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State Water Resources Control Board
Division of Water Quality
P.O. Box 100
Sacramento, CA 95812-0100
commentletters@waterboards.ca.gov

Comment: Instream Flow Policy - Northern California Streams

These comments are intended to support the intent and requirements of Section 1259.4 of the California Water Code as an additional source of agency authority to carry out mandated duties to prevent the extinction of species.[1]

All state entities "**shall** comply with state policy for water quality" (Water Code §13146). [2] Given the importance and possibility of the task ahead of the Board, the opportunity to draft unambiguous and enforceable policy at this time, must be fully embraced. The policy must articulate the clear intent, to reverse the damage caused by over appropriation of watersheds in a timely manner, as well as outlining numeric limits and quantitative requirements from which implementing regulations can readily flow. Where science has indicated risks to fish survival including, migration, reproduction, and rearing, adoption of the most cautious approach is indicated and proper. The most cautious approach includes mathematical models as developed by Deitch, Kondolf, and Merenlender[3] in

[1] The Legislature further finds and declares that it is the policy of this state that all state agencies, boards, and commissions **shall** seek to conserve endangered species and threatened species and **shall** utilize their authority in furtherance of the purposes of this chapter. (emphasis added; § 2055 Fish and Game Code; CESA)

[2] 13146. State offices, departments and boards, in carrying out activities which affect **water** quality, shall comply with state policy for **water** quality control unless otherwise directed or authorized by statute, in which case they shall indicate to the state board in writing their authority for not complying with such policy.

[3] Hydrologic impacts of small-scale instream
7 diversions for frost and heat protection in the
8 California wine country; U.C. Berkeley; 2008

combination with field observations and daily precipitation patterns.

In order for this policy to satisfy the requirements of the law and given the time sensitive nature of the survival of species, a strong emphasis must be on identifying illegal diverters and permitees abusing their permits in over appropriated watersheds coupled with the vigorous pursuit of fines, penalties, and settlements commensurate to the harms perpetrated.

The mandate from the state legislature is clear - the board **shall** adopt principles and guidelines **for maintaining** instream flows in coastal streams (Water Code 1259.4). In an effort to support agency action the legislature went so far as to declare that (2) The board may adopt principles and guidelines for maintaining instream flows not described in paragraph (1), encies must exercise their authority to fulfill mandated duties. (Water Code 1259.4). The policy must make clear that the emphasis is on reversing the effects of over appropriated streams on the aquatic species. Such a remedy would place compliance, enforcement, and restoration well ahead of processing of new permit applications.

Funding

Without a mechanism for securing funding to ensure timely implementation, frequent compliance investigations , and vigorous enforcement of the proposed policy, the policy cannot succeed in its noble and obligatory goals. Knowing approval of an unfunded policy will not satisfy the requirements to maintain instream flows.

The basic mechanism for funding, because it is currently available, must be collection of fines, penalties, and settlements. Not only will these enforcement efforts generate appropriate and much needed funding, they will have the immediate positive effect of alerting the public of the determination of the resource agencies to carry out their important work while making the job of agency staff easier and more meaningful.

Take this opportunity, as is your duty, to exercise your authority. Make it clear in the proposed policy that it is not the mission of resource agencies to oversee the demise and disappearance of the fishery. Expressly state and emphasize that it is the intent of the agencies to recover the fishery and that the agencies intend to immediately begin to reverse the tragic trend of fishery collapse. This must be the

stated policy from which all methods and processes emanate and upon which all decisions and questions fall back. Let the public be put on Notice and seek its cooperation.

Instream Flow Criteria

The instream flow criteria must simply be based on worst case scenarios including the effects of climate change, creek side well pumping, long drought periods, interception of natural spring flows, and longer than average recovery times for the species. To do less would be to put further study, pilot projects, and subtle details before common sense, legal requirements, and timely action.

With respect to the season of diversion, the increase in months of diversion must be rejected as risky. It is not reasonable to risk massive diversions in October when it has been documented that many years will remain very dry late into the fall and early winter. The Diversion season must be tied to rainfall sufficient to maintain adequate instream flows. The required choice is the shorter season of diversion as proposed in 2002 - December 15th thru March 31st if precipitation is adequate.

If the policy exempts certain periods from minimum instream flow requirements, by its language and thereby through its implementing regulations, it will not satisfy the requirements of the law. Maintaining instream flows is a year round challenge. "On cold spring mornings when air temperatures approached 0°C, flow in streams 10 draining catchments with upstream vineyards receded abruptly, by as much as 95% over hours, corresponding to times when water is used to protect grape buds from freezing."(*Hydrologic impacts of small-scale instream 7 diversions for frost and heat protection in the California wine country* Deitch, Kondolf, and Merenlender; 2008). Relying soley on a mathematical model may not be adequate to maintain instream flows, which is **required year round**, at critical periods on the margin of the season of diversion.

Enforcement and Compliance Sections

The proposed policy purports to provide a framework and to offer principles and guidelines to maintain instream flows for the protection of the fishery resources. As such, the guidelines will only serve their goals and satisfy the requirements of the law if they are explicit and forward looking. The enforcement and compliance sections must set out the expectation that it will be the burden of applicants and diverters to prove where the water is coming from, year round, for their project, pond, dam, vineyard, etc. In addition, the policy must make explicit that the standard of proof to which an enforcing agency will be held when seeking compliance with the law. That standard must be reasonable given the precarious circumstances in which the fishery finds itself. That is, if agency staff have probable cause or a reasonable belief that a diversion is illegal or a diverter is abusing its permit, a cease and desist order shall issue. This is reasonable given the lethal effects of a diversion that may last only an hour or two during a dry period will have on threatened and endangered species. (U.C. Berkeley team study *Surface water balance to evaluate the hydrological impacts of small instream diversions and application to the Russian River basin, California, USA* see Deitch, Kondolf, and Merelender et al.; pages 2, 12, 13; 2008).

Who defines what is reasonable in these changing and precarious times must not be left up to the illegal diverters or suspected permit violators. It must be clear in the language that the resource agencies will be expected to err on the side of caution with respect to protection of the species at risk. To the extent that funding and lack of enforcement exists, the policy cannot meet its mandated requirement and will not satisfy the requirements of the law.

Observations by the Concerned Public or other Agencies

In the absence of perfect funding allotments, public agencies must rely on observations made by the concerned public. When habitat modification is observed, when reproduction or stranding, unusual health affects including mortality are suspected or observed, exhaustive study shall not be required. Prophylactic measures must be instituted. Credible observations and reports must be treated as valuable contributions to the effort to prevent extinction and must be processed and acted upon in a timely manner.

In anticipation of climate change and longer hotter summers, the predicted effect of allowing massive diversions to occur as early as October in most years is not based on the best interest of salmonid recovery, migration, or rearing. As the

Berkeley team points out, it is critical to "evaluate whether streams are fully appropriated at a daily scale, which is more important for evaluating impacts relative to ecological processes (p.16). "In the streams studied here, sufficient flows do not exist to meet human demands during spring and summer (p.18). (see Merelender et al. 2007). Pumping and diversions during periods of low precipitation whether they are in September, October, November of December will have dire consequences and must be prohibited. Regulations, policies, and laws that give tacit approval or cover for practices that existing laws are intended to prevent like "take" of the last specimens necessary to perpetuate a species, are not properly promulgated.

And finally, the principles of statutory construction creates in the state the prerogative to adopt legislation and regulations that are more protective of the resources with which it has been entrusted, but the state cannot make laws that are less protective. To the extent that the policy is consistent with existing law and or strengthens protections and authorities of agency staff, the policy will be proper.

Thank you.

Kimberly Burr
Post Office Box 1246
Forestville, CA 95436
707-887-7433

ATTACHMENTS
Hydrologic impacts of small-scale instream diversions for frost and heat protection in the California wine country; U.C. Berkeley; 2008

Surface water balance to evaluate the hydrological impacts of small instream diversions and application to the Russian River basin, California, USA Deitch, Kondolf, and Merelender; 2008