

# Water Review

*A Perspective On Western Water Issues Prepared By The Family Farm Alliance And Its Members*

## CALIFORNIA

# Throwing Water At The Problem

State Board's Policy Plan Promises Radical Fish Flow  
Impacts On North Coast's Agricultural Water Users



A Napa Valley vineyard. The new policy would affect many small farms.

**T**he California State Water Resources Control Board (State Board) has developed a draft policy for maintaining instream flows in Northern California coastal streams (instream flow policy) to protect fishery resources, primarily salmon and steelhead species.

However, those most affected by the instream flow policy would be agricultural water users, who question if, after all of the water is foregone and money spent, the fishery would actually be improved.

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# Instream: Plan Promises Big Impacts On North Coast Ag Users

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## Background

The instream flow policy will impact 3.1 million acres and 5,900 stream miles. The policy covers portions of Humboldt, Mendocino, Sonoma, Napa, and Marin counties.

Agricultural water users will be most impacted as the only large urban water user in the region has been exempted from the policy. The majority of the agricultural diverters are vineyard owners, many of whom have very modest operations.

The State Board is required to develop “policies and guidelines” for determining instream flows in north coast streams by state law enacted in 2004. The policy was shaped by a 2001 State Board petition by the Peregrine Chapter of the Audubon Society and Trout Unlimited. The policy considered and would replace the 2002 Department of Fish and Game and National Marine Fisheries Service joint draft guidelines (draft guidelines”).

**IN MANY RESPECTS**, the instream flow policy is much more restrictive than the draft guidelines, which were never formally adopted but were nevertheless used by the State Board to process water right applications.

The proposed instream flow policy would make the water right application process even more complex and expensive than it has been in the past. This is especially problematic for the north coast, which has the largest backlog of pending water right applications on file with the State Board. Some of these 300 applications have been awaiting action for decades for State Board approval.

Applicants have simply been unable to get the State Board to process their applications, and have spent tens of thousands of dollars trying to comply with the State Board’s ever-changing requirements.

The instream flow policy would make the water right application process much more complex and much more expensive than before, with about an



The Gualala River: One of many affected streams.

equal likelihood of getting a decision from the State Board.

## The Policy

The instream flow policy would apply not only to new water rights, but also to some existing water rights. If adopted, the instream flow policy would apply to proposed and existing facilities identified in applications for new water rights, petitions for changes to existing water rights, petitions for extensions of time, small domestic use registrations, and stock pond registrations.

**THE INSTREAM FLOW POLICY** would not apply to water rights that are outside the authority of the State Board, including riparian rights, pre-1914 appropriative rights (which preceded California’s State Board authority), and groundwater diversions.

Within the project area, there were two streams specifically exempted from the policy. They are the Russian River mainstem below Lake Mendocino, and Dry Creek downstream of Lake Sonoma.

These streams are already subject to State Board decisions, which may explain why they

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A lush and beautiful farm nestles against the Sonoma County hills (left) while some of the county's vineyards contribute to California's wine culture and industry. Many of Sonoma County's farming regions stand to be included in the controversial new North Coast Instream Flow Policy.



## Instream: Bypass Flow Limitations On Diversions Sought

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were exempted. The Russian River, however, is also the primary water source for the region's largest urban area.

The draft instream flow policy would require stringent bypass flow limitations on diversions. The policy requires a large minimum rate of flow before water diversions may begin. The policy also includes a maximum flow rate, above which diversions must cease. Therefore, during peak storm events in the winter, diversions would be prohibited. Diversions are also prohibited in the spring and summer. The result is an extraordinarily narrow window in which water diversions may occur, which will significantly limit opportunities to develop a reliable water supply.

The specific minimum bypass flows are to be determined through two complex mathematical equations that apply across the region and only vary depending on whether a watershed is more or less than 290 square miles.

The size of the watershed is to be measured from the "point of anadromy," which is the point in the watershed above which salmon and steelhead do not exist. The State Board has not identified the locations of these points.

At the same time, the State Board has stated that it may not consider a currently impassible barrier (like an existing dam) the point of anadromy, if the barrier could be made passable in the future.

The water right applicants will have to identify the point of anadromy for their projects, and then debate that determination with the State Board.

The State Board has also failed to identify the stream classes (Class I, Class II, or Class III) for each stream in the project area, even though this determination defines where onstream storage could be permitted in the future. However, the State Board's failure to identify stream classes probably does not hinder the public's understanding of the policy because, in reality, essentially all onstream storage would be prohibited. The State Board would prohibit new onstream storage on Class I streams.

The State Board would prohibit new onstream storage on Class II streams (although there are some limited exceptions). The State Board would permit onstream storage on Class III streams, with mitigation, but there probably are no streams in the region that could be classified as Class III.

The policy also requires a calculation of the maximum cumulative diversion rate.

This is an upper limit on flow rate that limits diversions, specifically during flood events, making almost all high flows unavailable for diversion and use.

The quantity of water available for diversion is further limited by existing uses, so applicants

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## Policy: Huge Grower Costs Could Take A Big Farming Toll

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would have to calculate consumption by senior diverters. Not only is it difficult to determine the extent of existing diversions, but it may also mean there is no water available for diversion by a water applicant during the periods when water is abundant.

**EXISTING WATER** impoundments that fall within the policy will have to build bypass flow structures (or move the impoundment off-stream). A passive system using a channel or pipe around an impoundment is preferred but where that is impossible, an automated system will be required. The policy also requires habitat and biological resource mitigation, and monitoring and reporting. Applicants would have to complete compliance plans developed by pre-approved engineers and biologists.

The cost of compliance with these new requirements is estimated by the State Board as ranging from \$100,000-\$3,000,000, depending on the project. The increased cost and reduced project yield could mean that many of the projects awaiting State Board approval would no longer be viable.

California water law requires that beneficial uses of water be balanced, and that water be put to its highest and best use (which is defined as being primarily urban and agricultural uses).

However, the instream flow policy attempts to provide maximum protection to the fishery without any consideration of the needs of other beneficial uses, such as agricultural uses, and the small municipalities and the small domestic users throughout the region.

### Concerns And Questions

After all water and financial resources that would be required by the new policy have been spent, the water right applicants have serious concerns whether or not whether the instream flow

policy would actually provide measurable benefits to the fishery.

While the instream flow policy claims to target “maximum protection” for the fishery, it is not clear that is what the State Board would achieve. The policy does not account for the variety of factors that have contributed to the decline of salmon and steelhead species of concern, including ocean conditions, food availability, and over fishing.

The level of flow on every little stream is not necessarily a primary contributing factor to the regional fishery decline. The policy, for example, will require significant bypass flows in areas where fish are almost never found, even in unimpaired conditions.

The policy will also require the dedication of significant winter bypass flows in areas where the force of the flood flows are actually causing habitat degradation through channel incision and destruction of riparian habitat. In these locations, it is suspected that more flow will not protect the fishery or enhance population abundance.

**THE STATE BOARD** has indicated the policy would be reviewed periodically to determine its effectiveness and evaluate whether the policy is sufficiently protecting the fishery. However, the State Board has no ability to measure the relative success of the policy, because it has not defined success and has no baseline from which to calculate “improvement.”

For example, the draft instream flow policy does not make a link between the policy’s requirements and actual increases in the size of the fishery. The policy does not include an estimate of the size of the populations of the species of concern, and it does not describe the extent that the policy will protect or increase those populations. There are no estimates of the extent of habitat improvement that would result and, indeed, no quantification of the degree of “threat” posed by currently proposed water applications and petitions.

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## Policy: Did State Board Simply Go Too Far With New Rules?

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The water applicants are concerned that since the State Board has not defined success, the State Board will further reduce water availability in the future, without even knowing if the last large dedication of water provided any measurable fishery benefits.

The State Board's statistical analysis and use of data in developing the policy are also causes for concern. The policy appears to have been developed based on data from other states, in watersheds with very different topography and hydrology.

The State Board had to make a variety of statis-



Farmland in Northern California's Mendocino County.

tical assumptions in an attempt to make the data fit its notion of protectiveness. The water right applicants believe many assumptions are scientifically unsupportable. As the statistical analysis was the basis for determining the required bypass flows, for example, the policy may not be scientifically defensible.

Due in part to the data and statistical analysis that was used, the instream flow policy may not be suited for very small watersheds, which include approximately two-thirds of pending applications.

The State Board has stated that variances from

the policy may be available, but it has provided no procedures for processing variance requests, and no criteria for judging them. Based on the stringency of the policy, the State Board may be grossly underestimating the number of variance requests it will receive.

**IT MAY BE** that the State Board just went too far in trying to develop a policy that would be universally suited to such a large region, with such a variety of hydrologies, topographies, and other environmental considerations.

The one-size-fits-all approach has profound limitations when the appropriate environmental considerations are not the same in each watershed. While the State Board considered many of the relevant factors for establishing flows, it would probably have developed a more useful and effective policy if it had stopped at just developing "guidelines," as current state law requires, rather than an expansive new regulatory program.

### Lack Of Adequate Notice

The State Board has another fundamental problem. It failed to provide adequate notice to the public and many potentially affected individuals continue to be unaware of the policy.

The policy was released for public comment and review on December 28, 2007. Initially, the public comment period was only 45 days. After multiple requests for an extension of the comment period, the State Board extended the public comment deadline until May 1, 2008, at noon.

Sometime on or after March 14, 2008, however, the State Board released an addendum with significant changes. In fact, the main formula for determining bypass flows was changed, in addition to many smaller changes scattered throughout the 800 pages of policy, substitute environmental document, and supporting technical appendices.

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## Policy: Reconsideration?

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The instream flow policy is so complex that the average person cannot determine how he or she would be impacted without assistance of consultants with engineering and biological expertise.

For this reason, these mid-comment period changes to the policy are particularly problematic because any technical review of the policy that has been completed will have to be re-done. Those aware of the policy will have even less time to try to understand how they may be impacted.

### The Solution?

The State Board must reconsider its proposed policy. The State Board has gone into a level of detail that is inappropriate and scientifically unjustifiable in such a varied landscape.

**EXISTING STATE LAW REQUIRES** only that the State Board develop “policies and guidelines,” not an entirely new regulatory program. The State Board should adopt a framework for evaluating water right applications that both water right applicants and State Board staff can easily understand and apply. The State Board’s policy should provide fishery protection, while also satisfying the California Constitution’s mandate that our state’s water supply be put to beneficial use.

The public, particularly landowners who are potentially affected by the policy, are strongly encouraged to submit comments to the State Board by the May 1, 2008, public comment deadline urging the State Board to reconsider its instream flow policy.

**FOR MORE INFORMATION** on the instream flow policy, please contact Becky Sheehan at the Law Offices of Kronick, Moskovitz, Tiedemann and Girard, 400 Capitol Mall, 27<sup>th</sup> Floor, Sacramento, California 95814. Phone: (916) 321-4500. Or visit: [www.kmtg.com](http://www.kmtg.com).

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