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STATE WATER RESOURCES
CONTROL BOARD
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DEPT. OF WATER RIGHTS
SACRAMENTO

Karen Niiya, Senior Engineer
Division of Water Rights
State Water Resources Control Board
1001 I Street, 2nd Floor
Sacramento, CA 95814

Reference: AB2121 Draft Policy of December 2007

Dear Ms. Niiya:

In mid January I became aware of the December 2007 Draft of the Policy for Maintaining Instream Flows in Northern California Coastal Streams (the Policy). I wish to comment on this Policy during the public comment period which ends 1 May 2008. I wrote comments for the Notice of Preparation of Documents and Notice of August 2006 Public Scoping Meeting, and comments directed specifically to the Environmental Checklist. The following comments concern the proposed Policy.

1. Application Procedure

This Policy complicates the application procedure beyond all recognition and is contrary to AB2121 and to the intent of the Trout Unlimited/Peregrine Audubon Petition of October 27, 2004 to improve the application procedure.

AB2121 states in Section 1(g), "Many of these applications have been pending for a decade. Most of these applications have been pending for at least five years. These delays are inappropriate, and they produce regulatory uncertainty for the water user community and the conservation and fishing communities." Trout Unlimited/Peregrine Audubon wrote in its petition, "Although most have been pending for five years or longer, the State Water Board has not published or set a schedule for final action." (Page 1)

In a press release (Encl. 1) dated October 1, 2004 Trout Unlimited wrote,

"[Chuck] Bonham [Counsel to Trout Unlimited in California] said the legislation was necessary because there are approximately 276 applications pending before the SWRCB for new water permits. Without guidelines, the Board has no way to determine whether enough water is available to permit new diversions and how much is needed for threatened salmon and steelhead populations.

"In addition, many of the pending applications have been stuck in an administrative limbo. The Board has not acted on many of them in the last decade and most have been pending for at least five years.

“The process is clearly not working - a problem that will hopefully be remedied by the Governor’s signature on AB 2121,” Bonham said.”

One of the purposes often stated by the Water Board and others is to reduce the backlog of applications and to make decisions in a timely manner. The new Policy does nothing of the sort. It requires entirely new classes of regulations and restrictions, e.g., completely new engineering methods to calculate water availability and instream flows, new requirement standards for bypass flow structures, environmental remediation and mitigation plans, and others. It adds new regulations to the class of small domestic use and livestock ponds by including registration for these minor water uses in the Policy. The Policy substitutes unknown procedures that are untested in Northern California for determination of water availability and instream flow criteria such as minimum bypass flow rate and maximum cumulative diversion rate.

Each of these provisions makes the whole process more complicated. Each will result in years of delay and great expense for each applicant. There is no time line for the numerous submissions and reviews and no time line for response by any agency. It is especially unfair to those with pending applications who have either complied or done their best to comply with every new requirement and rule for the last decade which have seen with no progress in the application process.

While the Draft Guidelines of 2000 (revised in 2002) may not be perfect, they were written by the Department of Fish and Game, NMFS, and Trout Unlimited/Natural Heritage Institute, and have been reviewed by engineers and others. These Draft Guidelines are understandable and reasonably workable in a way the Draft Policy is not. Many engineers and hydrologists have criticized the Draft Guidelines on technical points and believe modification is necessary regarding minimum bypass flows and structures and natural hydrograph. The Draft Policy should be scrapped entirely, and a new policy developed with the assistance and cooperation of *all* stakeholders, not just Trout Unlimited and Natural Heritage Institute. This will take two to three years probably but will result in a fair policy which both enhances fish habitat and promotes larger anadromous fish populations, while at the same time preserves agriculture. This policy, however it reads, will be setting a precedent and may act as a model for water rights throughout California and therefore it is crucial that it be fair, balanced, and workable.

In the interim, here are three suggestions. As you read further, the rationales for these suggestions will become clear, and are simply based on what the Division staff repeatedly told applicants they would do, but never did.

- For applications submitted prior to December 31, 1997, the appropriate procedure to evaluate them should be based on the procedures acceptable through December 31, 1997, i.e., procedures that were acceptable at that point in time.
- For applications dated January 1, 1998 and later until a reasonable and comprehensive policy is developed, the Draft Guidelines of 2000 (modified in 2002) should be used, but in accordance with revisions suggested by professional engineers.
- For applications dated subsequent to the adoption of a new Policy, use the provisions of the new Policy.

2. Documented History of Water Right Applications since 1997 and the Abuses of the Right to Protest, or Why Participatory Democracy is in Peril and What Can be Done

The proposed Draft Policy was released for public comment and for some peer reviews at the end of December 2007. This Draft Policy was the work of staff and consultants over the prior 12 to 15 months or so, and the Policy ignores or glosses over the most important events of the last decade.

No one will disagree about the benefits of writing a water policy based on watershed data, or about developing a fair and comprehensive method for determining how water will be put to all types of beneficial uses. But this policy has many things wrong with it. It is a single focus policy to benefit anadromous fish and ignores all other wildlife, such as migratory waterfowl, large and small mammals and invertebrates except to serve as fish food. It is directed against agricultural water users and rural residents but no one else such as urban water users will suffer. The mainstem of the Russian River is actually *exempted* from the Policy, as are Dry Creek and Lake Sonoma, and Lake Mendocino.

There is a fundamental question which must be asked: Will the requirements of this policy by themselves bring the fish back to a sustainable level? Of course not. The decline of the salmon population is the result of a very large and complex ecological problem that few are willing to admit can be solved only by including the effects of Lake Mendocino and Lake Sonoma. Both these reservoirs are exempted from the Policy and the Policy not only pretends they do not exist, but pretends these reservoirs have no impact on the fish.

Moreover, the public, especially landowners, have been shut out of the process. I must admit to being upset about the methods used to bring this policy into being. As you will see by this history, the strategy and methods make a mockery of participatory democracy, because most people were denied participation even when they followed the rules. This Policy is the result of legal and political maneuvering rather than the result of scientific research and reasonable compromise. It is a Policy so cumbersome, so restrictive and so expensive to comply with that many small landowners will have to quit and "sell the farm". This policy is the result of the overwhelming influence of a single-focus group with an agenda started in 1997-1998.

In a single sentence, Trout Unlimited/Natural Heritage Institute (TU/NHI) has been controlling the agenda and political process since 1997 and 1998. This will become evident in the succeeding paragraphs. It is now time for everyone involved, including all agencies, applicants, cities and environmental groups to learn some history during the time period prior and up to issuance of the Draft Guidelines, some history of AB2121 and the TU Petition, and some history of the "Collaborative Group" which failed to produce any collaboration much less any documents that stakeholders could agree on. Most people want history to be written on the back of a postage stamp and to be kept simple. It's not possible here, and it's important to document as much as possible so please bear with me and take the time to read this history and all the supporting correspondence enclosed. As the Quakers stated in 1955, it is time to speak truth to power.

The root of this problem lies in the Protest procedures which are found in the booklet titled Regulations Pertaining to Protests and Hearings, California Code of Regulations, Title 23, Waters.

As it now stands, even when the Division of Water Rights, the Department of Fish and Game, NOAA Fisheries and other agencies sign off and approve an application and supporting documents, there is no enforceable method at all available to an applicant to resolve a remaining protest, let alone resolve it in a timely manner. All power rests with the protestant. That power is so easy to use. It is the power of being able to do nothing except to wait and to say no to any request from the applicant to discuss protest resolution. The protestant also has unlimited power to file more objections and to delay the process forever; he does not have to drop his protest until he gets what he wants. The protestant is not required to do anything constructive after filing a protest. The protestant does not have to validate his objections nor talk to the applicant, nor even to have ever been within 200 miles of the project he is protesting. All he has to do is sit back and say he will not drop the protest. And this is exactly what TU and NHI have been doing for more than a decade. The Division does have the ability to dismiss a protest, but this is something that has occurred very rarely up to this point. Only the Division can answer why it has been so reluctant to dismiss any protests and I hope it does address this question publically.

During the workshop held in Santa Rosa on February 6, 2008, an audience member asked Mr. Herrera about the Division dismissing protests if an applicant followed the Policy. This man asked if an applicant complies and all requirements are met and accepted, will protests be dropped? Mr. Herrera said the protests will go on because many protests are not environmental in origin, but could be neighbor protesting neighbor. However, Mr. Herrera indicated DFG and NMFS will drop their protests if an applicant meets the requirements for permitting.

Mr. Herrera answered the question in very general terms and failed to address the real problem. Apart from Department of Fish and Game which automatically investigates and resolves a protest one way or the other with the landowner, there is only one protestant common to these applications in the Russian River Basin and North Coast Streams. It is of course Trout Unlimited. The importance of this fact cannot be overestimated.

By Stan Griffin's declaration in the Trout Unlimited/Peregrine Audubon Petition, he states he has filed 82 protests on behalf of Trout Unlimited and only withdrawn one (Petition Declaration of Stan Griffin, page 4). These protests go back to at least 1991 (Petition Declaration of Stan Griffin, page 3). It was TU's MO to file a protest against every application; these were boiler-plate protests, blanketing a large area and were used to tie up the process and in some cases the rationale for the protest was completely irrelevant to the actual project application. TU and one of its legal representatives, Mr. Richard Roos-Collins of Natural Heritage Institute, have made sure that for more than a decade no protests have been withdrawn for these more than 80 projects despite repeated requests to resolve the issues.

Let us begin with an actual Protest filed by TU and United Anglers on September 2, 1994 (Encl. 2). Please take a moment to read it carefully and you'll quickly see that there is nothing in it to substantiate and foretell what Mr. Roos-Collins of NHI, acting on behalf of TU, was going to do in 1998 and subsequent years.

This particular application was for a water right on an ephemeral stream, a tributary to the West Fork of the Russian River north of Redwood Valley. It happens to be my own application

against which TU protested, but could easily be someone else's application. I'm intentionally omitting nearly all of the details specific to my application because we are now discussing a proposed Policy which will apply to everyone. However, I should mention that the Department of Fish and Game did not file a protest, and in fact its staff was most helpful to me in completing the necessary paperwork. The only protest was by TU and United Anglers. The information revealed here about my own application is strictly to demonstrate what happened. My application is representative of many, perhaps hundreds. The pattern for all TU protests is identical. The TU protest on this application is clearly a "boiler plate" job from beginning to end. This protest discusses sewage spills in Sonoma County, wastewater discharges from Windsor and Santa Rosa, reduced flows into the estuary 120 miles distant at Jenner, the PG&E diversion from the Eel River into Potter Valley, and finally a brief mention is made of the Public Trust Doctrine. A curious point is that this protest seems to object to the proposed flow reductions from the Potter Valley Diversion into the Russian River system and Lake Mendocino.

What the protest doesn't mention is anything to do with the West Fork of the Russian River let alone this particular project. There is no mention in the protest of the measured flow regimes documented by the USGS Gaging Station on the West Fork, the presence or absence of anadromous fish in the West Fork, the fact the application is a supplemental one to correct an error, and that the pond is on an ephemeral stream which is a tributary to the West Fork, and the fact no anadromous fish can ascend that tributary. There is absolutely nothing in the protest specific to the proposed application.

The Protest Form from the Division of Water Rights is very clear on this subject. The form reads, "**Protests of a general nature (not project specific) or opposed to constitutional or legislated state policy will not be accepted.**" [Bold type mine.] See Enclosure 2. This particular protest is a poster child for the type of protest that should never have been accepted by the Division of Water Rights in the first place according to its Protest Form. However, TU was able to submit and have the Division of Water Rights accept this type of non-specific protest over and over again.

The Division of Water Rights for reasons unknown to me accepted this protest, and during the next three years I attempted without success to have Mr. Griffin visit the site and discuss ways to resolve the protest. Mr. Griffin never visited nor showed any inclination to cooperate. The Division wasn't responsive to my requests for help to move the process forward, nor did the Division respond to my written request to have the protest dismissed. It was a mystery to me why the Division did not and would not act on my application during that time.

However, the Division did continue some general work during that period, specifically developing criteria for instream flows and permissible diversions. On August 15, 1997 the State Water Board released the Staff Report by Frank Roddy and Ernest Mona. It was called "Russian River Watershed: Proposed actions to be taken by the Division of Water Rights on pending water right applications within the Russian River watershed." About two weeks later, a minor workshop was held in Ukiah for Mendocino County applicants. About a dozen of us were there. Mr. Roddy and Mr. Mona told us that part of their job was to resolve protests and investigate the unresolved ones. Mr. Mona made it very clear that the Division intended to act on the pending applications. Mr. Mona told us that after January 1, 1998, the Division would be able to terminate an application if

there was no response from the applicant to move things forward. He also went on to say that if a protestant didn't respond and if the protestant failed to attempt resolution, the Division could dismiss the protest.

At the same meeting, Mr. Roddy made it clear that if applicants would agree to the conditions set out in the Staff Report, that the Division would work hard to get the permits issued.

The same message was presented not long after, on September 16, 1997 at a major workshop at Luther Burbank Center in Santa Rosa. Well over 100 people attended. This workshop had Division staff represented by Jerry Johns (Assistant Chief of the Division), Barbara Leidigh (staff attorney), Frank Roddy, Ernest Mona, Ed Dito, and Andy Chu. They carefully explained the Staff Report and Mr. Johns said to us all that the Division would "take the report to the Board [SWRCB], get their concurrence, and then begin issuing water right permits." He spoke of the more than 80 applicants [at that time in 1997] and specifically mentioned that the smaller projects would be suitable for permits.

Two months after the Santa Rosa meeting I and many others received a letter dated November 25, 1997 from Edward Anton which said, "Therefore, the Division will resume processing pending applications within the Russian River watershed consistent with the process described in the August 15, 1997 Staff Report" (Encl. 3). His letter went on to say applicants and protestants would be contacted, and would be advised of activities which must be completed. Although I was never contacted about this, I and others did receive a letter from Mr. Ed Dito dated April 24, 1998 which said that if I agreed to some modifications, "the Division will continue processing the application" (Encl. 4). The letter also said, "If the proposed project modifications below are acceptable, no additional environmental information will be required from the applicant." I agreed to these modifications in a letter I wrote on April 28, 1998.

It is doubtful that the Division at that time ever intended to *approve* all projects because some may have been illegal, some would have harmed fish or wildlife, some might dewater a stream reach, some might have been for places where all water was already appropriated, and so forth. The purpose was to *make a decision* on each application. The language was always the same: " will continue to process the applications." Some would have been approved, some denied, and some would have required further study. But the Division was making a good faith attempt to make these decisions, to reduce the rapidly building backlog of cases, and to permit those that were worthy, those that obviously would not cause any potential environmental harm or where conditions were satisfied for other factors. Within a few days TU/NHI prohibited the Division from acting on any application with a blitzkrieg of legal stonewalling.

On May 4, 1998 TU/NHI really flexed its muscles after they had received the same letter of April 24, 1998 that applicants had received. Mr. Roos-Collins' reply contained the first of the Additional Grounds for Protest (Encl. 5). TU/NHI brought up nine totally new requests that had never been referred to in the initial protest of September 2, 1994. Among them were the following: 1) whether or not coho or steelhead use the stream; 2) what was unimpaired flow at the point of diversion by month and year; 3) what was the regulated flow by month and year; 4) whether or not the 60% bypass flow as recommended in the Staff Report of August 1997 exists; 5) effects of the

diversion on availability and quality of habitat for anadromous fish; 6) how will the State Water Board monitor the impacts on water flow, fish and fish habitat.

Now, these requests for further information may have been reasonable issues to bring up for an application filed in 1998 because the topics would have been included in the original protest. But there was an inherent unfairness in bringing these up more than 4 years after the application was filed, and 3 ½ years after the protest was filed and accepted.

However, hardly had the staff report been released when Trout Unlimited contracted with the firm of McBain and Trush in Eureka to criticize it. McBain and Trush's commentaries and some unpublished discussions and correspondence with the Department of Fish and Game and NOAA Fisheries put the Staff Report of August 1997 in its coffin. Here's part of what happened.

In his letter of May 4, 1998, Mr. Roos-Collins also included a reference to a report dated March 12, 1998 by McBain and Trush. TU/NHI hired that firm to write the commentary (Encl. 13). One of the major criticisms of the Staff Report was that findings were not "site specific" enough. There was probably some truth to that statement. However, this commentary discusses Maacama Creek, Dry Creek and a few others in Sonoma County. It spends a little time on the Navarro River, and on Elder Creek (a tributary to the South Fork of the Eel River). The commentary never once mentions any site of the Russian River or any of its tributaries in Mendocino County. On page 3, McBain and Trush admit that, "Unlike most other Central California watersheds, many Russian River tributaries are probably not yet overallocated." But then, the report goes on to say, "The SWRCB proposal, as presented, 'gives away the farm' when only a patch sufficient to support the mailbox is being requested." This report also claims (page 5) that the SWRCB in adopting the Tennant Method of stream flow models is in a "scientific fantasyland when applied to stream and river ecosystems in Northcoast [sic] California." This commentary was the first of three by McBain and Trush. This initial one was used to raise doubts about the accuracy of the Staff Report of August 1997, and succeeding commentaries dealt a deathblow to the Staff Report. By 2007 hardly anyone remembers the Staff Report, and for those few who do, speak of it as misguided or even wrong, and they probably have only a hazy idea of the McBain and Trush role.

On May 28, 1998, Mr. Ed Dito wrote a response to Richard Roos-Collins of Natural Heritage Institute, the legal representative for TU. He stated that the SWRCB agreed with the staff recommendations in the Staff Report of August 1997. Mr. Dito said in his letter to Mr. Roos-Collins what the recommendations were and he discussed the conditional approval provided the applicants agreed to modify their projects. If the protestants were satisfied with the modifications, the Division of Water Rights would prepare documents and the permit process would go forward to issue permits when appropriate. He added, "However, if the protests are not withdrawn or dismissed, the Division will continue to process the applications in accordance with the provisions of either Water Code Sections 1345-1348 for minor projects (i.e., direct diversion of less than three cubic feet per second or storage less than 200 acre-feet per year) . . ." The letter went on to say the Division would schedule "a field investigation with all parties in attendance, and the Division will prepare a decision" (Encl. 6).

It appeared to me that Mr. Dito was saying that the Division would proceed with our

application and many others even though Trout Unlimited and Natural Heritage Institute wouldn't withdraw their protest. The Division's intention was clear and was consistent with what I knew from before. There was no guarantee of approval at that time, but at least the Division was moving the process forward.

Mr. Roos-Collins, on behalf of Trout Unlimited in a letter dated July 7, 1998 to Mr. Dito, refused to withdraw any protest to any project, and made no mention in his letter of ever planning a site visit. He said, "In answer to your question, Trout Unlimited will not withdraw our protests merely on the basis that the applicants have agreed to amend their applications to conform to the Division of Water Rights' August 1997 Staff Report" (Encl. 7). He referred to letters of June 12, 1998. Instead of trying to resolve anything, Mr. Roos-Collins added more grounds to the protest than before, demanding answers to questions that Trout Unlimited had never raised earlier.

Mr. Roos-Collins in his reply had cited a request found in Mr. Dito's letter. "You asked us to state any additional conditions on which we will withdraw our protests." Mr. Roos-Collins' answer is blunt, and he wrote back, "Although it is premature to specify such conditions, we underscore our continuing grounds for protest."

This time, TU/NHI wanted the Division to conduct many more studies and to answer more and newly developed questions. Among these were: 1) even though the Division calculated streamflows, TU/NHI wanted a new review of all calculations of available flow in all tributaries or streams; 2) a new evaluative concept and method to determine actual cumulative impacts on listed fisheries; 3) coordination between the Division and other agencies; 4) insistence on specific compliance measures; 5) techniques to "monitor actual flows into and out of the points of diversion, and *report such data on a real-time basis* [italics mine]"; 6) methods to "*provide for fish and gravel passage, and then monitor the effectiveness of such passage after construction*" [italics mine]; 7) a denial of any site visit until these steps have been taken.

On July 24, 1998, Mr. Roos-Collins expanded the complaint again (Encl. 8) in what he termed "a follow-up". [On the page 2 header of this letter, Mr. Roos-Collins accidentally used the date of July 7, 1998.] He wanted this time to obtain comprehensive information on many things, among them 1) the numbers of permits and licenses; 2) pre-1914 rights, riparian rights; 3) total authorized diversion under riparian rights; 4) the number of field inspections during each of the years 1990-1998 the Division had conducted; 5) the number of enforcement proceedings the Water Board had initiated regarding diversions in excess of water rights throughout the entire Russian River basin; 6) whether or not any existing permit or license had a monitoring requirement of either direct or cumulative impact on anadromous fisheries; 7) whether or not the Water Board had "authority to require public access to a monitoring station for inspections." Once more, he asked new questions, ones far removed in scope from the original protests which Trout Unlimited had been filing for years.

Mr. Dito replied to TU/NHI on July 28, 1998, and said that, "the Division intends to proceed with the further processing of the applications in accordance with the provisions of Water Code Sections 1345-1348 for minor projects. Accordingly, a field investigation will be scheduled for each project . . ." (Encl. 9). Once more, it was pretty clear that the Division intended to move forward on these pending applications even though the outcome for each had not yet been decided.

Mr. Roos-Collins responded in a letter dated August 21, 1998 not by offering to have Trout Unlimited visit sites and help in the field investigation but instead Mr. Roos-Collins said, "A site visit, which will occur in a single day, will not be informative on the issue whether unappropriated water will be available for both the proposed diversion and the required bypass flows, during the entire diversion season in all year-types" (Encl. 10). Mr. Roos-Collins wrote, "Because of the passive voice and generality of the statement [regarding Water Board authority and TU/NHI suggested procedures] we are uncertain who is evaluating which of the specific issues raised in our letter, and on what schedule. More importantly, we did not just ask for the Division to evaluate these issues. We proposed procedures by which your data, methods, and conclusions may be tested *by experts representing Trout Unlimited* [italics mine] and other parties."

Once more, it was clear that Mr. Roos-Collins and Mr. Griffin weren't in the least interested in this resolving a protest, especially when in a subsequent paragraph of the August 21, 1998 letter he wrote, "*We intend to file a formal motion with the Board itself requesting approval of the further procedures we have proposed for these and other pending water right applications in this basin.*" [Italics mine.] We see once again an expansion of the inquiry, and by this time Mr. Roos-Collins is writing about their proposed procedures as though their objections had been around for many years instead of a month or two.

Mr. Roos-Collins wrote another letter to Mr. Dito the same day, August 21, 1998, responding to a letter dated August 5, 1998, adding in more questions and expanding his inquisition still further (Encl. 11). Specifically, some of the requests were: 1) to obtain a list of all water rights, both riparian and appropriative, for the whole Russian River basin; 2) a companion list of all pending water rights to include the original 80 and 30 new ones since July 1, 1998; 3) an evaluation of why the Division can assure itself and others that the unappropriated water in any tributary stream is adequate for the protection of anadromous fish; 4) how much flow is diverted and how much remains under existing rights; 5) what "'post-approval' monitoring" is done, and the letter gives examples of measurement of stream depth for spawning, migratory fish passage, and observation of individual fish. Clearly, Mr. Roos-Collins was beginning to control the water rights procedures by the simple method of more and more requests to be answered.

Mr. Dito replied on September 16, 1998 (Encl. 12) to the first of Mr. Roos-Collins' letters of August 21, 1998. He presented the history of the applications, the procedures developed to have the applicants accept conditions on their projects, and the Division of Water Rights efforts to have protestants withdraw their protests. He defended the August 1997 Staff Report and wrote, "The results of the Division's evaluation are described in a staff report dated August 15, 1997 that provides a detailed description of the analysis of water availability, the proposed measures to protect fishery resources and the proposed approach for acting on pending applications within the Russian River watershed. As described in the staff report, Division staff conclude that sufficient water is available to allow diversion during the peak winter runoff period and, at the same time, to provide adequate flow to protect the fish and other public trust resources. Division staff recommend that pending applications for wintertime storage and diversion of water be approved, provided the projects are modified to include specific conditions that: limit the allowable season of diversion, limit the rate of diversion, require bypass of flows needed for fish, and implement measures to insure compliance with these terms" (Encl. 12).

His letter included a direct reply to Mr. Roos-Collins' idea of a formal motion. Mr. Dito wrote, "You indicate in your letter that you intend to file a formal motion with the SWRCB requesting approval of your proposed procedures for processing all applications within the Russian River watershed. The SWRCB will review your motion when it receives it." (Encl. 12.)

His letter to Mr. Roos-Collins also said, "The Division intends to continue processing these applications, in accordance with the provisions of the Water Code The Division staff will conduct an analysis of water availability for each project The field investigation is the next step in the water right process. The field investigation will provide an opportunity for the applicant, experts representing Trout Unlimited and/or other protestants and interested parties to evaluate and comment on the Division's data, methods, and conclusions. Contrary to your assumption that a field investigation does not involve technical examination of physical and biological conditions, the SWRCB can request such material for its evaluation before, during, and after a field investigation."

Needless to say, the Division of Water Rights staff never called anyone to schedule a field investigation, although it seemed fairly clear to me at the time that the Division was trying its best to process these pending applications and issue both permits and licenses where appropriate. Perhaps others felt the same way. Also, I never heard anything further about the SWRCB reviewing such a motion if indeed it had ever been filed. However, there was no progress and one can only surmise what pressures were brought to bear on the Division at that time. I would be interested to learn if lawsuits were filed or threatened if TU/NHI did not get its way. In any event, by September of 1998, the water right process was fully politicized and TU/NHI was in firm control.

There seems to be only two possible explanations as to what was going on during that year, and both are frightening to examine. The first is that TU/NHI had taken control of a governmental agency which exists to serve all the people of the State of California. That's what is seemed like at the time and even later, because I truly believed the Division when it on so many occasions wrote, "We intend to continue processing these applications." But the Division utterly failed to continue processing applications and then for a few years even refused to talk to applicants about what was going on. At that time I believed that this failure was not totally due to its own efforts as public servants, but was due almost entirely to TU/NHI.

Of course, had the Division used its legitimate authority to reject a number of protests from 1991 through 1997 because the TU protests didn't comply with the requirement for project specificity or dismiss them because TU wouldn't meet with applicants to resolve them, the Division would have avoided an enormous amount of trouble. I actually wrote to the Division on two occasions asking the Division to dismiss the TU protest on the grounds of non-cooperation and because TU never tried to resolve it nor would they meet with me. No one from the Division ever wrote back to me, although my letters are in their files.

The alternative explanation is also frightening to think about, and that is that the staff was being untruthful to applicants when they assured us they wanted to move forward and process the applications. Perhaps staff was simply saying what we applicants wanted to hear and had no intention of actually following through on its promise.

It is now time for the truth to come out. The Division and the entire SWRCB should explain to the applicants, the public and perhaps to the Legislature what really happened. Was the Division being forced into non-action by TU/NHI or did the Division never intend from the outset to process the applications as staff repeatedly said they would? We deserve an honest explanation to account for what happened. Government integrity is far too important to dismiss or ignore, and at the moment the Division's credibility among several hundred applicants whose applications have been held up for more than a decade is not very high.

For the next six years after the summer of 1998, there was not a lot of progress visible to anyone not intimately connected with the process. There was a short staff report dated July 20, 2000 (Encl. 13). The Division discussed its August 1997 report and the recommendations, and went on to discuss other ideas. In particular, the report said that on October 23, 1998, NMFS objected to the methods used in the report, and substituted its own criteria for salmonids. No mention was made in this document of the TU/NHI involvement, but these organizations were intimately involved in formulating both policy and requirements for landowners to follow. The Division, acting on behalf of the SWRCB as Lead Agency, agreed to some changes, such as no new instream storage, and an increased minimum bypass flow regimen. The report contained the prior criteria of reduced storage season, no new migration barriers and construction of fish passage facilities where needed.

The Division of Water Rights concluded its summary paper dated August 3, 2000 (Encl. 13) as follows:

"Division staff recommends that the criteria outlined in the July 2000 Staff Report be considered for inclusion in the environmental review of all pending water right applications within the Russian River and other mid-California coastal watersheds. Pending applications will be evaluated on a case-by-case basis and appropriate measures will be included in any permits issued. Division staff believes small water projects can be permitted with the criteria so that the individual and cumulative effects of these projects are reduced to non-significant levels. Applicants that desire to operate their projects other than under these conditions will need to submit fishery studies and other supporting documentation to demonstrate that fishery resources will not be adversely affected or they will need to prepare an Environmental Impact Report."

"Unless directed otherwise, Division staff will continue processing pending applications as outlined in the July 2000 Staff Report."

I don't know of any applications that were processed but there may have been a few.

During that time, according to Stan Griffin's testimony (page 6) accompanying the Petition. TU, NOAA Fisheries and California Department of Fish and Game were meeting together. The purpose of these meetings among these three entities was to design and write the Draft Guidelines which came out in May 22, 2000, and were revised in June 17, 2002. On page 6 of the TU/PAS petition, it states, "TU contributed to DFG and NOAA Fisheries' adoption of their 'Guidelines for Maintaining Instream Flows to Protect Fisheries Resources Downstream of Water Diversions in Mid-

California Coastal Streams (May 22, 2000, updated June 17, 2002) (2002 Joint Guidelines)’.”

Although applicants were totally unaware of what was going on, there was significant behind the scene activity, and the next TU/NHI victory was AB2121. On September 30, 2004 Governor Arnold Schwarzenegger signed Assembly Bill 2121, which added sections to the existing Water Code. It had been introduced by the Committee on Budgets on February 18, with no specific author’s name, which may not seem peculiar to some people who are more acquainted than I am with politics. Its actual author was Assemblywoman Sheila Kuehl (later Senator) from Santa Monica (Encl. 14). Trout Unlimited and the Natural Heritage Institute were intimately involved in writing AB2121. After it had passed, a Trout Unlimited press release dated October 1, 2004 confirmed what a few of us suspected about the role Trout Unlimited played. The press release said that Trout Unlimited “was instrumental in designing and passing AB2121” (Encl. 15). This bill went through the legislative process with virtually no public input, although the Senate version modified the bill a little. On the last day of the legislative session at 3:15 A.M., the Speaker of the Assembly pushed the bill through. It had been in print only four days and had never been heard in any policy committee. The bill passed the Assembly 41-38, and the Senate 22-14, and was sent to the Governor. During the first few days prior to his signing, substantial opposition surfaced, including from quasi-public and public organizations such as The Association of California Water Agencies, the Northern California Water Association, the Regional Association of Rural Counties, the Southern California Water Committee including supervisors from seven counties, and trade groups such as The Wine Institute and the California Farm Bureau. The Governor signed the bill.

The bill requires the Water Board to adopt guidelines to maintain streamflow in certain North Coast streams. It’s worth quoting the actual language from the bill. (a) “In 1997, the SWRCB prepared a staff report that broadly analyzed water right permit matters relating to the Russian River basin.” (b) “From 1997 to 2002, the board, the Department of Fish and Game, the National Marine Fisheries Service, and *Trout Unlimited* [italics mine] debated the necessary flow requirements, and other biological and fish-related conditions that are appropriate for inclusion in water rights permits.” (c) “In June 2002, state and federal fish agencies released their updated ‘Guidelines for Maintaining Instream Flows to Protect Fisheries Resources Downstream of Water Diversions in Mid-California Coastal Streams’.”

The bill goes on to say that there are many applications for appropriative water rights still pending, some for more than 10 years, and that the Legislature recognized that “these delays are inappropriate, and they produce regulatory uncertainty for the water user community and the conservation and fishing communities.” There is no reference to the permit process nor to the fact that what had held up all these applications were all the protests filed by Trout Unlimited and Natural Heritage Institute, plus all the delaying tactics used in 1998, as detailed in the preceding paragraphs. The Legislature was led to believe that this bill would remove the bureaucratic impasses created over the years. However, few people recognized that Trout Unlimited and Natural Heritage Institute had stopped the process dead in its tracks by the summer of 1998.

The bill recognizes that the Draft Guidelines had not been adopted by the Water Board, but says, “the adoption would significantly advance the effort to ensure that appropriate fish measures are included in new water right permits and that cumulative impacts are considered.” Moreover, “The

adoption of these joint guidelines is necessary for the protection of fishery resources even if these guidelines are required to be amended from time to time." And finally, ". . . the [water] board may consider the 2002 'Guidelines for Maintaining Instream Flows . . .' for the purpose of water right administration."

In other words, the Legislature legitimized the Draft Guidelines without quite saying so. Reaction to the signing was too late. Mendocino County's own Carre Brown, Executive Director of the Mendocino County Farm Bureau, was quoted as saying, "This is the kind of gut-and-amend bill the governor had guaranteed the public he would not sign." The California Farm Bureau's water resources director and attorney, Tony Francois, said, "Codifying these underground regulations in the State Water Code is the worst kind of stealth legislation" (Encl. 16).

Predictably, Trout Unlimited was elated by passage of this bill. Chuck Bonham, Counsel to Trout Unlimited, said, "The decision of the Governor to sign AB2121 demonstrates his commitment to helping to protect salmon and trout populations in northern California. We share his clear belief that some semblance of order is necessary to make sure that the region's streams are not sucked dry, the fate that has met many streams and rivers throughout the West" (Encl. 15).

There were a few curious things about the process to pass this bill. From what I can tell, there were no public hearings held. According to an official senate document, there was no recorded support or opposition received, which seems peculiar on a bill of this importance. The bill was obviously made public at the beginning of the legislative process, but I don't think most folks realized what it meant. Clearly, Trout Unlimited did, but no doubt preferred to lay low and not draw any attention to its part in the crafting of this legislation.

With this victory in hand, TU/NHI took the next step of dealing directly with the State Water Resources Control Board to further their ends. Within a month of AB2121 becoming law, Trout Unlimited and Natural Heritage Institute filed a 77-page petition, accompanied by 150 pages of other documents. There's no doubt that Trout Unlimited had the petition ready to go, and was waiting for the Governor to sign the bill. In a press release from October 28, 2004, Trout Unlimited said, "The petition complements a TU legislative success this year that resulted in passage and signing of Assembly Bill 2121" (Encl. 17).

Some months later, in March 2005, Senator Kuehl wrote to the SWRCB and said, "I encourage the State Water Board to embrace the recommendations proposed by Trout Unlimited and Peregrine Audubon Chapter to develop an open and collaborative process to resolve the issues raised, and to bring efficiency to the regulation of applications for new water rights to this region" (Encl. 18).

It's worthwhile examining the petition in some detail, both for what it says and for what it leaves out. It was written, not surprisingly, by Richard Roos-Collins of Natural Heritage Institute on behalf of Trout Unlimited and Peregrine Audubon Chapter, and its major purpose was nothing less than a total overhaul of how water rights are granted. "This Petition seeks reform of the water rights *system* [bold italics theirs] - beginning with a review of applications for water right permits and ending with compliance - as necessary to protect these steelhead and coho salmon fisheries, riparian habitat, and birds and wildlife dependent on such habitat, in good condition."

The petition cites what so many landowners already know, that by that time there were nearly 300 pending applications, and that most had languished for more than five years. The petition points out the Water Board didn't have guidelines to decide how much water might be taken from winter runoff, and how much should be reserved for migrating fish. The petition will in its words "assist in the implementation of AB2121, as signed by Governor Schwarzenegger on September 30, 2004."

What the petition doesn't ever refer to is the role of Trout Unlimited and Natural Heritage Institute in blocking the permit process so completely in the 1990s. There is no mention in this document that Trout Unlimited stalled everyone and was almost completely responsible for the delays that frustrated applicants and Water Board staff alike. I should mention here that there is a supplemental testimony by Stan Griffin of Trout Unlimited in which he says he began protesting applications in March 1991, but really became proficient some time later. According to his testimony (page 6), he filed his last protest on August 2, 2004. That was two months before the Governor signed AB2121. As we have seen from earlier sections of these comments, Trout Unlimited and Natural Heritage Institute went out of their way during the period 1997-1998 to ensure the Water Board could not process applications even when the Board said it intended to, but continued to keep pressure on the Division for six more years by filing new protests on new applications.

To be sure, the state Department of Fish and Game and the federal NOAA Fisheries were also involved. Their contribution with the help of TU/NHI was to write the Draft Guidelines in May 2000, and to revise it in June 2002. Both agencies were quite insistent even then that the Draft Guidelines be used by the Division of Water Rights in considering any water right application. It didn't matter to any agency that the Draft Guidelines hadn't been adopted and were considered as "underground regulations."

The petition discusses repeatedly the idea that low water flows are caused by winter diversion and this is the reason for salmonid decline. The petition states, "Plainly, the State Water Board, NOAA Fisheries, and DFG will address water diversion as a limiting factor on such recovery. These agencies will address the cumulative impacts as diversions, both permitted and unpermitted, increase rapidly as a result of significant agricultural and other developments in Sonoma and Mendocino Counties . . ." A paragraph later, "Water diversions are a significant cause for the threatened status of the coho and steelhead fisheries within the Geographic Scope [of the petition]."

What is not said nor ever remotely referred to is the effects of other factors on the decline of fish populations. The petition ignores entirely the existence of Lake Mendocino and Lake Sonoma. The petition also ignores the reality of some river flows. The West Fork of the Russian River develops an average flow of 128,000 acre-feet per year at its confluence with the East Fork which flows out of Lake Mendocino, and less than 4,000 acre-feet is diverted annually. This is as close to unimpaired as anyone will see. There are no remaining barriers on the main stem of the West Fork nor in Forsythe Creek, the largest tributary system to the West Fork, and very few barriers on the smaller tributaries. Nonetheless, fish still do not ascend in large numbers as they did prior to 1960 or so. Clearly, the petition overreached with its explanation of why fish numbers are small. Unfortunately, the petition did not ask the Water Board or other agencies to examine other potential factors which contribute to the decline of salmonids.

The petition made no mention of the ocean environment in which anadromous fish spend most of their lives. Overfishing was not mentioned, depletion of foodstocks for these fish was not mentioned, nor was there any reference to global warming very likely altering the oceanic environment in ways detrimental to salmonids. The only important factor to the petitioners was the water right process, as if changing this and consequently prohibiting all diversions will result in larger fish populations. The petition is sweeping in its intent to change the whole water right procedure. It is also very broad in its allegations against landowners and against the State Water Board. Here are some examples of complaints in the Petition by Trout Unlimited, beginning with my personal favorite. "The State Water Board does not have an adequate procedure to assure timely action on water right permit applications." As we have seen, during the period 1997-1998, the Water Board attempted to move forward on small project applications but was thwarted every time . . . by Trout Unlimited. Trout Unlimited never let one permit get through, and dropped only one protest.

The petition claims that the Water Board "improperly exempts small domestic water uses and stockponds from environmental review of cumulative impacts." The facts are different. While the procedure for stock ponds and small domestic facilities is less stringent, the exemption is written into the regulations for very small projects such as stock ponds which frequently hold less water than a suburban residential swimming pool. Moreover, these uses must be registered with the State Water Board, and the amounts of water that are held in them do count as a cumulative diversion when regular water right applications are made.

Another claim is that "the State Water Board and other State agencies named in the petition have not adopted adequate procedures for coordinated environmental review of water right permit applications and related permit applications." This claim is misleading, because the Water Board has for decades required detailed descriptions of each project along with photographs and a specific Environmental Information Form. This form in part must be completed by Department of Fish and Game personnel by consultation. The Department of Fish and Game has long required a site visit and a 1603 permit for the private sector, or a 1601 permit for the public sector. The Department of Fish and Game has routinely protested applications but also has a history of working with landowners to mitigate or eliminate problems to fish and wildlife in order to help the process. Historically, Fish and Game has applauded many ponds or water conservation efforts, because the Department knows that wildlife, especially migratory ducks and geese are enormously benefited by these ponds. In most cases, the Department of Fish and Game is the lead agency to address environmental concerns, and is authorized to work with the applicant on behalf of NOAA Fisheries, the Army Corps of Engineers, and other agencies. Clearly, the Fish and Game Department has had adequate policies and procedures in place for years and has been the lead agency to coordinate the environmental reviews.

The petition alleges that, "The State Water Board does not have guidelines adequate to determine the existing diversions from Central Coast streams." In fact, there is the Water Rights Information Management System database which tabulates all applications, permits and licenses for water diversion. This database includes name of applicant or licensee, exact location of the pond or stream diversion, amount of water stored or diverted, dates of authorized diversion and more. It's true that the Water Board sometimes falls behind in posting the information, and in October 2007, they changed the website significantly. But the amount of diverted and stored water is well known and is a matter of public record.

As for illegal diversions, the petition may be closer to the target when it says the Water Board can't determine the existing diversions. But neither can anyone else short of a site visit and measuring the pond volume or streamflow. But the petition is not really addressing illegal diversions. Illegal diversions are already under the control of the Department of Fish and Game or the Water Board and punishments or other enforcement actions are readily available to the agencies if they choose to use their authority. *In reality, the petition is aimed at all current and future water users, not the illegal diverters.*

The petition says that the "water right permit conditions that protect and restore coho and steelhead fisheries in good condition" are inadequate. In stating this, the petition makes it seem like the permit conditions are flawed to the point that anadromous fish cannot be protected or their populations restored. The corollary to this statement of course is that if the permit process is totally changed, the fish will be protected and their populations will be restored to prehistoric levels. Given the environmental complexity, this correlative assertion is false.

However, the problem of bringing back larger numbers of fish in these rivers is far greater than the small amounts of water most people apply for. The two major public dams and the way they are operated to release water are far more to blame for low numbers of salmon or steelhead than are the small ponds. Substituting a new water right permit process will not bring back the fish in appreciably higher numbers. Many fish runs on the Russian River and its tributaries went nearly or totally extinct in the 1960s, shortly after Lake Mendocino was built and more than a decade before construction began on Lake Sonoma. Also, during that period of time there were few ponds or other diversions on the tributaries of the Russian River, but fish numbers dwindled significantly anyway.

The petition claims that the Water Board "does not take adequate enforcement actions to prevent or correct unauthorized diversions." There seems to be some truth to this allegation. However, beginning in 2002 or so, the Water Board began a detailed study of the Russian River system using maps and aerial photographs to identify each and every storage pond. They were very thorough. In one case I know (it was my neighbor), a swimming pool was identified as a pond. Fortunately, the staff person didn't require the homeowner to get a permit. For those ponds which did not have a permit, landowners were instructed to apply for an appropriative water right (or a small domestic or stock pond registration where appropriate) in cases where the stream had not been declared fully appropriated. Naturally, Trout Unlimited protested them, and to my knowledge, none has yet been permitted.

The petition asks the Water Board and other agencies in power to do a number of things. Quite reasonably, it wants the Water Board to be the lead agency (which it already is), and to develop a Memorandum of Understanding with other agencies. It also asks that the Water Board investigate and identify unauthorized diversions. This also makes sense, but it's also something that the Water Board already does when it is able to. The petition asks for five "remedies" from the Water Board. These include amending the standard Memorandum of Understanding regarding CEQA documentation; to "use as a starting point" the adoption of the Draft Guidelines; to set a time limit of three years in which to process a water right application; to enforce the provisions and prevent or correct unauthorized diversion; finally, to bring under CEQA regulations small domestic water use and stock pond registrations.

On the surface, the five "remedies" perhaps seem reasonable. I think there are few people indeed who approve of blatantly illegal and unauthorized water diversions, and no one will argue against the notion that the Water Board should complete the processing of applications within three years. However, TU/NHI must stop protesting the applications and tying up the process for years, and instead work with applicants. Many of us are conservationists as well as farmers and ranchers, and we have a long-term view of land stewardship. Stricter enforcement of illegal ponds is no doubt a good thing, although it's hard to say what those enforcement measures might be. That should be up to the enforcement agencies to determine.

There are two "remedies" which are likely to cause trouble. One is rewriting the standard Memorandum of Understanding. It's not clear where this would lead, but certainly the procedure will be more complex than ever and whenever CEQA is involved, landowners (or public entities) pay huge sums to comply with CEQA requirements. The other "remedy" to bring livestock ponds and small domestic water use under CEQA is also a terrible burden.

Summarizing the petition and its accompanying documents is not an easy task. The document is far more than the assertions just discussed and the "remedies" asked for, but I also take great care not to take anything out of context.

The petition also claimed that, "The State Water Board does not have written guidelines (namely, policies which guide substantive review of water right applications) for the purpose of deciding how much water is divertible for water supply, and how much must remain to protect the coldwater fisheries."

The State Water Board had, of course, attempted this in its exhaustive Staff Report of August 1997. The staff studied many subwatersheds of the Russian River system. The State Water Board concluded that there was ample water in normal rainfall for fish and humans, and even in dry years which happen on average one year in ten. There was enough water for storage and to permit fish passage and spawning but as we have seen, that report may as well never have been written.

The petition invokes the public trust doctrine, and asserts that, ". . . a multitude of property owners operating separate storage and diversion facilities have cumulatively caused the decline in the flow of numerous streams." Once more, the petition stretches credibility. The flow reduction in the West Fork of the Russian River due to diversions as measured by stream gage readings and known storage is in an average year less than 3% of the overall flow, and in most of the larger tributaries to the West Fork well under 2% or even less. In about 75% of all years, the annual flow is more than 85,000 acre-feet and the storage and diversion amount to 3.1%. Even in the very dry years such as 1975-1977, annual flow was 32,000 acre-feet. The ponds, had they been built then, would have taken 8% of the flow. But these drought years are expected with a frequency of once every 50 to 100 years or so. The annual cumulative streamflow impairment from ponds is actually quite minimal.

In half of the years there is more than average rainfall, and storage and diversion account for much less than 3% of annual flow of the West Fork. In fact in one day of the December 30-31, 2005 storm, nearly 45,000 acre-feet of water passed the gage on the West Fork. This gage is located just upstream from the confluence of the West Fork and East Fork bringing water from Lake Mendocino

and both join to form the mainstem of the river. In that one day alone, the flow was twenty times as much as all the storage ponds on the West Fork could hold. Perhaps in dry and drought years the petition may make some sense, but to charge there is a cumulative decline in flow that significantly impacts fish is an overstatement.

After AB2121 was signed into law and after the Trout Unlimited/Peregrine Audubon Society petition had been filed, there was the customary waiting time, followed by a Notice of Preparation of a Substitute Environmental Document (SED) and Notice of Public Scoping meeting for the North Coast Instream Flow Policy. An Environmental Checklist was distributed on July 16, 2006, and public comments were solicited.

Thirty-two comment letters were received by the August 25, 2006 deadline. I wrote a letter which can be found in the Appendix, pages 102-110 if anyone reading this commentary cares to look. Many others also responded. At that time, everyone thought the DFG/NMFS/TU/NHI Draft Guidelines was the document under consideration.

TU/NHI and Peregrine Audubon Society also responded in a comment letter dated August 25, 2006 prepared by Mr. Roos-Collins and Julie Gantenbein (Encl. 19). By now, we might think that TU/NHI had run out of new ideas to impose on any policy to be developed. But no. In their letter, TU/NHI endorsed the Draft Guidelines but calls them the "starting point". They go on from there, and here is a brief list of some new requirements sought by TU/NHI: 1) to apply the policy (or guidelines) to any modification of a previously permitted project as well as new projects (this might be as innocuous a thing as a change in diversion date or a reduction in water use); 2) any project will include a licensed engineer to design a flow bypass system to prohibit more than a certain amount of water to go into the pond and to ensure that no more than a certain maximum amount of water may flow into the pond, and the system must be fully automatic and run without an operator controlling it; 3) each point of diversion must be equipped with some form of continuously recorded flow monitoring (i.e., record the flow every second that water is flowing by); 4) each point of diversion will include real-time monitoring and recording of physical conditions such as inflow rate, outflow rate, water quality, and depth or width of wetted channel; 5) the Water Board shall take authority to remedy cumulative impacts for fish, wildlife and riparian habitats. He further wants the Water Board to individually or with Department of Fish and Game or NOAA Fisheries staff to have authority for unannounced inspections, and finally, he's asking that the Water Board give itself authority to remedy cumulative impacts by invoking the Endangered Species Act in water rights procedures.

By now, any reader is recognizing some of the exact criteria now specified in the new draft Policy released December 30, 2007. The provisions in the Policy are just what TU/NHI spelled out for adoption.

It is interesting to note a major change in language in this letter. Instead of requests, there are demands. The language used says such things as, "The guidelines *will apply*" [italics mine] or "Each point of diversion *will include* [italics mine] real time monitoring" and so forth. Moreover, the penultimate paragraph of the letter states, "We also expect to file more specific supplemental comments in the future, both in our capacity as Petitioners and in our capacity as participants in the North Coast Water Rights Working Group." The letter claims the Working Group (also known as

the Collaborative Group) agreed to all this. As we will see presently, this was not the conclusion of the Collaborative Group as a whole.

In October 2006, the SED Final Scoping Report (State Clearinghouse #2006072091) was printed, prepared by North State Resources, Inc. This consultant did a masterful job of reading, abstracting and interpreting many important points on the items from the Environmental Checklist and from the public comments. I highly recommend it to anyone as a superb example of analysis of some very complex issues. However, comments to this Final Scoping Report were essentially ignored, with the exception of the TU/NHI letter just cited.

Once TU/NHI had stopped the forward progress dead in its tracks, movement had begun in a different direction, the direction TU/NHI had always intended, and TU/NHI was involved at every step of the way. This included a major role in the development of the Draft Guidelines, helping to write AB2121, complete authorship of the Petition, and as we will see they took control of the Collaborative Group. It is my belief that the driving force behind the creation of this Policy is not merely to protect anadromous fish in the Russian River watershed but is also TU/NHI's first step toward the goal of entirely rewriting California's water laws. The region covered by the Policy is a good place to "test the waters" for TU/NHI because there is no conflict with large urban water users, and the people who will be affected are those least likely to be able to mount a fight, i.e., the agricultural community.

TU/NHI had easily changed roles. It went from stonewalling to becoming intimately involved in the creation of a water policy. When the Draft Guidelines were written, TU had an important role in this task. Then TU/NHI was instrumental in writing AB2121 and then they submitted the Petition. To my knowledge no other stakeholder, and certainly no applicant or organization such as a major water agency or the California Farm Bureau or other agricultural trade groups such as grape growers or wineries had any voice whatever. But TU/NHI did.

The North Coast Water Rights Working Group, also known as the Collaborative Group formed under Arthur Baggett's direction was a good idea, but landowners such as me were not allowed to participate. When I heard of this group's formation I called the Water Board on October 6, 2005 and spoke with Mr. Baggett's assistant, Bonnie Hard. She wasn't sure who could attend, but was kind enough to tell me she would check on my behalf. I spoke with her again on October 11, and she said this group was formed "by invitation only" and that individual applicants or landowners could not attend.

Fortunately, I was not kept completely in the dark. I did know one person, Mr. Tim Buckner, who did attend these meetings. He is my employee, and he was also on the Board of the Mendocino Winegrowers Alliance, and went as that organization's representative. I asked him to prepare for inclusion with my comments a brief report on his experience with the Collaborative Group. His report follows.

"On September 27, 2005, Arthur Baggett, Jr., then Chair of the SWRCB sent out a letter titled "Central Coast Water Rights Solutions" inviting "interested parties" to "consider a structured collaborative process to develop such solutions over the next

3-12 months". This letter was mailed to a number of interest groups and stakeholders around the region, setting the first meeting for October 12, 2005. John Enquist of the Mendocino Winegrowers Alliance (MWA) attended this first meeting after being alerted by Carre Brown, Executive Director of the Mendocino County Farm Bureau that such meetings were to take place. In spite of representing a significant block of stakeholders in the region (175 grape growers and 50 wineries), MWA did not rate an invitation to the first meeting, and without Mrs. Brown's notice, might never have been informed. There were, however, positions for United Winegrowers of Sonoma County and Sonoma County Grapegrowers in the group. I should also note that to my knowledge, no one from the state or from the subsequently formed elite group ever made an attempt to notify water rights Applicants directly about these proceedings.

"John Enquist notified me about the succeeding meeting because of my interest and involvement in water rights issues. I attended as a representative of the MWA the next meeting which was held on November 10, 2005. Prior to this meeting we received a copy of a letter from the California Farm Bureau Federation (CFBF) addressed to Mr. Baggett concerning a number of issues central to the "Collaborative Process". In this letter the CFBF attorney, Tony Francois, clearly states some grave concerns with not just the goals of the process, but the methods employed by the principals as well. To quote Mr. Francois, "The Board (SWRCB) should certainly provide a meaningful opportunity for participation by any of the pending applicants who wish to join the process and should not go forward without clear notice to all of them." To my knowledge, this crucial step never was taken. Mr. Francois also repeatedly expressed concerns about the openness of the meetings and the need for proper public noticing. As I will describe later, this issue developed into a serious problem as time passed.

"At the November meeting, which took place at the Sonoma County Water Agency, there were about 40 people in attendance, 23 of which were from various agencies, 7 from various agricultural interests. The remainder represented various environmental groups. There were a number of presentations and some discussion opened up.

"Mr. Baggett's original invitation stated, "It is critical that agencies and interested stakeholders develop such collaborative solutions now. As you know, there are three listed anadromous species in the regions and hundreds of pending water rights applications. AB2121 mandates that the SWRCB develop guidelines for this purpose in the near future and the Board has pending before it an administrative petition filed by Trout Unlimited and Peregrine Audubon that addresses these issues."

"Therefore, as a seated member of the Collaborative Group, I felt it was important to establish the connection between the "collaborative solutions", the hundreds of pending water rights applications, the guidelines, and the TU/PA petition. In essence, I asked what would the Applicants get out of this collaboration? In fact,

TU themselves claimed in their Fall-Winter 2004 newsletter that "The (TU's) petition complements AB2121, which requires the Water Board to develop instream flow guidelines and principles for these coastal streams by January 2007."

"That led to the question I posed to the group. I asked, "If the SWRCB develops guidelines that conform to AB2121 and water rights Applicants followed those guidelines, would the Petitioners drop their protests that have held up the permitting process for the last 11 years." Mr. Baggett spoke up and said that the SWRCB also would like to know the answer to that question.

"Richard Roos-Collins of the Natural Heritage Institute (working with TU) answered first by saying, "The Petition hadn't held up the application process for 11 years because it was only filed last year." I allowed for that correction by elaborating that it was not the Petition, but rather, the Petitioners in the guise of TU that had blockaded the entire permit process since at least as far back as September 1994. The vocally registered surprise from around the room indicated that a number of participants had fallen for TU's cover story that TU and NHI were there to expedite the permit process. I then reiterated my question about whether the Petitioners would drop their protests given the conditions listed above.

"Chuck Bonham, Counsel for TU, stepped up and said, "Yes, AB2121 compliance would satisfy our concerns and our protest would no longer be necessary." At this point Mr. Roos-Collins interrupted and said, "No, such compliance would only satisfy part of our concerns, but there are other issues that might need to be addressed, such as enforcement and public trust issues." The stir created by this comment indicated that a number of the more savvy participants of the group realized that the "Collaborative Process" of this group would not satisfy the instigators of the protests that had tied up the application process for over a decade. As you could imagine, the Applicants' representative's trust in the value of the proceedings was reduced significantly at that point. What Mr. Roos-Collins had just done was insert a placeholder in the product that he could use to again subvert the application process after all of the hard work of the "Collaborative Process" had been completed.

"At this point, we could fairly conclude that this series of meetings, which pretended in part to address expediting the frozen permit process, and which meetings could take many months to complete, would *not* result in any further permitting of applications. As I was naive enough to believe that the Applicants had something to gain from this "Collaborative Process", and feeling somewhat disillusioned by what I had just heard, I checked in with others after the meeting and found that we were in agreement regarding what had just transpired.

"In the following weeks I tried to contact Mr. Baggett to ascertain his perspective on this issue. I put the question to him in the form of phone messages and emails but really only learned how busy he was traveling around the state handling

SWRCB issues. I never did establish contact with him about the issue of the resolution of protests based on work by the Collaborative Process Group. However, I did receive feedback of another kind at the next meeting of the group in Santa Rosa on January 12, 2006. Richard Roos-Collins, in a flagrant attempt to block out sunshine on these proceedings, rolled in a fog bank of verbiage demanding "non-attribution, outside of this group" and that "statements made by private parties will not be submitted to regulatory agencies at a later date". Mr. Roos-Collins wanted to keep the proceedings on a level that was "brainstorming, not binding". This demand for secrecy was clearly connected to my attempts to clarify with Mr. Baggett the impacts of the TU/NHI "placeholders" that were revealed at the November meeting.

"After a few meetings of the large body, now called the Plenary Group, which were not productive, someone suggested that a steering committee, a subset of the Plenary Group, be developed because the plenary meetings were cumbersome with so many attendees. Thus, an elite group was formed, and my recollection is that it was composed of the following people:

- Arthur Baggett, Member of SWRCB
- Victoria Whitney of Division of Water Rights
- Richard Roos-Collins, Attorney for NHI representing TU
- Chuck Bonham, Counsel for TU
- Brian Johnson, Attorney for TU
- William Hearn of NOAA Fisheries
- (Gary Stearn as alternate for Dr. Hearn)
- Linda Hanson of California Department of Fish and Game
- Randy Poole of Sonoma County Water Agency
- (Chris Murray as alternate for Mr. Poole)
- Anne Schneider, attorney for several large corporate wineries
- Bob Anderson of United Winegrowers of Sonoma County

"Both Mr. Francois of the Farm Bureau and I were dismayed by a small faction of the larger group trying to obfuscate their role in writing SWRCB policy under this cloak of secrecy, and said so. Unfortunately, this event was not the least of the attempts by those in control of the Collaborative Process Plenary Group to eliminate public input. A few examples of the techniques used to obscure the process follow.

1. Thorough and repeated failure to post minutes of meetings, after repeated requests
2. Separation of an elite group to draft all work product to be approved by the full (Plenary) group
3. Meetings of this elite group behind locked doors in Sacramento, far from the affected watershed and Applicants so directly affected
4. Last minute submission of the elite group product for approval by Plenary group, sometimes over thirty pages of material to review and approve

in a two-hour period

5. Arbitrary selection of elite group from Plenary group, and restriction of members of Plenary group from elite group
6. Last minute meeting changes and postponements of elite group meetings and Plenary group meetings
7. Elite group appointing themselves "new directions" and "paradigm shifts" between Plenary group meetings
8. Cancellation of Plenary group meetings by decision of elite group, often with the explanation "the elite group hadn't gotten their work done"

"If these methods were employed to further the original goals describe by Mr. Baggett in his original letter, they might have better standing as excuses. But the elite group, once locked away in Sacramento did little to fulfill the original intent of the group, instead spinning off on endeavors that took up their time with "special projects".

"Much of the February 16, 2006 meeting was spent in discussion of rules of engagement and justifications about who could contribute and/or vote and why, as well as who couldn't and why not. Again we raised concerns about meeting minutes, public record, inviting permit Applicants, openness, etc. Again these concerns were noted on the flip charts and subsequently forgotten in time for the next meeting.

"Subsequent meetings followed in this pattern of dysfunction until the end of the August 10, 2006 meeting when the group drafted a vacuous letter to Karen Niiya promising specific recommendations on AB2121 by the end of September 2006. At a separate August 16, 2006 meeting with Ms. Victoria Whitney of the Division of Water Rights, she informed our group that, "The deadline for input is mid September [of 2006]. Apparently she was mistaken in this, as Brian Johnson, attorney for TU, and Peter Kiel, assistant to associate attorney Anne Schneider, were still drafting and submitting Policy language at least as late as December 28, 2006. There were a series of re-schedulings and postponements of Plenary Group meetings, but to my knowledge, no meeting ever took place.

[Commentary Note by R.H. Light: In fact, Mr. Roos-Collins and Julie Gantenbein had prepared and sent their letter on August 25, 2006, and that letter had cited Mr. Roos-Collins' presence on the North Coast Water Rights Working Group.]

"As an aside, during the August 16, 2006 meeting with Ms. Whitney, she actually admitted that the Division of Water Rights staff "had probably accepted protests they shouldn't have." She also claimed "enforcement of current law is not practical. We have six enforcement staff and can only complete 40 enforcement actions a year. Illegal dam removal would have to go through the State Attorney General's office. The Attorney General is too busy defending the Division against lawsuits to take action on illegal dams."

"In summary of the "Collaborative Process" I would have several comments. First, and in spite of Mr. Baggett's appeal to "stakeholders" and TU's doubletalk about streamlining the process for Applicants, there was never any attempt to bring any real Applicants into the procedure. Despite repeated requests, they were never notified of the "process". You cannot fairly argue that they were well represented by the lawyers and consultants because the bulk of the Applicants weren't informed of the developing language or initiatives of the group.

"Second, and more seriously, the Policy language and initiatives of the "Collaborative Process" were developed by a select few, representatives of agencies and TU/NHI, in a remote location, behind locked doors. The Plenary Group was mostly expected to approve whatever the select elite group had developed in Sacramento. Objections and dissent were "lost track of" between meetings.

"And third, the select elite group was allowed input long after the Division deadline for mere mortals. Apparently, if you worked with the "insiders" group, you got special treatment. But this was clearly not the intent of the ideas offered up by Mr. Baggett in his invitation of September 2005."

So we see, the Collaborative Group was hardly collaborative at all. Nothing was accomplished except to stall for time and to give the public an illusion of an open and honest exchange of ideas, and it was clear that the leaders of this group had no intention of helping the Division in its task to move forward and actually process applications. Their real goal was to rewrite the Water Code for the North Coast by proposing many new and more time-consuming regulations. Mr. Roos-Collins in his letter of August 25, 2006 implied the Working Group had agreed to the items he was presenting. This "Working Group" could only have been the self-selected elite group subset of the Collaborative Group. I expect that if a poll were taken of all members of the Plenary Group about these demands, most members would be surprised to learn that this was the outcome of their deliberations. Further, I suspect many Plenary Group members would disagree with some or most of these proposals.

Now, we have the new Policy to contend with, or in some cases, the Draft Guidelines, which may be applicable to projects where a WAA/CFII was submitted before December 31, 2007. I do not know the extent of the involvement by TU/NHI in drafting the proposed Policy, but given their prior known involvement in managing the process, I firmly believe whatever role they played should be made public. Clearly, the entire Policy is a direct reflection of TU/NHI influence and desires which this organization put in writing a long time prior to the Policy being written.

The chart below illustrates some of the requests made by TU/NHI and their subsequent inclusion into the Draft Policy. Notice many of these topics were brought up in 1998, and were either accepted outright or with only slight modifications.

TU/NHI Correspondence	Policy Item Requested	Location in Draft Policy
letter dated May 4, 1998	unimpaired flow amount at POD	page 15, 30
letter dated May 4, 1998	upper limit of anadromy	page 12, A1-10
letter dated May 4, 1998	effect on availability and quality of habitat	page 17
letter dated May 4, 1998	monitoring impacts on flows, fisheries, habitats	page 5, 31
letter dated July 7, 1998	better coordination between Division and other agencies	page 1
letter dated July 7, 1998	compliance and enforcement topics	page 30
letter dated July 7, 1998	movement of spawning gravels	page 20
letter dated July 7, 1998 letter dated Aug. 25, 2006	monitoring actual inflow and outflow at POD and report information on real time basis	page 29
letter dated July 7, 1998	provide for fish and gravel passage and monitor effects after construction of project	page 17
letter dated July 7, 1998	maintenance of channel-forming functions, gravel and wood transport	page 5
letter dated Aug. 21, 1998	bypass flow requirements and post approval monitoring	page 3, 30
letter dated Aug. 25, 2006	minimum bypass flow	page 3, 16
letter dated Aug. 25, 2006	maximum cumulative diversion	page 4, 16
TU/PAS Petition, page 52	small domestic use and stockponds	page 1, 8, 27
letter dated Aug. 25, 2006	habitat conditions: width, depth, gradient, temperature	page 20
letter dated Aug. 25, 2006	passive bypass system	page 23
letter dated Aug. 25, 2006	civil engineer with valid license	page 29
letter dated Aug. 25, 2006	modified permits as well as new permits	page 1
TU/NHI role not disclosed	calculations for MBF and MCD	page 3, 4

This account of the history leads back to the topic of protest resolution if the Policy or even the Draft Guidelines are adopted. The problem all applicants face is twofold. First, how to comply with an ever-changing set of requirements and rules. These are not minor procedural changes but are life-altering events, and will require the hiring of environmental consultants, hydrologists, and perhaps other professionals to wade through a swamp of new paperwork all of which comes with a large financial burden. Even if successful (and so far no one's consultants' track record is very good), an applicant has no guarantee that a protest will be resolved or dismissed. And that is the second problem, to remove the protests which started this whole process more than 15 years ago. I am talking about those protests that were filed not for the purpose the protest procedure was meant to serve, but the protests which were used only as a tool to tie up the application process until TU and later TU/NHI could get legislation passed that suited them. Without a guarantee from the Division to dismiss a protest if an applicant acts in accordance with the Division conditions, TU/NHI can continue to protest, and as happened in 1998 will doubtless add more and more objections. As Tim reported about what Mr. Roos-Collins said about dropping protests if an applicant complied, the

answer was, "No. Such compliance would only satisfy part of our concerns, but there are other issues that might need to be addressed, such as enforcement and public trust issues." TU/NHI now control the water rights process, something I'm sure that the Division did not anticipate in 1997 when its Staff Report was published.

I can close this section by posing a few questions. "How did TU/NHI get so much power?" is a question with which the Water Board as a whole must grapple. Trout Unlimited, a special interest group with an agenda for a pre-defined result sat at the table as an equal to make decisions for all applicants and the applicants themselves had no voice. No other group was so favored. It is no stretch to compare TU/NHI to the CEOs of Exxon and Enron meeting secretly in the White House in 2001 to write an energy policy for the citizens of the U.S., while excluding any representatives of those citizens' interests. While TU/NHI were setting the agenda and the rules, applicants were deprived of their right to assist in the development of the rules, and at the same time no applicant could move an application forward. The 80 (or 276) applicants suffered under a process that totally denied them access to being part of the process and denied them the opportunity to have their own applications considered under existing regulations. Am I the only one who thinks there is something not quite right about that? Please ask yourself and answer publically, can a fair policy be written when there is so much influence from a single-focus group?

The Water Board must also ask itself this question, "Does this new policy fit their mission of watching over all beneficial uses of water?" This narrow focus on anadromous fish to the exclusion of other wildlife and human activity cannot be in the best interest of the State, nor even in the best interest of the Public Trust Doctrine. TU/NHI is misusing the concept of protection of public trust resources by focusing solely on three species of anadromous salmonids, and TU/NHI intentionally neglect everything else. It's as if TU/NHI has filed a water rights application to appropriate virtually *all* the water in these streams and tributaries for use by anadromous fish. If this is accomplished, there will be hardly any water left for other beneficial use.

As an ordinary citizen, there is not much I can do in the face of this power, but the Division and the Board as a whole are not powerless, and have some choices to make. Is the SWRCB willing to accept the singularly favored TU/NHI involvement in the way the water right process has been managed for the last decade? Or is the SWRCB willing to start this process over and include others? There is no doubt that TU/NHI has made it very difficult for everyone and impossible for applicants. Clearly the road ahead will not be easy, but I hope that the Board as a whole will respond with an affirmative stance that *all* people may participate in the development of a workable policy for the North Coast rivers.

In the meantime, there are three things the Division can do and all relate to the protest procedure. If something isn't done, and soon, the Division can count on continued protests even when applicants follow the rules and when they and government agencies are in agreement. I can confidently speak for myself and many others when I ask for this relief and protection.

- The SWRCB should formally adopt into the Policy a provision that for applicants whose projects will be evaluated using the Draft Guidelines, that compliance with these Draft Guidelines will result in any protest being automatically dismissed. Moreover, the

Draft Guidelines should be revised in accordance with professional engineer and hydrologist criteria.

- There cannot be any new grounds for protests.
- The SWRCB should formally adopt a provision in the Policy that if an applicant follows those regulations that all protests be dismissed and that no new grounds for protest will be accepted.

3. Proposal for Equitable Handling of Protests

It may seem to some that this section of my commentary about how to deal with protests is not directly enough involved with the Policy to warrant inclusion here. However, the proposed Policy is making enormous changes to the water right application and permitting process. Because of that, the Policy should deal directly with the issue of protests, and new regulations must be written into the Policy. If the Division had moved forward as it said it so often said it would, or if the Division had rejected or dismissed many of the illicit protests prior to 1998, applicants and the Division would not be facing these problems now.

Any organization that says it needs to have the ability for 3 ½ years to sit on a protest without ever meeting with an applicant to discuss resolution, and then after that 3 ½ years, goes on to say it needs the power to file additional grounds for protest is enough reason all by itself to warrant changes in the protest procedures and bring the protestants into line. Applicants are often constrained by time limits by the Division, and in fact the Division has on occasion canceled applications because the applicant did not respond in time to a request. Now, it is time for some fairness and to force the protestants abide by the same set of rules. The rules must limit the allowable time to initiate and add grounds for further protest. It is so clear that the protest procedure was abused. Now, the SWRCB as a governing body has a duty to rectify this situation.

Here are some carefully thought out suggestions. What I am proposing may not work perfectly, but is a far better system than applicants have now.

For protests brought by individuals or organizations such as environmental groups:

- All protests must be written specific to the project, and no more "boiler plate" protests will be accepted. If the protest is not specific to the project, the protest will be rejected. This of course is already written on the protest form. If the protest is rejected, the protestant will be allowed only one more opportunity to correct the protest and make it specific. Resubmission of the corrected or amended protest must be within 60 days of the protestant receiving the rejected one.
- No additional grounds for protest will be accepted more than 30 days after acceptance by the Division, to include if needed the second submission due to rejection of the first protest.

- The Division shall send a copy of the accepted protest to the applicant and require that applicant and protestant attempt to resolve the protest. The letter will also include instructions that all correspondence between applicant and protestant must include copies to the Division.
- After a protest is filed and accepted, the protestant shall have no more than 60 days to contact the applicant in writing and arrange for a site visit. If the protestant does not do this, the applicant may petition the Division to have the protest automatically dismissed on grounds of non-cooperation.
- Once the applicant and protestant set up a site visit, this visit must be scheduled within 90 days of the initial contact letter, unless both applicant and protestant agree to an extension. Neither applicant nor protestant may allow more than 60 days to go by without some form of written communication with each other.
- Applicant and protestant shall meet at the site, and each shall review the project. In particular, the protestant must raise specific objections that are capable of being answered and the applicant must be able to answer the protestant's objections. Both parties must attempt to arrive at agreement within 90 days of the site visit. Resolution may be worked out face to face, by telephone or by correspondence, but the final agreement of resolution or disagreement on disputed points must be in writing, with copies to the Division.
- If applicant and protestant cannot reach agreement on one or more points, both will consult with the Department of Fish and Game and with Division staff for guidance in resolution procedures.

For protests filed by Department of Fish and Game and other public agencies:

- DFG will continue to be the lead agency for environmental issues.
- DFG will have 120 days to contact applicant to schedule a site visit if needed.
- DFG will work with applicant to try to resolve the protest.
- The Division shall have final authority on resolution of protests.

4. Guidance for Developing Mitigation Plans

Section 4.0 discusses Water Right Applications, and Section 4.4.4 treats environmental mitigation for the construction of small onstream dams or the permitting of existing dams. Mitigation includes plans to eradicate non-native species, moving large woody debris and gravel downstream, and a complete riparian habitat replacement or restoration plan.

I believe these functions are beyond the scope and authority of the water right permitting

process. There is no nexus between a water right procedure and a legal requirement to eradicate plants or animals or to restore riparian or riverine habitat. I am well aware that the Endangered Species Act may be broadly interpreted, but I cannot accept without reservation that the ESA was intended to be used to deny issuance of a license to store water. This surely exceeds the legitimate authority of the Division of Water Rights. There is no law stated in or cited by the Policy which gives the right to the State Water Board to regulate habitat enhancement, and this entire section should be deleted. Mitigation plans should fall solely under the jurisdiction of the California Department of Fish and Game and the California Forestry Department, and as applicable to satisfy jurisdiction of NOAA Fisheries.

5. Practical Issues Regarding Mitigation Plan if Mitigation Plan is Retained

A. Non-native species eradication

The Policy is too vague regarding non-native species. It is unclear as to what is to be removed and from where. There are no geographic or topographic or ecological limits set, nor is there mention of what to do if reinvasion occurs. No landowner can possibly comply. Scotch broom, yellow star thistle, Klamath weed, knapweed, arundo, sowthistle, exotic nightshades and numerous alien grass species are ubiquitous in Northern California, and are impossible to eradicate. The state and federal governments have spent tens of millions of dollars with limited success, and on most federal lands (BLM, U.S. Forest Service, U.S. Park Service) no effort at all is made to remove most entrenched non-native species. There is nothing in the Policy to designate what species are involved, how far back from a pond, what costs would be involved, and what will happen in the event of failure or reinfestation. There is an inherent unfairness about requiring removal of non-native species in this situation when ordinary homeowners can plant all the non-native species they wish.

B. Gravel and wood augmentation plan

This plan can have serious adverse consequences. If a person moves LWD downstream to a lower reach, the accumulated material can form a barrier to stream flow which in turn can cause the channel to be moved some distance laterally, and may result in a new channel unsuitable for salmonid passage. The consequence of LWD being placed downstream can even cause catastrophic flooding under rare circumstances. Will an applicant be held legally responsible for any damage related to LWD being purposely placed downstream if this results in consequent flooding, soil erosion, streambed alteration or damage to a neighboring property? Will permits (e.g., DFG 1603) and other paperwork be required to do this work? This could easily become a logistical and financial problem, and expose a landowner to substantial liability. If these augmentation plans are adopted, please include a discussion of about the need for a 1603 permit, and state that a landowner will or will not be liable for acting as directed by the Policy.

C. Riparian habitat replacement plan

This sounds awfully good when written by people in offices. In the field, riparian restoration is a very complex and expensive proposition. I know this from personal experience. We constructed in 2000-2002 a large restoration project on the West Fork of the Russian River, and it still needs a lot of attention each year. Details may be found in a booklet I printed called West Fork Russian River Restoration at Light Ranch 1999-2005. I sent a copy to Eric Oppenheimer. Before any riparian habitat replacement plan is adopted, people in authority should contact landowners and

contractors who have done riparian restoration projects and get their advice. These projects are far too complex and expensive simply to be ordered into existence by people who think they are a good idea.

6. Small Domestic Use and Livestock Ponds

The Policy intends to incorporate small domestic uses of water and livestock ponds into the broader regulation of water rights. This provision is totally unneeded and will cause harm not only to ranchers but also to many rural people who depend on creeks for their residences and gardens. (Refer to the Final Scoping Report on pages 112-113 for a touching letter from a 70 year old grandmother who has lived in her cabin for 35 years and who must draw small amounts of water from the creek on her property. As it turns out, she is outside the Project Area at this time, but there are many like her who will be affected now by the Policy.)

In the Mattole River system, a conservation organization called Sanctuary Forest, located in Whitethorn, is currently working on a project so people will not exercise their riparian rights to pump water in summer time in exchange for winter collection and storage over the summer months. Meeting the conditions for maintaining stream flows as set forth in Section 2.2 of the Policy will be impossible for these people. They will never be able to meet the MBF requirements, nor will they be able to construct the required facilities.

As for livestock ponds, there is no justification for including them. Most livestock ponds are pit ponds anyway, collecting runoff directly from the hillsides and not in defined channels. Many are built high on hillsides, but are so small they fill quickly. In the summer, they dry up completely. The water that flows even in springtime soaks into the ground well before reaching a Class 2 or 3 stream or the Russian River or other large river. Including these makes no sense from an ecological, hydrological or regulatory perspective.

I suggest the following remedies.

- Eliminate Section 5.0 entirely.
- If the Division insists that livestock ponds and small domestic uses be included, at least exempt any pond or diversion where the stream would normally dry up and not flow to a major tributary or the main river in the months of April through November.

7. Potential Inherent Unfairness in Preparation of New Policy Compared to Draft Guidelines

The Notice of Preparation of the SED was sent out in late July 2006 and two workshops were held. Subsequently 32 respondents wrote letters by the 25 August 2006 deadline, and four more were received shortly afterwards. These comments were published in the Final Scoping Report, and were excellently interpreted by North Coast Resources.

Everyone who dealt with the process at that time believed that the Draft Guidelines was to be the basis for a new instream policy. Read their comments in the Final Scoping Report for

confirmation of this assertion.

While not perfect, the Draft Guidelines are relatively understandable, and applicants have been instructed to use them for the last five years or so. The engineering firms and other consultants are familiar with the provisions and know how to apply them. Applicants have spent a great deal of money trying to comply with the regulations as then drafted. In my case, consultant and attorney fees since I received the MOU letter in March 2005 have reached more than \$27,000. There is a significant risk that all the work may have to be done all over again. I might add that this is \$27,000 that otherwise could have been spent for habitat restoration and conservation.

The Policy states on page 8 under Section 4.0 that "If the applicant has submitted a water available [sic] analysis and an analysis of cumulative flow-related impacts prior to January 1, 2008, the State Water Board will consider processing the water availability aspects of the application using the DFG-NMFS Draft Guidelines if the State Water Board determines that the project is consistent with the recommendations contained in the DFG-NMFS Draft Guidelines pertaining to diversion season, onstream dams, minimum bypass flows, protection of the natural hydrograph and avoidance of cumulative impacts." This should be changed from "will consider processing the water availability aspects of the application . . ." to "will accept the Water Availability Analysis and the Cumulative Flow Impairment Index of the application . . ." It's the decent and honorable thing to do. As mentioned before, the Draft Guidelines should first be modified in accordance with professional engineers' recommendations regarding natural hydrograph, minimum bypass flows and necessary structures.

I realize on page 9 there are conditions which favor the acceptance of the Draft Guidelines' WAA/CFII for older projects but I think most applicants would appreciate a firmer stance on this point, so we know the WAA/CFII will be accepted. The rules and the process have changed numerous times over the last decade and each time the applicant has had to bear the expense and has had no real input into the process. It has been a nightmare, and we need to wake up with provisions we can abide by and can afford.

Therefore, I respectfully suggest that until a new Policy is formulated and adopted, the Division of Water Rights:

- will use the Draft Guidelines (as modified by professional consulting engineers) as the standard method for implementing the North Coast Instream Flow Policy for all applications dated after January 1, 1998.
- will accept the WAA and CFII for all applications dated after January 1, 1998.

8. Technical Implications Associated with Minimum Bypass Flow Calculations, Maximum Cumulative Diversion and Stream Gage Data

One serious shortcoming with the MBF formula is that it severely and needlessly penalizes upstream water users, and makes much more winter and springtime water available to downstream users, especially to cities. At the same time, these restrictions do not necessarily enhance fish numbers. We have been told that the number of allowable diversion days is greater under the Policy

formulas than under the Draft Guideline formulas. In fact, the SED says on page iii, "Each Policy element was selected for inclusion in the proposed Policy to allow for the greatest amount of diversion while still protecting instream flows." On the same page it goes on to say, "The combination of elements that make up the proposed Policy is not the most restrictive in terms of the volume of water that is potentially available for diversion; *implementation of the CDFG-NMFS Draft Guidelines on average would restrict the volume of water available for diversion by as much as two times more* [italics mine]." These statements are simply not true for the vast majority of diverters. This is a misstatement of the highest order, and is terribly misleading, if not downright deceptive.

This topic was also a big part of the Power Point Presentation at the Santa Rosa Technical Workshop in which it was asserted more storage is available under the Draft Policy than under the Draft Guidelines. The table of Bypass Flows comparing the four scenarios of Upper MBF, Lower MBF, Draft Guidelines February Median Flow (DG FMF) and 10% Exceedance is not a helpful table because it omits two very important things. First, there are only four selected streams and they may not be representative. But more important, the table doesn't include how many days per year one could collect water. In all of these methods, anytime a MBF is exceeded, it is a diversion day. For the Dry Creek Tributary, the DG FMF bypass is 6.8 cfs. How many diversion days would this allow? It isn't stated. Using the Lower MBF there must be at least 10 cfs, and the same question is asked: How many days does this happen? It doesn't say, but will clearly be fewer days because the MBF must exceed 10 cfs instead of 6.8 cfs. So, the DG FMF method obviously allows more storage in this size watershed than the Lower MBF method. On small watersheds, the Lower MBF and Upper MBF methods clearly are more restrictive than the DG FMF bypass as demonstrated by the Power Point Presentation table.

The allowable diversion becomes greater for the Policy and the Lower MBF method compared to the February Median Flow method only when the Drainage Area is quite large, say 10 square miles or more. As the Drainage Area decreases, there is an increasingly declining percentage of allowable water diversion and storage, and this is clearly reflected in the number of days one would be allowed to divert. In other words, the smaller the watershed is, the fewer permissible days there are in which one may divert water. The MBF is too restrictive in smaller watersheds, as I demonstrate below. These calculations use the revised formula $Q_{MBF} = 9.4 Q_m (DA)^{-.48}$.

The methodology to determine MBF is this (and I checked my method with a professional engineer). Q_m is "the mean annual unimpaired flow in cubic feet per second." For a given USGS stream gage, this value can be found in the USGS Surface-Water Annual Statistics table published at their website <http://waterdata.usgs.gov/nwis/annual>. Data are presented for each year as a yearly flow in cfs. The mean of all years of record is taken to estimate Q_m . That value and the area of the watershed are plugged into the formula to arrive at the instantaneous MBF requirement.

The next step is to refer to the USGS Surface-Water Daily Statistics at <http://waterdata.usgs.gov/nwis/dvstat> and see the mean of the daily mean flows over the years of record. Then count the number of days from October 1 to March 31 in which the daily flow value exceeds the value of MBF as calculated by the formula.

I have examined the stream gage data from the USGS website

(nwis.waterdata.usgs.gov/ca/nwis) from 10 gages in Mendocino County, ranging in Drainage Area from 1.19 square miles to 303 square miles. The calculations were made on the assumption that a person would divert at the gage site, and takes into account actual recorded stream flows, but not senior diverters and other such factors. By assuming the diversion takes place at the gage site, there is no need to make any adjustment for a Drainage Area differing in size from that of the gage site Drainage Area. The Drainage Area is all the watershed above the gage. These calculations include only stream gage data, and correctly illustrate what happens to the MBF based on real information provided by the USGS. This exercise shows how many days per year that the MBF is exceeded on small and large Drainage Areas if one were to divert water at or near the gage site for each of these streams, and thus how many days during a year that water could permissibly be diverted using a diversion season of October 1 to March 31.

Stream Name	USGS Number	Drainage Area (mi ²)	Annual Flow (A-ft)	Q _m Annual Flow (cfs)	Q _{MBF} (cfs)	Q _{MBF} / Q _m	Number of Days flow > MBF
Dry Creek near Hopland	11464050	1.19	1,560	2.16	18.63	8.63	8
Soda Creek near Boonville	11467850	1.53	1,879	2.60	19.89	7.66	7
Russian River near Redwood Valley	11460940	14.1	19,442	27.04	71.38	2.64	24
Albion River near Comptche	11468010	14.4	14,970	20.68	54.03	2.61	32
Feliz Creek near Hopland	11462700	31.3	34,544	47.71	85.89	1.80	55
Big River near Comptche	11468070	36.2	40,081	55.36	92.93	1.68	73
Rancheria Creek near Boonville	11467800	65.6	100,503	138.8	175.2	1.26	95
Garcia River near Point Arena	11467600	98.5	246,649	340.7	353.7	1.04	130
Russian River near Ukiah	11461000	100	128,059	176.9	182.3	1.03	124
Navarro River near Navarro	11468000	303	367,998	508.3	307.7	0.61	132

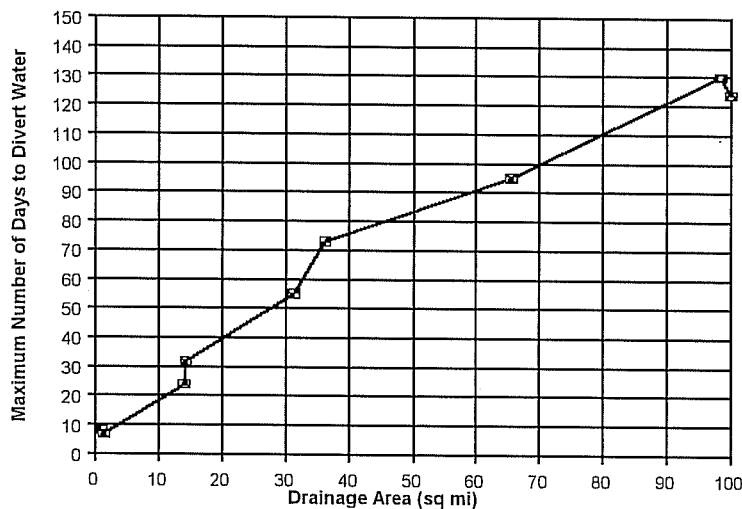
The table is arranged in order of increasing Drainage Area size. All stream gage data are from Mendocino County, but I'm confident that results from Sonoma, Napa, and Marin Counties will be similar.

Interpreting the table is not difficult. As we would expect, as the Drainage Area increases, the annual flow (Q_m) increases. With two exceptions (Rancheria Creek and Garcia River), the annual flow (cfs) is somewhat less than twice the Drainage Area in square miles. The Q_m on Rancheria Creek is just over twice as great and is similar to the others. The Garcia River is unusual in having three times the flow related to Drainage Area. But the pattern in general is to say that annual flow

increases rather linearly when related to Drainage Area. The same cannot be said for MBF.

The MBF increases at a much slower rate. Look at the column Q_{MBF} / Q_m which shows the ratio of the MBF to the annual flow rate. In the small watersheds of one square mile the MBF is approximately eight times the mean annual flow (Q_m). While I don't have data, I'm sure that for a Drainage Area of 0.5 square mile (320 acres), the MBF will be 12 times or more the average annual rate of flow. Surely, none or only a few days each year will provide enough water for diversion and to maintain the MBF in the 320 acre watershed. When very small watersheds are considered, say 200 acres or less, there won't be any permissible diversion days using the MBF formula, and all water must go downstream.

Another way to look at part of the data is in the form of a graph. This graph uses the MBF formula from the Policy. The maximum permissible number of days to divert water is on the Y-Axis, and the Drainage Area in square miles is on the X-Axis. It is easy to see that if the Drainage Area is less than 15 square miles that only about 25 to 35 days are available for diverting any water. When the Drainage Area is 5 square miles (3,200 acres), that drops to less than 15 days. Refer to chart below.



Thus, the assertion that implementing the Draft Guidelines would restrict water diversion when compared to the Draft Policy is proved wrong. In fact, the Drainage Area must be around 20 square miles or more before there is greater allowable storage under the Draft Policy. Very few ponds are constructed in watersheds approaching 10 square miles, let alone 20 square miles. The majority of ponds are in watersheds of under one square mile, and many are in watersheds of half that size or less. And there won't be *any* allowable diversion in these drainage areas.

At the same time however, these small watersheds do not in general support rearing habitat simply because they are too small and there is little if any summer or fall water present. Coho salmon must spend their first year in fresh water and streams in these tiny watersheds invariably dry up or the pools are too warm for coho survival unless they are close to the Pacific Ocean. Chinook salmon and

most steelhead trout migrate downstream their first season within 4 to 12 weeks of hatching. Some steelhead will remain in their natal streams for one or two seasons if the water is available and if the temperature and oxygen levels are tolerable. The water that would be diverted in the winter for summer agricultural or wildlife use will instead have to go downstream in the winter and spring. The cities will benefit, and wildlife habitat will be harmed.

Because of this very severe restriction, the result is that in a one square mile drainage area the number of days when the actual flow is greater than the MBF is only about seven to eight days as the chart shows. Of course, in large Drainage Areas (say 30 square miles), the ratio of Q_{MBF} to Q_m is less than two, and the number of permissible diverting days is accordingly increased to 70 or more.

Clearly, as the chart shows, any Drainage Area below 30 mi^2 will have few days in which to divert, less than a month, and for very small Drainage Areas, the allowable days can be less than a week or no days at all. Many ponds were built or are proposed on watersheds of 160 acres (= 0.25 mi^2) or less. Even though 150 to 200 acre-feet of water flows by such a pond site each year, there would be no collection period at all.

The solution for this is to revise upward the MBF for all Drainage Areas of less than 20 square miles and which are also greater than 200 acres, and to permit at least 60 days of diversion no matter how small the Drainage Area is. This should be developed by professional engineers because it is very complex.

However, I do have an alternative solution for very small watersheds, i.e., those of 200 acres or less. The key is to eliminate the MBF for these small watersheds and substitute volumes.

I think that the overall water availability in all small watersheds should be calculated on the basis of annual runoff as set forth in the Draft Guidelines and eliminate altogether any minimum bypass flow. If the pond size is kept small and if the diversion season runs from December 15 - March 31, there will be plenty of water for fish and some for storage. The runoff can be calculated either from gage data and prorated for area and precipitation (Drainage Area Ratio Method) or by the Rainfall-Runoff Method. Both were used as standards by the Division of Water Rights in the Draft Guidelines, and both are suitable to determine minimum bypass yet allow some storage of water. Refer to the Example Format for the WAA/CFII Report published by the Division of Water Rights for a good discussion of these methods.

Since so many ponds are placed in very small watersheds, and since the total runoff of all of them together is small relative to the total runoff of the streams in which these are tributaries, instream flows can be protected and still make some water available for appropriation in watersheds of 200 acres or less. It builds directly upon this method and criteria in the Draft Guidelines.

Instead of requiring lengthy calculations based on rates (MBF and MCD), use calculations based on volumes, and merely limit the storage season and amount of water that may be collected. Also, a) the amount of water applied for must be less than 20% of the annual runoff and maximum storage in acre-feet should be limited to no more than an amount equal to 30% of the Drainage Area in acres; and b) the stream cannot be suitable for anadromous salmonids. Originally, the Draft

Guidelines set a bypass flow of the volume equal to the February median flow, and the collection period was December 15 - March 31.

The following is a real example (calculations omitted) of water available for appropriation in a watershed of 65 acres, and where the mean annual precipitation is 45.8 inches. Plugging values into the formula, it was determined there was 139.1 acre-feet of runoff above the point of diversion.

This amount of 139.1 acre-feet is reduced by taking into account the collection season of December 15 - March 31, so the total available water is reduced to 115.7 acre-feet (calculations not shown). A required bypass flow equal to the unimpaired February median flow is next calculated (calculations not shown), and for this example came to 41.0 acre-feet.

So what is really available for appropriation in this example is:

$$115.7 - 41.0 = 74.7 \text{ acre-feet}$$

For this site, the amount for allowed diversion is reduced still further by the CFII requirement, calculated by a totally different method, and it compares the water supply to the expected demand. The CFII is the ratio of demand/supply expressed as a percentage, and is very conservative in favor of fish by stipulating that 90% or more of the water must go downstream. Site specific studies are required if the CFII is 10% or more at any point of anadromy, but if no anadromous fish could exist, requirements may be lessened on a case by case basis. In this case, it is conceivable that up to 18 or more acre-feet could be stored.

This method and example described above came directly from the Draft Guidelines, but now that the Division insists on the more restrictive formula of the Draft Policy. The MBF and MCD of the Policy are not only very restrictive, but in cases like this, the MBF requirement alone will prohibit all diversion.

This is what happens for minimum bypass flow based on the Draft Policy using the same real example and the formula, and calculations are shown.

$$Q_{\text{MBF}} = 9.4 Q_m (\text{DA})^{-.48}$$

$$Q_{\text{annual runoff}} = 139.1 \text{ acre-feet (same as before)}$$

$$Q_m = 139.1 \text{ acre-feet} / 1 \text{ yr} * 1 \text{ yr}/365 \text{ days} * 1 \text{ day}/86,400 \text{ sec} \\ * 325,851.4 \text{ gals/acre-foot} * 1 \text{ cu ft}/7.481 \text{ gals}$$

$$Q_m = 0.1921 \text{ cu ft/sec or } 0.1921 \text{ cfs}$$

$$\text{Drainage Area} = 65 \text{ acres}$$

$$65 \text{ acres} * 1 \text{ sq mile}/640 \text{ acres} = 0.1016 \text{ sq miles}$$

$$Q_{\text{MBF}} = 9.4 (0.1921) (0.1016)^{-.48} = 5.41 \text{ cfs} = \text{bypass flow requirement}$$

$$5.41 \text{ cfs} * 7.481 \text{ gal/cu ft} * 86,400 \text{ sec/day} * 1 \text{ acre-ft}/325,851.4 \text{ gal} \\ = 10.7 \text{ Aft/day}$$

This means that there can be no diversion unless the stream flows at a rate of at least 10.7 acre-feet per day. For a stream which has an annual mean flow of 139.1 acre-feet, this requirement of a flow of 10.7 acre-feet in one day represents 7.7% of the total average annual streamflow. Clearly, this amount of flow would occur only during major floods.

I can approximate the daily flow at this site using data from a nearby stream gage that operated during the 1960s. When we look at the daily flows, we find that the instantaneous flow of this stream at this pond has probably never exceeded 3.7 cfs and certainly never more than the required minimum of 5.4 cfs even in a raging flood. The bottom line is that no diversion could occur in this watershed even though it is a Class 3 stream with no possibility of salmonids being present.

This method is also extremely expensive to comply with. Designing and constructing a passive bypass structure will cost tens of thousand of dollars and two structures would have to be built, one to ensure a MBF and the other to satisfy the MCD requirement. For small streams in drainage areas of 200 acres or less, this doesn't make any sense because the benefit of the added water going downstream is low compared to the cost of construction and monitoring.

As we saw earlier, even in a 640 acre (= 1 square mile) watershed, one can divert only about 7-8 days per year. In a 15 square mile (9,600 acres) watershed, about 30-37 days will be allotted for collection, and when the watershed area is around 65 square miles (41,000 acres) one may divert for up to 110 days. This, incidentally, is practically the same collection season (107 days) as under the Draft Guidelines, but under the Draft Guidelines, watershed size was irrelevant. In small watersheds of say 320 acres (0.5 square mile), only one or two days would be allowed for collection per year, and in watersheds of less than about 200 acres, there would certainly not be any diversion allowed. No one will ever get permission to build a pond in small watersheds because of the overly restrictive minimum bypass flow requirement as developed by the formula.

Surely there should be some allowable diversion in very small watersheds, 200 acres or less, simply because there is so little incremental water for anadromous fish. But the 15 to 30 acre-feet that could be collected for wildlife or agriculture or firefighting makes a huge difference to a landowner, to CDF and to deer, mountain lions, and migratory birds.

• Here is an alternative to both the Draft Guidelines and the Draft Policy method for watersheds of 200 acres or less. Eliminate MBF requirement altogether.

- 1) Set diversion dates of December 15 - March 31.
- 2) Calculate annual runoff using Rainfall-Runoff Method or Drainage Area Ratio Method as appropriate.
- 3) Reserve a bypass of 80% of annual runoff, and allow collection of no more than 20% of annual runoff, subject to a further restriction as described in 4) below.
- 4) Set an overriding maximum diversion in acre-feet equal to 30% of the Drainage Area in acres, (i.e., if Drainage Area is 100 acres, maximum diversion could be no more than 30 acre-feet).
- 5) Continue to ensure cumulative flow impacts are not exceeded downstream.
- 6) Possibly restrict this to watersheds in which no salmonids can spawn as well as limit it to no more than 200 acres.

Here are the calculations on the same project using this simple method.

A = 65 acres

Q = 139.1 acre-feet mean annual runoff at POD (as before)

Maximum diversion = 20% of mean annual runoff

$139.1 \times 0.20 = 27.8$ acre-feet available for appropriation

But, using the more restrictive 30% rule, $65.0 \times 0.30 = 19.5$ acre-feet available for appropriation no matter how much precipitation falls. This provision protects flow in areas where the precipitation may be somewhat less than in other areas, i.e., it penalizes diversion where precipitation is less. In practice, use the lesser of the two amounts.

Using the Draft Guidelines for this example, there is 74.7 acre-feet available for appropriation, which would be reduced by collection season and by the CFII requirement. By using my simplified method, the amount available for appropriation is 27.8 acre-feet but by adopting the 25% rule, this limits diversion to 19.5 acre-feet. Expressed the other way, under the Draft Guidelines, 41 acre-feet is reserved for fish, and under my method, 111.3 acre-feet is reserved for fish or even 119.6 acre-feet of the total 139.1 acre-feet. Even in very dry years, fish will get plenty and some is still available for diversion. This is also a simple method which is an advantage. The whole idea of the instantaneous MBF is eliminated and there is no need to construct a bypass flow structure because the diversion season begins on December 15. Of course, the landowner must keep the valve at the bottom of the pond open, and I am sure that compliance among landowners will be nearly 100%.

The trade off is that for small watersheds of 200 acres or less, no bypass structures should be required. The rationale is straightforward. In watersheds of this size, even if all the water were reserved for fish, the incremental gain for fish habitat and water volume is small. In most of these small watersheds there are no salmonids anyway. For the landowner, however, being able to collect up to even 19.5 acre-feet on a 65-acre watershed can be critical to his operation, and without the cost and trouble associated with bypass flow structures.

For projects in watershed greater than 200 acres, a different method should be used because the amounts of stored water become significant and the cumulative impacts could be significant, and because fish might be able to use the stream. I have not developed this as a further part of my comments, and leave this to others.

The Maximum Cumulative Diversion is another burden on diverters in small watersheds. The winter floods would fill small ponds rather quickly if allowed to, but the MCD severely limits the maximum filling rate. I have not done the calculation for MCD but it is easy to see how restrictive it is. On medium sized watersheds, say 800 to 8,000 acres or so where collection can be made for only 10 to 25 days each year because of the MBF limitation, the presence of an MCD rate will almost ensure ponds cannot fill. The window of flow is simply too narrow.

- The solution for this is to eliminate the requirement for any MCD for all watersheds less than 20 square miles (= 12,800 acres), although an MBF may be appropriate for watersheds greater than 200 acres. Utilize the MCD concept where it makes a

difference to instream flow, not to every watershed.

Finally, there is another issue which needs addressing. The Policy will require a stream gage to have been in service at least 10 years in order to consider the data both reliable and valid. While this is a laudable goal, the fact is most stream gages do not have that long an operating period. This requirement should be reduced to a five-year continuous operation. Moreover, using correlation studies one can develop valid and accurate long-term models from a gage with many years of data and apply results to gages with fewer years. This is not only possible but should be encouraged. Otherwise, the engineers will not be able to utilize valid and important stream gage data when preparing the Water Supply Report and the Instream Analysis, or the WAA/CFII as appropriate.

- Instead of a 10 year period for stream gages, require a period of 5 years continuous operation.

9. Failure to Address Potentially Adverse Consequences of the Policy

One of the most unsettling aspects of the Draft Policy is that the Policy ignores topics and potentially adverse consequences of its adoption even though these had been brought up and discussed earlier. I am referring to the Environmental Checklist, the Final Scoping Report and the Substitute Environmental Document. Staff was well aware of what could happen if a policy was adopted, and staff wrote about many possible impacts. As the Policy was printed, nearly all references to these impacts were ignored and staff ignored virtually all of the public comments. I'm not a Sacramento insider, so perhaps this is the way rules are developed and promulgated. If so, my first comment must be to take care about what you wish for, because the consequences may not be remotely close to what you think you'll get.

The Environmental Checklist included a number of carefully thought out possibilities of impacts that might occur if the Policy were adopted. At the time the Checklist was written, August 2006, everyone believed the Draft Guidelines of 2000 (2002) would be adopted, not the more restrictive Draft Policy.

In the two-page Notice of Preparation and Public Scoping Meeting and Request for Public Comments, staff realized some of what could happen. Here is what they said on page 2, Section 4.0 regarding Probable Environmental Effects to be Analyzed in the SED.

"Future actions that could occur as a result of adoption and implementation of the policy include the removal of existing, on-stream storage reservoirs and the construction of off-stream storage reservoirs. These construction activities could cause short-term impacts such as the following: increases in sediment discharged to streams due to construction or dam removal, temporary visual disturbances due to earthwork activities and vehicular traffic, temporary increases in air pollution from particulate matter and ozone, potential for site-specific erosion, temporary use of hazardous materials, temporary noise impacts, and temporary increases in solid waste generation.

"The removal of on-stream reservoirs as a result of adoption and implementation of the policy also could cause long-term impacts. These could include: loss of wetlands, which could adversely affect species that rely on those wetlands for habitat and food; changes to channel and floodplain maintenance processes and riparian zone characteristics, which could affect habitat conditions; a reduction in available storm flow storage capacity, which could cause increased runoff during storm events, increased potential for downstream flooding, increased sedimentation, the potential for mudflow, and the potential for downstream dam failures; a reduction in emergency fire suppression water supplies; and a loss of recreational opportunities such as swimming and fishing.

"Adoption and implementation of the policy also could lead water diverters to switch to alternative water supplies in order to avoid any limitations applicable to new water right applications that may be contained in the policy. Some diverters might switch to groundwater pumping, which could impact groundwater levels, potentially resulting in a reduction in summer instream flows. Other diverters might choose to directly divert under riparian rights, instead of seasonally storing water, for which a permit is required. An increased reliance on riparian rights could result in increased surface water diversions during the spring, summer, and fall, potentially reducing instream flows to levels that might cause reductions in or loss of habitat. Decreases in summer groundwater elevations and instream flows due to groundwater pumping and riparian diversions could result in the loss of riparian vegetation. The loss of riparian vegetation could affect terrestrial and aquatic species that rely on riparian vegetation for habitat and food and lead to declines in water quality, such as increased water temperature and fine sediment levels. Finally, some diverters might choose to cease diverting altogether, and fallow lands that are currently being irrigated, or switch to dryland farming, or convert existing farmland to non-agricultural uses."

To summarize these, adoption of the Policy could lead to:

- removal of onstream reservoirs, which is the major focus
- construction of offstream reservoirs
- loss of habitat for wetland or riparian species (e.g., migratory waterfowl, large and small mammals, birds and insects)
- increased runoff during storms with increased downstream flooding
- insufficient water for firefighting in rural areas
- loss of recreation opportunity such as swimming and fishing
- diverters switching to alternative water supplies (e.g., using riparian rights, pumping groundwater, water purchases)
- diverters ceasing to irrigate, and letting land lie fallow
- diverters changing land use altogether

On page 6 of the Environmental Checklist, these same topics are mentioned, and then the Checklist addresses 16 required issues, from Aesthetics to Utilities. These 16 topics were in turn also

discussed by nearly three dozen commenters, who also raised many new points. Listed below are a few of the points raised by staff in the Environmental Checklist. To save space, read each of these bullet points in the form "Would the policy possibly . . . ?" and note that for all questions, a positive answer leads to a potentially significant impact.

- convert prime farmland to non-agricultural use? Yes
- have a substantial adverse impact on any riparian habitat or other sensitive natural community? Yes
- have a substantial adverse impact on federally protected wetlands? Yes
- interfere substantially with movement of animals or interfere with wildlife corridors? Yes
- substantially deplete groundwater supplies or interfere with groundwater recharge? Yes
- result in loss of recreational opportunities? Yes

Here are additional concerns raised by commenters which staff didn't think of or felt were inconsequential. The same format is used, i.e., "Would the policy possibly . . . ?"

- directly impact existing land uses and conflict with land use plans, policies, regulations and water management plants that water purveyors rely on? Yes
- impact fire-fighting abilities because without ponds, helicopters can't obtain water? Yes
- impact recreation opportunities in parks? Yes
- impact cities' ability to provide affordable housing, etc, if cities' water rights are undermined or lost? Yes
- result in violating the state constitutional requirement that all water be put to its highest and best use? Yes
- result in potential restriction on development in the North Coast area with resultant greater urban growth in other areas? Yes
- impact water purveyors because some people will substitute contracted water delivery from purveyors instead of other sources in order to avoid policy requirements? Yes
- have an adverse impact on users who voluntarily give up riparian rights of summer use in exchange for winter storage of domestic water for later use in summer? Yes
- exempt large reservoirs? Yes
(This was addressed and the Draft Policy misguidedly exempts Lake Mendocino (90,000 acre-feet), and Lake Sonoma (250,000 acre-feet), and the mainstem of the Russian River.)

Despite the fact I've enumerated six important issues raised by staff in the Checklist and nine more raised by commenters, I assure you these lists are by no means exhaustive. What these items demonstrate, however, is a selection of topics which should be addressed by staff and without exception, were not discussed carefully in the Draft Policy nor in the supporting documents, such as

the SED.

The Substitute Environmental Document (SED) is where we should find a thorough discussion of all other potential impacts raised by staff and by commenters. In fact, very few of these are addressed, and those that are can be found on pages 48-73 of the SED.

The SED mainly expands on what was written in the original Notice of Preparation document, which is why I quoted the NOP at length. Farmers or ranchers or other people may have to remove an unauthorized dam and the short term impacts of its destruction are covered. New offstream dams might be constructed. People might obtain water through purchase, wells or directly under a riparian right. The SED does try to estimate the effects of substituting wells for ponds. It also attempts to estimate the effects of greater use under riparian rights.

The Policy devotes a few pages to the possibility of constructing new or expanding existing offstream storage in response to dams being torn down. For some unexplained reason, the SED authors figure that the amount of water that could be stored in offstream ponds would be equivalent to that stored in onstream reservoirs, as if one could easily replace an onstream pond with a pit pond. This is like saying the 250,000 acre-feet in Lake Sonoma could just as easily be stored in Alexander Valley or in Windsor, which would free up Dry Creek for salmonids and restore the 180 miles of spawning habitat destroyed by the construction of Warm Springs Dam.

Dams of all sizes and ponds and lakes are built where they are for a reason, and a big reason is, well, because that's where the water is. Also, creating water storage in a gully or ravine allows water to be efficiently stored by taking advantage of the natural terrain. If a pit pond is built, one has to excavate far more material to get the same storage volume as with an instream pond. Pit ponds are more expensive to construct per acre-foot of storage. Therefore, many people won't be able to build replacement offstream ponds. The SED doesn't consider this at all.

There is another reason why many people cannot construct an offstream pond, and that is because their land has too steep a slope for offstream storage. A typical onstream pond will be built where the slope is 5% to 20%, or even greater. If one is forced to remove the onstream pond and dam, there is no place to build. To use Lake Sonoma again, if this were built offstream and still in the northwestern hills above Healdsburg, where would it go? The answer is obvious, and is that this couldn't be done due to topographic constraints. Landowners with small ponds of 10 to 100 acre-foot capacity face the same problem, and staff didn't discuss it.

The SED acknowledges that other beneficial uses of water (municipal, industrial, or agricultural) might be curtailed (page 65). I would strongly add adverse impacts to wildlife to that list because wildlife must drink, too. Mammals, birds, amphibians, invertebrates are just as dependent on adequate water as are anadromous fish, and removal of ponds affects them as critically as it does livestock or crops.

I am quite sure the real result of removing onstream dams will be that only a relatively small number will be replaced with offstream storage, and perhaps that is the whole point of the Policy: to force people to tear down dams and not allow landowners to replace them or to make it exceedingly

difficult. Reading the NOP and SED carefully, it is fairly clear that the main thrust of the Policy is to develop a strategy for dam removal, perhaps allowing replacement with pit ponds, and prohibition of all new instream ponds on Class 1 or 2 streams, and approving very few on Class 3 streams. The environmental impacts discussed in the NOP and SED relate to these activities almost exclusively, and do not take into account much else. But remember, the loss of water storage isn't important only to agriculture. It's also harmful to wildlife. This topic needs more discussion.

There is also a fairly extensive discussion in the SED of what might happen if more wells were drilled, or if people pumped water from streams under riparian rights. Stetson Engineers wrote two reports on changes in water use by agriculture, industry and municipalities, and what could happen if dams were removed. Some of their discussions are site specific and very useful. However, in general, many important topics were not addressed and should have been.

Before the Policy can be adopted, satisfactory answers must be provided to the issues raised earlier by others and in this commentary, and adjust the Policy accordingly. Look at the bullets again. The SED should discuss the environmental impacts of the conversion of agricultural land to non agricultural use (and as an aside, what about the numerous ways the loss of local food production of apples, pears, beef and grapes affects consumers and the local economy) or what happens when wildlife are deprived of water and wildlife corridors are compromised. The SED should discuss the implications of forest fires going out of control because insufficient water is available, or what less recreation opportunity means to kids. The SED should examine the impacts on cities when rural people are forced to move to cities or suburbs because they can no longer raise crops or cattle or sheep, and what the impact on urban growth will be. The impacts to rural people who voluntarily give up summer riparian rights and instead store winter river water in tanks for summer use should be described. These people are using water only for domestic purposes, and the Policy can affect their goodwill intentions in detrimental ways. Staff and the public all were in general very thoughtful about the implications of this Policy as described in the Environmental Checklist and Final Scoping Report, but most of their concerns may as well never have been written, because they never made it to the SED or the Policy.

Therefore, I think it would be a good idea if before adoption is even considered, the Board request staff to:

- Carefully examine the Final Scoping Report with reference to all the comments that were made. Many people brought up excellent points.
- Address the criticisms and comments made in the SED or other document.
- Modify the Policy to resolve the issues that were raised.

10. Enforcement Provisions

Much of the Enforcement section makes pretty good sense. We all recognize that water is a scarce resource and needs to be used wisely, and for many beneficial purposes. The inspection process for licensing has worked well in the past and has been fair. The ability of individuals to form a watershed group is innovative and may work well. The idea of progressively more stringent enforcement is good, beginning with notification and correction. Then, the Water Board may become more punitive, to the extent of cease and desist orders or even revocation of a license.

However, I do have serious concerns about two of the provisions in this section. The first has to do with the possibility of changes to existing licenses. These changes can easily be profound enough to take away the license holders right to use the water. More accurately, the Division won't directly challenge the water right itself, but will modify the mechanisms of diversion and storage to the extent a person could no longer use the water.

Under Section 11.1.1 (Enforceable Terms and Conditions) it states, "The State Water Board also will consider adding terms and conditions to existing water rights or revising ambiguous or inappropriate terms and conditions when analyzing petitions."

In the supporting documents to the Policy, it indicates that the Policy will affect only new and pending applications, and changes to existing licenses or permits. This apparently is not the case, according to the Policy Section 11.1.1, and this certainly needs public clarification.

It is frightening to contemplate the possible outcomes if all currently licensed diversions are at risk to be changed this easily. The Policy grants enormous power to regulators and takes away the security of the license holder, jeopardizing his future. For a family farm or ranch, long-term regulatory stability is crucial to its existence, and landowners must know that the rules aren't going to change again in such drastic ways as they have been changed in the past decade. The way the Policy is written, the Division can easily change the conditions and regulations that apply to existing licenses and permit terms such as requiring a licensed dam to be removed and replaced by a pit pond; or the Division may require a passive bypass system to be installed on an existing licensed pond to meet the newly adopted MBF and MCD requirements. The holder of the license will have little or no recourse and could easily lose the ability to store water. Here is a suggestion for improvement.

- Delete the phrase "also will consider adding terms and conditions to existing water rights."

The second concern is a requirement on the part of the license holder to come forth under penalty of perjury and admit and describe any possible violation he may have committed, even an inadvertent violation.

Section 11.1.2 (Self-Monitoring Reports) says the State Water Board "will require a permittee or licensee to clearly identify any violations of applicable requirements and to identify any corrective actions taken or planned within a specified time schedule."

No American would allow this provision in other contexts. The Vehicle Code doesn't require you to turn yourself in if you speed, although you know you broke the law. No one who wins an office football pool will tell the IRS a year later that he had won and is now willing to pay the tax, the interest and the penalty.

This will not apply to me personally because everything I do is in full compliance. But it looks to me that the Policy will demand that a person engage in a report of self-incrimination if a violation is discovered. That must be contrary to the Constitution or other law.

The provision that "self-monitoring reports are signed under penalty of perjury" is especially

galling. No one should be held to that high a standard under this sort of administrative law. In fact, practically no one is held to that standard when it comes to submitting documents to regulatory agencies. You'll never find a protestant who writes a protest who would also sign a statement under perjury that everything he says is true.

The solution for this is to tone down the signing statement, and have it read thus.

- I affirm to the best of my knowledge and ability that all the foregoing is correct and complete.

11. Concluding Remarks

I had intended to close these comments with a lengthy and somewhat technical discussion on the ecological requirements of salmonids and why adopting the Policy won't help much if at all in their recovery. There is an overwhelming amount of literature on Pacific salmonids and the Russian River. The following is a list of some of the more important publications and I admit I am citing only a few.

Park Steiner, Steiner Environmental Consulting (SEC), August 1996. A history of the salmonid decline in the Russian River.

Robert F. Beach, Sonoma County Water Agency, August 1996. The Russian River: an assessment of its condition and governmental oversight.

Sari Sommarstrom, April 1989. An inventory of water use and future needs in the Eel River Basin of Mendocino County. Prepared for the Mendocino County Water Agency.

Larry R. Brown and Peter B. Moyle, 1991. Status of coho salmon in California. Report to the National Marine Fisheries Service. UC, Davis, CA.

Larry R. Brown, Peter B. Moyle and Ronald M. Yoshiyama, 1994. Historical decline and current status of coho salmon in California. North American Journal of Fisheries Management 14(2):237-261.

California Department of Fish and Game. Various stream surveys available from the KRIS website, and Cherr and Griffin compilation of stream surveys in Mendocino County, 1979.

California Department of Fish and Game, 2002. Status Review of California coho salmon north of San Francisco. Report to the Fish and Game Commission.

Robert S. Coey, et al., California Department of Fish and Game, Draft July 2002. Russian River basin fisheries restoration plan.

Shawn D. Chase, D.J. Manning, D.G. Cook and S.K. White, 2007. Historic accounts, recent abundance, and current distribution of threatened chinook salmon in the Russian River, California. California Fish and Game 93(3):130-148.

If a person takes the time to go through these or even skim them, he or she will quickly realize how complex and confusing it all is, and that the salmonid decline has many causes.

But instead of discussing technical literature, I'm going to provide a little history and tell some stories. Anecdotes indicate that in many watersheds up and down the Russian River fish were plentiful prior to 1963 or so, but have become scarce to rare or even endangered. I've had old-timers tell me that in the 1950s, fish in the West Fork of the Russian River (steelhead and probably more chinook than coho) were so plentiful, people could and did gaffe them under the bridge in Redwood Valley. Others tell me that for the first two or three years after Coyote Dam was constructed to create Lake Mendocino, returning salmonids would beat themselves to death at the bottom of the spillway. The influence of Lake Mendocino on their decline cannot be overestimated. This dam destroyed more than 100 miles of spawning habitat but the subsequent water release schedule from the lake over the last 50 years has also been detrimental to populations. The same scenario played out with Dry Creek and Lake Sonoma in 1983 after Warm Springs Dam was completed. Official stream surveys were infrequent but all professionals agree that historical numbers of all salmonids were much higher in the past than they are now.

I have read Bob Coey's well-researched "2002 Draft Russian River Basin Fisheries Restoration Plan." In it, on page 22, he quotes Park Steiner's 1996 report as follows.

"There are no chinook population estimates until the 1960's. Documented returns appear strongly associated with periods of sustained hatchery supplementation. Estimated chinook escapement in 1966 was 1,000 (CDFG 1966) and estimated escapement in 1982 was 500 (COE 1982). (Escapement is the number of adult fish successfully returning to a river system to spawn.) Heavy planting in Dry Creek during the 1980's did not result in establishment of a [large] run."

On page 219, Mr. Coey writes of the West Fork of the Russian River and Forsythe Creek. He says:

"Several tributaries to the West Fork historically harbored coho salmon, but are mainly habitat for steelhead . . ." He goes on to say, "No DFG habitat surveys have been conducted yet in the West Fork system. According to a 1966 DFG survey, the West Fork and most of its tributaries are limited in their utilization as nursery streams due to lack of flow in some sections during the summer."

I bring this to your attention to stress the original premise of my letter, which is adoption of this instream flow policy is unlikely in and of itself to change anadromous fish populations significantly. Tributaries to the West Fork and even West Fork itself totally dry up each summer and historically always have. This 100 square-mile area is separate from and has no influence from Lake Mendocino, and is very close to unimpaired. Many other tributary systems are identical or similar to the West Fork although I don't have as much knowledge or experience with them. Conditions in the river system with respect to the mainstem, however, have changed dramatically and the problems are very complex.

The "Status Review of California Coho Salmon North of San Francisco Bay" prepared in 2002

by DFG is another gold mine of information. There is an extensive discussion of hatchery operations, and on page 140 they cite a paper by Brown and Moyle that concluded that hatchery coho as opposed to wild stocks dominate all but the Eel River system. They say coho are in "catastrophic decline" and I think few will argue that. Hatcheries have a 100-year history with limited effect.

There was a major hatchery at the western edge of the City of Ukiah on a tributary of the Russian River called Gibson Creek. It operated from 1897 until the 1930s and was probably mainly for steelhead. An article from the *Mendocino Dispatch-Democrat* (predecessor of the *Ukiah Daily Journal*) dated April 17, 1908 (reprinted April 13, 2008) said this:

"Hatchery Open to Visitors. The fish hatchery, under the superintendency of Col. A. V. LaMotte, is now open for the season and for the reception of visitors. Over a million and a half eggs were secured this season and the spawn is now being rapidly hatched. Thousands of small fish are to be seen and the various stages of development from the spawn to the perfect fish is plainly seen. Col. LaMotte will stock nearly all the streams in our vicinity this fall."

Imagine. More than 1,500,000 small fish were raised in one year in a hatchery exactly a century ago. Not all, of course, went to the Russian River system. Some went to the Eel and elsewhere. By the time this hatchery closed, there must have been more than 40 million fish raised there, and from all accounts, fish were abundant, and so were fishermen.

The hatchery near Warm Springs Dam on Dry Creek began operating in 1970, according to the Status Review Report of California Coho on page 142, and has produced millions of coho. On the same page, the report says that the 5-year average coho production for each year between 1987-1991 was 138,208. On page 144, the Report says that in 1980 DFG released 79,300 fingerlings into Dry Creek, sourced from the Klamath River. Clearly, there have been heroic efforts over many years to assist salmon populations in the Russian River Basin.

However, the Status Review Report says on page 141 that in 1999/2000 there were two or three returns, and in 2000/2001 none came back. Even with all the efforts and millions of coho releases, the sad truth is that no functioning coho run has yet been established on Dry Creek. If small water diversions are considered one of the primary causes of salmonid decline in the Russian River Basin, why could not and cannot DFG establish a viable coho run where there was and is water? This hatchery began operating before Lake Sonoma was built. Surely, this is an important fact to acknowledge when developing a policy to help salmonid populations recover.

The U.S. Army Corps of Engineers has operated a steelhead facility at the base of Coyote Dam adjacent to Lake Mendocino since 1994. This facility was constructed as a mitigation measure to make up for some of the losses due to the construction of Lake Mendocino. In a typical year 250,000 to 450,000 young are raised and sent downstream. While the goal for returnees is 4,000 or more, this number has been met only once or twice.

So, we conclude hatchery fish are very important but even raising millions and millions of them has not stopped the decline of salmonids. How can the prevention of any new agricultural

ponds be much help to the recovery of fish populations when there are so many other factors, especially the presence of the large dams and the severely compromised mainstem?

The Policy and many supporting documents and reports say they want to see a “natural hydrograph” be re-established or preserved. In most upper tributaries, i.e., the 1st and 2nd order streams of the Russian River, the hydrograph *is* pretty much natural. That’s because most tributaries don’t have dams on them. DFG and NMFS want to recreate natural hydrographs, but they already exist in lots of places. Yet, there are few fish in the Russian River system, and the mainstem Russian River will never again see a “natural hydrograph”. The concept that restoring or preserving the natural hydrograph in smaller watersheds will increase salmonid numbers is insufficient to explain declining fish populations. For example, when you look at coho surveys in streams that flow directly into the Pacific Ocean, fish numbers are down but many of these streams are relatively unimpaired and still have relatively natural hydrographs.

The overarching problem for the Russian River system with respect to the freshwater portion of the salmonid life cycle is attributable to the effects of the two large dams. There isn’t one person alive today who can remember the natural hydrograph of the Russian River below Ukiah. The Potter Valley diversion into the Russian River is nearly 100 years old and has influenced the river from Potter Valley all the way to the Pacific Ocean. In recent years, more than 130,000 acre-feet of water is diverted annually from the Eel River to Potter Valley, then to Lake Mendocino, and down the mainstem to Sonoma County. The influences of this diversion to the Russian River system were at first probably positive for salmonids to a great degree inasmuch as there was more summer and fall water in the system. Certainly, the historical records indicate abundant fish populations in the whole system well into the 20th century, certainly until after World War II. (I must add of course that the effects to the Eel River system as a result of the Potter Valley diversion are another story.)

With the construction of Lake Mendocino and Lake Sonoma, it all changed, and anadromous fish numbers dropped rather quickly. The large dams had to have played a major role in this population decline, and the Policy, whatever it may eventually look like, must take the presence of these dams into account, or the goal of greater salmonid populations cannot possibly be achieved.

There is a terrible irony in the story of Warm Springs Dam and Lake Sonoma. This lake was constructed at a cost of \$360 million in 1983 dollars for flood control and for water storage, to serve as a water supply for a rapidly expanding population in Sonoma and Marin Counties. Recreation was an important but secondary purpose. The main customers were and are urban and suburban folks, now more than 600,000 of them. The construction of Warm Springs Dam eliminated more than 180 miles of prime spawning habitat for steelhead, coho and some chinook. There was a trade-off when it was built - people were given a good water supply, salmon spawning and rearing habitat were destroyed.

In Spring 2007, NOAA Fisheries declared that there was too much water being released from Warm Springs Dam, so they wanted the releases cut by 40%. The reason given was that “too much water is harmful” to the steelhead and salmon populations, according to a Santa Rosa *Press Democrat* article of May 6, 2007. The purpose of the cutback was to protect the fish in a small section of Dry Creek during the summer. A later article written by Guy Kovner of the *Press Democrat* and dated

July 7, 2007 said it well. "Lake Sonoma's abundant water can't be tapped fast enough to meet summer demand without endangering the federally protected fish in Dry Creek." William Hearn, a well known fishery biologist for NOAA Fisheries, was quoted, "They are basically treating 14 miles of critical habitat as a conveyor belt [for delivering water to the mainstem]." The biologists said that, "even a relatively low summertime flow, controlled by releases from the dam, is devastating to the fingerling coho salmon and steelhead in Dry Creek."

So in midsummer, the SWRCB severely curtailed water delivery from Lake Sonoma down Dry Creek to the mainstem of the Russian River. The SWRCB then instituted a "mandatory conservation program" for all users along the Russian River. One important outcome was that Sonoma County Water Agency began to draw more water from Lake Mendocino than it normally would have. This forced upriver water districts and cities such as Ukiah and Hopland which use water coming from Lake Mendocino to require their customers to limit water use through voluntary water conservation, although mandatory rationing was avoided. With the loss of Lake Sonoma water, the situation was even worse in cities such as Santa Rosa, Petaluma, Windsor and Rohnert Park. The Windsor Town Council proposed an ordinance cutting back water to restaurant patrons, and also to restrict lawn watering and vehicle washing. Santa Rosa began sending out "water police" to check for excessive use on lawns or other water wasting, and urged people to turn their neighbors in. That was in 2007. We all wonder about 2008 and later years and beyond, because this problem won't go away by itself.

So the situation for Lake Sonoma now is that the summer water must be kept behind Warm Springs Dam to benefit a small number of fish downstream from the dam. Coho is an endangered species and naturally deserves special treatment. But, Lake Sonoma itself is now nothing more than a recreation lake, and most likely stocked with warm water fish. Recreation has become the primary purpose because the main purpose to provide water for human use in large quantities is no longer allowed. The reservoir can't supply as much water to the cities or to agriculture, and the lake sits there, used mainly only by boaters and swimmers.

Because of the dam, fish have lost a great deal of spawning habitat, and at the same time people have lost the use of much of the lake water because of curtailed flows. The ultimate irony of this story for the fish is that all of that 180 miles of prime salmonid spawning habitat above Warm Springs Dam was lost for nothing.

However, I have little doubt that the restrictive cutbacks placed on the Lake Sonoma releases will be negotiated in such a way that much of the summer flow will be restored one way or another. Summer flows will be allowed to increase because cities need the water so badly, and this will happen sooner rather than later. Remember that Lake Sonoma, Dry Creek, and the mainstem are specifically exempt from the Policy. The agencies are even talking about building a 14 mile bypass to deliver lake water around Dry Creek to the mainstem which will increase the water available for municipal use. This bypass would then allow low water releases to be maintained in Dry Creek for preservation of fish habitat. This bypass will of course be built at taxpayer and ratepayer expense. But the Policy ignores the dams and the mainstem. Its stated (and only) goal is to protect instream flows for fish, and it doesn't address anything else associated with salmonid decline. It is punitively restrictive on small watersheds and on small streams, and it largely targets small onstream dams and small

watersheds. It is to be implemented almost solely on the backs of farmers and ranchers and small landowners. This Policy won't achieve the goal of protecting salmonid populations, and these populations will continue to decline. What a tragedy.


I'll close on a personal note. I am a committed conservationist and consider conservation practices a very high priority on our ranch; I yield to no one in my passion for fish and wildlife habitat enhancement. I have at my own considerable expense put in a major riparian restoration project on the West Fork of the Russian River. We give tours of this project to groups and in fact Bob Coey, a prominent fishery biologist for DFG, has brought his classes here to show how a project is built and what its benefits are. Mr. Coey was instrumental in the design and permitting of this project and was helpful in many ways. This restoration project has been a success. This was demonstrated in 2004 when seven chinook made their way upstream and spawned in gravels at our restoration site. We've seen a few fish, say four to six, in each year since, and in March 2008 we were thrilled to see more than 30 steelhead pass by. By this writing in late April 2008, the river flow is very low, but the progeny of these fish (and perhaps some of the adults) should soon go downstream because in two more months the river here will be completely dry and the few pools left upstream will have daytime temperatures around 85° F, lethal to salmonids. If agencies worked with landowners as Mr. Coey did with us, we together could achieve more successes like this. Landowners should not be treated as enemies.

I support fully any workable idea that will restore fish numbers even though they will never reach historical levels in the Russian River system. Restoration projects are the best way to restore both habitats and fish populations. A Policy for preservation of instream flows may be needed, but it must not be so draconian that landowners are unable to continue to farm or raise livestock. As it is written, this Policy is a pipe dream at the expense of agriculture.

This Policy if enacted will cause far more harm to landowners and to other wildlife than can be offset by any conceivable benefit that could accrue for fish. The Water Board and DFG and NMFS must find ways to cooperate with landowners for a common goal, because if you lose the cooperation of people like me and so many other conservation-minded landowners due to overly strict regulation, you will greatly decrease your ability to achieve the goal of protecting anadromous fish. We're in this together, and I'm asking that this Draft Policy be rejected, and that a workable one be written. That is why I have spent so much time and energy to write these comments - to help make a fatally flawed product into a good and serviceable Policy for all water users.

Thank you for your attention to these comments.

Very truly yours,


Rudolph H. Light

RHL:lep