

California Sportfishing Protection Alliance
"An Advocate for Fisheries, Habitat and Water Quality"

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Ms. Karen Niiya,
Senior Engineer, Division of Water Rights
State Water Resources Control Board
1001 I Street, 2nd Floor
Sacramento, CA 95814

Dear Ms. Niiya:

The California Sportfishing Protection Alliance (CSPA) is pleased to offer the following comments on the *Draft Policy for Maintaining Instream Flows in Northern California Coastal Streams*.

A Science Based Policy Is Essential

CSPA has long been gravely concerned with the decline of salmon and steelhead fisheries in the waters affected by the proposed policy. In the lifetime of this commenter, many of these streams have gone from robust salmonid fisheries to streams where salmonids have been largely or entirely extirpated. While there are many causes of this tragic decline, over-appropriation and irresponsible appropriation of water have played a major part. We welcome the Board's efforts to bring an end to this death by a thousand cuts, and to provide a policy that, if adopted and appropriately implemented, offers an opportunity to improve the fisheries that remain, and possibly to help recover a tremendously precious part of our heritage as Californians.

CSPA commends the Board and its consultants for the thoroughness and diligence they exercised in the effort to make the Draft Policy scientifically based. Each of the key elements of the Draft Policy, Minimum Bypass Flow, Maximum Cumulative Diversion, and Season of Diversion, is essential for the protection of instream resources. We believe that the formulas arrived at in the Draft Policy are a good starting place. Provided that the same degree of scientific rigor and standards for protectiveness are maintained, we might be able to support some changes in the formulas, if good cases were made by affected stakeholders.

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SACRAMENTO, CA

Policy Administration Must Be Funded and the Policy Must Be Implemented

CSPA finds it troubling, however, that Policy implementation has not been contemplated with the same rigor as has the science. The Draft Policy proposes **no funding source** for Policy administration, and no governance structure separate, apparently, from the already underfunded and understaffed Water Rights Division of the State Board. In our May 7, 2007 written comments to the Board on water rights enforcement, and our oral comments presented at the Board workshop on June 17, 2007, we addressed the need for good process above all: adequate and secure funding; cataloguing of existing diversions; timely application processing and permitting; monitoring and reporting; auditing, investigation and enforcement.

The Instream Flow Policy, if adopted, will compel unauthorized diverters to spend, in many cases, ½ million to 1½ million dollars to bring their diversions and their reservoirs into compliance. Bluntly, who is going to make them spend it or shut down?

A list of priorities for enforcement of water rights laws, appropriately applicable to the entire Policy geographical area, and not just to presently unauthorized diverters, is elaborated in section 11.2. What does it mean if not one dollar is appropriated to carry it out, and if the Water Rights Division in Sacramento, whose personnel have just been cut from already grossly inadequate numbers, is supposed to be responsible for seeing it through?

An Effectiveness Monitoring Program is outlined in great detail in the Task 3 Report. We support it, provided that watershed and fisheries groups are included in any Monitoring Oversight Committee that may be established; and provided that the timeline is shortened so that review takes place every five years. However, in the frequently asked questions section of the IFP web page, we are informed that, “unfortunately, the State Water Board currently does not have the funding to implement this monitoring program.” In addition, there are various other monitoring and reporting requirements that should follow from the Policy that are not provided for, and in some cases, not even described.

Administration for the policy must be based on a **reliable funding stream** that is separate from that of the State Board in general and from the State’s General Fund. Policy implementation cannot succeed if those who administer it are required to scabble for dollars on an annual basis. We proposed in our May, 2007 comments that funding be legislatively mandated, as a corollary of AB 2121, and that legislative oversight be made part of the funding package. We still believe this is the best choice. Alternatively, part of the costs of administrating the policy could be borne by the applicants who seek to legalize previously unauthorized diversions. However, we have concern that, leaving aside for a moment culpability for previous violations of the Water Code, as a practical matter the costs of coming into compliance will already be formidable for many parties, and the reliability of a funding stream based solely on user fees will likely fall short.

Electronic monitoring and reporting of all water use, as well as of stream conditions (both flow and temperature), while requiring initial monetary outlay, would prove cost

efficient in the long run, and should be required. Mr. David Briggs of the Contra Costa Water District presented at the June 17, 2007 Board workshop an outline for electronic reporting; his approach should be put into practice, and his advice should be sought and followed. A publicly accessible, web-based database should be created that archives and organizes monitoring and reporting data from the Policy area.

We note that, as proposed in the Draft Policy, flow monitoring is not required for passive bypass systems. We re-emphasize: not only should all water use be gauged, it should also be reported electronically.

As we noted in our May, 2007 comments, **cataloguing existing diversions** is an essential building block of a foundational database for the Policy. In addition to providing a receiving point for Policy reporting and monitoring data, the web-based database should thus also include all available information of existing authorized diversions. Further, the database should, in the long term, require the same level of monitoring and reporting for all diversions in the geographic area that we propose be required initially for Policy-affected compliance reporting.

A **formal auditing division**, which might initially consist of only a few people, needs to be created to evaluate monitoring and reporting data as it comes in. To start, such a division needs to create a standardized format for reporting and monitoring that makes these processes usable and accessible by water rights holder, auditor and the public. Second, timely filing of monitoring and reporting data should be a condition of every water right and should be the first cut of auditing. Third, the auditors need to develop a review process and then actually review the data that is reported.

A **team** needs to be set up that is devoted to **processing applications** and petitions in the Policy area. Parties that are presently out of compliance need to have a sense that their applications will not be drowned in process. By the same token, conservation and fisheries interests equally need certainty that applications under the Policy do not simply become parked in a legal limbo which allows another decade of inaction.

The entire water rights process should be daylighted on the Internet, and the Policy area is an excellent starting point. Thus, **applications and petitions** within the context of the Policy should be put **on the Web**, as should all documents supporting and otherwise relating to these applications and petitions. The public should be able to track an application, especially for a previously unauthorized diversion, from start to finish. Further, complaints, follow-ups, and enforcement notices and actions should be posted on Web. The applications and processing team must thus include a webmaster or –masters.

Another staff group, coordinated with the auditing and processing teams, needs to be established to carry out **investigation and enforcement**. The Draft Policy discusses hypothetical priorities for enforcement and sanction. The Board needs to stop dancing around the issue. You need people ready to enforce the law and the political will to back them up. The central issue is **ending illegal diversions and reservoirs. You've identified 1771 of them.** Anyone who does not come forward with an application for a

water right and a plan to come into compliance within one year of Policy adoption needs to be shut down. The Draft Policy places such an explicit one year limitation on applications for onstream reservoirs on Class I streams that were constructed before July 19, 2006. **The one year limitation should be extended to include all applications that involve existing unauthorized diversions.**

Enforcement is not a happy or pleasant thing to do. It requires a special kind of person who is at once a hard case, a diplomat and a person who will stand up to every sort of special interest and above all to superiors who lack courage. It must be done. **The alternative is extirpation.**

Variations

Lacking gauge data, and dealing with widely varying sizes of streams, the Policy has set generalized flow formulas rather than stream-by-stream instream flows. This reflects that tacit understanding that waters in the Policy area are often fully or over-appropriated, and that a policy that is not comprehensive will allow extirpation of salmon and steelhead because of the cumulative impacts of over-diversion. This is the Draft Policy's strength, but it must not be allowed to become its weakness.

Because water is limited, and because of likely costs, we foresee the likelihood that most applicants will request variations. They will be based on the logic that, viewed individually, their impacts are small. **A generalized policy cannot work if variations become the default approach.** To prevent thus institutionalizing death by a thousand cuts, requests for variations should be required fulfill the following principles: 1) if based on water volume, they should be substantially better than volume-neutral with the instream requirements for their watersheds and 2) if based on infrastructure, they must propose and implement a specific and relatively immediate benefit to salmonid fisheries that is functionally better than the stated Policy requirement.

Examples:

Applicants requesting more water than is allowed under the applicable policy formula, or petitioners seeking changes that would decrease at any time the amount of water in a stream, could subsidize conservation for a neighbor and then have the neighbor devote the conserved water to a section 1707 instream water right.

No variance should be allowed for infrastructure requirements on Class I streams. Applicants or petitioners requesting infrastructure variations from Class II or Class III might be allowed to pay for a fish ladder or screen on an existing facility on a Class I stream, where this would not otherwise be required, and provided that it actually gets done. Channel improvements in a Class I stream might qualify if it could be demonstrated that the improvement is biologically substantial and that is enough water in the thus improved channel to provide a tangible benefit to salmon or steelhead.

In general, however, **variances must be administratively discouraged**, and a process for weeding out variance requests not based on substantive alternative proposals must be established to prevent a regulatory bottleneck whose intent or de facto result is delay.

Watershed groups

Conceptually, we have no quarrel with the concept of a group of diverters pooling resources to share expenses and reduce costs, particularly if this means that more people with thus come into compliance. We also have no quarrel with a group of neighbors seeking to equitably share the pain of limitations on available water.

However, we have seen all too painfully, in the case of the Ag Waiver program in the Central Valley, how something that was ostensibly designed for purposes of efficiency and cooperation has become an institutional impediment to, in this case, water quality compliance. The central institutional flaw of the Ag Waiver program is to allow monitoring at the downstream end of a group of water users, with a tiered response that requires added monitoring if a problem at the downstream end is discovered. However, when problems have been detected, the next tier has not been implemented to determine the source or sources of problems. Rather, the water user group has acted as an established lobbying force to change the criteria by which problems are identified, a source of delay, and vocal opponent of needed expenditures to determine culpability.

The watershed concept in the Draft Policy must not repeat this fatal error. The simplest and most basic measure that can be taken to prevent this is that **gaging must be done for each individual diversion** within a watershed group, and the group must be held accountable collectively for gaging failures or reporting failures by each of its members. **Individual responsibility must be assignable, not after a problem is identified, but as soon as a problem is identified.**

Conclusion

The Policy that is adopted must be based on solid science. Administration of the Policy must be funded and staffed. A review of policy effectiveness every five years must be funded and staffed. A web-based database and web-based reporting for the Policy must be funded and staffed; all documentation relating to applications and petitions under the Policy must also be posted on the Web. Illegal diversions must come into compliance or be shut down. Variances must be discouraged. Individual responsibility for compliance must be institutionally assured.

Thank you for the opportunity to comment on the *Draft Policy for Maintaining Instream Flows in Northern California Coastal Streams*.

Respectfully submitted,

Chris Shutes
California Sportfishing Protection Alliance