

INFORMATION SHEET

PROPOSED POLICY FOR MAINTAINING INSTREAM FLOWS IN NORTHERN CALIFORNIA COASTAL STREAMS

FEBRUARY 2010 REVISIONS

The Proposed Policy for Maintaining Instream Flows in Northern California Coastal Streams (proposed Policy) was released in December 2007. A staff workshop was held in February 2008 in Santa Rosa to provide technical information regarding the proposed Policy. Two State Water Board workshops were held in August 2008 in Ukiah and Santa Rosa to receive additional public input on the proposed Policy. Over 600 comment letters were received during the public comment period that ended May 1, 2008. State Water Board staff has completed revisions to the proposed Policy based on consideration of the comments that have been received. The following is a summary of the major policy revisions.

Review of the Joint Recommendations submitted by Trout Unlimited, Wagner and Bonsignore, and Ellison, Schneider, and Harris

On April 30, 2009, Trout Unlimited, Wagner and Bonsignore Consulting Engineers, and Ellison, Schneider, and Harris, LLP, submitted Joint Recommendations for the North Coast Instream Flow Policy (TU/WB/ESH Proposal). The TU/WB/ESH Proposal contains recommendations for water right procedures and recommended review standards for calculating bypass flows and rates of diversions. Comments clarifying the Proposal were received on November 12, 2009. Important concepts presented in the proposal include: (1) providing an alternate method to evaluate the effects of cumulative diversions on fishery resources; (2) providing recommendations for implementing the proposal for projects located above salmonid spawning habitat, including evaluating the effects of fill and spill onstream dams; and (3) providing for the possibility that diversion limitations may not be needed on some diversions.

The State Water Board's consultants prepared a review of the scientific aspects of the proposal in "Review of TU/WB/ESH Proposal" (Stetson Engineers and R2 Resource Consultants, November 2009). Staff considered the concepts contained in the proposal in developing the revisions to the proposed policy that are described below. For example, staff modified the instream flow analysis requirements to take into account a given project's location in the watershed, and included a small project exemption, based on the proposal. Some of the recommendations contained in the proposal, however, including the alternative method for evaluating cumulative impacts, need more development in order to be included in the policy.

Additional detail in site-specific studies

The proposed Policy was revised to clarify that site-specific studies may be conducted as an equal alternative to using the regional criteria, and the site-specific study provisions were given more detail and clearly defined expectations. Additionally, the discussion regarding the regional criteria was clarified to explain that the intent of providing regional criteria is to provide water right applicants an avenue for quicker processing of pending applications while still being protective of fishery resources. The regionally protective criteria 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.

Modified methodology for assessment of proposed diversions' impacts to fishery resources (includes small project exemption)

The Instream Flow Analysis requirements were modified to account for the proposed diversion's location in the watershed. The analysis considers the proposed diversion, senior diversions in the watershed, and contributory flows from tributaries draining into the flow path. The modification generally allows diverters to evaluate whether their project causes adverse impacts to streamflows needed for fish habitat at and below the upstream end of the range of anadromous fish, or upper limit of anadromy. Diverters located above the upper limit of anadromy can evaluate their project with the minimum bypass flows and rates of diversion of their choice as long as the analysis demonstrates that operating their project as defined will not cause adverse impacts to streamflows needed for fishery resources at and below the upper limit of anadromy. The analysis must consider the proposed project in combination with the flow reductions by senior diverters and contributory flows from stream tributaries. Application of this modification to small diversions could result in no minimum bypass flow or rate of diversion limitations for the project.

Adjustment of regional criteria

The regional criterion for the minimum bypass flow was slightly adjusted based on the results of a sensitivity analysis that compared the relative benefits and impacts to fisheries and diversions associated with different minimum bypass flow and maximum cumulative diversion criteria (Sensitivity Study Report, Stetson Engineers and R2 Resource Consultants, June 2009). Additionally, the revised minimum bypass flow relationship for watersheds less than one square mile which contain anadromous salmonid habitat will be set equal to approximately nine times the mean annual flow for the stream, rather than using the originally proposed regional equation for these smaller watersheds (see response to comment no. 4.3.21). Finally, the diversion season will be shortened to December 15 to March 31 from the originally proposed season of October 1 to March 31.

Cumulative diversion analysis

The revised proposed Policy clarifies that the Instream Flow Analysis is a cumulative analysis of the effects of the proposed project, in combination with senior diversions, on instream flows needed for fishery resources. In addition, the Instream Flow Analysis was renamed "Cumulative Diversion Analysis."

Modifications to direct cost report

Due to the additional clarity provided in the site-specific study provisions, the costs for completing site-specific studies are now estimated to be higher than what was originally reported in the December 2007 Direct Cost Analysis Report. The Direct Cost Analysis Report was updated to incorporate these changes (see Revised Direct Cost Analysis Report, Stetson Engineers, January 2010).

Water available for diversion under the revised provisions

Staff reevaluated the example projects presented at the February 2008 workshop in Santa Rosa using the revised regional criteria and the modified methodology for assessing the effects of the proposed diversion, in combination with senior diversions, on instream flows. Table 1 summarizes the results.

Watershed approach

The watershed approach provisions were clarified regarding watershed group definitions and participants, coordination of water right processing, coordination of diversion operation, and individual water right permitting.

Incentives for voluntary modifications to existing water rights for the benefit of fish and wildlife

Section 3.3.2.3 has been added to the proposed Policy to allow projects that improve conditions for fish and wildlife to receive expedited water right processing. The processing is expedited under the assumption that the changed condition is better for fish. This section of the proposed policy includes a requirement that the project proponent agree to conditions of approval that will ensure that any water dedicated to instream beneficial use pursuant to a petition filed under Water Code section 1707 will remain instream.

Regulation of instream flow impacts resulting from unauthorized diversions

Section 9.6 has been added to the proposed Policy, which provides that the State Water Board will consider additional factors when deciding whether or not to take formal enforcement action to address an unauthorized diversion that is the subject of a pending water right application. In addition to considering listed factors when establishing monetary penalties, the State Water Board will consider the applicant's diligence in submitting the information necessary to process the pending application, and whether the applicant (1) complies with interim operating conditions consistent with section 2.2.1 of the policy, including at a minimum the season of diversion regional criterion; (2) monitors and reports diversion amounts on-line; and (3) submits a Statement of Water Diversion and Use and supplemental statements.

Administrative Civil Liability for failure to file Statements of Water Diversion and Use

Many commenters noted that the State Water Board identifies 1771 water impoundments for which the State Water Board has no record of a water right. The commenters assume that all of the impoundments require a water right and are therefore illegal. State Water Board staff believes that many, but not all, of the impoundments are illegal. The revised proposed Policy clarifies that some impoundments may not require a water right. The revised proposed Policy states that the State Water Board will contact the owners of water diversion facilities in the policy area with no known basis of right and inform them that they must either file a Statement of Water Diversion and Use or explain why they are not required to file a statement pursuant to Water Code section 5101. Persons who are required to file a statement but fail to do so within the time allowed will be assessed administrative civil liability consistent with amendments to Water Code section 5107, which become effective in February 2010. The State Water Board

will review the information contained in the Statements of Water Diversion and Use that are filed as a result of this notification to identify which water diversions are likely to be unauthorized and to identify the potential impacts of the diversions. This information will be used to determine enforcement priorities within the policy area.

Supplemental Environmental Projects

Proposed amendments to the proposed Policy state that the State Water Board will consider Supplemental Environmental Projects that are consistent with the provisions of the State Water Board's water quality policy on Supplemental Environmental Projects when imposing Administrative Civil Liability for water right violations.

Major comments on the Substitute Environmental Document

Responses to comments on the substitute environmental document (SED) are provided in Volume 2 of the Response to Public Comment Document. The following paragraphs highlight staff's responses to two major comments on the SED.

- **Cumulative Impacts.** Section 6.9 of the draft SED discusses the potential cumulative impacts of the proposed Policy. As explained in that section, the proposed Policy could result in cumulative impacts associated with increased greenhouse gas emissions. In addition, in conjunction with other land use and water development projects, the proposed Policy could result in cumulative impacts similar to the potential indirect impacts discussed in section 6 of the draft SED. In response to comments concerning the adequacy of the cumulative impacts analysis, more detail concerning the latter category of cumulative impacts is provided in the response to comment 23.6.11.
- **Mitigation Measures.** For purposes of CEQA, the proposed project is adoption of the North Coast Instream Flow Policy. The Policy itself will not approve any particular water diversion project(s). Moreover, in general the Policy will operate to protect the environment by ensuring that water rights are administered in a manner designed to maintain instream flows.

The proposed Policy requires limitations on diversions which could lead some affected parties to take actions that could in turn result in indirect environmental impacts. An indirect physical change in the environment is a physical change which is not immediately related to adoption of the policy, but which may occur as a result of the policy being adopted.

As explained in chapter 7 of the draft SED, future CEQA reviews conducted by the State Water Board or by another lead agency can be expected to identify any significant project-specific environmental effects and mitigate them to less-than-significant levels. In addition, other regulatory mechanisms can be expected to provide opportunities for minimizing and avoiding significant environmental effects.

In response to comments that the draft SED did not adequately describe mitigation measures, the response to comment 23.7.1 provides some examples of potentially significant indirect impacts of the Policy and the regulatory requirements and mitigation measures for these impacts that may be incorporated at a project-specific level.

Responses to Public Comments

The responses to comments are primarily contained in two volumes. A table of contents is provided identifying the topics covered in each volume.

Additional comments were received after the public comments were compiled. On April 30, 2009, Trout Unlimited, Wagner and Bonsignore Consulting Engineers, and Ellison, Schneider, and Harris, LLP submitted Joint Recommendations for the North Coast Instream Flow Policy (TU/WB/ESH Proposal), which contains recommendations for water right procedures and recommended review standards for calculating bypass flows and rates of diversions. Brian Johnson of Trout Unlimited submitted additional comments on November 12, 2009 and December 11, 2009. Staff's responses to these comments are provided in the following documents:

- Responses to comments contained in the Joint Recommendations
- Review of the TU/WB/ESH Proposal, prepared by Stetson Engineers and R2 Resource Consultants, which contains a technical evaluation of the scientific aspects of Section 5 and the Appendix of the Joint Recommendations.
- Responses to Comments Received from Brian Johnson on November 12, 2009 and December 11, 2009.

The responses to public comments were prepared prior to the final revisions to the proposed Policy. The responses, therefore, do not reflect all wording and terminology changes that were incorporated into the January 2010 revision.

Documentation

The documents below are being released with the proposed Policy.

- Proposed Policy
- Revised Direct Cost Analysis
- Responses to Peer Review Comments (Stetson and R2 Resource Consultants, June 2009)
- Sensitivity Study (Stetson and R2 Resource Consultants, June 2009)
- Responses to Public Comments, volumes 1 and 2, January 2010
- Responses to Joint Recommendations
- Review of TU/WB/ESH Proposal (Stetson Engineers and R2 Resource Consultants, November 2009)
- Responses to comments from Brian Johnson dated November 12, 2009 and December 11, 2009.

No revisions were made to the following documents:

- Scientific Basis and Development of Alternatives Protecting Anadromous Salmonids – Technical Report and Appendices, dated December 2007 and March 14, 2008
- Substitute Environmental Document and Appendices, dated December 2007 and March 14, 2008.

Table 1. Summary of Modeling Results

Summary of Modeling Results for
Application of North Coast Instream Flow Policy vs. DFG-NMFS 2002 Guidelines¹

Application #	Name	Amount Requested	Bypass (cfs)				Modeled Amount Collected (af)				Period of Record (years)	Watershed
			DFG-NMFS	January 2008 Draft Policy	March 2008 Draft Policy	January 2010 Draft Policy	DFG-NMFS	January 2008 Draft Policy	March 2008 Draft Policy	January 2010 Draft Policy		
A030363	Todd	10	59	171	179	173	9.8	9.6	9.6	9.4	55	Russian
A031623 ³	Franciscan	40	0.2	1.8	1.9	0.00	33.5	18.5	17.7	35.5	20	Russian
A030740 ³	Sutter Home	26	0.11	0.08	0.08	0.00	19.0	15.4	15.3	20.9	12	Napa
A031250	Anderson Cr.	42.0	41.9	77.2	80.9	78.0	40.6	40.2	40.1	40.2	56	Navarro
A030553	Schoeneman	30.0	1.6	13.0	14.1	12.5	29.5	17.5	16.4	17.1	56	Navarro
A031080	Schoeneman	15.0	2.2	15.5	16.8	15.7	14.7	12.0	11.6	11.9	56	Navarro
A029772 ^{2,3}	Sass	12	0.02	0.13	0.14	0.00	11.7	1.2	1.2	17.4	20	Russian
A030994 ^{3,4}	Savoy	9	0.01	0.05	0.06	0.00	4.0	0.2	0.1	5.3	56	Navarro
A030794 ^{3,4}	Incapture Meadows	12.5	0.01	0.08	0.08	0.00	3.1	0.1	0.1	4.3	56	Navarro
						totals	165.9	114.7	112.1	162.0		

¹ Comparison of flow related components of DFG-NMFS Guidelines and Draft Instream Flow Policy only.

² Project is a 40 af nonconsumptive reservoir, requested amount reflects a conservative estimate of evaporation and seepage

³ Project's POD is above anadromy and meets small project exemption

⁴ Project's upstream drainage area is less than 5 acres