

**Principal Recommendations for Developing an Instream Flows
Policy to Comply with AB 2121
- State Water Resources Control Board
North Coast Instream Flow Policy Comments**

STATE WATER RESOURCES
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PRINCIPAL RECOMMENDATIONS FOR DEVELOPING AN INSTREAM FLOWS POLICY TO COMPLY WITH AB 2121

These recommendations expand upon the comment letter and its attached fisheries, technical, legal, and policy memoranda.

I. The Water Board Should Reject the Draft Instream Flows Policy in Favor of a Watershed Management-Based Policy

A. The Draft Policy is Infeasible

The Draft Policy, as proposed, should be rejected. The Draft Policy is not feasible because it attempts to develop a flow-habitat model that will prescribe the biologically appropriate bypass flow for every diversion without conducting site-specific studies. This one-size-fits-all approach fails because the hydrology, biological resources and water demands are different in every watershed, and no amount of tweaking the Draft Policy will yield conditions that are fair and accurate in most circumstances. The Draft Policy also fails because it makes no effort to improve the water right process, which is a primary reason AB 2121 was enacted. Furthermore, the Draft Policy fails to take advantage of opportunities to provide positive incentives for resource stewardship, such as encouraging winter offstream storage projects to reduce water diversions during the dry season. The Water Board should instead adopt as the foundation of its policy a watershed management-based approach for investigating impacts, processing water right applications, and managing water diversions.

B. A Watershed Management Approach is Preferable to the Draft Policy's Regional Criteria Approach

In March 2007, Trout Unlimited and Ellison, Schneider & Harris submitted a joint recommendation to the Water Board to include a Watershed Management Approach as an alternative in the Draft Policy. The Draft Policy includes a brief provision (Section 12.0) for a "watershed approach" that purports to give "flexibility . . . to groups of diverters who endeavor to work together to allow for cost sharing, real-time operation of water diversions, and implementation of mitigation measures, . . . consistent with the principles for maintaining instream flows provided in section 2.2." The Draft Policy's entire discussion is only 3 pages. The Draft Policy watershed management section does not provide the functionality of the watershed management approach we recommended in March 2007 because the Draft Policy's watershed approach is merely a mechanism for groups of applicants to jointly attempt to comply with the Draft Policy requirements, and is not tailored to actual watershed conditions and water user needs. Since submission of the March 2007 letter, a very substantial amount of work leads even more strongly to the conclusion that a watershed management approach should be the foundation of the entire policy, and not just a permitting strategy alternative to rigid regional criteria.

The panoply of habitat factors considered by the Draft Policy should not be thrown out, but should instead be reexamined and incorporated into a new process and approach for analyzing and considering water right petitions and applications on a watershed basis. This practical approach would take into account the specific factors limiting the fishery in the

watershed, and the hydrology and environmental issues specific to the watershed. Clear policy guidance for conducting environmental and hydrologic studies that take into account actual stream and watershed factors, including environmental and economic benefits of leaving onstream dams in place, should replace the Draft Policy's one-size-fits-all minimum bypass flow equations and bypass facility requirements.

The proposed watershed approach is unlike the Draft Policy's "watershed alternative". As noted, the Draft Policy's "watershed alternative" is actually only a mechanism for groups of water users to jointly satisfy the Policy's criteria. The coordinated processing of applications can be useful, and it has been helpful in at least one instance (Anderson Creek applications group), but it is not the same as the watershed-based policy we propose. A true watershed alternative would provide positive incentives for resource stewardship, and a feasible and effective policy alternative that actually improves the administration of water rights and the management of natural resources. The watershed alternative would also strive to produce scientifically and technically sound decisions in a process that is fair, transparent, and efficient for both applicants/petitioners and protestants.

C. The Draft Policy Ignores the AB 2121 Mandate to Address the Dysfunctional Water Right System

Assembly Bill 2121 is not solely concerned with restoring populations of anadromous fishes. AB 2121 was enacted by the Legislature to fix a fundamentally broken water right system that can neither protect natural resources nor efficiently process and evaluate the effects of the numerous water diversion applications in the North Coast region. The 2004 petition to the Water Board by Trout Unlimited and the Peregrine Audubon Society, the sponsors of AB 2121, make this point clear: Trout Unlimited and Peregrine Audubon's petition seeks "reform of the water rights system" to protect the environment. And AB 2121 echoes the goal, directing the Water Board to adopt "principles and guidelines for maintaining instream flows . . . for the purposes of water right administration." (Water Code § 1259.4 (emphasis added).)

The traditional mode of processing applications individually ended when the backlog of applications in the Russian River and Navarro River systems reached high numbers in the late-1990s. Water Board staff retirements and hiring freezes compounded the processing delay. Increased concern over fishery resources in the North Coast by the Department of Fish and Game and NOAA Fisheries placed greater scrutiny on, and therefore delay for, the pending applications. The DFG-NMFS Draft Guidelines attempted to impose conservative screening criteria to expedite processing of small projects, but the Draft Guidelines backfired as screening criteria both because the criteria were too restrictive, and because they were often used as absolute requirements and not just screening criteria. Fish and Game and Water Board staff in many cases misapplied the criteria as one-size-fits all standards for every project in an attempt to reject those projects to clear some of the backlog. These delays, coupled with increased enforcement actions, have created a backlog of over 300 pending applications and numerous pending change and extension petitions in the North Coast region today.

Assembly Bill 2121 provided the ideal opportunity for the Water Board to address the fundamental problems inherent in the water right system. Unfortunately, the Draft Policy, like the Draft Guidelines before it, is concerned solely with instream flows for anadromous fisheries,

and it does not strive to improve the processing of water rights applications or facilitate real improvement in water management. It is thus not responsive to the Legislature's direction.

Water right process improvements are embedded within our proposed watershed management approach. The approach outlined below will be more efficient, transparent, and fair to all applicants and protestants, and will lead to scientifically and technically sound decisions.

II. Proposed Approach for a Watershed Management-Based Policy

A. Proposed Principle and Goals

A Water Board watershed management-based policy should be founded upon a set of goals and objectives broader than protection of fisheries resources. It should be based upon the principle of preserving fish and other natural resources within the North Coast region while serving agricultural, municipal, domestic, and industrial uses which are dependent on the water – the same balancing engaged in for Decision 1610, the same balancing required by the State Constitution, statutes, and judicial decisions. Consistent with this principle, the policy should be based upon the following goals:

1. Improve the efficiency, scientific and technical accuracy, and fairness of the water right process.
2. Contribute to the management of natural resources within the watersheds and provide incentives for stewardship, such as encouraging existing diverters to shift to winter offstream storage.
3. Process permits and approve permit changes consistent with the other goals.
4. Facilitate compliance with the Water Code and other laws and regulations.
5. Condition water right applications and petitions in a manner that maintains instream flows needed for the protection of fishery and other resources. In general, diversions should be conditioned to a rainy season of diversion, to periods of high flows, to reasonably maintain the natural flow variability, to minimize to the extent practicable the effects of onstream dams, and to avoid significant cumulative diversion effects.

B. Provide Flexibility for Individual or Group Processing

The watershed approach should establish strategies for improving the efficiency of processing individual as well as groups of applications and petitions.

Individual Application Processing. Some watersheds will not have a critical mass for batch processing or other coordination strategies. Although individual application processing is not preferred, individual projects can be processed in a manner that accounts for the watershed-specific hydrological and biological factors in a way that the Draft Policy criteria cannot. New impact evaluation criteria described below will ensure that individually-processed projects account for appropriate watershed factors.

Batch Processing. Group or batch processing involves the preparation of joint or coordinated hydrological and biological studies and CEQA documents and coordinated Water Board review of a group of pending projects within a watershed. Batch processing is an effective tool for expediting the water right approval process, for cost sharing of studies, and for improving the knowledge base of the system. Batch processing may be most appropriate for relatively unimpaired watersheds where the instream resources can be protected by conditioning all projects with standard terms. The Anderson Creek watershed pilot project is an example of batch processing within a watershed.

Coordinated Processing and Watershed Management. Coordinated application processing may be required in complex and impaired watersheds where stream- and watershed-specific environmental, hydrologic and other analyses must be conducted, and where special permit terms and conditions and other forms of mitigation are necessary to protect the affected resources. The unique feature of this watershed management approach is that it will provide opportunities to implement alternative mitigation and enhancement actions that provide equivalent or better resource protection than the current system or proposed Draft Policy would allow. Examples may include fish passage improvements, stream shading, and shifting of existing spring, summer and fall diversions to the winter rainy season. For example, if biological analyses indicate that project-specific mitigation would be insufficient, then some form of watershed-wide mitigation or out-of-kind mitigation would be accepted. A coordinated process should also give incentives to applicants to enter into agreements with existing water users to accomplish the environmental objectives. A formal watershed management plan could be produced through this approach if the participants choose.

C. Coordination

Coordination of studies, regulatory compliance, resource mitigation and enhancement activities, and water use are important objectives of the watershed approach. In particular, applicants and petitioners should be given incentives to reach agreements with existing water rightholders to include them in a watershed management program, such as by encouraging the rotation of diversions during critical streamflow periods.

D. Incentives for Stewardship

The watershed approach should encourage stewardship of natural resources. In addition to providing guidelines and principles for processing new water right applications, it should encourage beneficial stewardship activities for existing diversions. For example, it should expedite processing of permits for those who wish to change the timing of an existing diversion to winter storage in order to improve dry season streamflows.

E. Improve the Efficiency and Accuracy of the Water Right Process

The policy must also improve the efficiency and accuracy of the water right process. We propose specific improvements to the water right system in Section III and IV below, including scientifically-based impact evaluation guidelines, appropriate project terms and conditions, small project and de minimus project exceptions, and other administrative changes for application processing.

F. The Watershed Approach Will Produce Better Science and Result in Equivalent or Greater Environmental Benefit

The one-size-fits-all application and petition criteria of the Draft Policy will fail for three principal reasons: (1) because there is imperfect scientific understanding of actual fisheries and instream flow requirements, the proposed criteria have been made to be overly conservative in order to be protective everywhere in the system; (2) these overly conservative criteria will result in overwhelming resort to the individual variance process because projects cannot be approved under the Draft Policy's Regional Criteria in the vast majority of circumstances; and (3) water users and protestants will not support evaluation criteria and mitigation requirements that do not address the actual resources issues affected by the projects. The fundamental element of the watershed approach is that projects will be scientifically and technically evaluated from a comprehensive watershed perspective, and that appropriate terms and conditions tailored to the resources affected by the projects will be identified.

Because the new watershed approach will better utilize existing scientific studies and support additional on-the-ground scientific and technical evaluations of actual streams rather than blanket application of generic one-size-fits-all screening criteria, the watershed approach will foster better science and provide the public with far better information on the health of the watersheds.

The watershed management approach will also provide opportunity to implement alternative actions that provide equivalent or better resource protection than the default standards. Examples may include fish passage improvements, stream shading, and shifting of existing spring, summer and fall diversions to the winter rainy season. This holistic approach to restoration and management is essential if the actual resources affected by diversions are to be addressed.

III. Develop Impact Evaluation Guidelines, Biologically-Appropriate Terms and Conditions, and Small Project Exceptions

A. Practical Resource Impact and Water Availability Guidelines Should Replace the Rigid "Regional Criteria"

The rigid Regional Criteria of the Draft Policy are not workable. Practical resource impact and water availability guidelines are essential in order to give water users sufficient flexibility to assess the actual environmental impacts and resource needs of the watershed. Such watershed-based analyses are preferable to generic one-size-fits-all criteria that do not necessarily consider the actual conditions in the watersheds. Practical resource impact and water availability guidelines should require the coordination of hydrological and biological analyses amongst applicants and petitioners to provide cost and time efficiencies and to improve the science on which actions are based.

Narrative Criteria: The guidelines should include narrative impact evaluation criteria (as opposed to the Policy's numeric minimum bypass and maximum cumulative diversion criteria) for appropriate minimum bypass flow, cumulative diversion, onstream dam limitations, and be based on the actual geographic extent of anadromy based on field data. The hallmark of these

narrative criteria should be that they will be tailored to address the specific features of projects within each watershed and the potential impacts caused by those projects as determined by site-specific field evaluations and data. A second hallmark of narrative criteria should be that they would function to screen smaller projects with lesser impacts and to move those projects through an expedited review process. Larger projects with greater effects would follow a more involved evaluation process.

Guidance for Determining the Upper Limit of Anadromy: The applicant/petitioner should identify the upper limit of anadromy in relation to the project in order to determine whether special terms and conditions are required for the protection of salmonids. The upper limit of anadromy determination should consider both the upper limit of spawning habitat as well as the upper limit of habitat open to passage that are available in normal and above-normal water year types. Where possible, the upper limit should consider the quality of habitat available over a range of water year types. Extremely wet water year types are not required to be considered in determining the upper limit of anadromy. Applicant/petitioner should be encouraged to utilize previous estimates of the upper limit of anadromy from critical habitat designations or other stream surveys, as well as any evidence of natural and artificial barriers to passage that may be generally known to landowners or identified in public records including the CalFish database. Alternative methodologies would include a fisheries biologist's field report or determination that the project is located above a stream reach with a 12% of greater slope over 300 linear feet.

Watershed-specific special terms and conditions: Special terms and conditions that are tailored to watershed conditions should be developed for permits issued through a coordinated watershed management approach. For example, where appropriate, a watershed management plan would describe the enforceable management objectives and the watershed standards and actions the participants will take to accomplish the objectives and standards, all of which will take into account watershed size and all physical parameters, and be based on site-specific information.

Watershed-specific conservation and mitigation measures: Conservation and mitigation measures would be targeted to the highest priority resources needs of the watershed, and not necessarily those related to specific water diversion effects. Off-site and out-of-kind conservation and mitigation measures would be incorporated in special terms and conditions.

B. Develop Small Project and De Minimis Project Exceptions

Our hydrological and fisheries analyses of the Draft Policy support the establishment of exceptions from minimum bypass flow requirements, cumulative diversion limitations, season of diversion limitation, and other flow and habitat mitigation for small projects in small watersheds. By excepting the environmentally benign projects, applicants, agency staff and protestants can appropriately focus on the larger, more difficult projects. We propose the following exceptions:

- Drainage areas of 160 acres or less: – No minimum bypass flow, no maximum cumulative diversion limitation, and no season of diversion limitation should be required. Rationale: The smallest watershed evaluated by R2 for the Draft Policy was 160 acres. R2 determined that no salmonid habitat exists in watersheds this size and smaller. A minimum bypass is not required because the small and intermittent

unimpaired streamflow is typically insufficient to support aquatic life. A season of diversion restriction is not required because there is little to no water flow outside the winter rainy season.

- 161 acres to 1.19 square mile – Provided that salmonids are not present at the point of diversion, diversions should be required to bypass February median flows (as proposed in DFG-NMFS Draft Guidelines); the season of diversion should be limited to the rainy season (generally October 1 to March 31); active bypass of minimum bypass flows should be allowed; a cumulative effects test should be developed that considers the rate of diversion, watershed area and mean annual flow to ensure that the proposed project is logically evaluated in the context of existing projects. If salmonids are present, a biologically-appropriate minimum bypass flow and shorter season of diversion (such as December 15 to March 31) would likely be required if the diversion is upstream of a stream reach supporting Coho salmon or another species that requires higher flows early in the rainy season. Rationale: R2 did not find salmonid habitat in watersheds less than 1.19 square mile; however, watersheds larger than 160 acres may support aquatic life.
- Larger than 1.19 square mile – A biologically-appropriate minimum bypass flow should be required; the season of diversion should be limited to the rainy season (generally October 1 to March 31); a passive bypass facility should be installed, if feasible; a cumulative effects test should be developed that considers the rate of diversion, watershed area and mean annual flow to ensure that the proposed project is logically evaluated in the context of existing projects.
- Municipal Diversions – Municipal diversions should not be required to be retrofitted with bypass facilities. Rationale: Municipal water use is the highest use of water per Water Code section 106.
- Diversions above municipal reservoirs – Diversions above municipal reservoirs should not be required to be retrofitted with bypass facilities. Rationale: Diversions from streams tributary to municipal reservoirs will not affect fisheries already impacted by the existing municipal projects.
- Bypass Facilities for Dam within the Russian River system constructed prior to 1982 – Diversions within the Russian River system constructed prior to 1982 (completion date of Warm Springs Dam) should not be required to be retrofitted with a bypass facility. Rationale: Lake Sonoma and Warm Springs Dam caused more extensive habitat loss than all other existing diversions in the Russian River watershed.

IV. “Re-Engineer” the Water Right Process

These recommendations cannot succeed without improving the water right system. Water Board members have directed the Division of Water Rights to “re-engineer” the water right process. Re-engineering the water right process is a crucial component of a functional policy. The Water Board should direct staff to implement the following changes to the current water right process:

- The Water Board staff's requirement that private applicants and petitioners enter into an MOU for preparation of environmental documents should be rescinded.
- The Water Board should direct staff to triage the current backlog and develop protocols for approving petitions, applications, and registrations where there is lack of evidence of significant impacts. Many existing projects involve little more than descriptive changes to points of diversion, places of use, or purpose of use or extensions of time. Many projects are either unprotected or protests have been resolved and could be approved if direction was given to staff to do so.
- The applicant and Water Board staff should mutually develop a work plan at the start of the process.
- The applicant and Water Board staff should agree upfront to the scope of the environmental impact and water availability studies, and the analytic methodologies for those studies.
- Where there are acceptable alternative methodologies available to address a resource question, the applicant should be allowed to select the methodology.
- Consistent with the mutually agreed-upon work plan and study methodologies, the applicant should be given more control of scheduling and document preparation. This will reduce Water Board staff time spent on the projects.
- The SWRCB should establish a process to obtain decisions with an opportunity for appeal on key issues before final action on the applications and petitions are taken.

V. Local Watershed Management Approaches

Several important watershed-based water right processing and resource enhancement efforts are underway. The following locally-initiated efforts are consistent with and should be encouraged by the watershed-based policy.

Anderson Creek Pilot Project. Applicants and Water Board staff are implementing a pilot project to coordinate the processing of twelve water right applications in the Anderson Creek watershed in Mendocino County.

Mattole River Streamflow Enhancement Program. Landowners on the Mattole River worked closely with Water Board staff to obtain small domestic registrations to allow for the diversion and offstream storage of water in the winter months in lieu of stream diversions in the low-flow season.

Sonoma County Salmonid Coalition. The Sonoma County Salmonid Coalition, a partnership of property owners, public agencies and conservation groups, is developing a watershed management program that will contribute to the recovery of protected salmonids in Alexander, Dry Creek and Knights Valleys of Sonoma County. The Coalition has presented its work plan for developing the watershed program in its Draft Policy comment letter.

Fish Friendly Farming. The California Land Stewardship Institute's Fish Friendly Farming Environmental Certification Program works with farmers throughout Mendocino, Sonoma, Napa and Solano counties to assess and evaluate agricultural lands, stream habitats, hydrology, water supply, water and soil conservation practices, and other features. The Institute's Draft Policy comment letter presents a framework for conducting a watershed-based hydrologic and geomorphic analysis of a number of streams in Mendocino County and Napa County.

VI. Next Steps

We strongly encourage the Water Board to consider our recommendations for replacing the Draft Policy with our proposed watershed management-based policy. Many of our proposals are supported by Trout Unlimited and the Peregrine Audubon Society as described in their joint comment letter with Ellison, Schneider & Harris and Wagner & Bonsignore. Our joint comments reflect our mutual concern with the Draft Policy and desire to advance the watershed management concept. We recommend that the Water Board direct staff to meet with stakeholders to further develop these joint recommendations and direct staff and stakeholders to report back to the Board as soon as possible.