

**STATE WATER RESOURCES CONTROL BOARD
BOARD MEETING/HEARING SESSION – DIVISION OF WATER RIGHTS
OCTOBER 22, 2013**

ITEM 6

SUBJECT

A PUBLIC HEARING TO CONSIDER A RESOLUTION ADOPTING A PROPOSED POLICY FOR MAINTAINING INSTREAM FLOWS IN NORTHERN CALIFORNIA COASTAL STREAMS AND CERTIFYING THE CALIFORNIA ENVIRONMENTAL QUALITY ACT DOCUMENTATION PREPARED IN CONNECTION WITH THE POLICY.

DISCUSSION

The proposed Policy for Maintaining Instream Flows in Northern California Coastal Streams (Policy) was developed to comply with Water Code section 1259.4. The purpose of the Policy is to preserve the instream flows needed to protect fishery resources, while minimizing the water supply impacts of the proposed Policy on other beneficial uses, including agricultural, municipal, domestic, and industrial uses. The Policy will apply to applications to appropriate water; small domestic use, small irrigation use, and livestock stockpond registrations; and water right petitions. The geographic scope of the Policy encompasses coastal streams from the Mattole River to San Francisco and coastal streams entering northern San Pablo Bay, and extends to five counties: Marin, Sonoma, and portions of Napa, Mendocino, and Humboldt Counties. Streams in the Policy area provide habitat for steelhead trout, coho salmon, and Chinook salmon, which have been listed as threatened or endangered species under the federal Endangered Species Act and the California Endangered Species Act. The State Water Resources Control Board (State Water Board) adopted the Policy in 2010, as part of state policy for water quality control pursuant to chapter 3, article 3 (commencing with section 13140) of the Porter-Cologne Water Quality Control Act (Wat. Code, § 13000 et seq.), in order to comply with Water Code section 1259.4.

On August 9, 2012, the Alameda County Superior Court granted in part a petition for writ of mandate challenging the Policy and associated environmental documentation pursuant to CEQA. (*Living Rivers Council v. State Water Resources Control Board* (Sup. Ct. Alameda County, 2012, No. RG10-543923).) The Court issued a writ of mandate, directing the Board to set aside Resolution No. 2010-0021, which adopted the Policy and certified that the environmental documentation complied with the California Environmental Quality Act (CEQA). In addition, the writ directed the State Water Board to take the following two actions in order to comply with CEQA: (1) evaluate certain subterranean stream delineations as a potentially feasible mitigation measure for the potential increase in use of percolating groundwater that could be caused by the Policy and make appropriate disclosures regarding that evaluation and resulting decision; and (2) present sufficient information to enable the decision makers and the public to understand and to consider meaningfully the limited legal options facing the State Water Board to mitigate any increase in the use of percolating groundwater and the implications for the effectiveness of the Policy.

On October 16, 2012, the State Water Board set aside [Resolution No. 2010-0021](#), thereby vacating the Board's adoption of the Policy and certification of the environmental documentation, as required by the Court. ([State Water Board Resolution No. 2012-0058](#).) On February 22, 2013, the State Water Board circulated additional CEQA documentation, including

revised sections 6.2, 6.9, and 7 of the 2008 Substitute Environmental Document (SED), a new Supplement to Appendix D of the 2008 SED, and revised portions of the 2010 Response to Public Comments, Volumes 1 and 2, for public review and comment in accordance with applicable State laws and regulations. The primary purpose of the revisions was to satisfy the Court's requirements. The written public comment period ended at noon on April 8, 2013. On April 23, 2013, a public hearing for the receipt of oral comments on the adequacy of the additional CEQA documentation was held during a regularly scheduled State Water Board meeting. No significant revisions to the Policy are proposed based on the additional CEQA documentation and comments received. Edits to the Policy consist of clarifications to existing language and clerical corrections.

POLICY ISSUE

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 as part of state policy for water quality control pursuant to chapter 3, article 3 (commencing with section 13140) of the Porter-Cologne Water Quality Control Act (Wat. Code, § 13000 et seq.) on or before January 1, 2008. As described above the previously adopted Policy was vacated in October of 2012.

FISCAL IMPACT

No Impact. The Policy can be implemented with existing fiscal resources. The Policy would increase efficiency and consistency to the water right process, resulting in cost savings for the State Water Board and the water user community.

REGIONAL BOARD IMPACT

No Impact

STAFF RECOMMENDATION

Staff recommends that the State Water Board adopt the Policy as part of state policy for water quality control pursuant to chapter 3, article 3 (commencing with section 13140) of the Porter-Cologne Water Quality Control Act (Wat. Code, § 13000 et seq.)

State Water Board action on this item will assist the Water Boards in reaching Goals 3 and 5 of the Strategic Plan Update: 2008-2012 to promote sustainable local water supplies and to advance organizational performance. In particular, approval of this item will assist in fulfilling Objective 3.3: To ensure that adequate stream flows are available for the protection of fish and wildlife habitat while meeting the need for diversions of water for other uses; and Objective 5.1: To improve the current Water Board systems, programs, functions, and core business processes to enhance effective and consistent implementation of Water Board plans and policies, and State and federal laws and regulations, and to reduce processing time and costs.

DRAFT

STATE WATER RESOURCES CONTROL BOARD RESOLUTION NO. 2013-

ADOPTION OF A PROPOSED POLICY FOR MAINTAINING INSTREAM FLOWS IN NORTHERN CALIFORNIA COASTAL STREAMS

WHEREAS:

1. Assembly Bill 2121 (Stats. 2004, ch. 943, §§1-3) added sections 1259.2 and 1259.4 to the California Water Code. Water Code section 1259.4 requires the State Water Resources Control Board (State Water Board) to adopt principles and guidelines for maintaining instream flows in northern California coastal streams for the purposes of water rights administration. The principles and guidelines must be adopted as part of state policy for water quality control pursuant to chapter 3, article 3 (commencing with section 13140) of the Porter-Cologne Water Quality Control Act (Wat. Code, § 13000 et seq.).
2. As required by Water Code section 1259.4, the State Water Board has developed a Policy for Maintaining Instream Flows in Northern California Coastal Streams (Policy). The Policy establishes principles and guidelines for maintaining instream flows for the protection of fishery resources, while minimizing the water supply impacts of the policy on other beneficial uses, including irrigation, municipal use, and domestic use. The geographic scope of the Policy encompasses coastal streams from the Mattole River to San Francisco and coastal streams entering northern San Pablo Bay and extends to five counties: Marin, Sonoma, and portions of Napa, Mendocino, and Humboldt Counties.
3. Coastal streams within the Policy area provide habitat for steelhead trout, coho salmon, and Chinook salmon. The National Marine Fisheries Services (NMFS) and the California Department of Fish and Wildlife (DFW) have listed steelhead trout and Chinook salmon as “threatened” under the federal Endangered Species Act (ESA) and the California Endangered Species Act (CESA), respectively. Coho salmon are listed as “endangered” on both the ESA and the CESA lists. Water diversions result in a significant loss of fish habitat in California.
4. The Policy will apply to applications to appropriate water, registrations, and water right petitions. The Policy contains guidelines for evaluating whether a proposed water diversion, in combination with existing diversions in a watershed, may affect instream flows needed for the protection of fishery resources. It prescribes protective criteria limiting the season of diversion, establishing minimum bypass flows, and limiting the maximum cumulative rate of diversion from a watershed. As an alternative to the criteria specified in the Policy, the Policy allows site-specific studies to be conducted to evaluate whether different protective criteria could be applied. The Policy also limits construction of new onstream dams and contains measures to ensure that approval of onstream dams does not adversely affect instream flows needed for fishery resources. The Policy provides for a watershed-based approach to evaluate the effects of multiple diversions on instream flows within a watershed as an alternative to evaluating water diversion projects on an individual basis. Enforcement requirements contained in the proposed Policy include a framework for compliance assurance, prioritization of enforcement cases, and descriptions of enforcement actions.

5. The project under consideration is the adoption of the Policy. As required by California Code of Regulations, title 14, section 3777, the State Water Board has evaluated the potential environmental impacts of Policy adoption. The adoption of a policy for water quality control is a regulatory program that has been certified by the State's Secretary for Resources as exempt from the requirement of the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.) to prepare an Environmental Impact Report (EIR) or Negative Declaration. (Cal. Code of Regs., tit. 14, § 15251, subd. (g); Cal. Code of Regs., tit. 23, § 3775.) Accordingly, the State Water Board prepared a substitute environmental document (SED) in lieu of an EIR or Negative Declaration. At the time of the 2010 Policy adoption, the SED consisted of an SED dated March 14, 2008, and responses to comments on the 2008 SED. The CEQA documentation prepared in connection with the Policy also included a scientific basis report, a sensitivity study, and responses to comments submitted during the public participation phase in the development of the Policy. In addition, the State Water Board prepared an analysis of the costs of compliance with the Policy and identified potential sources of funding.
6. As described in the SED, the Policy requires limitations on diversions to ensure that water rights are administered in a manner designed to maintain instream flows. Adoption of the Policy would have no direct effects and the Policy itself will not approve any particular water diversion project(s); however, Policy implementation could lead some affected parties to take actions that could in turn result in indirect environmental impacts. The Policy could have potentially significant indirect environmental impacts as a result of the following activities that affected parties might take in response to the Policy: (1) increased groundwater pumping, (2) increased diversions under riparian rights, (3) increased reliance on alternative water sources, (4) modification or removal of onstream dams, and (5) construction of offstream storage facilities. It is impossible to predict which affected parties will take any of these actions, or exactly how many affected parties will take any of these actions. Accordingly, the SED evaluates indirect environmental impacts at a programmatic level.
7. At the close of a hearing held on April 27 and May 4, 2010, the State Water Board approved [Resolution No. 2010-0021](#), which adopted the Policy and certified that the SED and other environmental documentation complied with CEQA.
8. On August 9, 2012, the Alameda County Superior Court granted in part a petition for writ of mandate challenging the Policy and associated environmental documentation pursuant to CEQA. (*Living Rivers Council v. State Water Resources Control Board* (Sup. Ct. Alameda County, 2012, No. RG10-543923).) The court issued a writ of mandate, directing the State Water Board to set aside Resolution No. 2010-0021, thereby vacating the State Water Board's adoption of the Policy and certification that the SED had been completed in compliance with CEQA. The State Water Board complied with this directive on October 16, 2012. ([State Water Board Resolution No. 2012-0058](#).)
9. In order to comply with CEQA, the writ provided that the State Water Board was to take the following two actions: (1) evaluate certain subterranean stream delineations as a potentially feasible mitigation measure for the potential increased use of percolating groundwater that could be caused by the Policy and make appropriate disclosures regarding that evaluation and resulting decision; and (2) present sufficient information to enable the decision makers and the public to understand and to consider meaningfully the limited legal options facing the State Water Board to mitigate the expected increase in the use of percolating groundwater and the implications for the effectiveness of the vacated Policy. The writ left to

the State Water Board's discretion whether it was necessary to recirculate the SED, in whole or in part.

10. On February 22, 2013, the State Water Board circulated additional CEQA documentation, including revised sections 6.2, 6.9, and 7 of the 2008 SED, a new Supplement to Appendix D of the 2008 SED, and revised portions of the 2010 Response to Public Comments, Volumes 1 and 2, for public review and comment in accordance with applicable State laws and regulations. The primary purpose of the revisions was to satisfy the Court's requirements. The written public comment period ended at noon on April 8, 2013. On April 23, 2013, a public hearing for the receipt of oral comments on the adequacy of the additional CEQA documentation was held during a regularly scheduled State Water Board meeting. The State Water Board prepared written responses to comments received on the revisions to the SED. Together, the documents described in paragraph 5, above, as revised and supplemented by the documents described in this paragraph, constitute the required environmental documentation under CEQA. (See Cal. Code Regs., tit. 14, §§ 15250, 15252; Cal. Code of Regs., tit. 23, § 3777.)
11. Regulatory requirements and mitigation measures for potentially significant impacts are described in the SED, specifically section 7. These regulatory requirements and mitigation measures are likely to reduce many, but not all, of the potential significant indirect impacts of the Policy to less than significant levels. Some indirect impacts may not be identified or mitigated because it is impossible to predict who will take action in response to the policy, or what action they will take. Some potential actions, such as pumping percolating groundwater, may not require discretionary approvals, and may not be subject to project-level CEQA review or regulation. In other cases, it may not be feasible to mitigate the indirect impacts of the Policy to less-than-significant levels. The CEQA Findings prepared for the Policy includes written findings for each of the significant effects identified in the SED and a list of mitigation measure(s) for each impact where applicable. ([Attachment 1.](#)) In addition, the Policy includes provisions that provide for monitoring and reporting of the implementation of the mitigation measures, as described in the attached Mitigation Monitoring and Reporting Plan. ([Attachment 2.](#))
12. To the extent that regulatory requirements and mitigation measures are not implemented or do not mitigate indirect impacts to less-than-significant levels, the economic, social, and environmental benefits of the Policy outweigh any unavoidable adverse environmental effects, as set forth in the attached Statement of Overriding Considerations ([Attachment 3](#)).
13. The Policy is consistent with the California Water Plan prepared by the California Department of Water Resources.
14. The State Water Board has carefully considered all comments and testimony received on the proposed Policy, responses to comments, and all of the other evidence in the administrative record.
15. The State Water Board will continue to work with stakeholders to evaluate and implement reforms to the water right permitting and enforcement processes.

THEREFORE BE IT RESOLVED THAT:

The State Water Board

1. Certifies that the [Substitute Environmental Document, as supplemented and revised, Scientific Basis Report, and Sensitivity Study have been completed in compliance with CEQA](#). The State Water Board has reviewed and considered the information contained in these documents, which reflect the State Water Board's independent judgment and analysis.
2. Makes the CEQA findings set forth in Attachment 1 to this resolution and the statement of overriding considerations set forth in Attachment 3 to this resolution.
3. [Adopts the revised Policy for Maintaining Instream Flows in Northern California Coastal Streams, including its appendices, as attached hereto.](#)
4. Directs staff to submit the Policy to the Office of Administrative Law (OAL) for final approval.
5. If, during the approval process, State Water Board staff, the State Water Board, or OAL determines that minor, non-substantive corrections to the language of the Policy or supporting documentation are needed for clarity or consistency, the State Water Board's Executive Director may make such changes.
6. The State Water Board will continue to work with stakeholders to evaluate and implement reforms to the water right permitting process.

CERTIFICATION

The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Resources Control Board held on October 22, 2013.

Jeanine Townsend
Clerk to the Board