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Date: 5/1/08

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To: JWR CB AB2121 COMMENTS

From: SUPERINTENDENT, PRNS

Subject: COMMENTS ON AB2121

Comments: _____

*The National Park Service cares for special
places saved by the American people
so that all may experience our heritage.*

2008 APR 31 AM 11:54
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United States Department of the Interior

NATIONAL PARK SERVICE

Point Reyes National Seashore
Point Reyes, California 94956

IN REPLY REFER TO:

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May 1, 2008

California State Water Resources Control Board
Division of Water Rights
P.O. Box 2000
Sacramento, CA 95812-2000

D. J. SCHNEIDER

2008 MAY - 1 PM 11:56

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

To Whom it May Concern:

The National Park Service (NPS) has reviewed the Draft Policy for Maintaining Instream Flows in Northern California Coastal Streams (Policy). There are two Park Service units within the planning area, Point Reyes National Seashore and Golden Gate National Recreation Area (including Muir Woods National Monument). Each of these units is located within Marin County, and includes streams and impounded habitat that are subject to the proposed policy.

The intent of the new Policy is to protect instream flow for the benefit of anadromous salmon in the watersheds, which is consistent with the goals of the NPS. However, our review found that the draft policy does not address summer flow, a critical limiting factor for salmonid survival in our central coast watersheds; the draft policy as written could actually reduce the flexibility necessary to protect summer flows in these watersheds. The proposed policy could also result in extensive alteration to existing California red-legged frog habitat, a federally threatened species. This species occurs in the southern portion of the policy planning area, including Marin County.

Many of these watersheds have riparian users who are able to take water throughout the year, including the low summer flow period. The policy would actually restrict potential for addressing riparian summer withdrawals in a manner that is beneficial to aquatic species (by means such as creating winter appropriative storage), and could result in extensive loss to California red-legged frog breeding habitat. It could result in major retrofit requirements for existing ponds, which could entail extensive CRLF mitigation.

Cumulative Effects

The water law regimes of the western states are in various stages of evolution and so address new appropriations of water differently. Many states do not consider cumulative effects when making decisions regarding new appropriations. We agree with the approach of the draft Policy, to consider cumulative effects of new appropriations of water within the policy area to existing flow. Incorporation of this consideration into the

decision process should lead to more informed decisions and result in greater protection of instream resources.

The draft Policy also requires that water availability and impact of the proposed diversion on instream resources be considered independently. In many states, these two issues are considered to be one and the same. Again, the approach taken in the draft Policy will afford a greater level of protection to instream resources.

Policy Review Process

The CEQA review process for this policy is not clear. Included in the various policy documents was a "Substitute Environmental Document". Given the breadth of the policy, and potential impacts, will an Environmental Impact Statement be prepared for the proposed Policy?

The SWRCB released an Errata Memo on March 14, 2008, which included a change in the equation used to calculate minimum instream flow. This substantial change puts the basis for the Policy and Technical Evaluations in question. The premise for this change is not clear. One result of this change is an increase in the minimum bypass flows, above what was presented in the original documentation. As an example, in Table 4-3 of the Scientific Basis and Draft Alternatives Administrative Draft Report (R2 Resource Consultants and Stetson Engineers 2007) in Lagunitas Creek, by this March 14 equation change results in an increase of the proposed minimum bypass from 108 cfs to 124 cfs. Discussions during the public meeting addressed how application of the proposed Policy could prevent applicants from being able to store water in some years. The change in minimum bypass flows effectively increases the limitations of the policy, but these changes were made after the public meetings, and therefore have not been presented.

Limiting factor in Marin County Watersheds

Based on our observations within Olema, Pine Gulch, and Redwood Creek in Marin County, the summer base flows are most limiting to salmonid survival within these watersheds. The NPS has worked with California Department of Fish and Game (DFG) and the State Water Resources Control Board (SWRCB) to develop water rights terms and conditions for the Muir Beach Community Services District in lower Redwood Creek to protect surface flows through the summer necessary to support rearing juvenile coho salmon and steelhead. In Pine Gulch Creek, a project to develop off-stream irrigation storage for riparian water users is intended to establish winter appropriated water capture in order to reduce summer riparian water demand. Table 4-3 of the Scientific Basis and Draft Alternatives Administrative Draft Report (R2 Resource Consultants and Stetson Engineers 2007) shows for Pine Gulch Creek, the minimum bypass flow would be 42 cfs (March 14, 2008 revisions), while the DFG/NMFS minimum bypass flow is 19 cfs (also from Table 4-3). Salmonids have access to the watershed at the existing minimum bypass flow. The proposed Policy would more than double the bypass requirements for applicable water rights in winter, a time that is not limiting for these watersheds; this could limit the ability of riparian users to off-set impacts to summer flow through alternative storage solutions.

Testing the Proposed Minimum Instream Flow Policy

There were 12 pilot watersheds tested in the course of developing the proposed Policy. Three of those watersheds are within NPS lands where NPS has conducted more than a decade of coho salmon and steelhead monitoring. To our knowledge, the Principal Investigators for the test project did not contact the NPS to compare the proposed flow requirements with observed salmonid response and upstream migration flows in these watersheds. A good example for this is to look at Lagunitas Creek. In this case, there is ample coho salmon and steelhead spawning information that can be related to actual measured flows at the USGS gage. In addition, there are mandated release requirements under SWRCB decision 95-17. For Lagunitas Creek, the proposed minimum bypass flow presented in Table 4-3 of the Scientific Basis and Draft Alternatives Administrative Draft Report (R2 Resource Consultants and Stetson Engineers 2007) is 124 cfs (see note above as it was changed from 108cfs). The Decision 95-17 mandated releases for winter spawner access is actually 25 cfs, which has shown fish access into spawning habitat. Table 4-3 shows the existing DFG/NMFS policy requires a bypass of 83cfs. In this scenario, and in this area, the proposed Policy is more protective than the DFG/NMFS guidelines, however, it does not actually increase salmonid access within the watershed.

California Red-legged Frog – Breeding habitat and Unauthorized Dams

In 2002, the USFWS published the Recovery Plan for the California red-legged frog, which included Marin and Sonoma County. In 2006, the USFWS published a Designation of Critical Breeding Habitat (USFWS, Federal Register Vol 71, No. 71, pages 19244-19292).

The proposed Policy refers to a large number of unauthorized dams within the California red-legged frog listing area that would be subject to retrofit to comply with the proposed policy. In Marin and Sonoma County, these unauthorized ponds are designated by the USFWS as critical breeding habitat for the California red-legged frog (CRLF). The requirements of the proposed Policy, to bypass flow through the pond site without storing water could negatively impact the breeding habitat for CRLF. The USFWS would require ESA consultation on each of these facilities. The implications of this should be fully described in the draft substitute environmental document for the proposed policy.

Other Questions/Suggestions regarding proposed Policy

- Given that the goal of the draft Policy is to maintain stream flows in the policy area, we are concerned that Cal. Water Code § 1707 was not mentioned. This section is one of the avenues NPS may pursue in order to improve stream flows, and additional guidance from the Board would be helpful as to how this section may be used to bolster the draft Policy goals.
- Municipalities in California receive some leeway in terms of diligence in developing their appropriations, i.e., they are allowed to “grow into” their water right. How will the draft Policy handle this? Will a municipality be required to analyze availability and stream flow impact based on full use of the appropriation?

- The policy should clarify how protestants to an appropriation will be accomodated in the process of proving availability and stream flow impact. This mechanism has been important for the National Park Service to ensure protection of the resources we manage for the public trust.

To summarize, while the proposed policy clearly addresses the protection of minimum winter flows, it does not apply well to the Marin County portion of the project area, where low summer flows are far more restrictive and limiting for salmonid habitat than are the winter flows. In addition, while the Policy is focused on the protection of instream flows for anadromous salmonid migration, it could inadvertently mandate substantial negative impacts to California red-legged frog breeding habitat. The NPS has identified some important areas that should be carried into any future policy evaluation, including cumulative flow impact analysis, etc. However, as proposed, the current Policy may result in far more unintended consequences, than anticipated.

We appreciate the SWRCB's efforts to protect salmonids, and look forward to the development of a policy that is protective of salmonids, as well as other sensitive species that rely on special seasonal hydrologic conditions for their survival. Please feel free to contact park hydrologist Brannon Ketcham at (415) 464-5192 if you have questions regarding these comments.

Sincerely,



Don L. Neubacher
Superintendent