

**STATE WATER RESOURCES CONTROL BOARD
BOARD MEETING SESSION – OFFICE OF CHIEF COUNSEL
OCTOBER 16, 2012**

ITEM 14

SUBJECT

CONSIDERATION OF A PROPOSED RESOLUTION TO SET ASIDE RESOLUTION NO. 2010-0021, WHICH ADOPTED A POLICY FOR MAINTAINING INSTREAM FLOWS IN NORTHERN CALIFORNIA COAST STREAMS AND CERTIFIED COMPLIANCE WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT, IN ORDER TO COMPLY WITH A WRIT OF MANDATE ISSUED IN LIVING RIVERS COUNCIL V. STATE WATER RESOURCES CONTROL BOARD (SUPER. CT. ALAMEDA COUNTY, 2012, NO. RG10-543923)..

DISCUSSION

On August 9, 2012, the superior court entered judgment against the State Water Board in *Living Rivers Council v. State Water Resources Control Board* (Sup. Ct. Alameda County, 2012, No. RG10-5435923). The case is a California Environmental Quality Act (CEQA) challenge to the State Water Board's adoption in 2010 of the Policy for Maintaining Instream Flows in Northern California Coastal Streams (Policy). The superior court has issued a writ of mandate to the State Water Board, directing the Board to set aside [Resolution No. 2010-0021](#), which adopted the Policy and certified the CEQA documentation that had been prepared in connection with the Policy.

The Board adopted the Policy in order to comply with a statutory mandate, enacted in 2004, which required the Board to adopt principles and guidelines for maintaining instream flows in Northern California coastal streams as part of state policy for water quality control, for purposes of water right administration. (Wat. Code, § 1259.4.) The Policy applies to applications to appropriate water from surface streams and subterranean streams flowing through known and definite channels, water right petitions, and water right registrations. The geographic scope of the Policy encompasses coastal streams from the Mattole River to San Francisco and coastal streams entering northern San Pablo Bay, and extends to five counties: Marin, Sonoma, and portions of Napa, Mendocino, and Humboldt Counties.

In order to comply with CEQA, the State Water Board prepared a substitute environmental document (SED) in connection with the Board's consideration and adoption of the Policy. The SED included a programmatic analysis of the potential indirect environmental impacts of the policy, which are attributable to actions that diverters may take to either comply with or avoid the requirements of the policy. One of the potential indirect impacts identified in the SED was a potential increase in groundwater pumping, which could occur if diverters switch from surface water diversions to groundwater pumping in order to avoid the limitations on surface water diversions imposed by the Policy.

The superior court held that the Board failed to comply with CEQA because the SED did not evaluate as a mitigation measure certain subterranean stream delineations that had been prepared by the Board's consultant. (Final Statement of Decision, pp. 14-16, 30.) In support of this conclusion, the court reasoned that the subterranean stream delineations are a facially feasible enforcement tool that could mitigate the potential impacts of increased groundwater pumping. (*Id.* at pp. 14-16.) The court also held that the SED was inadequate because it did

not clearly disclose that for many wells pumping percolating groundwater there would be no project-level CEQA review or regulation because four of the five counties within the policy area have limited or no laws regulating groundwater use. (*Id.* at pp. 18-24.)

In order to comply with CEQA, the writ provides that the Board must take the following two actions: (1) evaluate the subterranean stream delineations as a potentially feasible mitigation measure for the anticipated increased use of percolating groundwater and make appropriate disclosures regarding that evaluation and resulting decision; and (2) present sufficient information to enable the decision makers and the public to understand and to consider meaningfully the limited legal options facing the Board to mitigate the expected increase in the use of percolating groundwater and the implications for the effectiveness of the vacated Policy. The writ leaves to the Board's discretion whether it is necessary to recirculate the SED, in whole or in part.

POLICY ISSUE

Should the State Water Board approve the proposed resolution setting aside Resolution No. 2010-0021 in order to comply with the writ of mandate issued by the Alameda County Superior Court.

FISCAL IMPACT

The additional CEQA documentation required by the superior court can be prepared using existing fiscal resources.

REGIONAL BOARD IMPACT

None.

STAFF RECOMMENDATION

Staff recommend that the State Water Board adopt the proposed resolution.

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STATE WATER RESOURCES CONTROL BOARD RESOLUTION NO. 2012-

ADOPTION OF A RESOLUTION SETTING ASIDE RESOLUTION NO. 2010-0021

WHEREAS:

1. Assembly Bill 2121 (Stats. 2004, ch. 943, §§ 1-3) added sections 1259.2 and 1259.4 to the California Water Code. Water Code section 1259.4 requires the State Water Resources Control Board (State Water Board or Board) to adopt principles and guidelines for maintaining instream flows in northern California coastal streams for the purposes of water right administration. The principles and guidelines must be adopted as part of state policy for water quality control pursuant to chapter 3, article 3 (commencing with section 13140) of the Porter-Cologne Water Quality Control Act (Wat. Code, § 13000 et seq.).
2. In order to comply with Water Code section 1259.4, the State Water Board developed a Policy for Maintaining Instream Flows in Northern California Coastal Streams (Policy). The Policy established principles and guidelines for maintaining instream flows for the protection of fishery resources, while minimizing the water supply impacts of the Policy on other beneficial uses, including irrigation, municipal use, and domestic use. The Policy applied to applications to appropriate water from surface streams and subterranean streams flowing through known and definite channels, small domestic use and livestock stockpond registrations, and water right petitions. The geographic scope of the Policy encompassed coastal streams from the Mattole River to San Francisco and coastal streams entering northern San Pablo Bay, and extended to five counties: Marin, Sonoma, and portions of Napa, Mendocino, and Humboldt Counties.
3. The adoption of a policy for water quality control is a regulatory program that has been certified by the State's Secretary for Resources as exempt from the requirement of the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.) to prepare an Environmental Impact Report (EIR) or Negative Declaration. (Cal. Code of Regs., tit. 14, § 15251, subd. (g); Cal. Code of Regs., tit. 23, § 3775.) Accordingly, the State Water Board prepared a substitute environmental document (SED) in lieu of an EIR or Negative Declaration. The SED consisted of a draft SED dated December 2007 and responses to comments on the draft SED. The CEQA documentation prepared in connection with the Policy also included a scientific basis report, a sensitivity study, and responses to comments submitted during the public participation phase in the development of the Policy.
4. The SED included a programmatic analysis of the potential indirect environmental impacts of the Policy, which are attributable to actions that diverters may take to either comply with or avoid the requirements of the Policy. One of the potential indirect impacts identified in the SED is a potential increase in groundwater pumping, which could occur if diverters switch from surface water diversions to groundwater pumping in order to avoid the limitations on surface water diversions imposed by the Policy.
5. During a meeting held on April 27 and May 4, 2010, the State Water Board approved [Resolution No. 2010-0021](#), which adopted the Policy and certified that the draft SED and other environmental documentation complied with CEQA.

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6. On October 27, 2010, Living Rivers Council, an unincorporated association of individuals interested in protecting the Napa River, filed a petition for writ of mandate in Alameda County Superior Court, seeking to compel the State Water Board to set aside Resolution No. 2010-0021. Among other things, Living Rivers Council alleged that the State Water Board had violated CEQA because the discussion of mitigation measures contained in the SED was inadequate.
7. On August 9, 2012, the superior court granted in part Living Rivers Council's petition for writ of mandate, and entered judgment against the State Water Board. (*Living Rivers Council v. State Water Resources Control Board* (Sup. Ct. Alameda County, 2012, No. RG10-5435923).) The court held that the Board failed to comply with CEQA because the SED did not evaluate as a mitigation measure certain subterranean stream delineations that had been prepared by the Board's consultant. (Final Statement of Decision, pp. 14-16, 30.) In support of this conclusion, the court reasoned that the subterranean stream delineations are a facially feasible enforcement tool that could mitigate the potential impacts of increased groundwater pumping. (*Id.* at pp. 14-16.) The court also held that the SED was inadequate because it did not clearly disclose that for many wells pumping percolating groundwater there would be no project-level CEQA review or regulation because four of the five counties within the policy area have limited or no laws regulating groundwater use. (*Id.* at pp. 18-24.)
8. In accordance with the court's decision and judgment, discussed above, the court issued a writ of mandate to the State Water Board on August 10, 2012. The writ directs the Board to set aside Resolution No. 2010-0021, thereby vacating the Board's adoption of the Policy and certification that the SED had been completed in compliance with CEQA. The writ provides that the Board is not precluded from treating the vacated Policy as a guideline and processing water right applications consistent with the vacated Policy until the CEQA process is completed, if consistent with Water Code section 275, Water Code section 1200 et seq., and other laws.
9. In order to comply with CEQA, the writ provides that the Board must take the following two actions: (1) evaluate the subterranean stream delineations as a potentially feasible mitigation measure for the anticipated increased use of percolating groundwater and make appropriate disclosures regarding that evaluation and resulting decision; and (2) present sufficient information to enable the decision makers and the public to understand and to consider meaningfully the limited legal options facing the Board to mitigate the expected increase in the use of percolating groundwater and the implications for the effectiveness of the vacated Policy. The writ leaves to the Board's discretion whether it is necessary to recirculate the SED, in whole or in part.

THEREFORE BE IT RESOLVED THAT:

The State Water Board:

1. As required by the writ of mandate issued by the Alameda County Superior Court, Resolution No. 2010-0021 is set aside. As provided by the court, the vacated Policy for Maintaining Instream Flows in Northern California Coastal Streams may be treated as a guideline pending completion of the CEQA process.

D R A F T

2. The Division of Water Rights is directed to prepare the additional CEQA documentation necessary to comply with the court's decision and recirculate all or part of the SED, if necessary. Once the additional CEQA documentation has been completed, the Division is directed to prepare any necessary or appropriate revisions to the Policy for the State Water Board's consideration. The State Water Board will consider re-adoption of the Policy, with or without revisions, at a future Board meeting.

CERTIFICATION

The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Resources Control Board held on October 16, 2012.

Jeanine Townsend
Clerk to the Board