



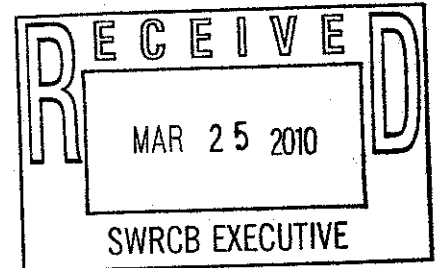
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VIA ELECTRONIC MAIL ([commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov))

March 25, 2010

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State Water Resources Control Board  
1001 I St. 24<sup>th</sup> Floor  
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Re: **Comment Letter – AB 2121 Policy**

Dear Board Members:

The Proposed Policy for Maintaining Adequate Instream Flows in Northern California Coastal Streams ("AB 2121 Policy") would establish a policy for determining minimum instream flows needed to protect fishery resources, while minimizing the water supply impact on other beneficial uses. The San Joaquin River Group Authority ("SJRG") has serious concerns regarding the AB 2121 Policy's impact on water rights. Although the AB 2121 Policy presently only applies to certain North Coast streams, Water Code §1259.4(a)(2) authorizes the SWRCB to develop policy and guidelines for maintaining instream flows in other streams as well. The SJRG therefore has serious concerns that elements of the AB 2121 Policy would not only threaten water rights in North Coast streams could become precedents that would threaten water rights in other streams in California. The AB 2121 Policy also needs to more specifically address how it fits into water quality control planning process under the Porter-Cologne Water Quality Control Act ("Porter-Cologne") (Water Code §13000 et seq.).

**Instream Flow Implementation Must Respect Water Right Priority**

Section 8.3 reiterates the authority of the State Water Resources Control ("SWRCB") Board to amend or modify existing water right permits and licenses to protect the public trust, ensure waste is abated, or ensure diversion and use of water is reasonable. (AB 2121 Policy, p. 23.) It further states that the SWRCB may modify existing permits or licenses if the SWRCB 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 §13000) of the Water Code. In addition, Section 8.4 states that the SWRCB has an affirmative duty to protect public trust uses, including fisheries, from the effects of water diversion and use. (AB 2121 Policy, p. 24.) In exercising that duty, it states that the SWRCB may order a party diverting and using water to comply with requirements necessary to ensure protection of public trust resources if there is evidence that the diversion or use of water impacts such

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resources. Such actions would only occur, however, after notice to the parties and an opportunity for a hearing has been provided.

The AB 2121 Policy must qualify such statements with the rule of water right priority. Under the rule of priority, riparian rights take precedence over rights of appropriation, so that in times of shortage riparians are entitled to fulfill their needs to the extent natural flow is available for diversion before appropriators are entitled to any use of the natural flow. As between appropriators, the rule of priority is first in time, first in right, with a senior appropriators entitled to fulfill their needs before junior appropriator are entitled to use any water. (El Dorado Irr. Dist. v. St. Water Resources Control Bd. (2006) 142 Cal.App.4<sup>th</sup> 937, 961.) Water right priority has long been the *central* principle in California water law. (Id. at 962.) In any pending matter, it should be the first concern of the SWRCB to recognize and protect the interests of those who have prior and paramount rights to a stream's waters. (Id.) Although priority of right is significant only when the natural or abandoned flows in a watercourse are insufficient to supply all demands being made on the watercourse at a particular time, this is precisely when bypass flows and other measures contemplated by the AB 2121 Policy become necessary.

Although the rule of priority is not absolute and the SWRCB has authority to act contrary to the rule, it may do so only in appropriate circumstances, such as when a competing principle or interest justifies action inconsistent with strict application of the rule of priority. (Id. at 965.) One circumstance would occur when the rule of priority clashes with the constitutional prohibition on waste and unreasonable use of water. (Id.) Nonetheless, every effort must be made to respect and enforce the rule of priority. (Id. at 966.) The public trust doctrine could also justify action inconsistent with the rule of priority, but every effort still must be made to preserve water right priorities to the extent those priorities do not lead to violation of the public trust doctrine. (Id.)

When the SWRCB seeks to ensure that minimum flow standards and water quality objectives are met in order to enforce the rule against unreasonable use and the public trust doctrine, it still must attempt to preserve water right priorities to the extent those priorities do not lead to unreasonable use or violation of public trust values. (Id. at 967.) In such circumstances subverting water right priority is justified only if enforcing that priority would in fact lead to the unreasonable use of water or result in harm to values protected by the public trust. (Id.) Even when the SWRCB allocates the burden of meeting minimum flow standards and water quality objectives based on factors other than water right priority, it can only do so with substantial justification. (Id.) Otherwise, if the SWRCB is going to modify or amend a water right permit or license for such purposes, it must amend every water right permit and license in order of priority, starting with the most junior. (Id.)

### **Minimum Bypass Flows are Not Flow-Based Water Quality Objectives**

In its water quality control planning role, the SWRCB has a duty to adopt objectives for fish and wildlife beneficial uses, but in so doing it has a duty to consider all other beneficial uses of water as well, among them municipal, industrial, and agricultural uses. (St. Water Resources Control Bd. Cases (2006) 136 Cal.App.4<sup>th</sup> 674, 778.) The

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SWRCB, in its discretion and judgment, must balance all such competing interests in adopting water quality objectives and formulating a program of implementation to achieve those objectives. Minimum bypass flow, by definition, only considers fish spawning, rearing, and passage and, unlike water quality objectives, the protection provided does not have to be "reasonable" in light of all demands made on the system. (AB 2121 Policy, p. 4, 10.) It does not meet the legal requirement of a water quality objective enacted under Porter-Cologne, but nonetheless operates as one. If the SWRCB wants a regulatory standard it can use like a water quality objective, then it should proceed as required under Porter-Cologne, adopt a water quality objective and program of implementation, and then implement that water quality objective through water right proceedings if necessary.

Very truly yours,  
O'LAUGHLIN & PARIS LLP

By:

  
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