

State of California

STATE WATER RESOURCES
CONTROL BOARD**Memorandum**

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Date: August 25, 2006

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From: **Robert W. Floerke, Regional Manager** 
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Subject: Response to Notice of Preparation of a Draft Substitute Environmental Document for the North Coast Instream Flow Policy for Napa, Mendocino, Humboldt, Marin, and Sonoma Counties

DFG Response to the SWRCB North Coast Flow Policy NOP

The Department of Fish and Game (DFG) has reviewed the Notice of Preparation (NOP) and Environmental Checklist (EC) prepared by the State Water Resources Control Board (SWRCB) for the Substitute Environmental Document (SED) for the North Coast Instream Flow Policy (Policy). In developing the Policy, the SWRCB is authorized to consider the draft "Guidelines for Maintaining Instream Flows to Protect Fisheries Resources Downstream of Water Diversions in Mid-California Coastal Streams" [National Marine Fisheries Service (NOAA)/DFG Guidelines]. The Policy area covers coastal streams from the Mattole River to San Francisco Bay and coastal streams entering northern San Pablo Bay.

The SWRCB will use the SED to evaluate the Policy's potential environmental impacts and any alternatives or mitigation measures necessary to avoid any significant environmental impacts that are identified. DFG has limited its comments to those parts of the NOP/EC that address potential impacts to the State's fish and wildlife resources and those portions of Policy likely to require consultation with DFG to assure that mitigations are appropriate and the Policy and those of DFG are compatible.

General Comments

In the NOP, SWRCB states that it anticipates the Policy will cover the same issues as the NOAA/DFG Guidelines, but specific details or criteria may differ. DFG supports the use of the NOAA/DFG Guidelines as the basis for the Policy, and recognizes that SWRCB's authority allows for a more comprehensive approach than the one used to develop the NOAA/DFG Guidelines.

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However, it is unclear from the NOP and EC which types of water projects the Policy will cover. The NOAA/DFG Guidelines were developed to address the impacts of minor storage projects as defined in the Water Code. Section 4.0, Project Goals and Objects, in the EC states that the Policy is likely to address the SWRCB administration of water rights and proceeds to list a range of applications, registrations, licenses, permits, transfers, extensions and petitions for inclusion. For the Policy to be effective in protecting North Coast instream flows, the SWRCB will need to apply the Policy to all projects in the Policy area that affect surface and sub-surface flows. As the SWRCB pointed out in the EC, a narrow application of the Policy would allow water diverters to avoid the Policy by utilizing alternative sources of water that would still adversely impact instream flow. The SWRCB concluded that the ability of diverters to use alternative sources of water could lead to significant indirect impacts. Hence, SWRCB needs to consider reasonable means to avoid those impacts in the SED. Additionally, while the NOAA/DFG Guidelines were developed to address instream flow protection for minor diversion projects, the principles and guidelines developed in the SED and adopted as part of the Policy can and should apply to a wider range of water projects to provide adequate North Coast instream flow protection.

There are also projects within the Policy area that are currently diverting and/or storing water illegally, (i.e., without a valid basis of right). Those projects, many of which include onstream reservoirs that have no ability to bypass water to protect resources downstream, need to be specifically address in the SED. Under current SWRCB policy, such projects may not be subject to project level review under the California Environmental Quality Act (CEQA). As a result, a programmatic approach that relies on later project level review under CEQA for appropriate mitigation is not appropriate. The SED must include specific mitigation requirements that address the direct and indirect impacts of this subset of projects. DFG recommends that the SED specifically consider the procedures for dealing with CEQA baseline issues associated with this group of projects as SWRCB develops the principles and guidelines for the Policy.

The primary goal of the NOAA/DFG Guidelines is to provide adequate instream flows to support anadromous fish and, in doing so, protect instream flow and stream habitat for other aquatic resources. The SWRCB correctly recognizes in the EC that there might be situations where additional protections are needed to support other sensitive native species, especially amphibians, which might require changes in the timing of withdrawals in some locations. The SWRCB should identify appropriate mitigation in the SED to address any potential impacts associated with such changes in consultation with appropriate government agencies.

The NOAA/DFG Guidelines also addressed diversion to storage from December 15 to March 31 based on the limited amount of water available for use in the low flow months of the spring, summer, and fall. DFG recommends that SWRCB include in the Policy clear principles and guidelines for maintaining instream flows on a year-round basis, given that SWRCB regularly receives applications for direct diversions outside the season covered in the NOAA/DFG Guidelines from individuals who do not have the ability to store water. The SWRCB would be within its authority under Water Code section 1259.4 to adopt such a year-round approach.

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It is critical that the Policy include procedures and tracking methods to determine water availability in the watersheds the Policy covers. Specifically, the Policy needs to identify a means to quantify the amount of water that is available for diversion in each watershed, to track the amount of water being extracted by all diversions that impact surface and sub-surface flow, and to determine the amount of water available for use after taking into account the requirements for instream flow protection. SWRCB should consider means by which potential applicants can determine the amount of water available for diversion from a given stream in the Policy area, such as identifying those streams that are fully appropriated. Water use accounting within a watershed should include all water uses that affect surface flows. Related to that objective, SWRCB should develop and evaluate an approach to more accurately determine the extent of diversions under riparian right within a watershed. Although the Water Code currently requires that statements of riparian use be filed with SWRCB, there is no penalty for non-compliance, and even when statements are filed, they do not always quantify the amount of water being diverted. For the Policy to be effective, it must require an accurate accounting of riparian water use and include that as part of the Policy's enforcement element discussed below.

SWRCB states in the EC that it proposes to include an enforcement element as part of the Policy. DFG supports that decision, but recommends the SWRCB includes as part of the enforcement element, a monitoring component that enables SWRCB to determine whether water users are in compliance with their permit conditions or Policy requirements. In that regard, SWRCB should evaluate tracking methods, such as updated compliance monitoring systems that are capable of continuous monitoring, passive diversion systems, and/or automated diversion systems. SWRCB should identify funding sources to purchase and install necessary gages in tributaries in the Policy area.

In addition to including a component for compliance monitoring, SWRCB should include a component to monitor the effectiveness of permit conditions and Policy requirements to protect instream flows. Such a component should authorize SWRCB to require or allow water users to modify their operations if SWRCB determines that instream flow protection measures are inadequate, or conversely, overly restrictive. SWRCB should also develop a procedure to ensure that any needed modifications will be made as quickly as possible to protect resources.

In developing the enforcement element in the Policy, SWRCB should also consider modifying and strengthening its current enforcement procedures to remedy violations in a more timely manner to better protect public trust resources. For example, SWRCB should evaluate means to: 1) Adequately fund compliance activities; 2) reduce the need to enforce on a project-by-project basis, especially in watersheds where multiple diverters are operating illegally; 3) promote compliance through "carrot and stick" measures; and 4) develop enforcement alternatives that require less staff time to correct violations. Including improved monitoring methods would be a positive first step to achieve a greater level of compliance. However, SWRCB should also consider measures to prevent violations from occurring in the first place, such as improved outreach to local agencies and consultants and other professionals involved with water development and diversion projects. Such outreach should clarify the intent and requirements of the Policy and the

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consequences of not meeting those requirements. SWRCB should also consider evaluating the feasibility of a certification program for consultants and professionals to ensure they have the necessary training to design and construct projects that avoid or minimize impacts to instream flows.

All the alternatives developed for inclusion in the SED must include scientifically supportable standards and measures to protect instream flows and an effectiveness monitoring component that includes adaptive management to ensure that instream flows are protected. The protocols for additional site-specific studies necessary to support the standards in the alternatives, the purpose of those studies, and the funding responsibilities to allow the studies to be done must be developed and evaluated as part of the SED, and be included in the Policy. Until the studies have been completed and instream flow protection is in place, issuance of water rights based on the alternative should be held in abeyance, and enforcement action taken on all water diversions without a valid basis of right.

Obviously, effective implementation of the Policy will require additional SWRCB staff time. SWRCB should evaluate possible funding sources to support adequate staffing levels to expedite the processing of permits and adequately monitor and enforce permit conditions and Policy requirements.

Comments related to the Biological Section of the Environmental Checklist

Section 4 in the EC listed potentially significant impacts to sensitive species, riparian and other sensitive natural communities, wetlands, and the movement of fish and wildlife. It also listed additional significant impacts to resources, unless appropriate mitigations were incorporated into the Policy. All of those impacts were identified as indirect impacts resulting from actions taken by affected parties in response to the Policy. Those actions include: 1) Substitution of other water sources, including groundwater, for surface water to avoid any limitations applicable to new water right permits issued after the Policy is in place; 2) direct diversion under claims of riparian right during the low flow season with higher potential for adverse instream flow impacts than diverting to storage during the winter months when flows are higher; 3) removal or modification of onstream storage facilities; and 4) construction of offstream facilities. Another indirect impact of the Policy that was not addressed in the EC is related to the substitution of contracted water deliveries from a local water purveyor to avoid Policy requirements. Depending on the local purveyor's method of diversion, the indirect impacts could be the same as those associated with the utilization of alternative water sources that are also adversely affecting instream flows. Within the Policy area, this "substitution" could also result in significant impacts associated with the development of new facilities for the storage of delivered water and, because most water purveyors are still perfecting their water rights under permit, a potentially permanent increase in diversion under the purveyor's water right.

SWRCB will need to develop and evaluate in the SED requirements to mitigate adverse impacts from activities that substitute other water sources, including the substitution of groundwater, riparian water, or contract water; it should not rely on the mitigation

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requirements other permitting agencies might impose on water users. The SED should clarify SWRCB's jurisdiction under Water Code section 13142 in an effort to provide the highest level of assurance that impacts to instream flows are not shifted from one water source to another to avoid compliance with the Policy. The SED should include consultation with other permitting agencies to ensure that the biologically defensible Policy is compatible with other agencies' permitting processes to avoid "agency shopping" to avoid compliance with the Policy.

The other major category of adverse indirect impacts is expected to result from the abandonment, modification, or removal of existing onstream reservoirs. SWRCB in the SED should assess the levels of these impacts and work with RWQCB, DFG, and other agencies with authority to regulate those activities to ensure that appropriate mitigation is included in the Policy. The SED should also address the issue of canceling water rights before the actual decommissioning of onstream storage facilities that would continue to adversely impact flows and water quality. DFG has previously expressed its concern to SWRCB about the potential release of sediment, loss of habitat, and impacts to stream morphology from poorly planned dam removal projects. In some cases, the adverse impacts of breaching an onstream reservoir may be significant. However, it may be possible to make modifications that avoid impacts to wetlands, erosion, and the release of stored sediment by functionally moving the reservoir offstream. SWRCB should develop protocols to be used to evaluate the impacts related to removal and retrofitting onstream reservoirs, in consultation with DFG and other agencies.

Comments Related to the Hydrology and Water Quality Component of the Environmental Checklist

Section 8 in the EC identifies significant impacts to hydrology and water quality including the depletion of groundwater and/or the lowering of the groundwater table which have the potential to adversely impact instream flows and the resources those flows support. In addition, other impacts related to erosion, siltation, and violation of water quality standards were identified as significant impacts resulting from modification or removal of onstream reservoirs unless appropriate mitigations are incorporated into the Policy. DFG recommends that the SED include the results of consultation with the appropriate agencies to develop a coordinated procedure to address issues such as erosion control and sediment control during the removal of dams for inclusion in the Policy.

The EC proposes that the impacts on hydrology and water quality be evaluated at the programmatic level in the SED. It also proposes that projects carried out in response to adoption of the Policy would also be subject to separate project level CEQA analysis by the appropriate lead agency. This implies that rather than developing appropriate mitigation to be incorporate into the Policy, at least some of the required mitigations will be left to other agencies to develop at a later date. Such a delegation would be inappropriate in terms of SWRCB's responsibilities under CEQA. Also, existing but unauthorized projects in the Policy area might not have any nexus to allow additional mitigation be developed at a

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project level under CEQA. The SED should evaluate and include recommendations and mitigations for addressing the potential impacts related to activities of these projects that may be carried out in response to the Policy. The SWRCB should develop such mitigation in consultation with DFG and other agencies and include them in the SED.

In reviewing the narrative responses in Section 8, DFG recommends that the use of the phrase "may include" be changed to "will include," as it relates to the development of appropriate recommendations and mitigations for potential impacts resulting from the adoption of the Policy. For example, the SED "will include:" 1) Identification of pertinent water quality standards within the Policy area and a comparative analysis between these plans and the Policy to determine if there are any potential conflicts; 2) recommendations for addressing the potential impacts attributable to increased groundwater pumping through the SWRCB's exercise of its authority to protect public trust uses, and to prevent the waste and unreasonable use of water; and 3) specific recommendations for addressing the potential impacts of specific construction projects that may be carried out in response to the adopted Policy.

DFG appreciates the opportunity to comment on the NOP and EC and looks forward to consulting with SWRCB in preparing the SED. Should you have any questions regarding our comments, please contact Ms. Linda Hanson, Staff Environmental Scientist, at (707) 944-5562; or Mr. Carl Wilcox, Habitat Conservation Manager, at (707) 944-5525.

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