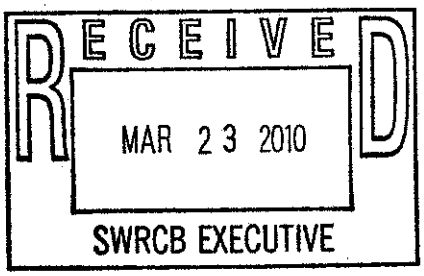
4/27/10 Board Hearing
AB 2121
Deadline: 3/26/10 by 12 noon

COAST ACTION GROUP P.O. BOX 215 POINT ARENA, CA 95468

March 23, 2010

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814



Subject: Comment Letter AB 2121 Policy

General

Coast Action Group submitted comments on the original iteration of this policy. Those comments are still relevant to this proposed policy and must be considered and responded to.

In this document, CAG submits additional comment to revisions and new information added.

In general, there are improvements in this new iteration of proposed policy to maintain flows in northern Californian stream. It is our view that we should preserve these improvements and push harder on the issues of enforcement and other criteria that will make this policy ultimately something that will improve the situation in which we find ourselves.

Peer Review and Sensitivity Analysis documents assess diversion policy in terms of maximum instantaneous diversion on a specific flow regime (stream). This review and analysis does not fully assess effectiveness of policy implementation criteria and standards. The Peer review and the policy itself does not discuss or address the effect (cumulative effect) of subsurface flow diversion (inclusive of all diverters) and how the policy, as stated, would address all users to arrive at policy that would attain desired results.

Nor did the Peer Review and Sensitivity Analysis consider effects of impoundment and diversion above anadromy. The proposed policy has no scientific or logical grounds to

ignore effects of impoundment/diversion of water (hydro- modification and interception) on instream flows necessary to support salmonids in all life stages.

Nor, was comparison made with the potential implementation of the Joint NMFS/DFG (2002) policy - in terms of implementation effectiveness. It is claimed the aspects of the Joint NMFS/DFG Guidelines have been incorporated into this policy. No analysis has been provided comparing the Joint Guidelines language and implementation policy with the policy presented by the SWRCB.

CEQA demands that the full range of alternatives must be considered, with analysis and findings based on analysis to demonstrate the deliberation process leading to conclusions. Thus, analysis should be forthcoming on how the proposed policy is consistent with, or diverges from the NMFS/DFG Joint Guidelines and who these differences apply to implementation of standards and desired outcomes.

Questions being asked by CAG in this document point to areas of policy and standards that must be clarified to assure effectiveness of implementation and participation by responsible agency and the public.

We notice, in the written policy, for every written rule or limitation there is a pathway that could allow justification of actions not consistent with the policy - or the intent of the policy. Additional clarification is needed to demonstrate how enforcement of flow maintenance targets will be met. We noticed peer review for the numeric system for establishing necessary flow levels only. There appears to be a lack of peer review and analysis of the policy in general. Was the enforcement policy peer reviewed for effectiveness potential?

There are, currently, numerous streams (or segments) with DFG established minimum flow criteria. If there are already flows established by DFG, and instream flows have not been developed by this process, what flow standard will prevail?

What policy (or interim policy) will prevail if the site specific study is requested, while the site specific study is in process (including scientific and peer review)? Will the SWRCB allow existing conditions (failure to meet a minimum flow standard) to continue while studies and evaluations are going on? The policy indicates interim criteria, but the criteria (except for season of diversion) and application of same during the interim permitting process is unclear.

Was policy been peer reviewed on issues related to flow management on all streams, Class I, II, and III, and issues (water collection and impoundment) in areas above anadromy? If peer review on aspects of policy has not been accomplished, what is the scientific basis for conclusions and the proposed policy (please explain and show thought process for CEQA review).

We notice that the policy applies to only water rights applications. We assume in calculations for diversion limits that will maintain minimum flows in streams, that existing

water rights will be considered in the calculation (this would include licensed and unlicensed diversions from subsurface flows that are hydrologically connected). In the case, if it is determined that the exiting water rights have reached the upper limit (or beyond) of acceptable diversion, does that mean no new water rights can be approved?

Within the policy language, the basis of all these questions and applicable CEQA review of this policy, inclusive of all subsequent applications down the road (site specific plans, exceptions, stream blocking structures, etc.), there seems to be a fundamental absence of enforceable standards. That is there is no clear line of standards for making determinations of how much total diversion is allowable - or - to put is another way, what are the absolute limitations of Cumulative Impacts from diversion that are allowable on any particular stream? Questions regarding enforceable standards are aggravated by al lack of monitoring and reporting controls. Will the policy allow an infinite number of small impacts that cumulatively add up to more than is acceptable if our goal if fish survival?

POLICY FOR MAINTAINING INSTREAM FLOWS IN NORTHERN CALIFORNIA COASTAL STREAMS - COMMENT

It needs to be pointed out here that the application of standards and policy, as mandated by AB 2121, to assure stream flow maintenance for protection of anadromous fish populations is way overdue. It was noted in CAGs original comments that the problem statement is adequate. When reviewing the limiting factors affecting salmonid habitat and survival issues associated with land use, the SWRCB should not lose site of the fact that it is the responsible agency for control of those limiting factors. Stream flow is just one element of the limiting factors present affecting salmonid survival - though it being a very important factor.

"This policy establishes principles and guidelines for maintaining instream flows for the protection of fishery resources. It does not specify the terms and conditions that will be incorporated into water right permits, licenses, and registrations."

If you do not have specific prescriptions and conditions for permitting and licensing, how will effective "protective measures" be implemented effectively. This policy is meaningless unless there is a backdrop or schedule of enforceable actions. What "protective criteria" will prevail while site specific studies are carried out? Do your really believe maintaining the status quo while these studies are ongoing and there are no protections in place satisfies SWRCB responsibility under Cal Water Code and the State and federal ESA? Please clarify the interim criteria and conditions that will be enforced while applications and studies are ongoing.

2.0 POLICY FRAMEWORK
2.1 Principles for Maintaining Instream Flows

In general all Principles are good. The proposed policy and implementation standards do not meet a level of enforceable effectiveness.

1. Water diversions shall be seasonally limited to periods in which instream flows are naturally high to prevent adverse effects to fish and fish habitat;

This is appropriate. December 15 to March 31 Season of Diversion is appropriate.

2. Water shall be diverted only when stream flows are higher than the minimum instream flows needed for fish spawning, rearing, and passage;
3. The maximum rate at which water is diverted in a watershed shall not adversely affect the natural flow variability needed for maintaining adequate channel structure and habitat for fish;
4. The cumulative effects of water diversions on instream flows needed for the protection of fish and their habitat shall be considered and minimized; and

Does this mean that historic permits and licenses for diversion must address cumulative diversion standards needed for salmonid survival? Subsequently in this document this it is implied that all diverters may be subject to regulatory control in efforts to meet stream flow targets. This issue is not clearly laid out as policy and how it will be implemented.

5. Construction or permitting of new onstream dams shall be restricted. When allowed, onstream dams shall be constructed and permitted in a manner that does not adversely affect fish and their habitat.

This implies a policy of no new onstream dams. What will occur with recently built onstream dams that limit anadromy that were built without permitting and licensing requirements? Are they just going to be ignored?

2.2 Protective Instream Flow Criteria

What goes on while unlicensed and unpermitted diversions continue while the flow criteria, site-specific or regional, are being developed? Allowing diversion to continue that modifies habitat in a way that is adverse to salmonid survival is inconsistent with State and federal Code.

What role will other responsible agency (DFG, Regional Boards and TMDLs, NMFS) play in development of site-specific and regional criteria? It is assumed that the development of such criteria, including licensing and permitting, is a CEQA based process - where noticing will be provided to responsible agency and interested parties. Under what framework will this noticing occur?

2.2.1.2 Minimum Bypass Flow

Will near stream diverters (licensed and unlicensed) diverting from subsurface flows be subject to minimum bypass flow requirements at the POD? If not, and if not considered in

the effects of cumulative diversion, how can policy work to maintain minimum flows? How will diversion be monitored for compliance and controlled when minimum bypass requirements are not being met? Will responsible agency and interested parities have access (current information) on flow status? If so, how will this work?

The criteria for establishing the minimum bypass flow necessary for survival of salmonids in all life stages may be appropriate. The problem is enforcing this standard in a timely way with verifiable monitoring.

For areas of diversion above anadromy, it is assumed that study and criteria will be presented to support standards and policy that apply to specific projects and diversions. It can not be assumed that diversion above anadromy has no effect on stream flow. There is plenty of science out there that shows that such diversion does have steam flow effects, effects on hydrology. Such studies related to effects of diversion above anadromy must considered effects of cumulative diversion downstream and habitat conditions.

It is still not clear what is to be done to protect flows under maximum cumulative diversion by those without license or permits and while studies are going on, both above and in anadromous regions. Policy clarification is called for.

2.3 Assessment of the Cumulative Effects of Water Diversions on Instream Flows

Cumulative effects analysis, as outlined, is appropriate and justified. Are conditions required under § 1375, subd. (d) equivalent to a water budget?

Exemptions for areas above anadromy will be difficult to justify. Projects claiming exemption are subject to qualify such exemption under CEQA - with noticing, project description, and cumulative effects analysis. This should be made clear in the policy.

In this section (#2 - Policy Framework) There are some assumptions and conclusions that may not be sufficiently support of a policy that will attain desired results.

Margin of Safety

It is claimed in the policy assumptions for the Regional Criteria (and assumed to apply to projects that proceed as Site Specific application analysis) that there is sufficient margin of safety in the criteria and methodology to establish minimum flows in streams with insufficient stream gauge data and/or insufficient rainfall data. The proposed methodology proposes to use data surrogate or reference streams near to the stream in question. It is not clear how the use of such surrogate or reference stream data will provide the necessary data to extrapolate protective flows with the necessary margin of safety. Given differences in watershed size, average slope, rainfall (and rainfall data), vegetative cover, soils, and geology, it is not clear how these method of using reference streams will provide accurate information on which to base flow prescriptions. In part the methodology includes the

need to include all diversions in analysis - for making determinations (we agree with and support this - but find it problematic). How is it possible to have accurate knowledge of all diversions (especially when there are fair numbers of unlicensed diversions)? When using a reference watershed, are all diverters taken into account in that watershed? If you were completing this process on a project on the mainstem Russian River, there are some stream gauges to and rainfall measurements to give you some degree of accuracy - but - considering all diversions, legal and illegal, in developing a flow target. It seems very unlikely you can get real numbers on amounts diverted. Without that degree of accuracy - is the proposed policy over protective or under protective?

Fish Size

Is the proposed policy aimed solely at providing flows that would support salmonid spawning and rearing to provide smolts that would make it to the ocean? Is the SWRCB considering the science that shows that if smolts are not sufficiently large after rearing in streams and making their way to the ocean there is little chance of them surviving and returning. There is sufficient science on this and it must be considered in policy implications. Flow regimes necessary to support fish must provide sufficient flows in all life stages to produce viable smolts capable of ocean survival.

2.4 Onstream Dams

Policy requirements for onstream dams are appropriate - but do not consider the full range of issue and actions that might be necessary to protect the resource. In addition, meeting these requirements requires CEQA review. As a responsible agency, or lead agency, the SWRCB should notice in this policy that all onstream dams must fulfill all requirements mandated under CEQA - including those enumerated in this policy. Justification and mitigation strategy for onstream dams is subject to requirements listed in this policy and that required under CEQA (Environmental Checklist - noticing, disclosure - project description, environmental review - cumulative impacts, and mitigation). The SWRCB should have a policy of removal of such structures that have impacts that can not be mitigated. This CEQA responsibility applies to all - Class I, II, and III streams. Omission of CEQA compliance is a failure of law. In some situations where the SWRCB is not the lead agency, and where DFG is, it is the responsibility to compel the owner of the onstream facility to comply with CEQA. No license or permits can be issued without such compliance with State Code. On stream dams built in recent history must meet CEQA compliance standards regardless of the arbitrary July 19,2006 noted in the policy document. Maintenance by any individual, or agency, of a structure that modifies habitat in a adverse manor and that can cause "TAKE" of listed species, or habitat, is in violation of, both, the State and federal ESA.

Criteria enumerated in Appendix D - must include CEQA analysis - not just for water right license - in the permitting and continued existence of any onstream structure.

3.0 POLICY APPLICABILITY

3.2 Geographic Area Covered by the Policy

If this policy *"establishes principles and guidelines for maintaining instream flows for the protection of native fishery resources in Northern California coastal streams"* **, then the question is raised as to why the policy does it not apply to areas above the Mattole River and south of the San Francisco Bay, where similar flow maintenance issues exist? The SWRCB is a responsible agency with a duty to maintain fish populations in all regions and streams in this state. It is suggested (and has been suggested in previous documents submitted by CAG) that this policy be expanded to cover regions and streams with similar issue.**

3.3 Water Right Actions Covered by the Policy

If this policy is to be effective and maximum cumulative diversion is to be considered in a way that minimum by pass flows are to be maintained, then all diverters must be considered and adjusted to meet the requirements necessary to maintain sufficient minimum bypass flows necessary to support salmonid survival in all life stages.
"Enforcement requirements include a framework for compliance assurance, prioritization of enforcement cases, and timely and appropriate enforcement actions" **can not be effective if all diversions, cumulative diversion, is not considered. Implementation of this policy will be limited if only applicants (and not all diverters including those with license) are considered in conditioning and mitigating the effects of diversion.**

4.0 WATERSHED APPROACH

The watershed approach can work to attain desired goals if administered properly. It is assumed that a group planning and project design that would establish methodology that would provide acceptable levels of minimum stream flow - to be accomplished on a watershed or smaller hydrologic unit scale - would be overseen by the SWRCB with standards established to assure that the minim flows necessary to support salmonids in all life stages would not only be the goal of the project - it would be the final result of such a project.

This methodology raises question broached (above) in this paper. Will acceptable standards be established in assessing cumulative impacts? Will there be robust, real time, monitoring of implementation and flow/stage of the watercourse in question? Will the State Board enforce all CEQA, Government Code, and ESA requirements?

What will occur in the interim, while the Watershed Approach project is in process? The State Board must consider interim guidelines that will protect the resource and assure or encourage the process to move forward and not linger forever - as it has been.

It is not clear what you mean by "Coordinated Water Right Permitting". Each diverter must have its own individual water right - with conditions (or coordinating conditions) that assure compliance with any plan that is developed - and - with monitoring that will measure the performance and outcomes (including real-time stream flow monitoring).

These watershed based planned diversion projects should be no larger than it is feasible for the SWRCB to control and monitor the project. It is recommended that the there be a size limitation based on size of a planning reach or established hydrologic unit - keeping in mind there must be disclosure and availability of information to managing agencies and the public.

4.3 Required Technical Documents

"The watershed group shall provide the technical information necessary for the State Water Board to (1) determine water availability, (2) satisfy the requirements of CEQA (if applicable), (3) evaluate the potential impacts of water appropriation on public trust resources, (4) make decisions on whether and how to approve pending water right applications for diverters in the watershed group, and (5) make decisions on whether to approve proposed diversion management plans."

The above quoted paragraph raises some questions. It should be clear that the SWRCB, and other managing agencies are overseeing and in control of the project process. Satisfying CEQA requirements will be necessary - both the SWRCB and applicants are legally responsible for CEQA compliance. Evaluation of potential impacts is part of CEQA. The groups will not make decisions on weather and how to approve the pending water right - or - diversion management plans. That is the job of the SWRCB. The watershed group will provide necessary information for the SWRCB to make or approve such decisions - after reviewing and responding to studies, applicable science, public, professional, and responsible agency input related to proposals by a watershed group.

All environmental documents shall be made available to responsible agency and the public. Provision should be made to provide such documentation in reasonable proximity to the project (not only in Sacramento).

4.4 Approval of Technical Documents

This section is appropriate.

4.5 Water Right Permit and License Terms

This section is appropriate

4.6 Retraction of State Water Board Approvals

This section is appropriate

5.0 BYPASS SYSTEMS, FLOW MONITORING, AND REPORTING

The monitoring and reporting requirements in this section need to be more robust.

Information (flow data) has to be available, in real time, to responsible agency and the public.

Passive system requirements may work in some instances - but not all. For instance if you have licensed and unlicensed diversion from subsurface flows, with or without the combination of surface water diverters, passive make work only for the surface water diverters. It is not clear how "passive" can work diverters pumping from subsurface flows.

5.2 Bypass Flow Monitoring and Reporting Requirements for Automated Computer-Controlled Bypass Systems

"If an automated computer-controlled bypass system is implemented, compliance with the minimum bypass flow requirements shall be demonstrated by hourly recording using automated flow measuring device(s). The flow data shall be recorded so that it is retrievable and viewable using commonly available computer software. The flow data shall be submitted electronically in a spreadsheet format usable by MS Excel or a similar software program. The hourly data shall be presented both graphically and numerically for the previous reporting period, and shall be submitted with Permittee Progress Reports, Reports of Licensee, or whenever requested by the State Water Board."

The above noted condition should be incorporated into policy for all diverters surface and subsurface cumulative diversion.

7.0 COMPLIANCE PLANS

The approval process for Compliance Plans shall be reviewed under CEQA mandates.

8.0 ENFORCEMENT

The enforcement framework *"(1) identifying and investigating instances of noncompliance, (2) taking enforcement actions that are appropriate in relation to the nature and severity of the violation, and (3) prioritizing enforcement resources to achieve maximum environmental benefits and compliance with the policy"* **needs dedicated support in staff availability and resources if desired intent is to be achieved.**

Terms and conditions, under permitting guidelines, must have sufficient standards to assure, not only compliance, but that compliance will achieve the desired goals in terms of stream flows that will support salmonids on all live stages.

Enforcement will can not occur unless real time monitoring devices are in place.

If there are not enough resources dedicated to this policy to attain desired results in the permitting and project review tasks, how will there be sufficient resource dedicated to enforcement? What are the cumulative impacts of letting numerous smaller violations pass without enforcement action (this might be one of the other factors)? Is it not that one of the largest factors leading to impacts from low flows as a result over use is that the over use is a result of numerous small impacts that add up to one big problem? We do realize that assessment and prioritization may be necessary due to an issue of limited resources. Enforcement capability (and any claims of capability are precluded) without demonstration of effective mechanisms (including staffing review and enforcement functions) are in place.

8.3 Continuing Authority to Amend Permits and Licenses

"The State Water Board has continuing authority to amend or modify water right permits and licenses pursuant to Water Code sections 100 and 275. If, after investigation, the State Water Board determines that a permitted diversion results in an adverse impact to public trust resources or results in a waste or unreasonable use or unreasonable method of use or method of diversion of water, the State Water Board may modify a permit or license term or may impose specific requirements over and above those contained in the permit or license in order to protect the public trust, ensure that the waste is abated, or ensure that the diversion and use of water is reasonable. Similarly, the State Water Board may modify existing permits or licenses if the State Water Board determines that such modification is necessary to meet water quality objectives contained in water quality control plans established or modified pursuant to Division 7 (commencing with section 13000) of the Water Code. The State Water Board will provide any affected permit or license holder with notice of the intent to modify the conditions of the permit or license and with opportunity for a hearing prior to making any modifications."

It is not clear how the above notice policy would be applied. Will it apply to cumulative diversion issues where minimum by pass flows are not being met? What is the trigger for such application? The above comments suggest that existing licensed diversion should participate in flow maintenance policy. The language provided does not indicate commitment of policy or program actions that will or can realize the desired results of maintaining flows. Please clarify this language.

8.5 Protection of Public Trust Resources

"The State Water Board has an affirmative duty to protect public trust uses, including fisheries, from the effects of water diversion and use. In the exercise of that duty, the State Water Board may order a party who diverts and uses water to comply with requirements to ensure protection of public trust resources if there is evidence that the diversion or use of water is impacting those resources."

Yes. Very True. However policy must have language sufficient to deliver on the protection of public trust values and responsibility to maintain those values and protect fisheries. At this point policy language needs improvement on the enforceability side of these issues.

8.6 Enforcement Action where Water Right Application is Pending

Section 2.2.1 does not adequately clarify what the interim policy is during the application permitting phase. Clarification of interim operating conditions (season of diversion is clear), but conditions necessary to maintain minimum by pass flows are not.

Interim (while in process) diversion conditions should be established by the SWRCB.

If there is a application for exception, interim operating conditions shall remain in place until there is a determination made by the SWRCB.

ENFORCEMENT - AND - PROJECT REVIEW STRUCTURE AND MECHANISMS

Let us assume that the proposed policy does eventually find Board approval and contained within the policy framework there are sufficient implementation and project review standards that, if appropriately applied, would make progress towards attaining the desired outcomes necessary to maintain instream flows. That would be one major hurdle overcome. However, one could, and should deliver the point, or argument, that implementing the necessary standards (as part of policy) and reviewing projects will not have any chance of occurring unless specific staffing and organizational resources are dedicated to necessary aspects of permitting and implementation.

You can (must) assume it will take a sizable staff to address the various aspects of project review, conformance, environmental response, enforcement, and violation processing to make this whole process work. No where in these policy documents is it outlined and/or demonstrated how this is to be accomplished.

In Mendocino and Sonoma County (not to mention Bay/Delta issues or the rest of the State). you have over 1,500 non-permitted diversions - with more than half of that number of applications. When you expand the scale of the project beyond the Russian River and the Navarro River, there are bound to be many, many more permitting issues.

In addition, if applicants and/or violators seeking to come into the system find the Regional Criteria too restrictive, then many of the project applications will be performed on the Site Specific Basis - requiring much more staff time and technical input from the SWRCB.

What you have here is a un-staffed and not completely organized project review system roughly equivalent to the Timber Harvest Review process (another CEQA equivalent process or Certified Regulatory Program) - where about 300 timber plans are reviewed each year in the north coast

region. To accomplish this volume and level of review you must have a shop capable of the following tasks (at a minimum but not limited to):

Staffing for administration of project permitting process

Staffing and a system for noticing of projects (required under CEQA, filing, and keeping track of records and project files.

Technical staff.

Staffing for mapping

Staffing for field review of projects

Staffing for response to applicants and coordinating project approval CEQA file

Staffing for monitoring and enforcement oversight and processing violations.

Staffing for environmental response - Official Response to Comments shop.

Then, appurtenant to the general instream flow maintenance policy, you must have minimum standards for filing project applications. Yes, I know the necessary elements are disclosed in the proposed policy. You, will have to decide how your policy for accepting applications will deal with applications that do not meet the minimum standards. You should understand in the Timber Harvest Plan review process project applications are often filed with minimum standards not being met, It is a game designed to put the resource agency on the defensive and to waste inordinate amounts of time and resources bringing projects into compliance.

In reviewing this policy, it seems apparent, that there are significant staffing issues that threaten the capability of this process (policy) to actually function properly and accomplish the desired goal of maintaining sufficient instream flows. There are some newly budgeted staff positions for enforcement. But as outlined above, there are very heavy responsibilities in the area of project review that are not funded. If water code section 1525 a, b, c, d - limits the ability of the SWRCB to exact fees to cover costs and/or if the Governor and Legislature can not agree on funding for more staffing project review related to this policy (as outlined above - where many applicants will apply for license under the Site Specific methodology), then the ability of the SWRCB to exercise oversight and review applications will be severely limited.

Until it is outlined how the organizational issues, including staffing and funding to support application reviews are going to be dealt with, there is little utility to the policy - at all. The policy simply can not be implemented without a processing structure and dedicated resources.

Note: This issue must be addressed in your CEQA document. Issues that are readily and reasonably noted to occur (and in this case compromise policy implementation) must be considered in the

environmental review process. In addition, as this project is a Water Quality Control Plan (as in the Delta project - see language in AB 2121 - "in accordance with state policy for water quality control adopted pursuant to Article 3 (commencing with Section 13140) of Chapter 3 of Division 7, for the purposes of water right administration."***), provisions of this policy must comply with section 13242 of the Water Code.***

Additional Note: As stated previously in these comments - that the CEQA document related to this policy must consider the full range of alternatives. An alternative (recommendation)being made here is that the SWRCB consider a way of financially supporting the structure and mechanism needed to make sure this policy is viable and enforceable. Included in those considerations regarding funding should be a permitting fee mechanism and schedule to recover costs for project review. Reasonable fees to cover costs are justified - economically. Reasonable fees will discourage the filing of substandard, incomplete, and misleading applications.

Water Stealing (Theft)

Is it not the case that those parties taking water without permit and license are actually stealing a commodity of significant value that is rightfully owned by the public or those with prior or superior water rights? Is this not theft or conversion under State Criminal Statute - and punishable under the criminal and civil codes of this State? As a viable and reasonable Project Alternative the SWRCB should consider enforcement actions, including use of criminal code for theft or conversion, to protect the Public Trust and prior or superior water right holders. This would include pursuing violations of Cal Water Code, CEQA, State Fish and Game Code (where flow and illegal operations are present), and incorporating actions from the Attorney Generals office (this is permissible under State Water Code and other State Code).

APPENDIX A

Water Availability Analysis Requirements

Submittal Requirements, data, information, and analysis requested are appropriate.

This information is part of the CEQA file - project description, analysis of impacts, and mitigatory process.

Projects above anadromy, if applying for exemption from policy, must provide science necessary to justify exemption (i.e. They would have to show that the project, collection and storage of water, would have no (zero - not de minimis) effect on the down stream hydrology.

Findings on upper limit of anadromy must be made on the basis of current and historic evidence. The concept of restorable streams, or restorable anadromy (e.g. Barrier removed, improved flows would allow) must be considered.

A.1.6 Stream Classification System

Stream classifications are appropriate. Restorable Class IIs should be treated as Class *Is*.

Criteria for selection of POIs and PODs is appropriate.

A.1.8 Cumulative Diversion Analysis

Cumulative Diversion analysis criteria and requirements are appropriate - if senior (all existing) diversions, surface and subsurface are considered in the analysis.

A.1.8.1 Diversions on Class III Streams

Class III analysis must show no impact or comply with minimum by pass requirements. Existing Class III diverters without water rights permits, and while in the process of application, must comply with interim permitting guidelines and standards.

A.1.8.1.1 Class III Exemption

Class III exemption applications must provide analysis that indicates no impacts on flows below the upper limit of anadromy. Existing Class III diverters without water rights permits, and while in the process of application, must comply with interim permitting guidelines and standards. All analysis will be presented to responsible agency and the public in a process consistent with CEQA.

APPENDIX B
Guidelines for Preparation of Water Supply Report and Cumulative Diversion Analysis

These Guidelines are appropriate for making stream flow determination. It is the case that in all probability that many diverters will seek to make their own site specific plans. This will delay the application of criteria for maintaining flows being implemented. Thus, interim policy for use during project development phase must be made clear. In the case

where historic DFG indicated minimum flow requirements exist, it is suggested that they be used for projects requiring interim guidelines.

APPENDIX C

Guidelines for Site Specific Studies

C-1

Appendix C. Guidelines for Site Specific Studies

C.1.0 Site-Specific Studies for Diversion Season, Minimum Bypass Flow and/or

Maximum Cumulative Diversion

Maximum Cumulative Diversion is the sum of all diversions, or rate of allowable diversion by all users, that would provide stream flows capable of supporting salmonid populations in all life stages. In this case who determines the minimum flows necessary to support salmonid survival? Who determines the validity of site specific conditions and criteria needed to set target minimum levels? Certainly not the study. Necessary flow levels should be determined by responsible agency - SWRCB, DFG, and NMFS.

What agency, with staffing components, will be responsible for verification of site specific information? If the responsibility falls to the SWRCB, will sufficient staffing be in place to assure verification?

Perhaps one way to fill the technical review gap is to require peer review of all proposals?
Has this been considered in your alternatives analysis?

What actions occur while the Site Specific is in process but not approved? In this case, if there is minim flow criteria presently set by DFG, should it be held as the interim target or should the Regional Criteria be use?

Site Specific Studies would have to provide sufficient information on how proposed projects will meet minimum flow targets and monitoring and enforcement mechanisms to assure compliance with maintaining target flows.

Again, review information and files of proposed projects falls under CEQA disciplines - where adverse impacts effecting salmonid habitat are not permissible (must be fully mitigated). If habitat is currently degraded (or of minimum flows necessary are not currently being met), this fact (and other conditions) should be noted in the Site Specific Study (noting that there is little pristine habitat in the geographic range of this policy) - there can be no justification for any reduction of flows and, in fact, current diversions (if they exist) may have to reduce frequency and rate of diversion until instream flow targets are met (See discussion for staffing requirements on these functions - above).

The basic information, standards, and elements required for Site Specific Studies are appropriate. What is a matter of great concern is the standards applied to the review process to assure compliance and eliminate invalid information.

Flow barriers (constructed flow barriers - not natural flow barriers) shall be removed.

C.1.1.2.3 Site Specific Season of Diversion

Altering the season of diversion - Regional Criteria (Dec. 15 to March 31) is tricky business.
Studies would have to justify changes based on rainfall data and seasonal hydrology. The numbers related to seasonal rainfall patterns vary over time - where the only long range consistency shows that hydrologic events deliver less water - and possibly deliver it later. Thus, with these variable and inconsistent patterns - justification for changing the season of diversion would probably call for expansion of the Season of Diversion from November 1 to April 31.

APPENDIX D
Guidance for Developing Mitigation Plans

Policy standards and elements required for mitigation plans are appropriate. Again, this process falls under CEQA disciplines. Administration of project revue, including Mitigation Plans, must be supported by an adequate staffing structure

APPENDIX E
Bypass System Requirements

Again the elements and standards set forth in this section are part of responsible agency project review. Thus, review these requirements must be disclosed in the project and must meet all CEQA mandates.

APPENDIX F
Compliance Assurance

Appendix F. Compliance Assurance

"The State Water Board will assure compliance with this policy by developing clear and enforceable permit terms and conditions, requiring and reviewing compliance plans, reviewing self-monitoring reports, and maintaining a field presence in the policy area through compliance inspections, licensing inspections and complaint investigations."

Agreed. Permits and unlicensed projects must be subject to enforceable standards - conditions written into the license or permit.

However, the likelihood of adequately conditioning a project and assuring compliance to said conditions is very slim - unless: 1) projects get full environmental review and assessment by responsible agency and the public (be consistent with CEQA; 2) There is a staffing support administrative infrastructure to provide adequate project review and compliance monitoring. Enforcement capability (and any claims of capability are precluded) without demonstration of effective mechanisms (including staffing review and enforcement functions) are in place.

Self-Monitoring reports are not consistent with CEQA mandates - or - any reasonable assurance of compliance.

Real time stream flow monitoring accessible to responsible agency and the public is necessary to monitor compliance.

Sincerely,

Alan Levine, For Coast Action Group.