

December 22, 2006

Ms. Karen Niiya  
Mr. Eric Oppenheimer  
State Water Resources Control Board  
PO Box 2000  
Sacramento, CA 95812-2000

Re: **Supplemental Scoping Comments of Wagner & Bonsignore Consulting Civil Engineers, James C. Hanson Consulting Civil Engineers, and Ellison, Schneider & Harris L.L.P on the North Coast Instream Flows Policy**

Dear Ms. Niiya and Mr. Oppenheimer:

On behalf of numerous landowners and water rights holders in the North Coast region, Wagner & Bonsignore Consulting Civil Engineers, James C. Hanson Consulting Civil Engineers, and Ellison, Schneider & Harris L.L.P. offer the State Water Resources Control Board supplemental scoping comments on the North Coast Instream Flows Policy. We have been working diligently with other stakeholders in the AB 2121 North Coast Water Rights Working Group, which has and will continue to develop recommendations for the Instream Flows Policy. However, given the diversity of the group's participants and the complexity of the water rights and instream flows issues in the North Coast, the Working Group has not yet been able to provide consensus recommendations to the Board. Based on those frequent discussions, we amplify and refine our previous scoping comments to assist the Board in evaluating a feasible policy that both accomplishes instream flow improvement and facilitates the water rights process.

**General Approach to Processing Applications.** Although we respect the Board's desire to simplify water rights administration, a one-size-fits-all application screening tool like the NMFS-DFG Draft Guidelines is not equipped to consider site-specific resource requirements. Any mechanistic approach to making permitting decisions would likely be unable to capture the complexity of the Board's required public interest findings, or result in establishing and maintaining accurate stream- and watershed-specific instream flow requirements. Adoption of mechanistic screening tools will not expedite the processing of applications, but instead will lead to cancellations and continued disputes – rather than undertaking the necessary on-the-ground gauging and biological assessments that will provide the bases for sound decision-making. We continue to urge that a watershed based approach coupled with a special North Coast permit program is the preferred alternative to effectively process the backlog of water rights applications and accomplish instream flow improvement.

**Bypass Flow Requirements and Dry Year Relief.** We concur that every new water rights permit in the North Coast should include an appropriate bypass requirement. The only scientifically defensible approach for determining bypass requirements, however, is to conduct hydrological and fisheries studies for each watershed. A bypass flow requirement specifically

tailored to a diversion and specific stream conditions will reassure water users that the restrictions on diversions are not arbitrary and will be effective. Water users will embrace Draft Guidelines-like bypass requirements as an interim standard until stream-specific bypass requirements are developed, provided they are narrowly tailored to the diversion, they have sufficient flexibility to address special circumstances such as dry years, and they are scientifically rigorous.

The Draft Guidelines bypass flow recommendations, and in particular the February median bypass flow and December 15 to March 31 season of diversion elements, were developed for the protection of salmonids, and do not provide the bypass flow requirements that should be applied in all circumstances. We request that the Board clarify when no bypass is necessary (e.g., in headwater streams with no fishes), and distinguish between bypass flows for streams with only non-salmonid fishes and for streams with salmonids. Other factors should also be taken into account. For example, if there are no salmonids present at a diversion, the need to bypass flows for salmonids would better be determined at the next confluence if salmonids are present at that lower point.

If a February median-based bypass flow requirement were to be adopted, it must include a provision for dry-year relief. February median flows rarely occur in dry years, so bypassing all flows up to the February median would halt diversions even though those beneficial high flows would not occur. The Board should consider various options, including a dry year standard of one-half of the February median flow, a dry year February median (the median February flows that occur in dry years only), or some other standard that would maintain necessary base flows for salmonids but allow some diversions for beneficial uses.

**Cumulative Effects.** The State Board's use of the Draft Guidelines Cumulative Flow Impairment Index (CFII) calculation has been a fiasco. It provides no meaningful information. The CFII calculation will always show larger calculated index percentages for diversions higher in the watershed. It does not accurately reflect true cumulative effects or effects at the places in the watershed where it matters, i.e., where fish are present. The more time-consuming and costly traditional approach of conducting full hydrological analyses of impaired versus unimpaired flows at the relevant points of interest is a more effective tool for assessing cumulative effects. To the extent any CFII or a CFII-like calculation is included in the Instream Flows Policy, it should remain only as an option for water rights applicants.

We appreciate the opportunity to provide additional scoping comments, and we look forward to reviewing and commenting on the draft Instream Flows Policy.

Sincerely,

ELLISON, SCHNEIDER & HARRIS



Peter J. Kiel

cc: Ms. Victoria Whitney