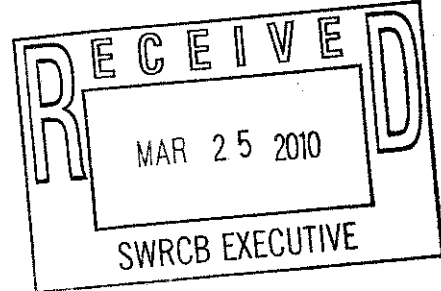




Mendocino County Water Agency
890 North Bush Street ♦ Ukiah ♦ California 95482 ♦ (707)463-4589 ♦ fax (707)463-4643

March 24, 2010

Mr. Charlie Hoppin, Chair
Members of the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, California 95812-2000



Atten: Ms. Jeanine Townsend

Subject: Proposed Policy for Maintaining Instream Flows in Northern California Streams (AB 2121)

Dear Chair Hoppin and Members of the Board:

The Mendocino County Water Agency has received the February 2010 Draft Policy for Maintaining Instream Flows in Northern California Coastal Streams (Instream Flow Policy), along with the State Water Resources Control Board (Water Board) staff responses to previously submitted comments, and while we appreciate the amount of work that the Water Board staff has invested in the development of the proposed Instream Flow Policy, we are gravely concerned that the Instream Flow Policy, as presently crafted, remains flawed, vague in key areas, and that the impacts of policy implementation, particularly land use and economic, continue to be seriously understated. More specifically, and for the reasons stated below, we believe that the proposed Instream Flow Policy, if implemented as drafted, will do little to change the status quo in terms of anadromous fish habitat protection and the abysmally slow and costly procedure by which water right applications are processed.

The Regionally Protective Criteria presented in the Instream Flow Policy are intended to "... provide applicants the opportunity to show that operation of their projects will not cause impacts to instream resources using data that would not be expensive to obtain as they assess whether water is available for appropriation". By the State Board staff's admission, the Regionally Protective Criteria are conservative in the sense that they may be overly protective of fisheries resources – allocate more water for instream flow purposes than is warranted given competing beneficial uses. We concur with the State Board staff's assessment. Our concern is that the Regionally Protective Criteria are so conservative with respect to the protection of fisheries resources that the majority of water right applicants will be forced to pursue the Instream Flow Policy's "site specific" study option, which in itself is not necessarily bad, except that the guidance provided for site specific studies is generally vague and for the most part, no

improvement over the status quo. To summarize, even if the Instream Flow Policy was implemented as currently drafted there would continue to be a significant number of applicants, if not the majority, who would feel compelled to forgo use of Regionally Protective Criteria in lieu of site specific studies. We believe that the Instream Flow Policy could be improved through either use of less conservative Regionally Protective Criteria, more specifically defined categories of exempted projects, and /or a more thoroughly defined process for conducting site specific studies.

One example of the Instream Flow Policy's overly conservative Regional Protective Criteria is the proposed Maximum Cumulative Diversion Rate provision, which limits the maximum diversion rate to five percent of the 1.5-year peak flow discharge. In view of the inherent inaccuracies of stream discharge measurements, simply confirming that no more than five percent of the 1.5-year peak flow discharge has been diverted could prove challenging. As noted in many publications of the United States Geological Survey, the accuracy of stream discharge data is characterized as "Excellent" when 95 percent of the readings are within five percent of actual stream discharge; "Good" when 95 percent of the readings are within ten percent of actual stream discharge; and "Fair" when 95% of the readings are within fifteen percent of actual stream discharge. The situation is compounded with increasingly greater stream discharges, because five percent of what constitutes the 1.5-year peak flow discharge is an even smaller percentage of the 2-year peak flow discharge, and so on. Even a Parshall Flume, one of the more accurate stream flow gauging devices, has an accuracy of plus or minus two percent. In summary, the Maximum Cumulative Diversion Rate criterion is so conservative that compliance will be difficult to confirm via conventional stream gauging practices. Even more alarming is the fact that the criterion severely limits the diversion of high winter flows - the only significant source of unappropriated water - in the policy area.


As previously noted, the proposed Instream Flow Policy lacks specificity in key areas. One example is the stated definitions of Class II and Class III streams. Class II streams are defined as streams where fish are not present, but aquatic non-fish vertebrates and/or aquatic benthic macroinvertebrates exist, Class III streams are defined as streams that do not support aquatic life. While these definitions may appear reasonably specific - they are not. For example, the aquatic life stage of some benthic macroinvertebrates, such as the mosquito, is very brief, typically two weeks or less. Is an intermittent stream that flows during rainfall events and then recedes to isolated standing pools for two weeks before drying up - just long enough to be colonized by mosquitoes - a Class II stream? Similarly, are bacteria or other single-cell organisms such as protozoans considered aquatic life? If so, very few if any streams would meet the Class III stream criterion. The distinction between Class II and Class III streams is critically important. If implemented as presently crafted, the proposed policy would typically require substantially more mitigation for projects proposed on Class II versus Class III streams. In some instances, particularly small diversions for rural residential use, the feasibility of the proposed water diversion/storage facility could easily hinge on whether the stream in question is considered Class II or Class III.

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While CEQA may not require a review of social or economic impacts, as asserted in the State Board's response to Comment 23.4.32 - Volume 2, and despite the assurances that the Substitute Environmental Impact Document adequately addresses potentially significant indirect environmental impacts on land use (see State Board's response to Comment 23.4.32- Volume 2), we remain concerned that implementation of the proposed policy will in fact have significant land use impacts in Mendocino County and in turn, potentially significant economic and social impacts. As discussed in our April 30, 2008 comment letter (copy attached), the proposed policy, as presently written, will hinder if not preclude rural residential development and/or irrigated agricultural activities in a large portion of Mendocino County. The elimination of these activities has property tax revenue implications - a probable decrease in property tax revenue - which will most likely further decrease the County's ability to provide essential health and safety, and other public services. We understand the State Board staff's desire to formulate an instream flow policy that is highly protective of anadromous salmonids, and note the State Board staff's reference to the use of the Precautionary Principle (see State Board response to Comment 1.9.5, Volume 1) as justification for the resulting proposed Regionally Protective Criteria, but would like to remind the State Board staff that to be consistent with the proper application of the Precautionary Principle, they are obligated to fully consider all impacts of their action - in this case the potential land use, social and economic impacts of policy implementation

In closing, we are keenly aware that the Legislature has directed the State Board to develop the Instream Flow Policy and that development and adoption of this policy is well behind schedule. However, given the potentially significant ramifications of the proposed policy we urge the State Board to delay policy adoption, extend the public review and comment period at least an additional 90 days, and continue to work with stakeholders to develop a truly practical and workable policy that meets the originally stated objectives of protecting aquatic resources and facilitating the orderly and efficient processing of water right applications.

Sincerely,


Roland A. Sanford
General Manager

Cc: Assemblyman Wesley Chesbro
Senator Patricia Wiggins
Ms. Victoria Whitney, Deputy Director, Division of Water Rights, SWRCB
Mendocino County Water Agency Board of Directors
Ms. Kristi Furman, Clerk of the Board, County of Mendocino
Ms. Carmel Angelo, Chief Executive Officer, County of Mendocino
Ms. Jeanine Nadel, County Counsel, County of Mendocino



MENDOCINO COUNTY WATER AGENCY
890 North Bush Street, Room 20
Ukiah, California 95482
(707) 463-4589 fax (707) 463-4643

April 30, 2008

Ms. Karen Niiya, Senior Engineer
Division of Water Rights
State Water Resources Control Board
1001 I Street, 2nd Floor
Sacramento, CA 95814

Subject: Comment Letter – AB 2121 Policy

Dear Ms. Niiya:

Thank you for the opportunity to comment on the State Water Resources Control Board staff's "Draft Policy for Maintaining Instream Flows in Northern California Coastal Streams" (AB 2121 Policy). While we appreciate the fact that considerable effort has gone into the development of the AB 2121 Policy, regrettably, we believe that the AB 2121 Policy, as presently drafted, will not meet the stated objective of protecting endangered salmonid fisheries without unnecessarily restricting water development, and in turn economic development, in Mendocino County. Like so many regions in the west, the physical and social character of Mendocino County is largely determined by the availability of water – the availability of water for instream as well as out-of-stream uses.

We are gravely concerned that adoption of the AB 2121 Policy will have significant land use implications for our County, some more immediate and obvious than others. We are troubled by the fact that these land use impacts are largely ignored or "glossed over" in the Substitute Environmental Document prepared in support of the AB 2121 Policy. Simply stated, we do not see how the State Water Resources Control Board will be able to fulfill its responsibility to reasonably balance the competing beneficial uses of water in Mendocino County if the AB 2121 Policy, as presently crafted, is adopted.

Our specific comments, which are intended to supplement the comments that were hand-delivered to you at the April 22, 2008 workshop in Ukiah (copy attached), are as follows:

The proposed AB 2121 Policy precludes water development in small drainages

As illustrated in Table 1, the proposed AB 2121 policy and more specifically, the policy's "Minimum Bypass Flow" criterion, effectively precludes water development in small drainages – drainage areas of one square mile or less - by restricting the "window of opportunity to divert water" to extremely wet but comparatively infrequent rainfall events.

Table 1. Minimum Bypass Flow Versus Drainage Area

Drainage (sq. miles)	(a) Mean Annual Flow (cfs)	(b) Minimum Required Bypass Flow (cfs)	24-hour Rainfall-Runoff Scenario		
			100% Runoff	50% Runoff	30% Runoff
			24-hour Rainfall Total (inches)	24-hour Rainfall Total (inches)	24-hour Rainfall Total (inches)
0.156	0.28	6.4	1.53	3.07	5.11
0.3	0.54	9.0	1.12	2.24	3.74
0.5	0.9	11.8	0.88	1.76	2.93
1	1.8	16.9	0.63	1.26	2.10
2	3.6	24.3	0.45	0.90	1.50
3	5.4	30.0	0.37	0.74	1.24
4	7.2	34.8	0.32	0.65	1.08

Notes:

(a) Mean annual flow based on an average annual runoff rate of 1,300 acre-feet per square mile of drainage area. By comparison, annual runoff in the Russian River, as measured by the USGS "Russian River near Ukiah stream gauge (gauge number 1146100), has historically averaged 1,280 acre-feet per square mile

(b) Computed using revised MBF equation: $Q_{mbf} = 9.4Q_m(DA)^{-0.48}$

For example, in the case of a 0.156 square-mile drainage (i.e., 100 acres) and assuming a mean annual flow of 0.28 cubic feet per second, the resulting Minimum Bypass Flow (Q_{mbf}), as computed by the AB 2121 Q_{mbf} criterion, would be 6.4 cubic feet per second. In order to produce a mean daily flow of 6.4 cubic feet per second from a 100-acre drainage it would need to rain at least 1.53 inches during that 24-hour period, and more realistically, since only a fraction of the rain that falls on the ground becomes surface runoff, something on the order of 3.00 inches of rain in a 24-hour period. 24-hour rainfall events equaling or exceeding 3.00 inches are infrequent even by North Coast standards, and when they do occur they typically result in widespread flooding in low lying areas. Frankly, it is hard to imagine a situation where one could reasonably argue that all of the runoff occurring as a result of 24-hour storm event of this magnitude is needed to maintain salmonid fisheries in any drainage in the North Coast.

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The land use implications illustrated by this example are significant and regrettably, not fully vetted in the Substitute Environmental Impact Document. For the most part, Mendocino County consists of comparatively rugged terrain with numerous small drainages and tributary streams. Accordingly, much of the land currently zoned for rural residential and to a lesser extent agricultural purposes is located in comparatively small drainages – drainages in which as illustrated above, surface water supply development would be effectively precluded by the AB 2121 Policy. The net effect is the near exclusion of rural residential development and irrigated agricultural activities from a large fraction of Mendocino County. Needless to say, the social and economic implications of these land use exclusions are not adequately addressed in the Substitute Environmental Document, which as noted earlier, leads us to question how the State Water Resources Control Board will be able to fulfill its responsibility to reasonably balance the competing beneficial uses of water – instream and out-of-stream – in Mendocino County if the AB 2121 Policy, as presently crafted, is adopted

An analysis of the direct and indirect economic impacts of the AB 2121 Policy is needed

As noted in the Substitute Environmental Document and illustrated above, the AB 2121 Policy will restrict water availability and in turn the geographic scope of urban and agricultural activities in Mendocino County. Land values, in areas where the AB 2121 Policy will restrict or preclude the development of surface water supplies, will be impacted and there will be increased competition between urban and agricultural water users for the existing developed or developable water supplies. Much of the developed agricultural water supply in Mendocino County consists of small storage facilities owned and operated by private individuals and entities. For example, within the Mendocino County portion of the Russian River basin there are, excluding Potter Valley, approximately 16,000 irrigated acres that collectively use roughly 18,000 acre-feet of water a year. Roughly 15,000 acre-feet of that total is derived from small privately owned facilities – facilities that will or may be impacted by the AB 2121 Policy.

While we appreciate the fact that the Substitute Environmental Document discusses some of the direct costs associated AB 2121 Policy implementation, we are very concerned that the indirect economic costs, which we believe may be substantially greater than the estimated direct costs, are not quantified. Consequently, it is difficult to accurately compare or balance the potential benefits of AB 2121 Policy implementation and more specifically, the “conservative” instream flow requirements (conservative in the sense that they may at times be more than adequate to protect salmonid fishery resources), against the economic, social and land use impacts that will be incurred as a result of AB 2121 Policy implementation.

The proposed AB 2121 Policy may in some instances promote “unreasonable uses” vis-a-vis the reliance of stream flow as the principal mechanism for the maintenance or enhancement of salmonid habitat

State law prohibits the wasting or unreasonable use of water. For the most part, the wasting of water is typically associated with excessive water diversions by out-of-stream water users. However, the courts have also determined that certain instream activities, such as the use of stored water to transport gravel in support of instream gravel mining operations, can be construed as an unreasonable use of water. We believe that under certain circumstances, particularly in highly modified stream channels (flood control channels and other manmade drainage courses, or natural channels whose morphology has been significantly altered by

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anthropogenic activities), there are opportunities to maintain if not enhance salmonid habitat without relying on excessive stream flow appropriations. Stated in other words, the minimum instream flow requirements specified by the AB 2121 Policy may at times constitute an unreasonable use of water because the fish habitat benefits they provide could be achieved through a combination of physical habitat alterations coupled with a lesser stream flow.

The instream flow requirements imposed by the AB 2121 Policy are based on hydraulic/geomorphic/fish habitat relationships associated with natural stream channels and therefore may not be applicable to all artificial or highly modified stream channels. Accordingly, we recommend that the AB 2121 Policy, or any succeeding policy, include provisions that would allow for physical habitat alterations in combination with a lesser stream flow, as opposed to relying on stream flow as the sole means of achieving suitable salmonid habitat conditions.

Similarly, we believe there are instances when the seasonal release of stored water can and should be used as mitigation, perhaps in conjunction with physical habitat alterations, to compensate for the implementation of a lesser minimum stream flow requirement -- a minimum stream flow requirement that is less than would otherwise be required pursuant to the AB 2121 Policy. For example, the augmentation of stream flows in a Class I ephemeral stream during the spring, as mitigation for stream flow diversions during the winter.

The proposed AB 2121 Policy largely ignores the ecological benefits provided by water storage facilities

As noted by the Substitute Environmental Document, the water storage facilities on the North Coast -- permitted or otherwise -- provide lake and pond-based habitats that would otherwise be unavailable to aquatic and wildlife species. In some instances habitat is provided for Federally listed species, such as the Red Legged Frog. We are concerned that the AB 2121 Policy, as presently drafted, provides little guidance with respect to meeting the instream flow requirements of salmonids while at the same time protecting State or Federally listed species that rely on pond-based habitats for their survival. How will the State Water Resources Control Board balance the ecological benefits provided by water storage facilities with the stream flow requirements of salmonids?

How will the proposed AB 2121 Policy apply to diversions of "underflow"

As previously noted, the State Water Resources Control Board reportedly asserts that essentially all of the "groundwater" in the Ukiah Valley, and most if not all of the other valleys in Mendocino County, is "underflow" and therefore subject to the State Water Resources Control Board's permitting authority. While we vigorously disagree with this interpretation -- that essentially all of the water underlying the Ukiah Valley floor is underflow -- we do acknowledge that there are instances where "underflow" occurs and is or could be diverted for out-of-stream beneficial uses. Simply stated, how does the AB 2121 Policy apply to underflow, if at all?

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The ability for groundwater to serve as an alternative water supply in Mendocino County is grossly overstated

The Substitute Environmental Document correctly notes that implementation of the AB 2121 policy may redirect water users to alternative sources, but is largely silent with respect to the actual availability of alternative water sources. For example, groundwater is identified in the Substitute Environmental Document as a potential source of water in lieu of surface water diversions. However, comparatively little is said about the availability of groundwater in Mendocino County.

As noted in various publications of the Department of Water Resources and the United States Geological Survey, the consolidated rocks of the Franciscan Complex, which dominate the geology of Mendocino County, generally yield little or no water. Mendocino County's groundwater resources are for the most part limited to the greater Ukiah Valley and a few other comparatively small and widely dispersed valleys in the region. However, even here there is a serious question as to the true availability of the groundwater supply, not because of geology but because of the State Water Resources Control Board's assertions that all of the "groundwater" in these valleys is in fact "underflow".

Once again, the land use implications are significant and regrettably, not adequately addressed in the Substitute Environmental Document. The fact is, in many areas of the County, particularly most of the small drainages discussed above, the only viable source of water is surface runoff - which the AB 2121 Policy effectively precludes from development.

Coordination with State and Federal Resource Agencies

The AB 2121 Policy is largely silent with respect to coordination and cooperation with other relevant State and Federal agencies, such as the California Department of Fish and Game, the National Marine Fisheries Service, and the United States Army Corps of Engineers - a serious omission, as past experience has shown that the processing of water right applications has been seriously hindered by the lack coordination/cooperation among the various State and Federal agencies involved. Although the AB 2121 Policy provides some guidance with respect to the development of mitigation plans and procedures for obtaining "case-by-case" exceptions to policy provisions, it is not clear for example, whether the State Water Resources Control Board staff will defer to California Department of Fish and Game and/or National Marine Fisheries staff with respect to the technical aspects and scope of any site-specific instream flow studies an applicant may elect to perform, and more specifically, if or how conflicting agency directives or differences of opinion will be resolved.

Utilize adaptive management approach to AB 2121 Policy implementation

The minimum instream flow requirements specified by the AB 2121 Policy may or may not achieve the stated objective of protecting endangered salmonid fisheries, but as previously discussed, will clearly have significant land use, economic and social impacts to Mendocino County. Given the uncertainty of success, vis-à-vis protection of salmonid fisheries, we urge the State Water Resources Control Board to proceed cautiously and adopt an adaptive management strategy with respect to policy implementation. More specifically, we recommend that the AB 2121 Policy, if adopted, be implemented on a trial basis on a much smaller geographic scale than currently envisioned.

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Encourage the development of off-stream storage by providing financial assistance

Many of the land owners potentially affected by the AB 2121 Policy are, as evidenced by their participation in "Fish Friendly Farming" and other land stewardship programs, very interested in and supportive of resource conservation programs. Typically, the failure to implement land stewardship programs is not through a lack of interest, but rather a lack of money. Based on our experience with Proposition 50 and other grant programs, we believe that significant progress toward the protection and enhancement of fisheries resources could be achieved through the implementation of a meaningful financial assistance program. Accordingly, we recommend that the State Water Resources Control Board develop and implement financial assistance programs to assist landowners and other entities with the development of off-stream storage.

Extend the comment period to allow for additional review and analysis of the AB 2121 Policy

We strongly urge the State Water Resources Control to provide additional time to review and comment on the AB 2121 Policy. The AB 2121 Policy is simply too complex, and the potential impacts to Mendocino County too significant, to fully evaluate and consider in the time frame allocated.

Once again, in closing, we appreciate the time that has been provided to review and comment on the State Water Resources Control Board staff's draft AB 2121 Policy. For the reasons stated above, we cannot endorse the AB 2121 Policy as currently crafted. However, we remain willing and in fact eager to work with the State Water Resources Control Board to develop workable alternatives.

Sincerely,



Roland A. Sanford
General Manager

Enclosure

Cc: Assemblywoman Patty Berg
Senator Patricia Wiggins
Senator Bob Dutton
Senator Sam Aanestad
Ms. Tam M. Doduc, Chair, State Water Resources Control Board
Mendocino County Water Agency Board of Directors
Mendocino County Board of Supervisors
Mr. Tom Mitchell, Chief Executive Officer, County of Mendocino
Ms. Jeanine B. Nadel, County Counsel, County of Mendocino

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(707) 463-4589 fax (707) 463-4643