



Brian J. Johnson
California Director



April 8, 2013

Felicia Marcus, Chair
and Members of the Board
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814
Via email to commentletters@waterboards.ca.gov

Re: Revised SED for North Coast Instream Flow Policy

Dear Ms. Marcus and Members of the Board:

On behalf of Trout Unlimited (TU) I submit the following comments for the Revised Sections of the 2008 Substitute Environmental Document (SED) for the Policy for Maintaining Instream Flows in Northern California Coastal Streams (Policy).

Trout Unlimited (TU) is North America's leading coldwater fisheries conservation organization, dedicated to the conservation, protection and restoration of trout and salmon fisheries and their watersheds. The organization has more than 140,000 members in 400 chapters across the United States, including 10,000 members in California. TU's vision is that, by the next generation, trout and salmon will be restored throughout their native range so that our children can enjoy healthy fisheries in their home waters. To accomplish this vision, TU works to protect, reconnect, and restore fish populations and their habitat, and to sustain this work by building a diverse movement of businesses, people, and communities dedicated to our mission.

As you know, TU was the sponsor of A.B. 2121, which mandated development of the Policy. We were involved in the Policy's development at every step of the way. Many portions of the final Policy stem directly from Joint Recommendations made by TU and representatives of the wine industry. The final policy including the joint recommendations was supported by groups ranging from TU, Russian RiverKeeper, and the California Sportfishing Protection Alliance to the Wine Institute, California Farm Bureau Federation, and United Winegrowers of Sonoma County.

TU Supports Readopting the Policy

I believed then that the SED adequately addressed the CEQA impacts of the Policy, and the Revised SED does not change that opinion. As an initial comment, I hope that the State Water Board can readopt the Policy without undue delay. While the Division of Water Rights has managed to continue processing applications with the Policy suspended, the gap in regulatory certainty has created some potential risks for natural resources, first by allowing a number of onstream ponds that would not have qualified to be "grandfathered" under the original policy to be grandfathered again; second, by allowing Division staff to consider waiving some

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Policy prescriptions (including measures for monitoring and reporting); and third, by causing uncertainty and delay.

TU Requests Reconsideration of Subterranean Stream Map Adoption

Although we support readopting the Policy, we are troubled by the tone of the revised SED and certain statements with respect to subterranean streams and groundwater. The revisions contain a number of comments that taken together could give the impression that the State Water Board is not committed to regulating subterranean streams equally with other water under its permitting jurisdiction. Although I am confident that this was not the Division's intent, the overall approach of the revised analysis and responses to comment creates the impression that administration of water rights for subterranean streams is difficult, and that as a result the Division will not make it a priority.

Enforcement actions undertaken by the Division often convey the same impression. In particular, the Division regularly identifies ponds for which it does not have a recorded water right, and then sends the owners a letter asking them to document their water right or file an application or registration. This has resulted in a large number of people coming into the water right system—which is good. However, the Division has not yet found a good way to make a similar effort for direct diversions or diversions from subterranean streams, because those diversions are more difficult to locate from aerial surveys. In many cases, these diversions are much more threatening to fish and wildlife or senior water right holders than the irrigation and stock ponds located by the sweeps.

The Division's approach is understandable given the relative difficulty of locating and permitting direct diversions (including those from subterranean streams) versus ponds, but it has unintended side effects. First, it results in the Division and the Department of Fish and Wildlife focusing time and resources on the diversions that are easiest to locate (including a number of very small stock ponds) rather than the diversions that have the most impact. Second, it creates perverse incentives for water users. The State Water Board, the Department, TU, and many farm groups are united in our belief that we need to encourage water users to rely on diversions to storage rather than direct diversions. That will not happen if the Board fails to regulate direct diversions—including subterranean stream wells—as much as it regulates diversions to storage.

Recall the original mandate behind A.B. 2121, which called for “principles and guidelines for maintaining instream flows” for “water right administration.” (Water Code § 1259.5.) A Policy that leads to aggressive enforcement for ponds and detailed permitting constraints for diversions to storage, but ignores direct diversions and diversions from subterranean streams will fail in its basic purpose.

As a final comment, we do not believe it is fair to landowners to maintain jurisdiction over subterranean streams but provide no guidance to individual farmers or homeowners to indicate when the Division believes a permit is required for a well. There are a large number of people who have streamside wells that could be subject to the State's permitting jurisdiction, and they have received hardly any guidance from the Division on when to submit an application. Needless to say, it is vanishingly rare for landowners to submit applications for water rights for

wells, even where they are probably drawing from subterranean streams. Given the lack of guidance from the State, I can hardly blame them. Similarly, it is not ideal for the Division to rely purely on potential enforcement actions without having first provided guidance.

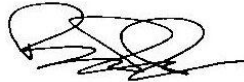
With that in mind, I make the following recommendations:

1. Clarify that the State Water Board is not disclaiming jurisdiction over subterranean streams, and that it intends to regulate them as aggressively as it regulates diversions to storage.
2. Work with the Department to refine the methods used by the Division for permitting sweeps to focus on the greatest threats to aquatic resources and senior water rights, rather than the diversions that are easiest to identify.
3. Work with the Department and other stakeholders to re-consider whether and how to adopt subterranean stream delineations; and if not, determine how to adopt alternative guidance for landowners with diversions that may be from subterranean streams.

I recognize that this third recommendation in particular will not be easy, inexpensive, or uncontroversial. But as CDFW notes in its comments, a case-by-case approach may not be cheaper or fairer in the long run. Assuming the third recommendation would take some time, it may be possible to re-adopt the Policy in the meantime but include a defined process and timeline for amending the Policy to include guidance for landowners on subterranean streams.

Thank you for considering my comments. I look forward to discussing them with you and Division staff.

Sincerely,

A handwritten signature in black ink, appearing to read "Brian J. Johnson", with a stylized flourish at the end.

Brian J. Johnson