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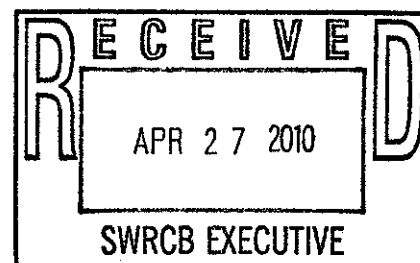
SAN FRANCISCO • 329 Bryant St., Ste. 3D, San Francisco, CA 94107 • T 415.777.5600 • F 415.777.9809  
SACRAMENTO • 9333 Sparks Way, Sacramento, CA 95827 • T 916.361.3887 • F 916.361.3897

Thomas N. Lippe  
Brian Gaffney  
Keith G. Wagner  
Jennifer L. Naegele  
Celeste C. Langille  
Kelly A. Franger  
Erin C. Ganahl

April 26, 2010

Via Email: [commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)

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



**Re: Proposed Policy for Maintaining Instream Flows in Northern California Coastal Streams**

Dear Ms. Townsend:

This office represents Living Rivers Council ("LRC") with respect to the State Water Board Proposed Policy for Maintaining Instream Flows in Northern California Coastal Streams. Living Rivers Council objects to approval of this Policy on the grounds that the Policy's Substitute Environmental Document fails to comply with CEQA for the reasons set forth below. In addition to the CEQA issues identified in my comment letter dated March 26, 2010, the Substitute Environmental Document is informationally deficient because it fails to identify mitigation measures for identified significant impacts.

**1. An SED Must Identify and Analyze Mitigation Measures for Significant Environmental Impacts.**

Under CEQA, a substitute environmental document "must include alternatives to the proposed project and mitigation measures to minimize significant adverse environmental effects." (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 127, citing § 21080.5, subd. (d)(3)(A).) Similarly, the Board's regulations require that any "standard, rule, regulation, or plan proposed for board approval or adoption must be accompanied by . . . a written report [that includes] . . . [m]itigation measures to minimize any significant adverse environmental impacts of the proposed activity." (23 Cal. Code Reg. § 3777, subd. (b)(3).)

As with the Fish and Game Commission's regulation in *Mountain Lion*, the Board's regulation "tracks the language of section 21002, one of the substantive provisions of CEQA which the Commission is required to carry out even when operating pursuant to its certified regulatory program." (See *Mountain Lion, supra*, 16 Cal.4th at p. 127, citing Guidelines, § 15250 and *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal. 4th 1215, 1230-1231.) If an agency "satisfies its CEQA obligation to mitigate or avoid significant environmental effects whenever feasible, it has also complied with the corresponding provision in its certified regulatory program." (*Mountain Lion, supra*, 16 Cal.4th at p. 127.)

CEQA's mandate that agencies "refrain from approving projects for which there are feasible alternatives or mitigation measures is effectuated in section 21081." (*Mountain Lion, supra*, 16 Cal.4th at p. 127, citing *City of Poway v. City of San Diego* (1984) 155 Cal.App.3d 1037, 1045-1046.) Section 21081 prohibits an agency approving a project with significant environmental effects unless it makes specific findings about mitigation measures. (*Mountain Lion, supra*, 16 Cal.4th at p. 127, citing § 21081.) This ensures there is evidence that the agency actually considered mitigation measures, and publically demonstrates the analytical process by which the agency arrived at its decision. (*Mountain Lion, supra*, 16 Cal.4th at p. 127, citing *Citizens for Quality Growth v. City of Mt. Shasta* (1988) 198 Cal.App.3d 433, 440-441.) The agency bears the burden of affirmatively demonstrating that approval of a project with significant impacts followed meaningful consideration mitigation measures. (*Mountain Lion, supra*, 16 Cal.4th at p. 127, citing *City of Poway, supra*, 155 Cal.App.3d at p. 1046.)

## 2. The SED Does Not Adequately Identify or Analyze Mitigation Measures.

The SED identified 58 "potentially significant" impacts. (SED at pp. 85-86.) The SED states that "[i]n many cases, the significance of the impacts . . . will depend on the timing, specific components, site-specific location, and other characteristics of the project-specific actions being proposed." (SED at p. 85.)

The SED's discussion of mitigation measures for these potentially significant impacts consists of a single paragraph, deferring all identification and analysis of mitigation measures to future site-specific environmental review:

**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 also be expected to provide opportunities for minimizing and avoiding significant environmental effects.** The State Water Board anticipates that the Instream Flow Policy will be used in reviews of water right applications, small domestic use and livestock stockpond registrations, diversions from subterranean streams, and water right petitions. **Terms and conditions can be added** as needed to water rights issued by the State Water Board to ensure that the specific projects are carried out in ways that avoid or minimize the potential significant environmental effects.

(SED at p. 87 [emphasis added].) Appendix D of the Policy sets forth guidance for developing mitigation plans, providing specific requirements for non-native species eradication, gravel and wood augmentation, and riparian habitat replacement. (Policy, Appendix D at pp. D-1 – D-3.) Appendix D is silent regarding mitigation measures for all other potential impacts, including those to aesthetics, air quality, hazardous materials, noise, population, public services, and transportation. (See *ibid.*) For example, the SED discloses that increased groundwater extraction in response to the policy may lead to reduced surface flows that could adversely impact water quality and recreation.

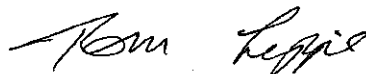
Appendix D does not identify any measures to mitigate these impacts or otherwise provide guidance for developing appropriate mitigation measures. Failure to address mitigation measures for this particular impact is especially problematic because the impact causes the precise harm that the Policy aims to avoid: reduction of instream flows.

The fact that the SED analyzes impacts at a programmatic level does not obviate the Board's duty to identify and analyze mitigation measures. "While proper tiering of environmental review allows an agency to defer analysis of certain details of later phases of long-term linked or complex projects until those phases are up for approval, CEQA's demand for meaningful information 'is not satisfied by simply stating information will be provided in the future.'" (*Environmental Protection Information Center v. California Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 502 [EPIC].) "Tiering does not excuse the lead agency from adequately analyzing reasonably foreseeable significant environmental effects of the project and does not justify deferring such analysis to a later tier EIR or negative declaration." (*Id.* at p. 503, quoting Cal. Code Regs., tit. 14 § 15152, subd. (b).)

The SED contends that "[i]t is impossible to predict which persons will take [actions in compliance with or in avoidance of the policy, causing indirect impacts], when or where the actions may occur, or precisely how many persons will take [the anticipated actions]." (See SED at p. 49.) This contention does not obviate the Board's duty to identify and analyze mitigation measures because the SED did, in fact, identify potentially significant impacts, and the Board has not shown that a general discussion of mitigation measures for such impacts is infeasible. "[W]here the exact parameters of generally foreseeable future actions cannot confidently be predicted, the full-disclosure goals of CEQA . . . may nonetheless be met with an analysis that 'acknowledges the degree of uncertainty involved . . . and discloses the significant foreseeable environmental effects of each alternative, **as well as mitigation measures to minimize each adverse impact.**'" (*Ebbetts Pass Forest Watch v. California Dept. of Forestry & Fire Protection* (2008) 43 Cal.4th 936, 955, quoting *Vineyard Area Citizens, supra*, 40 Cal.4th at p. 434 [emphasis added].)

Thank you for your attention to this matter.

Very Truly Yours,



Thomas N. Lippe