

# MEMORANDUM LEGAL AND POLICY ISSUES

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The Draft North Coast Instream Flow Policy and the process by which it has been presented to date pose serious problems of law and policy. This Memorandum presents those issues.

## I. The Draft Policy's Failure To Consider The Public Need For And Benefits From Water Diversion Is Inconsistent With Constitutional, Statutory And Judicial Mandates

The Draft Policy fails to consider the public need for and benefits of water. This failure is contrary to law. The fundamental principle underlying all of California's water law and administration is set forth in the California Constitution:

[B]ecause of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare

STATE WATER RESOURCES CONTROL BOARD  
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(Cal. Const. Article X, Sec. 2, emphasis added.)

While it is undisputed that the protection and maintenance of the state's fisheries is a beneficial use of water, that fact does not end the necessary inquiry. The "maximum beneficial use" mandate is tempered by the requirement that all uses be reasonable. Even instream uses must adhere to the standard of reasonableness (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 443), and the Water Board, in administering the state's water resources, must ensure that all uses are reasonable. Reasonableness of use "cannot be determined without considering the effect of such use on all needs of those in the stream system" and "statewide considerations of transcendent importance." (*In Re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d 339, 354; *Joslin v. Marin Municipal Water District* (1967) 67 Cal.2d 132, 140.)

This Constitutional mandate to balance the needs of all competing uses is carried forward by the statutes governing the Water Board. Section 1257 of the Water Code is especially pertinent:

In acting upon applications to appropriate water, the board shall consider the relative benefit to be derived from (1) all beneficial uses of the water concerned including, but not limited to, use for domestic, irrigation, municipal, industrial, preservation and enhancement of fish and wildlife, recreational, mining and power purposes, and any uses specified to be protected in any relevant water quality control plan . . . . The board may subject such

*Kronick, Moskovitz, Tiedemann & Girard, P.C.  
Ellison, Schneider & Harris*

appropriations to such terms and conditions as in its judgment will best develop, conserve, and utilize in the public interest, the water sought to be appropriated. (Emphasis added.)

The requirement that all water right applications must be weighed against competing needs, including instream needs, is confirmed in a 1980 opinion of the California Attorney General, which found proposed Water Board regulations establishing instream flows in the absence of such balancing to be contrary to state law. The Attorney General opined that the Water Board,

may not by the adoption of any rule of policy or procedure so circumscribe or curtail the exercise of its discretion under the statute as to prevent the free and untrammelled exercise thereof in every case, for an attempt to do so would be for it to arrogate to itself a legislative function.

(63 Cal. Ops. Atty. Gen. 95 (1980) (emphasis added).) In sum, the Attorney General concluded that the Water Board may not:

(1) determine, without regard to any application for appropriation of water for beneficial offstream uses, the required flow for beneficial instream uses, (2) establish, in advance of a hearing on any such application, the required flow for beneficial instream uses by rule, and (3) create, without considering the relative benefits of all beneficial uses, a presumption as to the validity of the rule.

Like the proposed regulations in 1980, the Draft Policy would establish instream flow requirements without consideration of the relative merits of the competing water uses, and would give such uses automatic priority over off-stream uses, regardless of the purpose for such diversions. The instream flow requirements would be established in advance of any hearing on an application. Such a result is contrary to law; it is inconsistent with the California Constitution and the statutes that delegate authority to the Water Board.

In addition to being contrary to law, the Draft Policy's failure to consider competing water uses is not the result intended by the Legislature when it enacted AB 2121. AB 2121, codified as Water Code § 1259.4, directs the Water Board to develop "principles and guidelines," not to mandate bypass flows automatically applicable to all existing and future appropriations and petitions, nor to wall off high flood flows so that they cannot be beneficially used. The Draft Policy is therefore contrary to the Constitutional mandate, statutes and court decisions requiring the Water Board to consider the relative merits of all uses of water in every case.

Moreover, in developing the principles and guidelines, the Water Board was instructed by the Legislature to develop them "as part of state policy for water quality control adopted pursuant to Article 3 (commencing with Section 13140) [of the Water Code]." The sections of the Water Code to which the Water Board was directed are the Porter-Cologne Act. Consistent

with all other provisions of law cited above, the State Legislature established the State's Policy in carrying out the Porter-Cologne Act is:

to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.

(Water Code § 13000, emphasis added.)

Water Code § 13141 expressly requires the Water Board to consider factors including "past, present, and probable future beneficial uses of water," "economic considerations" and "the need for developing housing within the region." None of these factors were considered in the Draft Policy. The Draft Policy asks only whether its principles are protective of fish, not even whether they are *necessary* to protect fish.

By way of contrast, in Decision 1610, the Water Board properly followed California law in developing specific streamflow measures to "preserve the fishery and recreation in the [Russian River] and in Lake Mendocino to the greatest extent possible while serving the needs of the agricultural, municipal, domestic, and industrial uses which are dependent on the water." (State Water Board Decision 1610, § 13.2, cited in Draft Policy at 10.) The balancing of competing uses demonstrated in Decision 1610 and every other Board Decision is the sort of balancing process required by California law and is the balancing that an instream flows policy must also embody.

By adopting the Draft Policy without consideration of the economic and social effects of the Draft Policy on the needs, development and water supply reliability of the communities in the North Coast counties, the Water Board would fail to fulfill its obligation under the Constitution and the statutes that govern it.

## **II. Many Provisions Of The Draft Policy Appear Irrational Or Patently Unconstitutional**

Beyond the Draft Policy's failure to consider and balance the water needs and beneficial uses of water in the North Coast counties, certain of its provisions are problematic from a logical standpoint.

### **A. The Draft Policy Fails to Justify its Strict Diversion Restrictions by any Analysis of Benefits to Fisheries**

Even as a single-purpose salmonid-protection policy, the Draft Policy fails to justify its stringent measures as providing measureable benefits to the region's fish resources. It assumes, without supporting analysis, that preventing diversion of streamflow will improve and protect the North Coast fisheries. While the Draft Policy discusses the physical attributes of fishery habitat related to streamflow, it undertakes no quantified analysis of the extent or manner in which these attributes are currently limiting fish populations in the North Coast streams, nor of the impact of existing diversions and pending applications on these factors.

For example, an analysis of the Policy's criteria for consecutive days needed for viable steelhead spawning habitat on Carneros creek reveals that there are zero spawning opportunities. The Carneros creek drainage area is 2.75 square miles (1,760 acres). The median drainage area size of projects being subjected to the Policy is about 50 acres (based on sample of 71 projects in Maacama Creek). Almost 90% of the projects impound less than 0.5 square miles (320 acres) of watershed. It is unlikely that limiting diversions of these small projects to the Policy's restrictive criteria will measurably improve streamflow; even if all of the water impounded by them was unregulated. The Policy will dramatically reduce the opportunities for diversion without any assurance of fishery or resource benefit. The Policy effectively declares the watersheds and streams to be Fully Appropriated, and does so without the notice and hearing process required for such declarations.

The Draft Policy also requires water users to refrain from diverting flows purportedly needed for anadromous fish passage, even in streams from which these fish are physically restricted. There is no reason to prematurely place limits on beneficial use of water when the Water Board has jurisdiction under its public trust authority and through reservations of jurisdiction commonly placed in water right permits, to impose passage flow requirements when and if such flows become potentially beneficial. Additionally, the Draft Policy simply assumes, without any analysis of hydrologic impact, that allowing collection and storage of "first rain" flows in small reservoirs located high in the watershed (a practice commonly referred to as "fill and spill") would adversely affect anadromous fish passage, even in stream sections that cannot be reached by the fish. The Draft Policy would require owners of such reservoirs to construct expensive and environmentally damaging bypass channels to accommodate the high flows required to be bypassed. (Flow Policy, pp. 8-9 and 29.)

The Draft Policy also requires costly preparation by pre-approved paid professionals, of mitigation plans for non-native species eradication, gravel and woody debris enhancement, even where a proposed water project will have no impact on these attributes of fish habitat. (SED, p. 22.) Due process and common fairness require that permit conditions relate to impacts that are likely to be caused by diversions and water use under the requested permit; they are not an opportunity for remediation of pre-existing conditions in the general area.

#### **B. The Draft Policy Will Have Unintended Adverse Consequences for the Environment and Water Use**

Among the acknowledged stressors causing fishery decline in North Coast streams are high temperatures and low streamflows during summer months. The Draft Policy would address these issues only in part, by prohibiting new diversions from April 1 through September 30, which is the dry, warm, irrigation season. However, at the same time, the Draft Policy makes any shift by riparians from summertime direct diversions to wintertime reservoir storage more difficult, if not impossible; despite the fact that winter diversion and storage is a practice widely acknowledged as being more beneficial to fish than summer diversions. The water availability analysis, bypass flow requirement and passive bypass flow facilities, peak flow diversion prohibition, shortened diversion season, and mandated highly technical habitat management plans all work together to render winter water storage projects uneconomic and virtually infeasible.

The Draft Policy proposes no incentives for landowners with existing summer diversion rights to convert their projects to winter storage operations; in fact, the Draft Policy makes such a shift exceedingly difficult, if not impossible. Due to their inability to achieve a more environmentally friendly water supply, landowners can be expected to continue their reliance on summertime diversions under their riparian or pre-1914 water rights.

By adopting a policy that makes obtaining a permit for winter stream diversion economically and physically infeasible, the Water Board will assure that unregulated practices continue and probably increase. This is an unintended consequence of the Draft Policy, which represents a missed opportunity by the Water Board to proactively support real water management change for the benefit of instream resources.

This unintended consequence was identified by several parties during the scoping process and made known to the Water Board in several comment letters, including those from Sanctuary Forest, Regional Water Quality Control Board, San Francisco Bay Region, and North Marin Water District. Despite notice of the possibility of these unintended effects, the Water Board failed to address the issue of accommodating programs such as the Mattole Flow Program or other environmentally helpful water programs which will be deterred by the blanket application of the Draft Policy.

**C. Bypass Flows for Anadromous Fish Are Required Above Man-Made Fish Passage Barriers for Stream Reaches Inaccessible to Such Fish**

Under the Draft Policy, diverters would be required to maintain prescribed streamflows for anadromous fish passage even within stream reaches physically unreachable by anadromous fish. In excluding reaches above natural barriers from the passage bypass flow requirement, the Draft Policy tacitly concedes that passage flows are pointless where anadromous fish cannot use them. Nevertheless, it would require such flows above man-made physical barriers, even though the bypassed flow would provide no fishery benefit. Many such artificial fish passage barriers exist, principally at road and highway culverts with precipitous slopes and outlet drops that prevent fish from ascending the stream, and at existing dams for which fish ladders were not required when the dam was constructed. The only man-made barriers to fish passage that would excuse upstream bypass flows under the Draft Policy would be dams for reservoirs used for municipal purposes (SED, p. 23) or barriers that could not possibly ever be removed. (SED, p. 13.)

No principled basis is provided in the Draft Policy for the distinction between municipal dams and agricultural dams; both have the precisely the same effect on fish passage. Nor is there any real basis for a distinction between natural and man-made barriers in the utility of upstream fish passage flows; an unreachable stream reach exists in both cases, and requiring fish passage flows in streams that fish cannot use is equally ineffectual in both cases. Because the Draft Policy would apply to all petitions for changes in appropriative rights, an unusable fish passage flow restriction imposed on a senior water right holder upstream of a junior appropriator's reservoir will have the effect of reversing water right priorities and reallocating the senior's water resource to the junior appropriator. The Draft Policy would impose no requirement that the downstream reservoir owner release the bypassed flows; they would simply augment to the water stored in the downstream reservoir under the junior water right. Such a reversal of priority

is inconsistent with California water law, as recently held in *El Dorado Irrigation District v. State Water Resources Control Board* (2006) 142 Cal.App.4<sup>th</sup> 937, 970 (allowing junior rights holders to continue diverting water while senior rights holder was precluded from doing so violates California law's fundamental rule of priority).

There is no cogent justification for preventing the use of the water that would be fruitlessly dedicated to non-existent fish in streams above physical barriers by the Draft Policy. In the case where an artificial passage barrier is eliminated, the Water Board has ample authority, either under Water Code § 1394 or under its Public Trust authority, to impose the bypass flows needed for anadromous fish passage. In parallel circumstances, the legislature has expressly approved and encouraged interim uses of water that may ultimately be required for municipal supplies (Water Code § 1462); the same approach and logic should be employed where artificial barriers that currently prevent anadromous fish from ascending a stream might someday be eliminated. Until the barriers are eliminated, foreclosing the beneficial use of water through bypass flow requirements under the spurious distinctions proposed by the Draft Policy would violate the Constitutional mandate of Article X, Section 2.

**D. There is no Rational Basis for Exempting Lake Mendocino and Lake Sonoma from the Requirements of the Draft Policy**

The Draft Policy would specifically exempt the mainstem Dry Creek below Lake Sonoma and Warm Springs Dam and the mainstem Russian River below Lake Mendocino and Coyote Dam from the minimum bypass and maximum cumulative diversion limitations of the Draft Policy even though these two major reservoirs have brought about major losses of fishery habitat and fish populations in the North Coast counties. No pertinent facts or meaningful rationale is provided for the exemption. The appropriative right holders for these facilities may seek future changes in their water rights by petition, providing a basis for conditioning the water rights to remedy the damage they have inflicted on the state's endangered fisheries. The express exemption provided in the Draft Policy would arbitrarily foreclose such an opportunity.

**E. The Policy Will Exacerbate the Backlog in the Water Right System**

As a water rights administration measure, the Draft Policy fails. The Draft Policy will not alleviate the tremendous backlog of applications and petitions currently facing the Water Board's Division of Water Rights; in fact, it is likely to exacerbate that workload. Because the Draft Policy's provisions will so dramatically reduce the anticipated yield of water projects currently proposed – rendering some completely infeasible – most applicants will seek refuge in the Draft Policy's "variance" provisions, a process that is discrete, ill-defined, and lacking in substantive criteria. In other words, the Draft Policy is nothing more than a screening tool and, like its predecessor, the Draft Guidelines, it screens almost everything.

**III. The Draft Policy Fails to Comply with Requirements of the California Administrative Procedure Act**

Water Code § 185 requires the Water Board to adopt rules for the conduct of its affairs in conformity with Chapter 3.5 (commencing with Section 11340) of the Government Code, procedures adopted by the Water Board in 23 CCR § 649.1. The chapter is commonly known as

the California Administrative Procedure Act (“APA”). The APA requires state agencies proposing to adopt a regulation<sup>1</sup> to provide adequate notice of the proposed regulation, and sets forth the information that must be included in such a notice. Such a notice must provide the time, place and nature of proceedings for adoption, and include “an informative digest drafted in plain English” that includes a concise and clear summary of the effect of the proposed action. (Gov’t Code 11346.5; *see also* Gov’t Code § 11353(b)(2)(A).) The notice of the Draft Policy provided by the Water Board did not meet the requirements of the APA.<sup>2</sup>

**A. Notice of the Draft Policy was Insufficient to Provide the Public an Adequate Opportunity to Comment**

Those most directly affected by the Draft Policy were given inadequate notice and thereby deprived of the opportunity for meaningful comment. The notice that was provided was not calculated to advise water users of the Draft Policy and its effects. Notice was provided by bulk mail, with a Colorado return address (of a Water Board contractor). There was no indication on the envelope that its contents contained notice from the California State Water Resources Control Board or dealt with matters that could affect the water rights of the addressee. Many of these bulk-mailed notices were not received until the last few weeks of January or early February 2008, despite the Board’s claims that notices were mailed out at the end of December 2007.

Additionally, notice was not sent to formally designated agents of water users. The water users’ designated agents and their addresses were known to the Water Board because they had been officially designated in the water users’ water right files, and the agents are those to whom the Water Board routinely sends all notices concerning water rights.<sup>3</sup> (See Gov’t Code

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<sup>1</sup>/ Regulation is defined as “every rule, regulation, order or standard of general application . . . adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it or to govern its procedure. (Gov’t Code § 11342.600.) In adopting the APA, the California Legislature considered its committee’s report that found:

[M]any agencies which avoid the mandatory requirements of the Administrative Procedure Act of public notice, opportunity to be heard by the public, . . .

(Fn. 1, cont’d). . . The manner of avoidance takes many forms, depending on the size of the agency and the type of law being administered . . . . They consist of rules of the agency, denominated variedly as ‘policies,’ ‘interpretations,’ ‘instructions,’ ‘guides,’ ‘standards,’ or the like, and are contained in internal organs of the agency such as manuals, memoranda, bulletins, or are directed to the public in the form of circulars or bulletins.” (*Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 205.)

<sup>2</sup>/ Although, arguably, the Water Board may be exempt from the strict and detailed notice requirements of the APA, because of Government Code § 11353(b)(7), the principle underlying these notice requirements – that fair and wise decision-making requires broad informed public input—is as applicable to the Water Board’s decisions as to the decisions of other agencies. And, broad and informed public input requires that the governed be afforded notice of governmental actions that may affect their interest – a practice that was contravened by the manner in which the public generally, and water users specifically, were given notice of the Draft Policy.

<sup>3</sup>/ For example, the Water Board sends notice to these agents of proposed water right appropriations that might adversely affect the water right holder’s rights, and sends its requests for filing of progress reports and licensee reports to these agents, rather than to the holder of the water right. Water right holders rely on the Water

§ 11346.4(a)(1).) Due to the unmarked bulk mailing to individual water right holders, and the failure of the Water Board to send notice of the Draft Policy to designated agents, many water right holders were unaware of the issuance of the Draft Policy until and unless informed of it by other means.

Electronic notice of the proposed adoption of the Draft Policy was posted on the Water Board's website in the waning days of 2007, immediately before the New Year's holiday. As a result, many water right professionals did not become aware of the Draft Policy until well into January 2008. The notice set a deadline of February 19, 2008 for comments on this 800+ page, highly technical Draft Policy, a wholly inadequate timeframe for those affected to understand the Draft Policy and determine its effects.

The APA requires that notice of a proposed regulation be mailed to a representative number of small business enterprises or their representatives that are likely to be affected by the proposed action. (Gov't Code § 11346.4(a)(3).) Such representatives are identified by the statute as including trade associations, industry associations and professional associations. Commenters, which include trade and industry associations whose members will be directly affected by the Draft Policy, were furnished no notice by the Water Board.<sup>4</sup>

In addition to the deficiencies in the delivery of notice, the notice itself did not offer even a cursory description of the Draft Policy or its potential effects. It merely directed the recipient to a website address for further information. Such notice was clearly inadequate for those without access to the internet. No physical locations were identified where a paper copy of the Draft Policy could be reviewed. Even for those recipients with internet access, the website did not offer a summary of the Draft Policy, merely a daunting array of enormous downloads with minimal descriptors.<sup>5</sup> The Draft Policy and its supporting documents consist of over 800 pages of highly technical and sometimes unclear provisions. The Draft Policy itself was supplemented by two errata documents: one of which was issued on March 14, 2008, correcting a fundamental error in a major element of the Draft Policy that infected basic analyses throughout the document. Despite the enormous changes arising as a result of the March 14 errata document, no further extension of time was given for analysis and comment. Despite repeated requests, significant underlying data was unavailable until April 7, 2008, and some responses by Water Board staff misidentified the data used in calculations, forcing a costly and time-consuming reevaluation at the eleventh hour.

Direct outreach by the Water Board staff was similarly lacking. At the insistence of the water user community, a workshop was held in Santa Rosa on February 6, 2008 at the North

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Board's notification of their agents to remain informed of potential threats to their rights. When designation of an agent has been made, the Water Board does not send notices directly to the water right holder.

<sup>4</sup> / Again, even if the Water Board is exempt from this provision of the APA, the quality of its decision-making could only be improved by adhering to the practice of consulting the governed public.

<sup>5</sup> / Only after February 6, 2008, in response to numerous requests by water users and their representatives for an explanation of the Draft Policy, were powerpoint slides posted on the Water Board's website with a summary of the Draft Policy's provisions. And not until April 14, a mere two weeks before the comment deadline, did the Water Board staff post a "frequently asked questions" fact sheet on its website. Additionally, many of the answers to the "frequently asked questions" were either purposefully vague, misleading, or altogether incorrect.



Coast Regional Water Quality Control Board's offices. Because of the widespread interest in the Draft Policy, attendance at the workshop was high and overfilled the meeting room's capacity. Not everyone who attempted to attend could be accommodated and many were turned away after an effort to find a larger venue delayed the commencement of the workshop proved fruitless. The Water Board staff did not tape the workshop, and videotapes that private consultants arranged for proved unusable. The workshop itself was truncated, due to the need to vacate the room at 5:00 p.m., and many individuals who had questions were unable to obtain answers. The Water Board staff promised a subsequent workshop, but did not schedule one despite requests by water users. In response to a formal request made by the Mendocino County Board of Supervisors, a second presentation was made to the Board of Supervisors on April 22. As a result of the minimal and grudging outreach, there has been inadequate explanation of the Draft Policy's provisions and proposed implementation; most water users remain frustrated in their efforts to understand the Draft Policy sufficiently to allow them to comment effectively.

Another factor hampering effective comment on the Draft Policy was the slow pace at which the Water Board staff responded to requests for data used in the preparation of the Draft Policy. The data was needed for a thorough evaluation of the Draft Policy's basis and effects. A record of the requests is attached to this memorandum. (Attached, Exhibit 1). Responses were never received to some of the data requests.

A further impediment to water users' opportunity to provide meaningful comments on the Draft Policy was the fact that the Draft Policy as initially published contained numerous errors, some of which involved fundamental calculations of bypass flow. One of the errata documents, posted March 14, 2008, corrected errors that infected basic analyses throughout the document. The correction required professional consultants retained by concerned water users to dedicate considerable time reworking their own analyses of the Draft Policy, at considerable additional expense – in the thousands of dollars. No additional time for submitting comments on the Draft Policy was allowed, despite the substantial additional work occasioned by the Draft Policy's errors. And, although errata sheets were posted on the website, no other notice of the errors was provided to water users.

#### **B. The Draft Policy Supporting Documents Fail to Include Any Analysis of its Economic Impact**

The APA requires state agencies to consider the economic effects of proposed regulations, and in many cases this endeavor may involve considering the potential economic impact of alternatives. Specifically, the APA requires an agency to include in the Initial Statement of Reasons “. . . a description of the alternatives to the regulation considered by the agency and the agency's reasons for rejecting those alternatives” and a “. . . description of any alternatives the agency has identified that would lessen any adverse impact on small businesses.” (Government Code § 11346.2(b)(4).)

The APA also requires the agency to include in the Final Statement of Reasons: “(4) A determination with supporting information that no alternative considered by the agency would be more effective in carrying out the purpose for which the regulation is proposed or would be as effective and less burdensome to affected private persons than the adopted regulation.” (Government Code § 11346.9(a)(4)) and “(5) An explanation setting forth the reasons for

rejecting any proposed alternatives that would lessen the adverse economic impact on small businesses” (Government Code § 11346.9(a)(5).)

The Draft Policy fails to seriously consider alternatives that achieve the goals of maintaining protective instream flows that lessen the adverse impact on small businesses. Instead, the Draft Policy proposes standards which could effectively wipe out many small businesses that rely on water diversions throughout the year. Additionally, no credible explanation is given for why other less drastic proposals for instream flows received by the Water Board during the scoping period were discarded in favor of what is proposed in the Draft Policy.

Section 11346.3(a) requires that state agencies, when proposing a regulation, “. . . assess the potential for adverse economic impact on California business enterprises. . . .”<sup>6</sup> More specifically, § 11346.5 requires that the results of the assessment be included in the notice of the proposed action. These provisions are consistent with the California Water Code requirement that economic considerations be taken into account in establishing water quality objectives under the Porter-Cologne Water Quality Act. (Water Code § 13241(d) and (e).) However, the Draft Policy neither identifies nor discusses economic implications, beyond flatly asserting that any such impacts will be the result of individuals’ actions responding to the Policy, not the result of the Draft Policy itself.

What the State Water Board staff has proposed is a policy that includes no assessment of the total number of diversions that can meet the proposed standards, no assessment of the environmental consequences of noncompliance, and no assessment of the environmental improvement (or detriment) that would occur from implementation of the standards. Commenters are not aware of a regulation of comparable scope and economic impact that was ever so vague. For example, the Air Resources Control Board would not adopt an air quality regulation that imposes a new pollution control technology without first assessing the air quality need for the new technology, the number of existing facilities that would have to be retrofitted and whether such retrofits are feasible, the direct cost of compliance, an estimate of the number of facilities that could not comply, and the direct and indirect economic and environmental effects of retrofitting or taking alternative action (such as decommissioning of the facility).

#### **IV. The Draft Policy Circumvents Statutory Procedures for Declaration of Fully Appropriated Streams**

The season of diversion restrictions in the Draft Policy have the effect of making unavailable for appropriation all streamflow in the five-county North Coast area for over eight

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<sup>6</sup> / Section 11346.3(b)(1) provides:

“(b)(1) All state agencies proposing to adopt or amend any administrative regulations shall assess whether and to what extent it will affect the following:  
(A) The creation or elimination of jobs within the State of California.  
(B) The creation of new businesses or the elimination of existing businesses within the State of California. The expansion of businesses currently doing business within the State of California. (Government Code § 11346.3(b)(1); these requirements were established by SB 513 (Stats. 1993, Chapter 1063))

months of every year. This consequence is effectively a declaration by the Water Board that every stream in the affected area is fully appropriated, but achieves this result without the procedural due process mandated by the Legislature. Water Code § 1205 provides the requirements for such a declaration:

A declaration that a stream system is fully appropriated shall contain a finding that the supply of water in the stream system is being fully applied to beneficial uses.

The Draft Policy contains no such finding, nor could it, because the finding can only be made “after notice and a hearing.” (Water Code § 1205.) Further, the notice specified for the required hearing is both personal and broad:

the notice shall be mailed to all persons known to the board who own land that appears to be riparian to the stream system, who divert water from the stream system, or who have made written request to the board for special notice of hearing pursuant to this article.

(Water Code § 1207.)

The underlying principle illustrated by these statutes is the Legislature’s recognition that water users and land owners who may desire to divert water to use from a stream have a vital interest in the availability of water—an interest that must be protected by due process. Because of that interest, an action to remove water resources from potential future use can be taken by the Water Board only after determining, after hearing, that all the water in the stream is being put to reasonable beneficial use.<sup>7</sup> Streams cannot be afforded “fully appropriated” status by mere fiat, as the Draft Policy attempts to do.

#### **V. Comments Concerning CEQA Compliance by Draft North Coast Instream Flow Policy**

The comments below concern the extent to which the Substitute Environmental Document prepared in connection with the Draft North Coast Instream Flow Policy fails to comply with the requirements of the California Environmental Quality Act.

##### **A. The Substitute Environmental Document Does Not Satisfy the Requirements of the California Environmental Quality Act (“CEQA”)**

The Water Board released a Draft Substitute Environmental Document (“Substitute Document” or “SED”) as CEQA compliance for the Draft North Coast Instream Flow Policy (“Draft Policy”). This document, however, does not satisfy CEQA’s substantive requirements.

CEQA provides exemptions from preparing environmental impact reports (“EIRs”), negative declarations, and initial studies for certified regulatory programs such as the Water

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<sup>7</sup> / The requirement that the full beneficial use must be reasonable did not need to be expressly stated in the statute; it is a requirement of all water use in California.

Quality Control (Basin)/208 Planning Program and instream beneficial use protection program. (See, Cal Pub. Resources Code § 21080.5; Cal. Code of Regs., tit. 14, § 15251.) If the Instream Flow Policy falls within one of these programs, it is generally exempt from the CEQA requirements contained in Chapters 3 and 4, and Public Resources Code section 21167. (Cal. Pub. Resources Code § 21080.5(c).) However, the exemption does not excuse the Water Board from complying with the substantive requirements of CEQA. “A certified program remains subject to other provisions in CEQA such as the policy of avoiding significant adverse effects on the environment where feasible.” (Cal. Code of Regs., tit. 14, § 15250.) “Documents prepared by certified programs are considered the ‘functional equivalent’ of documents CEQA would otherwise require.” (*City of Arcadia, et al. v. State Water Resources Control Board, et al.* (2006) 135 Cal. App. 4<sup>th</sup> 1392, 1423, citing, *Mountain Lion Foundation v. Fish and Game Commission* (1997) 16 Cal. 4<sup>th</sup> 105, 127.)

The Draft Policy has potentially significant impacts the Substitute Document either failed to adequately consider, or did not consider at all. Accordingly, it failed to consider feasible mitigation measures and project alternatives to minimize the Draft Policy’s potentially significant impacts. Adoption of the Substitute Document as currently written would violate CEQA’s substantive mandate that public agencies refrain from approving projects with significant environmental effects if there are feasible alternatives or mitigation measures that can substantially lessen or avoid these effects. (*Mountain Lion Foundation v. Fish and Game Commission, supra*, 16 Cal. 4<sup>th</sup> at p. 134.)

**1. The Substitute Document is Not a Programmatic Environmental Analysis That Will Support Tiering of Subsequent CEQA Documents**

The Substitute Document states that environmental review of the Draft Policy “was conducted at a programmatic level.” (SED, p. ii). Unfortunately, the Substitute Document is unlawfully attempting to use the programmatic structure to avoid doing the required environmental analysis, deferring all meaningful environmental review until the indefinite future. The environmental analysis is so inadequate that the Substitute Document fails to satisfy the most basic legal requirements for programmatic documents.

The CEQA Guidelines provide that:

A program EIR will be most helpful in dealing with subsequent activities if it deals with the effects of the program as specifically and comprehensively as possible. With a good and detailed analysis of the program, many subsequent activities could be found to be within the scope of the project described in the program EIR, and no further environmental documents would be required.

(Cal. Code of Regs., tit. 14, § 15168(c)(5).) The CEQA Guidelines also state an appropriate programmatic analysis would:

- (1) Provide an occasion for a more exhaustive consideration of effects and alternatives than would be practical in an EIR on an individual action,

- (2) Ensure consideration of cumulative impacts that might be slighted in a case-by-case analysis,
- (3) Avoid duplicative reconsideration of basic policy considerations,
- (4) Allow the lead agency to consider broad policy alternatives and program wide mitigation measures at an early time when the agency has greater flexibility to deal with basic problems or cumulative impacts,
- (5) Allow reduction in paperwork.

(Cal. Code of Regs., tit. 14, § 15169(b)(1)-(4).) The Substitute Document does not do any of these things.

The Substitute Document's consideration of effects and alternatives was anything but exhaustive. There is no analysis of cumulative impacts; instead, the Substitute Document provides that the "[Water] Board and other state and local agencies will need to address potential cumulative impacts in project-specific documentation." (SED, p. 84.) By so doing, the Substitute Document slightes the analysis of cumulative impacts rather than facilitating adequate review.

The Substitute Document also fails to provide mitigation recommendations for either direct or cumulative impacts. While the mitigation analysis does state "other regulatory mechanisms can be expected to provide opportunities for minimizing and avoiding significant environmental impacts," those mechanisms are not identified. (SED, p. 87.) The Substitute Document should have considered broad policy alternatives that would have dealt with and mitigated many of the basic problems associated with crafting an Instream Flow Policy for an entire region. Instead, only a couple of narrowly defined alternatives were considered.

And finally, the Substitute Document certainly will not allow any reduction in paperwork. The Water Board will likely require CEQA documentation for essentially all pending water rights applications and petitions, because the Substitute Document does not deal with the potential environmental effects "as specifically and comprehensively as possible." Since the Substitute Document does not evaluate cumulative impacts or provide any mitigation measures, every subsequent activity will need its own environmental documentation to address those issues. Because so much of the environmental analysis is deferred to the project level review, water right applicants will gain few benefits from tiering to the programmatic document.

The limited and incomplete environmental analysis in the Substitute Document is certainly not the "exhaustive consideration of effects and alternatives" mandated by the CEQA Guidelines.

## **2. The Substitute Document Failed to Adequately Consider Alternatives That Could Reduce or Avoid Significant Impacts**

The Substitute Document failed to adequately consider project alternatives to reduce or avoid significant impacts. The Substitute Document should have described, ". . . a range of reasonable alternatives to the project . . . which would feasibly attain most of the basic objectives

of the project but would avoid or substantially lessen any of the significant effects of the project.” (Cal. Code of Regs., tit. 14, § 15126.6.) The discussion of alternatives must “focus on alternatives to the project . . . which are capable of avoiding or substantially lessening any significant effects of the project, even if these alternatives would impede to some degree the attainment of the project objectives, or would be more costly.” (Cal. Code of Regs., tit. 14, § 15126.6(b).) Also, the discussion of alternatives must “include sufficient information about each alternative to allow meaningful evaluation, analysis, and comparison with the proposed project,” and the significant environmental effects of the alternative must be discussed. (Cal. Code of Regs., tit. 14, § 15126.6(d).)

The Substitute Document does not consider alternatives that mitigated the significant direct, indirect, and cumulative impacts of the project. The Substitute Document failed to complete the required analysis, in part, because it failed to properly identify the impacts of the project. Although the public identified several feasible alternatives and alternative components during the development of the policy and scoping, as discussed later in this document, none are considered in the Substitute Document.

**(a) The Project Objectives Are Overly Narrow, Thereby Foreclosing the Consideration of a Reasonable Range of Alternatives**

An EIR shall describe a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives. (Cal. Code of Regs., tit. 14, § 15126.6(a).) The selection of project objectives drives the selection of alternatives because an agency will eliminate from detailed consideration any alternative that does not meet the basic project objectives. However, when the project objectives are overly narrow, the range of alternatives will also be too constrained to satisfy CEQA’s requirements.

The Draft Policy “goals” or objectives are improperly narrowed by the “policy principles.” The Water Board foreclosed the consideration of a reasonable range of feasible alternatives to the Draft Policy by adopting overly narrow “policy principles” that do not fulfill the goals (or objectives) of the Draft Policy; instead they embody the Water Board’s *determination of the solution*, foreclosing consideration of any other means of achieving the objectives.<sup>8</sup>

The “policy principles” are so narrowly tailored that only alternatives that conform substantially with the preferred alternative could be considered. The Water Board’s narrow project principles improperly limited the range of alternatives to only those having all of the following features: 1. a seasonal limit on water diversions to a period of the year when instream flows are naturally high, 2. a minimum bypass flow to protect fish spawning and passage, 3. a

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<sup>8</sup> / The basic objectives or goals of the Draft Policy are: (1) protect instream flows through the administration of water rights in order to provide comprehensive, multi-species ecosystem protection for streams within the Policy Area; (2) stabilize and enhance fish and wildlife resources in the Policy area; (3) minimize the impact of the new guidelines on water supply reliability throughout the Policy Area; and (4) provide meaningful regulatory stability by adopting criteria that meet all foreseeable State and Federal requirements. (SED, p. 7.)

limit to the rate at which water may be diverted in a watershed, in order to provide for channel-forming flows, and 4. a cumulative limit on diversions for the protection of fish and their habitat. (SED, p. 7.) The salmonid fisheries-based policy principles directly conflict with the goals in a number of ways, including the failure to include a principle that advances the goal to minimize the impact on water supply reliability. As a result of the lack of project objectives, and the premature selection of overly narrow "policy principles," alternatives that might be protective without having every major component of the preferred alternative were never considered. The overly narrow project principles largely predetermined the results of the CEQA analysis by defining the only project that could be considered.

By not considering a truly reasonable range of alternatives, the Substitute Document also failed to analyze the relative importance of the various aspects of its preferred alternative, and balance the needs of the fishery with other beneficial uses of water. For example, the Substitute Document should have considered an alternative that did not include a minimum bypass flow or maximum rate of diversion for channel forming flows in locations where such limitations may not provide a biological benefit, or the requirement that diversions have a passive or computer automated bypass. If such an alternative had been considered, the Substitute Document might have determined that requiring a passive bypass facility around onstream reservoirs would have significantly greater adverse effects and cost than an active bypass built into the dam itself. As a result of the Water Board staff's overly narrow project principles, the selection of an alternative that required each of these elements was a foregone conclusion, even though potentially inappropriate in many locations in the project area. A similar analysis should have been completed for all of the policy components identified in the project principles.

**(b) The Substitute Environmental Document Did Not Discuss the Significant Environmental Effects of the Alternatives**

The Legislature has made it clear that the purpose of an environmental document "is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project." (Cal. Pub. Res. Code § 21061; Cal. Code of Regs., tit. 14, §§ 15003(b)-(e), 15252 and 15253(b)(3).) Because a Substitute Document must identify ways to mitigate or avoid the significant effects that a project may have on the environment, the discussion of alternatives shall focus on alternatives to the project or its location which are capable of avoiding or substantially lessening any significant effects of the project even if these alternatives would impede to some degree the attainment of the project objectives, or would be more costly. (Cal. Code of Regs., tit. 14, §§ 15126.6, 15252 and 15253(b)(3).)

The alternatives are identified in Section 5 and Section 6.8 of the Substitute Document, and provides some limited analysis—but analyzes only how well the alternatives satisfy the preordained "policy principles," not whether they result in any potential environmental impacts. The alternatives are never compared to determine their relative impacts on the environment.

The Draft Policy and each of its alternatives include four components: (1) diversion season; (2) maximum cumulative diversion; (3) minimum bypass flows; and (4) limitation of onstream dams. The environmental impacts of the various components of the alternatives are

never actually assessed. Instead, the Substitute Document only compares how well the alternatives satisfy the policy's overly narrow principles, particularly the poorly defined concept of "protectiveness" and to a lesser extent "water cost." (SED, p. 40.)

In Section 5, the Substitute Document provides a comparison of the Maximum Protectiveness Alternative, the CDFG-NMFS Guidelines, and the No-Project Alternative. (SED, p. 40.) Within the Maximum Protectiveness Alternative, there is a comparison of a limited number of variations of the four alternative policy components to measure the relative protectiveness of the alternatives to measure fit to the policy principles. (SED, pp. 44-47.) "Protectiveness" is defined as "the degree to which a possible policy element protects fishery resources, and habitat." (SED, p. ii.) The methodology to assess "protectiveness" is not provided; instead the Substitute Document simply concludes that each alternative is either "considered to be regionally protective of fishery resources," "considered potentially protective," or "are not considered to be protective." (SED, p. 74.) Ultimately, the method used to determine protectiveness is not as important as the fact that the comparison of "protectiveness" is not intended to measure whether the alternatives may have environmental impacts. The required analysis of environmental impacts would require the use of a methodology different than the undefined concept of "protectiveness."

Water cost is defined as "[t]he quantity of water remaining instream to protect fishery resources . . . which cannot be diverted for other uses." (SED, p. 73). In Section 6.8, the alternatives were compared to assess water cost by comparing 48 combinations of three of the policy components to 11 of the 13 validation sites. (SED, p. 73.) As explained by Wagner & Bonsignore and HDR/SWRI, these validation sites are relatively large watersheds that are not representative of the majority of the pending water right applications. The analysis of water cost is therefore flawed, as it does not provide a meaningful measure of the reduction in water supplies that will result from the policy. Regardless, the analysis in the Substitute Document is only intended to measure fit with the policy principles, and not evaluate whether the reduction in water supply resulting from the alternatives would result in environmental impacts. A different methodology would have to be applied to compare the environmental impacts of the policy.

Even within this problematic comparison of alternatives, the alternative policy components ultimately combined to create the Draft Policy are never evaluated as a separate assemblage. It was inappropriate to separately analyze the environmental impacts of each component of the project rather than analyze the components as a complete package, because the environmental impacts of the Draft Policy change based on how the components are combined. The Water Board's consultants recognized this relationship between policy components when they were trying to determine which policy component had the biggest impact on meeting the policy's goals, stating, ". . . *it was not possible to completely partition out the effect of the MCD element on habitat availability from the effects of the MBF and diversion season elements.*" (Scientific Basis pg. 4-13).

Not only does the Substitute Document lack comparison of the environmental impacts of the alternatives, it also lacks an analysis of the environmental impacts of the Draft Policy itself. As discussed in detail below, the Substitute Document concludes (without any analysis) that the Draft Policy will have no direct impacts, and defers the analysis of the indirect and cumulative



impacts to future project level review.<sup>9</sup> The potentially significant environmental impacts of the policy and the alternatives to the policy are insufficiently evaluated, and the cumulative impacts are never acknowledged.

**(c) The Substitute Document Fails to Consider All Feasible Alternatives**

The Substitute Document “must consider a reasonable range of potentially feasible alternatives that will foster informed decisionmaking and public participation.” (Cal. Code of Regs., tit. 14, § 15126.6(a).) The Substitute Document does not contain an analysis of a range of feasible alternatives that would mitigate some of the potentially significant impacts of the policy. Several parties provided recommendations for feasible policy alternatives or ideas for inclusion in alternatives during the development of the policy that were not analyzed in the Substitute Document. There is no discussion of why the approach recommended by these parties was not fully evaluated in the analysis of policy alternatives and adopted as the preferred approach to the development of instream flows. These recommendations are attached as Exhibit 2.

More specifically, the watershed-based approach described in the Principle Recommendations of our comment letter is a feasible alternative to the Draft Policy that would mitigate or reduce the effects of some of the potentially significant impacts of the Draft Policy. The proposed impact evaluation guidelines will identify the biologically-appropriate mitigation for each project and will thereby have less environmental effects than the Draft Policy regional criteria which do not even consider the local resources or potential environmental effects. The watershed approach will also provide incentives for resource stewardship including coordination of diversions, development of winter storage to reduce dry season diversions, and similar environmentally positive projects.

**3. The Substitute Document Failed to Sufficiently Consider Potentially Significant Direct and Indirect Impacts of the Policy**

The Substitute Document fails to adequately consider the direct and indirect impacts of the Instream Flow Policy. A “‘Significant effect on the environment’ means a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance. . . .” (Cal. Code of Regs., tit. 14, § 15382.)

Potentially significant environmental impacts may be both direct and indirect. Direct or primary effects are caused by the project and occur at the same time and place. (Cal. Code of Regs., tit. 14, § 15358(a)(1).) Indirect or secondary effects are later in time or farther removed in distance, but are still reasonably foreseeable. (Cal. Code of Regs., tit. 14, § 15358(a)(2).) Indirect effects must be considered in the environmental document if they are a “reasonably foreseeable indirect physical changes in the environment which may be caused by the project.” (Cal. Code of Regs., tit. 14, § 15064(d)(3).) The relative significance of the environmental impacts of the policy is measured against the environmental baseline.

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<sup>9</sup> / As the County of Napa pointed out in their scoping letter dated August 25, 2006, deferring specifics to project level analyses undertaken at a future date suggests a piece-meal approach that will overly burden the county, cities, special districts and private landowners charged with implementing the state policy.

**(a) The Substitute Document Failed to Adequately Describe the Existing Environment, So The Analysis of Environmental Impacts Is Flawed**

The Draft Policy's potentially significant impacts must be measured against the existing environment. (Cal. Code of Regs., tit. 14, § 15125(a).) The physical environment should be described as it existed when the notice of preparation was published, or if no notice of preparation was published, at the time the environmental analysis commenced. (*Id.*)

For the analysis of potentially significant impacts to be meaningful, the description of the existing environment must be sufficiently detailed, with an analysis that provides decision makers with sufficient information to make intelligent decisions. (*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal. App. 4<sup>th</sup> 931, 955.) The courts have recognized that even though a reader may be able to "cobble together" the information contained in the environmental document to gain a better understanding of the existing hydrology and other components of the environment, such efforts should not be necessary. (*Id.*) However, even with some cobbling together of information in the Substitute Document and information buried in the various appendices, the description of the existing environment in the Substitute Document is insufficient. The environment of the North Coast is described in broad brush strokes at the regional level of detail, instead of by watershed and stream where the Draft Policy will be applied. (See generally, SED, Ch. 4.) Without at least a watershed-level description of the existing environment, the reader cannot determine either the efficacy or the impacts of the project.

The hydrology and topography of each watershed and stream vary dramatically throughout the region, and these differences must be described as being part of the existing environment. For example, the streams and tributaries to the mainstem of the Russian River are significantly influenced by the operation of Warm Springs and Coyote dams. The Substitute Document should have explained how the operation of the large dams in the area impact flow. There are also areas in the upper watersheds that have very little flow during much of the year, even under unimpaired conditions. The Substitute Document should have described the environment in these watersheds. A proper description of the existing environment would explain the differences in the environment in large versus small watersheds, and streams that are high in the watershed, and possibly above the point of anadromy, and those that are not.

The Draft Policy proposes a new stream classification system in setting permitting requirements for instream dams. (See, e.g., SED, p. 8.) In order to understand the potential impacts of the Draft Policy, the description of the existing environment needs to identify the Class I, Class I, and Class III streams according to the Draft Policy's classification system. The discussion of the hydrology for the existing environmental setting does not provide those classifications. (SED, Section 4.2.) The identification of the classification of the streams within the affected area, as part of the existing environment is necessary to understand how the proposed Draft Policy would apply to those streams.

While Appendix E of the Substitute Document appears to provide information about stream classification, the classification scheme used in that appendix does not match the classification scheme used in the policy. The description of the stream classification system in

Appendix E is based on the stream classification system used by the Department of Forestry and Fire Protection (CDF) stream classification system,” which is different than the classification system used in the policy.<sup>10</sup> The stream classifications of the streams in the policy area are therefore not described in the Substitute Document or its appendices.

The Substitute Document also fails to include a description of existing agricultural resources in each watershed and stream. (See, e.g., *Galante Vineyards v. Monterey Peninsula Water Management District* (1997) 60 Cal. App. 4<sup>th</sup> 1109.) The Substitute Document provides some countywide agricultural acreage totals, and lifeform/landcover information for some of the counties. (SED, pp. 33-37.) However, this listing of facts is not an adequate description of the existing environment because there is no description of the types of crops and soils that exist along each stream and in each watershed in the affected area. The magnitude of the impacts to agricultural resources that will likely result from the policy can only be understood and measured if the existing agricultural resources are sufficiently described in the environmental baseline.

The Substitute Document must also make clear that the existing unpermitted dams are a part of the existing environmental baseline. Existing unpermitted water impoundments are a part of the environmental baseline from which the potentially significant impacts of the project must be measured. (See, e.g., *Fat v. County of Sacramento* (2002) 97 Cal. App. 4<sup>th</sup> 1270; *Riverwatch v. County of San Diego* (1999) 76 Cal. App. 4<sup>th</sup> 1428 [illegal activity part of environmental baseline]; Water Board Chief Counsel Memorandum, *Baseline for Analysis of Water Right Projects under the California Environmental Quality Act*, June 1, 2005 [existing unpermitted diversions are a part of the environmental baseline.]) Any changes to these existing structures will impact the physical environment. The information about where these structures may be located is hidden within Appendix E. However, their location should be included in the description of the existing environment in the Substitute Document.

The information necessary for a more detailed description of the environment is widely available. The Water Board probably already has much of this information in the files for the hundreds of pending water right applications. The county agricultural commissioners’ offices also have a significant amount of information about the existing agricultural resources.

**(b) The Substitute Document Should Have Provided a Legally Sufficient Analysis of the Direct Impacts of the Instream Flow Policy**

The Substitute Document failed to adequately consider the potentially significant direct impacts of the policy.<sup>11</sup> Instead, it defers all project-specific analyses and flatly asserts that “[a]doption and implementation of the Policy has no direct effects on the environment; all the environmental effects are indirect effects.” (SED, p. 48.) This conclusion is incorrect. This conclusion is incorrect. The Draft Policy’s direct effects are the changes in the environmental caused by its requirements. These impacts are different than the environmental impacts

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<sup>10</sup> / The policy modified the CDF classification system to reflect concerns expressed in Appendix D to the Scientific Basis Report. (SED, fn. 9, p. 8.)

<sup>11</sup> / The Substitute Document also made no attempt to apply the Draft Policy criteria to the actual projects that would be regulated by the policy, even though project information is readily available in files for the hundreds of applications and petitions pending before the Water Board.

associated with the regulated community's reactions to the policy. These changes in the environment are caused by implementation of the policy and must be evaluated by the Substitute Document, even if it is believed that some of the impacts are beneficial. (*See, e.g., Wildlife Alive v. Chickering* (1976) 18 Cal. 3d 190, 206; Cal. Code of Regs., tit. 14, § 15063(b)(1).) The courts require an analysis of projects that are designed to benefit the environment because even well intentioned projects may have unintended negative consequences.

The inadequate impacts analysis largely results from the fundamental inadequacies in the Draft Policy, the deficiencies in the description of the existing environment, as well as the statistical methods and assumptions used in the Draft Policy's development. The analysis completed by HDR/SWRI and Wagner & Bonsignore Consulting Engineers contains a detailed discussion of the significant problems with the policy itself. The following are some examples of how the fundamental problems with the policy have resulted in an inadequate analysis of the potentially significant impacts of the policy:

- **Failure to Analyze Preferred Alternative.** The Substitute Document does not analyze all components of the preferred alternative. The flow alternatives for minimum bypass flows were analyzed, but only in terms of passage and spawning. (*See, Scientific Basis and Development of Alternatives, Appendix I.*) These minimum bypass flow alternatives were never combined with the other elements of the policy, like diversion season and maximum cumulative diversion. It is impossible to evaluate the potentially significant impacts by incrementally evaluating each of the design elements. The direct impact of the policy's flow regime on aquatic species and the environment should have been considered.
- **Failure to Analyze Small Watersheds.** There is no analysis of the impacts of the proposed Instream Flow Policy on aquatic habitat and spawning in watershed under 2.75 sq. miles and smaller. This direct impact of the policy's flow regime on aquatic species and the environment should have been considered.
- **Failure to Analyze Movement of Aquatic Food Sources, Gravel And Woody Debris.** The policy states that restrictions on the rate of diversion even above the point of anadromy in a watershed is important because these flows facilitate the movement of beneficial insects, gravel, and woody debris downstream to areas where anadromous fish are located. However, there is no analysis either in the policy or the Substitute Document of how, when, and the extent to which this movement of food sources and habitat materials would generally occur.
- **Flawed Scientific Basis.** As thoroughly explained by HDR/SWRI and Wagner & Bonsignore, the statistical analysis and data management that formed the basis of the minimum bypass flow alternatives are flawed. Therefore, the evaluation of the impacts of the minimum bypass flow alternatives based on that analysis is similarly flawed. Similarly, because the development of these alternatives is flawed, the limited comparison of alternatives that was completed relating to "water cost" and "protectiveness" is also flawed. As discussed above, the Substitute Document does not contain an analysis of the environmental impacts of even these flawed alternatives

as required by CEQA. The only analysis that was completed measures fit of the alternatives to the policy principles, not impacts.

- **Inconsistency With Planning Documents.** The CEQA Guidelines require discussion of “any inconsistencies between the proposed project and applicable general plans and regional plans” including “water quality control plans.” (CEQA Guidelines, § 15125(d).) The analysis of project impacts is flawed because the Substitute Document fails to analyze consistency with the north coast and San Francisco Bay basin plans, TMDLs, and other planning documents.

**(c) The Substitute Document Does Not Adequately Analyze the Indirect Environmental Impacts of the Draft Policy**

The Water Board has an obligation to fully consider and mitigate both the direct and indirect impacts of its policy. The actions that water users will take to comply with the policy are highly foreseeable, and therefore must be fully considered and mitigated.

In determining whether it is required to consider the indirect effect of compliance with the Instream Flow Policy, the Water Board should follow the guidance provided by *County Sanitation District No. 2 v. County of Kern* (2005) 127 Cal. App. 4<sup>th</sup> 1544. In that case, the agency was required to analyze the environmental impacts associated with people’s reactions to an environmental policy, which necessarily includes identifying mitigation measures that would mitigate these effects of the policy.

The actions water users will take to comply with the Instream Flow Policy are highly foreseeable. Many parties identified easily foreseeable indirect impacts of the Draft Policy in their scoping comments. Many of the potential reactions to the policy are identified in the Substitute Document, and its appendices. The analysis of indirect impacts is legally inadequate, however, because the Substitute Document, while identifying the predictable reactions of the regulated community with a high degree of specificity, fails to complete the analysis by discussing potentially significant impacts resulting from those reactions with equal specificity.

As an initial matter, there are inconsistencies between the analysis in the Substitute Document and its appendices. Repeatedly, the Substitute Document states that the impact is unknown because the Water Board cannot determine how the regulated community will react. As the appendices contain a rather detailed analysis of how the regulated community will react, the contrary statements in the Substitute Document are inconsistent. For example, the Substitute Document says that the Water Board cannot foresee how the regulated community will react to having less water available for diversion, so an analysis of reactions to the policy must be deferred to the future. (SED, p. 85.) However, Appendix D to the Substitute Document identifies possible (although often unlikely) alternative supplies that could be developed. The Substitute Document should have acknowledged the analysis buried in the appendices, and considered the potential environmental impacts of developing alternative water supplies. The Substitute Document should also have considered the feasibility and timing of developing the alternative supplies.

The problem of identifying the reactions of the regulated community without actually considering the environmental impacts of those reactions is pervasive throughout the indirect impacts analysis in the Substitute Document and its appendices. The following are some examples:

- **Failure To Consider Sediment Impacts.** The Substitute Document estimates there are approximately 1,771 existing unpermitted impoundments in the north coast region that may be removed as a result of the Draft Policy. (SED, p. 63.) However, it fails to analyze the environmental impacts of dam removal, including the release of sediment. The Substitute Document estimates that removing 1,569 dams would result in the release of 29,237 AF of sediment. (Substitute Document, Appendix E, p. v.) The release of sediment would have negative environmental impacts as many of the potentially impacted streams are already on the section 303(d) list of impaired water bodies for sediment. The fishery would undoubtedly be significantly impacted, as these streams are listed for sediment because of the negative impact that sediment loading has on the same listed species the policy is suppose to protect. The Substitute Document should have considered the impact to aquatic species caused by sediment related changes in water temperature, dissolved oxygen, dissolved nutrients, dissolved organic carbon, total suspended solids, biological oxygen demand, and pH. The Substitute Document should also have analyzed the potential contaminants that may be contained in the sediment trapped behind that existing dam structures that would be released into the environment if the dams were removed. While acknowledging that hazardous contaminants will be released into the environment, the Substitute Document contains no analysis of the likely contaminants and the impacts associated with the release of those contaminants into the environment. (See e.g., Substitute Document, Appendix E, p. v.)
- **Failure To Consider Loss of Existing Habitat.** One of the foreseeable responses to the Draft Policy is that existing dams will be removed, but the environmental impacts of the permanent loss of habitat are not discussed in the Substitute Document. The Substitute Document simply list species (See, SED, Appendices B and C) without analyzing the environmental impacts to those species resulting from the predicted loss of habitat after dam removal.<sup>12</sup>
- **Failure To Consider Flood Protection Benefits Of Existing Structures.** The existing dams, whether permitted or not, provide some level of flood protection. The flood protection benefits provided by these structures should have been evaluated.
- **Failure To Consider Prohibition On Dam Construction.** The Substitute Document's analysis of the impacts of the removal of existing dams is also flawed because the analysis in Appendix E uses the CDF stream classification system, and

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<sup>12</sup> / County of Napa raised the same concern in their scoping letter dated August 25, 2006, stating: "... diversion and/or dam removal will affect aquatic species that have become dependent upon these habitats. . . . We understand that the policy is intended to improve habitat for some sensitive species (namely fish), however other species (i.e., red legged frog) may be harmed as a result of policy actions. Your analysis should fully disclose these inevitable trade-offs of one species' survival for that of another and justify the policy actions and mitigation suggested."

not the system actually used in the policy. The Substitute Document therefore failed to consider the potentially significant impacts of the on-stream dam prohibitions in its proposed policy

#### **4. The Substitute Document Failed to Adequately Consider Cumulative Impacts**

Environmental impacts may be cumulatively considerable, being individually minor but collectively significant. (Cal. Code of Regs., tit. 14, §§ 15355 and 15064(h)(1).) The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects. (*Id.*) An environmental document shall discuss cumulative impacts of a project when the project's incremental effect is cumulatively considerable, as defined in section 15065(c). (Cal. Code of Regs., tit. 14, § 15130(a).) The Substitute Document failed to sufficiently consider the cumulative impacts of the Instream Flow Policy.

The Substitute Document dedicates less than a single page to the topic of cumulative impacts. The analysis consists of a conclusory statement that various indirect impacts of the policy were considered. (SED, p. 83.) There is also a conclusory statement that the, "State Water Board considered foreseeable past, current, and probable projects to include two categories of land use and development projects . . . (1) projects requiring water supplies . . . and (2) projects developing water supplies under other bases of right." (SED, pp. 83-84.) These projects, however, are not identified. The Water Board simply concludes that, "The proposed policy, in combination with these land use and water development projects, may have cumulative impacts on the environment. . . ." (SED, p. 84.) This analysis, or lack thereof, is insufficient.

The Substitute Document states the analysis of cumulative impacts will be deferred until project-specific CEQA documents are prepared. (SED, p. 84.) Because the actions the regulated community will take in reaction to the policy are highly foreseeable – indeed are identified in the document and its appendices- the deferral of the consideration of the cumulative impacts is therefore unlawful. The Substitute Document also states that ". . . adoption and implementation of the proposed Policy will not result in any direct impacts on the environment. . . ." (Substitute Document, p. 83.) As previously discussed, there are direct impacts that should have been considered in the analysis of direct and cumulative impacts.

The analysis of cumulative impacts should have considered the direct and indirect impacts of the policy with the environmental impacts of other past, present, or reasonably foreseeable future projects, such as: urban development projects, habitat restoration projects, streambed alteration agreements, the implementation of TMDLs, existing and future groundwater extraction, existing and future water conservation and water reuse projects, desalinization projects, water right decisions and orders, wastewater discharges, commercial and recreational fishing, and the approximately 300 pending water right applications.

The approach taken by the Substitute Document completely undermines the purpose of a programmatic document, which is to evaluate the impacts of the Draft policy. At the project level, the cumulative impacts analysis will be limited to the impacts related to only that specific

project. If not considered in the Substitute Document, the cumulative impacts of the Draft Policy will never be considered, as required by CEQA.

**5. The Substitute Document Failed to Adequately Consider Mitigation Measures That Could Reduce or Avoid Significant Impacts**

The Substitute Document failed to identify a single mitigation measure even though, by its own admission, the policy will result in significant indirect and cumulative impacts. (SED, pp. 86-87.) The Substitute Document must fully describe feasible mitigation measures which could minimize significant adverse impacts. (Cal. Code of Regs., tit. 14, § 15126.4(a)(1).) “Mitigation measures must be fully enforceable through permit conditions, agreements, or other legally-binding instruments. In the case of the adoption of a plan, policy, regulation, or other public project, mitigation measures can be incorporated into the plan, policy, regulation, or project design.” (Cal. Code of Regs., tit. 14, § 15126.4(a)(2).) As it has done throughout the entire environment document, the Substitute Document once again improperly deferred any meaningful analysis until, “. . . future CEQA reviews. . .” (SED, p. 87.) This approach limits mitigation to “project-specific environmental effects,” and does not provide any mitigation for the significant affects of the Policy. (*Id.*) Once again, the approach taken by the Substitute Document completely undermines the purpose of a programmatic document, which is to consider and mitigate the impacts of the entire project or policy.