



JANET K. GOLDSMITH

August 25, 2006

VIA FACSIMILE AND MAIL – 916-341-5400

State Water Resources Control Board
Attn: Eric Oppenheimer
P.O. Box 2000
Sacramento, CA 95812

Re: Response to Notice of Preparation for North Coast Instream Flow Policy
Environmental Document

Dear Board Members:

This letter is written on behalf of the City of Napa ("City"). The City appreciates this opportunity to provide comments regarding the appropriate scope of the North Coast Instream Flow Policy ("Flow Policy") and Environmental Document. As a water provider for over 80,000 customers with water rights on Conn Creek and Milliken Creek, the City has serious concerns about the Flow Policy's potentially significant impacts, and about the Flow Policy itself.

The State Board proposed the NMFS-DFG Draft Guidelines for Maintaining Instream Flows to Protect Fisheries Resources Downstream of Water Diversions in Mid-California Coastal Streams as the only alternative. The proposed Flow Policy is as follows:

- Limiting new water right permits to diversion during the winter period (December 15–March 31) when stream flows are generally high;
- Maintaining minimum bypass flows and cumulative maximum rates of diversion to ensure that streams are adequately protected from new winter diversions;
- Conserving the natural hydrograph and avoiding significant cumulative impacts by limiting the maximum cumulative volume of water that can be diverted in a watershed; and
- Providing fish screens and fish passage facilities where appropriate.

North Coast Instream Flow Policy, Environmental Checklist, State Water Resources Control Board, July 19, 2006, p. 7.

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While the City supports some of the proposals in the Flow Policy, and the protection of natural resources generally, the City is concerned and urges the State Board to consider new alternatives to the Flow Policy

The City supports the State Board's proposal to require fish screens and fish passage facilities, where appropriate. The City would also support minimum bypass flows and diversion rates, provided the bypass flows and diversion rates are not arbitrary flows that are retroactively applied to all water right holders. The City believes that it is appropriate for the State Board to establish bypass flows and diversion rates on all new diverters when necessary based on the specific facts of each application.

The City questions whether the State Board should, and whether the State Board could legally, require that all diversions be limited to three winter months. Some north coast streams and rivers may have sufficient flows to support additional beneficial uses during other parts of the year. Without a scientifically supported finding that there is no water available for appropriation in any of the other 8 ½ months in any of the north coast streams, the State Board would likely be violating the state constitutional requirement that all water be put to its highest and best use.

The City does not believe it is reasonable to have a cap on the total amount of water that can be diverted in a watershed. First, water is not removed from the watershed as soon as it is diverted, as it may return to the stream as drainage or seep into the groundwater. Second, a watershed-wide cap does not prevent over-pumping on any particular stream or river. The State Board would still have to determine how much water is available for diversion when a new permit is issued. In making that determination, the State Board regularly considers necessary and appropriate bypass flows. Therefore, by adopting the proposed Flow Policy, the State Board would not gain any procedural advantage that would streamline the process and help resolve the backlog of applications. In fact, the adoption of the proposed Flow Policy would further burden already hopelessly overwhelmed State Board staff. The only way the State Board could limit existing rights is by undertaking a massive water rights proceeding that includes all appropriators and riparians. Such a proceeding would be extremely expensive, be very contentious, and probably be larger than even the Bay-Delta proceedings because of the large number of individual interests that would have to be individually represented. Of course, after the decision is finally made, there will be years of court proceedings, including numerous appeals. This process would take decades.

Moreover, if the State Board moves forward with the currently proposed Flow Policy, there will be significant negative impacts on both the local communities and the environment, as follows:

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The Flow Policy Will Have Significant Impacts On the Community

The General Plan, and the associated water supply plans, for the City have been developed through the year 2020, and beyond, based on the current diversion and bypass requirements. If the Flow Policy is adopted as proposed, the City will be required to spend millions to complete new planning documents. The proposed Flow Policy will profoundly alter the future of the City of Napa.

Moreover, if the City's planning documents are undermined by a loss of water rights, the entire community would be negatively impacted. The City's ability to provide economic development and affordable housing would also be profoundly compromised. As the City would have to develop new sources of drinking water, it would have to raise water rates dramatically, which would have the greatest impact on its poorest customers.

The Flow Policy May Not Benefit The Fishery

The State Board should not ignore the importance of site-specific biological and hydrological assessments, which are largely the basis for existing water rights. The water rights in the north coast have been the subject of numerous State Board and judicial proceedings, particularly with respect to the Napa River, therefore the existing balance between consumptive and instream uses should not be dismantled without careful consideration of the particular needs of each tributary and the Napa River itself.

The State Board should not act based on the simplistic assumption that more water will always benefit fish. Sometimes more water has little or no benefit because there is insufficient habitat to support a larger population. The extent the fishery that uses the Napa River could benefit from higher stream flows in tributary streams during certain life stages depends on the quantity and quality of the habitat in those streams. If habitat is a limiting factor, any additional flow will be a waste of water and therefore prohibited by law.

The Flow Policy Will Have Significant Environmental Impacts

The State Board must consider the direct, indirect, and cumulative impacts of its proposed decision. The State Board's Environmental Checklist states that the proposed Flow Policy will not directly impact hydrology and water quality. North Coast Instream Flow Policy, Environmental Checklist, p. 24. This is incorrect. Since the Flow Policy includes existing water rights, the policy will directly impact both hydrology and water quality, not to mention drinking water supplies, land use planning and public services (e.g., fire protection). The City also disagrees with the State Board's position that the proposed Flow Policy would not impact housing, either directly or indirectly. *Id* at p. 24. If the City is unable to provide the required

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level of water service, there has to be a resulting reduction in available housing. The Flow Policy has the potential to impact affordable housing, as the City would have to find an alternative water supply, which would raise rates, thereby significantly impacting low income individuals. The State Board's environmental document must also consider the impact on the groundwater basin as the city, and other owners of water rights in the region, switch to groundwater.

Besides direct and indirect effects, the State Board must consider the cumulative impacts of other activities that are having the same type of impacts as the proposed Flow Policy, like reducing available water supplies and impacting groundwater basins. Projects that should be considered in an analysis of cumulative impacts include: TMDLs (particularly those with flow components), state and federal regulatory requirements resulting from listed species, water development projects, water transfers/conjunctive use projects, changes in water quality standards, and construction projects.

The State Board Should Consider Reasonable And Prudent Alternatives To The Proposed Flow Policy

The State Board should formally adopt the broad concepts of appropriate bypass flows and specific diversion rates, a preference for off-stream storage and wet season diversions, and fish screens and fish passage facilities, when appropriate, to be applied on a case-by-case basis when new permits are issued and when no site specific biologic and hydrologic assessments are available. Assembly Bill 2121, which launched the State Board's current instream flow process, did not limit the State Board's broad discretion and only requires that the State Board adopt broad principles and guidelines. The State Board should therefore use the broad discretion permitted in AB2121 to adopt a policy that can be implemented within the state's, and the State Board's, available resources, and that is flexible enough to accommodate the specific needs of each north coast stream.

Sincerely,

Janet K. Goldsmith
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