



CALIFORNIA FARM BUREAU FEDERATION

NATURAL RESOURCES AND ENVIRONMENTAL DIVISION

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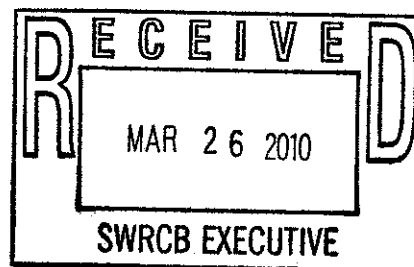
Sent via E-Mail

commentletters@waterboards.ca.gov

March 26, 2010

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

Re: **Comment Letter - AB 2121 Policy**



Dear Chair Hoppin and Members of the Board:

The California Farm Bureau Federation ("Farm Bureau") submits the following comments on the Proposed Policy for Maintaining Instream Flows in Northern California Coastal Streams ("Proposed Policy"). The Proposed Policy, although containing some revisions from the Draft Policy,¹ remains fundamentally unworkable for fish and for farms.

Farm Bureau is a non-governmental, non-profit, voluntary membership California corporation whose purpose is to protect and promote agricultural interests throughout the State of California and to find solutions to the problems of the farm, the farm home and the rural community. Farm Bureau is California's largest farm organization, comprised of 53 county Farm Bureaus currently representing over 32,000 farm families and more than 81,000 individual members in 56 counties. Farm Bureau strives to protect and improve the ability of farmers and ranchers engaged in production agriculture to provide a reliable supply of food and fiber through responsible stewardship of California's resources. Through its constituent county farm bureaus, Farm Bureau has members in the policy area that will be directly affected by the Board's action regarding the Proposed Policy.

Perhaps nothing evidences the shortcomings of the Proposed Policy more than the fact that in response to the 2007 release of the Draft Policy, conservationists and water users joined together to develop a workable policy framework. For reasons unclear to those who have followed this process, staff rejected the Joint Recommendations² and instead forged ahead with

¹ "Draft Policy" refers to the draft *Policy for Maintaining Instream Flows in Northern California Coastal Streams* released December 2007.

² "Joint Recommendations" refers to the *Joint Recommendations for the North Coast Instream Flow Policy* submitted April 30, 2009 by Trout Unlimited, Wagner & Bonsignore, and Ellison, Schneider & Harris.

a plan that was broadly condemned. Farm Bureau respectfully requests that the State Water Resources Control Board ("Board") reject the Proposed Policy and direct staff to rebuild the instream flow policy on a framework that will work to protect flows and provide water.

As explained below, Farm Bureau is concerned that the Proposed Policy retains the shortcomings of the Draft Policy; namely it is unreasonably protective, does not balance beneficial uses, and fails to make improvements to the water rights process. This letter also comments on staff's rejection of the collaboratively developed Joint Recommendations.

Proposed Policy Revisions – Prior Comments Still Applicable

The revisions in the Proposed Policy do not adequately address the concerns raised in comment letters on the earlier released Draft Policy or raised by other recommendations and comment letters. While the Proposed Policy retains many of the flaws pointed out in earlier comments, in accordance with the direction provided in the public notice, we will not resubmit those comments, but will simply say that the Proposed Policy retains the fundamental flaws of the Draft Policy. Therefore please consider our earlier comments as they are still relevant to understanding the problems with the Proposed Policy. Particular attention should be paid to earlier submitted comment letters by Kronick, Moskovitz, Tiedemann & Girard, *et al.* on behalf of a number of water users and interested organizations, California Farm Bureau Federation, and Rudy Light.

Protectiveness

One of the most troubling aspects of the Proposed Policy is that it uses an unreasonable standard of protectiveness. Although the issue of protectiveness has been discussed extensively, it remains the primary obstacle to the development of a workable policy. For any instream flow policy to be valid and workable, it must balance uses. When it comes to protectiveness, Farm Bureau recommends that the Board reject the "unreasonably protective" standard used in the Proposed Policy and instead go for the "meaningfully protective" standard reflected in the Joint Recommendations.

The Proposed Policy has regional criteria which are ostensibly fully protective of fish. While at a glance this may seem appropriate, digging into the Proposed Policy to see what "fully protective" actually means reveals that this standard is fundamentally flawed. As part of an effort to improve water rights administration, an overly protective policy is not functional. To be sure, fishery resources need to be protected, but an instream flows policy needs to strike the balance between what is meaningfully protective of fisheries and what provides water to those who need it. Just because an action has a statistically discernable affect on habitat does not mean that it would also result in a meaningful harm to fisheries. On the other side, limiting the ability to divert water based on a statistically predictable (but practically meaningless) impact has a huge affect on water users.

An illuminating example of this problem is found in the methodology used in the Draft Policy to establish regional criteria for Salmon Spawning Flows. In the review of the Joint Recommendations, it is explained that the "Draft Policy used a mean regression to fit data points that were considered protective at the site specific scale and conservatively increased the regression intercept by 3 standard errors to be protective at the regional scale." This approach definitively places *any* impact on Salmon Spawning Flows ahead of diversions, no matter how meaningless that impact may be. In using this approach to protectiveness, the Proposed Policy ensures that most people will not be able to comply with the regional criteria.

Since the regional criteria will not work because they are too protective to be reasonable, most diverters will likely be required to conduct site specific studies. The problem with the Proposed Policy is that there is no adequately described methodology to allow an applicant to know how to conduct these site specific studies. Furthermore, if everyone is conducting site specific studies, what good are the regional criteria? An even more troubling result of needing to conduct site specific studies because the regional criteria are unreasonably protective is the fact that when assessing these studies, the staff will continue to use the unreasonably protective standards underlying the regional criteria to assess the site specific studies. This will put the applicants into a never ending loop of not being able to use regional criteria because they are unreasonably protective, so they must conduct site specific studies or use a watershed approach, which staff will assess using the same unreasonably protective standards of the regional criteria.

An unreasonably protective standard, which is the level of protectiveness relied upon in the Proposed Policy, will not work. Instead, an instream flows policy should rely upon a meaningfully protective standard like that in the Joint Recommendations.

Balancing Beneficial Uses

As a result of using an unreasonably protective standard, the Proposed Policy fails to balance the needs of water uses. Instead, the Proposed Policy ensures that one use, in this case fisheries, trumps all others. Not only is this inconsistent with Constitutional and statutory mandates, but it is contrary to the expressed goal of many conservation organizations; namely to encourage water users to take water during the wet season and forego dry season diversions. The Proposed Policy, with its unreasonably restrictive standards, will not allow for such progress because no one will be able to divert water during the wet season. The Board should direct staff to work on a policy that balances the needs of all uses and does not ignore meaningful impacts.

Improvements to the Water Rights Process

From the very beginning of the instream flows policy development process, stakeholders have recognized that in order for the instream flows policy to be effective, there needed to be improvements to the water rights administration process. But such changes are absent from the

Proposed Policy. Staff's explanation can be found in their response to section 4 of the Joint Recommendations where they state that "changes to the water rights administration process ... [are] outside the context of establishing a policy for maintaining instream flows."³ Farm Bureau disagrees with this assertion. Water Code §1259.4(a)(1) provides that the State Water Board is to "develop principles and guidelines for maintaining instream flows in coastal streams . . . for the purposes of water right administration." The purpose is water rights administration; it is within the Board's authority to change the water rights administration process; and combining the two efforts is the only thing that will achieve the objectives of AB 2121 – a working water rights system that processes applications and protects fish.

The Joint Recommendations

Perhaps one of the most extraordinary affects of the Draft Policy was that it caused stakeholders that had long been aligned in opposition, to join forces. This extraordinary shift occurred for the simple reason that the Draft Policy was so unworkable that both sides thought another approach was needed. Recognizing that fish and farmers needed a workable policy, Wagner & Bonsignore, Trout Unlimited, Ellison, Schneider & Harris, and McBain & Trush sat down and hammered out what many support as a workable framework for an instream flows policy. To the surprise of nearly everyone, the staff completely rejected this proposal.

It is hard to understand why the Joint Recommendations were so completely rejected. Staff did not even include the Joint Recommendations' methodology in the Proposed Policy as an optional approach. And, although significant resources were invested in criticizing the Joint Recommendations (resources that Farm Bureau believes would have been better spent suggesting improvements), the entire point of the Joint Recommendations, and AB 2121 for that matter, seems to have been missed.

The purpose of the instream flows policy is to have a working water rights system that protects fish while providing water. This not only means a system that ensures flows are protected for fish, but also results in the timely issuance of permits and licenses. The Draft Policy did not do this, the Proposed Policy does not do this, and the staff has rejected a collaborative recommendation by stakeholders from across the spectrum that would have moved us in the right direction.

The key to understanding the difference between the Proposed Policy and the Joint Recommendations is how they function. The Proposed Policy uses regional criteria to set standards while the Joint Recommendations establish a framework to evaluate the meaningful impact of a diversion on the fishery. While using unreasonably protective regional criteria may work for screening projects that will require particular consideration, they do not work well as

³ From *State Water Board Staff Responses to Comments Received from Trout Unlimited, Wagner & Bonsignore, and Ellison, Schneider & Harris on April 30, 2009*, pg. 6.

“principles and guidelines” for maintaining instream flows. For that, we need something much more like the Joint Recommendations, which is a framework for evaluation.

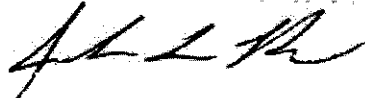
Because the Joint Recommendations represent a better foundation on which to build an instream flow policy, we request that the Board direct staff to step away from the Proposed Policy and instead focus on the approach described in the Joint Recommendations. Recognizing that the Joint Recommendations were a better opportunity, Farm Bureau began working on recommended changes to the Joint Recommendations months before the Proposed Policy was released. Please consider these changes not only specifically in regards to how the Joint Recommendations could be improved, but also as a reflection of support for what a workable alternative to the Proposed Policy.

Conclusion

Farm Bureau remains committed to helping develop a workable instream flows policy, but the Proposed Policy is not the answer. Rather, the Board should consider directing staff to rebuild a policy based upon the Joint Recommendations. The Board should develop a policy where uses are balanced, protectiveness is meaningful, and that has stakeholders support.

Thank you for your consideration. If you have any questions, please feel free to contact me directly at (916) 561-5667.

Very truly yours,



JACK L. RICE
Associate Counsel

JLR/pkh

cc: Humboldt County Farm Bureau
Marin County Farm Bureau
Mendocino County Farm Bureau
Napa County Farm Bureau
Sonoma County Farm Bureau