public and responsible agency noticing and participation requirements.

4.2 Stream Classification System

Stream Classification System (Criteria) is appropriate.
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4.2.2 Determination of Stream Class by Stream Survey

The criteria/standards that apply should be the same as for variance and/or Flow Analysis or Anadromy limit analysis.

Such Analysis shall be made available to the public and managing agencies for review and comment (under CEQA. Approval of variance is subject to public and responsible agency noticing and participation requirements

Generally, the criteria/standards applied in this section are appropriate.

4.3 Fish Screens at Diversions in Class I Streams

This section shall be consistent with the CDFG Coho Recovery Guidelines.
There is no justification for not fitting fish screens on diversions. Also, such diversions fall under the CDFG 1600 permitting process and are subject to CEQA determinations.

4.4 Permitting Requirements for Onstream Dams

Unauthorized onstream dams that inhibit fish migration and/or alter the natural hydrograph should not be permitted. Water can be diverted, at the appropriate time, and stored in an off stream facility.

4.4.1 Onstream Dams on Class I streams

Any unauthorized onstream (Class I streams - where there is habitat alteration, fish blockage, and potential to inhibit minimum bypass flows) dam built in recent history (last 20 years - or longer), that can not be completely mitigated for flow maintenance and fish passage, should not be permitted. Applications for permitting or authorizing diversion related to such dams should not be processed. Establishing an artificial date of July 2006 as a threshold for what should or should not fall under this guidance (where application for approval can be accepted) is not logical nor is it good policy. If a dam was built instream without benefit of a permitting process which would include CDFG 1600 permitting and environmental review and permitting review under Cal Water Code, that dam should, legally, be subject all existing law and to any newly proposed policy (and conditions contained therein - and where removal is an option if fish passage and flow issue can not be completely remedied) for maintaining instream flows.

If dams, under such conditions, are to be exempted from regulation (not part of the mandated application and permitting process - with complete mitigation for flow and passage issue), this issue must be dealt with in the environmental review for this policy - and mitigated via CEQA environmental review process. Most (a large percentage of the universe of unauthorized dams) existing and unpermitted dams on Class I streams were built before 2006. The proposed policy, as it stands in terms of mitigation and remedy for ongoing harm, would not achieve the desired results - if dams built prior to 2006 are exempted from State Code and the intent of this new policy. It must be acknowledged that full mitigation of onstream structures should be considered to be very unlikely. Environmental review of any permitting process (under DFG Code, State

Water Code, and CEQA - as mandated) would indicated the level of adverse impact and potential for mitigation. Any exemption of pre 2006 dams from a process that would require full mitigation for flow and passage issue would be omitting State responsibility to address such issue as well as committing this policy to process where the desired goals will certainly not be attained.

The SWRCB, CDFG and NMFS, should set up a programs where unauthorized diversions and dams should be assessed and prioritized (ranked) by level damaging contributions to limiting factors for salmonids - where the most damaging diversions and dams should be dealt with first.

4.4.2 Onstream Dams on Class II Streams

Again, policy exemption of dams built on Class II streams built prior to July 2, 2006, with potential mitigation being the solution, is not acceptable (see discussion above). Dams built onstream in Class II watercourses may not impede fish migration. However, they may interfere with natural hydrologic function, including natural peak flows needed sustain geomorphic function and/or the desired flows, including minimum bypass flows may be inhibited.

Such situations are subject to CDFG 1600 permitting process and review constraints noted in section 4.4.1

4.4.3 Onstream Dams on Class III Streams

Dams built in the channel (defined by bed and bank) in Class III watercourses may not impede fish migration. However, they may interfere with natural hydrologic function, including natural peak flows needed sustain geomorphic function and/or the desired flows, including minimum bypass flows may be inhibited.

Such situations are subject to CDFG 1600 permitting process and review constraints noted in section 4.4.1

4.4.4 Guidance for Developing Mitigation Plans

It is acknowledged that the construction and operations of onstream dams adversely affect instream flows and fishery resources. The intent of the SWRCB policy is to be directed towards reversing cumulative damage from hundreds (thousands) of unpermitted projects. Such projects should be discouraged and/or the most beneficial mitigation, dam removal, should be of the highest priority. Only in the case where dam removal is more damaging than other mitigation, as documented by a full environmental study (EIR), can such mitigation, rather than removal, be justified.

Again, such structures are subject do DFG Code and supporting environmental review, under CEQA - as well as sections of Cal Water Code.

5.0 SMALL DOMESTIC USE AND LIVESTOCK STOCKPOND REGISTRATIONS

CAG agrees with constraints as outlined in this section - except for the fact that the season of diversion should be changed as per discussion - above.

6.0 WATER RIGHT PETITIONS

CAG agrees with constraints as outlined in this section , except for the fact that the season of diversion should be changed as per discussion - above.

7.0 PASSIVE BYPASS SYSTEMS

Assuming bypass systems are for onstream facilities, and thus the bypass system is, in fact, a mitigation for and unpermitted structure that may interfere with natural hydrology and minimum flows; the discussion for sections 4.4.1 to 4.4.4 would apply.

8.0 FLOW MONITORING AND REPORTING

8.1 Flow Monitoring and Reporting Requirements for Passive Bypass Systems

The statement "*Bypass flow monitoring is not necessary for passive bypass systems"* does not consider the maintenance of minimum bypass flows where there are near stream wells that are diverting water from the underflow (in a defined channel) and where there is an established minimum bypass flow condition. In such cases flow monitoring and reporting is necessary.

9.0 COMPLIANCE PLANS

Such plans are subject to environmental review (as part of the permitting process under, both, Cal Water Code and DFG Code).

10.0 Policy Effectiveness Monitoring

This is, mandated under Cal Water Code. (see Legal Framework - above). Policy Effectiveness Monitoring is the basis for assuring desired results.

11.0 ENFORCEMENT

This policy will never be effective without a functional and funded enforcement mechanism. Enforcement should be accomplished with the cooperation with the Department of Fish and Game and National Marine Fishery Service.

11.1.1 Enforceable Terms and Conditions of Permits, Licenses and Orders

Terms and conditions should be part of any permitting process and related environmental review. Permit holder(s) should sign and agreement to comply with all conditions and included in the agreement should be a clause for the permit holder to pay for any costs to the enforcing agency for actions and activity related to an enforcement action.

11.1.3 Inspections for Licensing

The State Water Board should set up a fee schedule for these activities. Policy without funding and a mechanism for enforcement is a recipe for disaster.

11.1.4 Compliance Inspections

Funding and fee schedules to support a compliance inspection process must be developed to assure attainment of water quality standards. The prioritization concept where "*compliance inspection program initially will target high resource-value watersheds. Targeted watersheds will be selected annually based, in part, on input from the Regional Water Quality Control Boards, the Department of Fish and Game, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service*" is valid. Working in concert with these agencies is necessary for a successful program.

11.1.5 Complaint Investigations

Complaint investigations have historically been a problem. CAG has an outstanding complaint on the Garcia River (Garcia River/Walter Stornetta Ranch - License 6470 - Application 16700). In this case an unauthorized water transfer is occurring in sizable amounts (the landowner admits that 1/3 of its total diversion is used for irrigation outside of the watershed). This diversion, with unauthorized transfer, effects critical low flows. This complaint has been on file for about 4 years - without the SWRCB taking any action.

Surely the SWRCB can perform better than this.

11.2 Prioritization of Enforcement

Limited resources mandate prioritization. However, the SWRCB has been derelict in duty in the realm of discussion related the AB 2121 issues. Action must be taken. Coordination with other responsible agency can make the enforcement process more effective.

11.2.1 Violation Within Class I and II Streams in the Policy Area or Within an Existing or Wild and Scenic River System

Agreed. Enforcement in Class I and II streams (see discussion above) should have priority over violations in Class III watercourses. Violations lower in a system are likely to be more important than violations higher in the system.

Wild and Scenic River designation should be given consideration as well as streams known to support populations of listed fish.

CAG requests enforcement of ongoing, yearly, violation by the North Gualala Water Company on the North Fork of the Gualala River. Flows in the area of this diversion have been found by the SWRCB to be in the jurisdiction of the State. The Gualala River is designated Wild and Scenic, the North Fork supports coho and steelhead, and the diversion is in a Class I stream. The diverter continuously (yearly) violates conditions of License and make no effort to remedy - with no action from the SWRCB. Where are the SWRCB priorities in this case?

11.2.4 Waste and Unreasonable Use

Waste and unreasonable use is a problem. Conservation: diversion during peak flow events and off stream storage are mitigations to the problem this policy is attempting to address. It is possible for resource owners and responsible agency to take action(s) that will result in remedy. If such actions were, historically, taken the current problem would be much less severe and much less costly to remedy - for diverters and the State alike.

11.2.7 Recalcitrant Violators, Repeat Violators, and Willful Misstatements

Ongoing violations, noted above (Section 11) fall into this category. Yet - not action has occurred. Yes! Responsible agencies (SWRCB, CDFG, and NMFS) need to work harder on high priority situations and situations where the resource owner refuses to cooperate.

11.3.2 Informal Enforcement Actions for Lower Priority Violations

Warnings can be effective. This is where working with CDFG and NMFS might help.

11.3.3.1 Administrative Civil Liability (ACL) Complaints

Yes! Use your ACL authority.

11.3.3.2 Cease and Desist Order (CDO)

CDOs work too.

12.3 Required Technical Documents

Information provided by groups seeking permits or variance must be complete and accurate - and - the must comply with CEQA mandates. Group planning can occur on a watershed basis. Limitations and Conditions must be affixed to individual permits for each diverter (see - discussion under Legal Framework - above).

12.4 Approval of Technical Documents

CEQA applies. The public and responsible agency must be noticed and be given opportunity to comment.

12.5 Water right permit and license terms

Such license terms must be a part of each diverters individual permit. Consideration of default, or necessary conditions to mitigate, conditions and terms must be in place if there is failure to attain "group" objectives.

13.0 CASE-BY-CASE EXCEPTIONS TO POLICY PROVISIONS

Exception (variance) Provisions seem complete. Again - this is a CEQA based process with public and responsible agency notice and review and comment provisions.

RECOMMENDATIONS - SHORT LIST

Apart from suggestions and discussion from above, the following summarized suggestions are made:

- Proposed policy needs to be reworked to make it more understandable and enforceable

- Adhering to the original Joint CDFG/NMFS Guidelines might simplify policy and related implications.

- All origins of water use should be considered in Watershed Analysis and setting diversion limitations.

- Watershed Analysis and condition setting for permits and license shall be consistent with all State Code (including CEQA, Water Code, and CDFG 1600 permitting) - this includes group actions.

- All unauthorized onstream dams and storage facilities that block fish habitat shall be considered for removal on a prioritized basis.

- Season of Diversion should be no greater than January through March.

- Funding to support permitting and monitoring programs shall be developed through permit fee schedules.

- A functional enforcement system shall be developed and employed.

More in-depth discussion and recommendations are provided in the text of this paper.

Sincerely,

For Coast Action Group

Appendix

Stream flow estimation: the Rational Method is notoriously open to manipulation by the consulting hydrologists - it is well known that you can back numbers into the calcs to come out with the desired results. Consequently, most forward looking flood management agencies (see, for example, King Co. WA; Tulsa OK), have banned its use for modeling. More complex models that aren't as susceptible to manipulation are called for here (i.e., MIKE-II, from PWA). For more info on this, contact hydrologists Riley at SFBay Area RWQCB, or Betty Andrews at Phil Williams Assoc)

Compliance Monitoring: This is a perennial problem. Funding to the public agencies (i.e. SWRCB) for oversight, verification, validation, and long term operations is universally ignored. Thus, no oversight happens with any meaningful pattern or consequence. This is a constant issue where a right to use and impact public trust resources is granted to a private party, but the costs of oversight are left to the public agency with no funding stream. It's a guaranteed way to lose wetlands (at so-called 'wetlands replacements' or mitigation banks), and, in this case, viable fish habitat.

Fees: There needs to be some way to attach a permanent fee to the issuing of water diversion permits so that the public trust is not harmed, and so that downstream neighbors are not harmed. Annual fees? long term performance bonds? Severance fees? annual/multi-year license? There has to be a vehicle for this, or all this work is doomed.