

**RESPONSE TO PUBLIC COMMENTS ON THE
DRAFT POLICY FOR
MAINTAINING INSTREAM FLOWS
IN NORTHERN CALIFORNIA COASTAL STREAMS**

VOLUME 2

JANUARY 2010

**DIVISION OF WATER RIGHTS
STATE WATER RESOURCES CONTROL BOARD
California Environmental Protection Agency**

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EXECUTIVE SUMMARY

The Draft Policy for Maintaining Instream Flows in Northern California Coastal Streams was released in December 2007. Over 600 comment letters were received from the public during and after the public comment period that ended May 1, 2008. These two volumes provide responses to these comments, which were prepared by State Water Board staff, Stetson Engineers, and R2 Resource Consultants. A table of contents is provided identifying the topics covered in each volume.

Additional comments were received after the public comments were compiled. On April 30, 2009, Trout Unlimited, Wagner and Bonsignore Consulting Engineers, and Ellison, Schneider, and Harris, LLP submitted Joint Recommendations for the North Coast Instream Flow Policy (TU/WB/ESH proposal), which contains recommendations for water right procedures and recommended review standards for calculating bypass flows and rates of diversions. Brian Johnson of Trout Unlimited submitted additional comments on November 12, 2009 and December 11, 2009. Staff's responses to these comments are provided in the following documents:

- Responses to comments contained in the Joint Recommendations
- Review of the TU/WB/ESH proposal, prepared by Stetson Engineers and R2 Resource Consultants, which contains a technical evaluation of the scientific aspects of Section 5 and the Appendix of the Joint Recommendations.
- Responses to Comments Received from Brian Johnson on November 12, 2009 and December 11, 2009.

Please note that these responses were prepared prior to the final revisions to the Draft Policy. The responses, therefore, do not reflect all wording, terminology, and section numbering changes that were incorporated into the February 2010 revision of the Draft Policy.

LIST OF AGENCIES AND INDIVIDUALS SUBMITTING COMMENTS

Commenter Name and Affiliation	Acronym if any	Date(s) Received
Sam Aanestad, Senator 4th District and Bob Dutton, Senator 31st District		4/15/2008
Charles Acker		5/1/2008
Eric Adema		4/25/2008
Al Aflague		4/25/2008
Mike Airoidi		4/25/2008
Catherine Albers		4/25/2008
John Alcorn		4/25/2008
Pat Geib Alexander, Geib Ranch Vineyards		4/16/2008
Naomi Alvarez		4/25/2008
Steve and Rachael Alvarez-Jett		4/25/2008
Corrin Amaral		4/23/2008
Willis Andersen Jr.		5/1/2008
Chris Anderson		4/25/2008
John H. Anderson		4/25/2008
Myles Anderson		4/16/2008
Raul Anorve		4/25/2008
Anne Arns		4/17/2008
Bruce Ashley		4/25/2008
Drew Aspegren, Napa Valley Vineyard Engineering, Inc.		5/1/2008
Ilene Atkins		4/30/2008
Frank Atter		4/25/2008
Rebecca August		5/1/2008
Ron Avila		4/25/2008
Gary Bard		4/25/2008
Donald Barkemeyer		4/25/2008
Hugh Barron		4/25/2008
Vincent Bartolomei, Bartolomei Brothers Vineyard		4/29/2008
Joshua Basofin, Defenders of Wildlife; Don McEnhill, Russian Riverkeeper; and Linda Sheehan, California Coastkeeper Alliance		5/1/2008
Robert Battinich and Tom Spinardi, Aladdin Depot		5/1/2008
Paul Baumbach		5/2/2008
Hannah Beadman		4/25/2008
Kate Beck		4/30/2008
Charles Bell		4/25/2008
Sharon Bell		4/25/2008
Kevin Bendian		4/25/2008
Mercedes Benet		4/25/2008
Bruce Bennett		4/25/2008
Edward T. Bennett		4/25/2008
Gordon Bennett, Sierra Club Marin Group		5/8/2008
Brent Berge		4/25/2008
Tom Bertetta		5/1/2008

R. Stuart Bewley, Bewley/Motluk Family Limited Partnership	5/2/2008
Ray Binner	4/25/2008
Geoff Blachman	4/25/2008
Stephen Black	4/25/2008
John Blair	4/25/2008
Michael Bland	4/25/2008
Steve Bleasdel	4/25/2008
Diane Bolman	4/25/2008
Paul Bonaso	4/25/2008
Chris S. Bond	4/25/2008
Ashley Boren, Sustainable Conservation	4/29/2008
Gary Borgnino	4/25/2008
Walter A. Boring IV	4/25/2008
Carolyne Borst	4/25/2008
Barbara Bowne	3/18/2008
Peter Bradford, Bradford Ranch	4/17/2008
Craig Bradshaw	4/25/2008
Sherry Brainerd	4/25/2008
Diana Brand	4/25/2008
David Brandos	4/25/2008
Barbara Brenner	5/1/2008
William C. Briggs Jr.	4/25/2008
John Brinkley	4/25/2008
Matthew Brocchini	4/25/2008
Neil Brody	4/25/2008
Gary Brooks	4/25/2008
Carrie Brown	4/30/2008
Charlie Brown	4/25/2008
Joseph Buchbinder	4/25/2008
Tim Buckner	2/6/2008, 3/13/2008, 5/1/2008
Ross Bullard	4/25/2008
Jeb Burns	4/25/2008
Mary Burns, Sonoma County Regional Parks	5/1/2008
Kimberly Burr	5/1/2008
Dick Butler, US National Marine Fisheries Service	5/1/2008
Otto Cache	4/25/2008
Larry Cadd	5/1/2008
Michael Calkins	4/25/2008
Mike Callan	4/25/2008
Jack Campbell	4/25/2008
Wayne Campbell	4/25/2008
Demetra Canning	4/25/2008
Meghan Cannon	5/1/2008
Richard Cardella	4/25/2008
Sylvia Cardella	4/25/2008
Elizabeth Carey	5/1/2008
Aleesa Carlino	4/25/2008

Jeffery Carlton, Dutton Ranch Corporation	4/18/2008
Thomas Carpenter	4/16/2008
Joseph Celeste	5/6/2008
Robert Cerello	4/25/2008
Daryl Chan	4/30/2008
Tom Chandler, The Trout Underground	4/25/2008
Jeff Chaplin	4/25/2008
Jon-Mark Chappellet	5/1/2008
Cindy Charles	4/25/2008
Brian Churm, Potter Valley Growers, Inc.	4/16/2008
Vincent A. Ciolino, Montemaggiore	4/23/2008
Kirk Clague	4/25/2008
Dean Cobb	5/1/2008
Ned Coe, Bill Coe & Sons	4/16/2008
Howard Cohen	4/25/2008
Robert Cohen	5/2/2008
Bryan Coles	4/25/2008
Vira Confectioner	4/25/2008
Margaret Connell	4/25/2008
Kristin Conrad-Antoville	4/25/2008
Robert Cook	4/25/2008
Annette Cooley, Cooley Logging	1/0/1900
Casey Cooley	4/17/2008
Julie Cope	4/25/2008
Darren Cordova, MBK Engineers	5/1/2008
Sherri Corker	4/25/2008
Caitlin Cornwall	4/25/2008
Brian Cottingham	4/25/2008
Sandi Covell	4/25/2008
Jack L. Cox, Cox Vineyards	4/30/2008
Paul Crafts	4/25/2008
Eileen G. Crane, Champcal Estates	2/20/2008
Eileen G. Crane, Domaine Carneros	2/20/2008
Christopher Croson	4/25/2008
Greg and Karen Crouse	4/18/2008, 4/23/2008
Julius Cuanang	4/25/2008
John Curry and Janice Crow	5/2/2008
Kyle Daniels	5/1/2008
Elizabeth Darovic	4/25/2008
Bruce Dau	4/30/2008
John Davey	4/30/2008
Ryan Davidson	4/30/2008
Steve Davidson	4/30/2008
Jill Davine	4/30/2008
Richard Dawson	4/30/2008
David De Almeida	4/30/2008
N. de Wolfe	4/25/2008
B. Deckard	5/1/2008
Chris DeGabriele, North Marin Water District NMWD	5/1/2008
Matthew Deitch and Adina Merenlender, University of California, Berkeley	5/1/2008

John DeMartino	4/25/2008
Robert Dench	4/25/2008
Joyce and Ray Denne	4/25/2008
Edward J. Denson	4/25/2008
Richard Desrosiers	4/25/2008
Timothy Devine	5/1/2008
Larry Dickens	4/25/2008
Dino Dina, Ciamrossa Vineyards	4/28/2008
Jim Doerksen	5/28/2008
Christopher Dohring	4/16/2008
Kevin Douglass	4/25/2008
Michael Doyle	4/25/2008
Ellen Drell, The Willits Environmental Center	4/30/2008
Julie du Bois	4/24/2008
Charles Dunn	4/25/2008
Michael Dunn	3/3/2008
Sherry Katherine Dunn	5/1/2008
Tom Eakin, Peter Michael Winery	5/1/2008
Leilani Echols	4/25/2008
Alfred Edelbacher	4/21/2008
Burke Edwards	4/25/2008
Mark D. Edwards, North Coast Resource Management	5/1/2008
Gordon Ehrman	5/1/2008
Sandy Elles, Napa County Farm Bureau	4/16/2008
William Elliott	4/25/2008
Don R. Engler	4/25/2008
Steven Esgate	4/25/2008
Dinda Evans	4/25/2008
Lucinda Evans	4/25/2008
Michael Evans	4/25/2008
Mary Eaton Fairfield	4/25/2008
John Faivre	4/25/2008
Vicki Faivre	4/25/2008
Deborah Fallender	4/25/2008
Joseph Farfone	4/25/2008
Fred Farnsworth	4/25/2008
Douglas Farr	4/25/2008
Michael Farrar	4/25/2008
Ellen Faulkner, Acorn Growers Association	4/29/2008
Jeffrey R. Fecteau	4/25/2008
Brian Fedora	4/18/2008
Gary W. Feemster	4/25/2008
Terry Fernandez	4/30/2008
Adrienne Ferrari	4/30/2008
Nicholas Ferrari	5/1/2008
JB Ferrarone	4/30/2008
Melinda Fink	4/25/2008
Melvin W. Finke	4/30/2008
Paul Finkle	4/30/2008
Mark Fiore	4/25/2008

Kenneth Firl	4/25/2008
Thomas Firth	4/25/2008
Jonathan Fisch	4/25/2008
Ted Fishman	4/25/2008
Mitch Fleitz	4/25/2008
Kevin Floyd	4/25/2008
Paul Fluno Jr	4/25/2008
Jeanne Fobes	4/25/2008
Karen Fontanella, Fontanella Family Winery	5/1/2008
Frederick H. Forschler	4/25/2008
Roger E. Fox	4/25/2008
Lee Frank	4/25/2008
Margaret Frazier	4/25/2008
Jonah Freedman	4/25/2008
Jonathan Frey, Frey Vineyards	4/28/2008
Nick Frey, Sonoma County Winegrape Commission	2/14/2008, 4/30/2008, 8/6/2008
Louis Fry	4/25/2008
Joshua Fuller	5/1/2008
Debbie Gaadbois	4/25/2008
Malgaff Gaffney	4/25/2008
James Galsterer	4/25/2008
Tom Gamble, Gamble Ranch	4/17/2008
Gene Gantt	4/25/2008
David Garfin	4/25/2008
Courtney Gartin	4/25/2008
Patrick Garvey, Flora Springs Wine Company	3/14/2008
Richard Gates	4/25/2008
Gemma Geluz	4/25/2008
Jim Genes	4/25/2008
Leona Gerichter	4/25/2008
Yvonne Gesinger	4/25/2008
Sara and Gary Giannandrea, Three G's Hay and Grain	4/18/2008
Brian Gillespie	4/25/2008
Robert Giusti	4/25/2008
Janice and Jeanne Gloe	4/25/2008
Harry Goertz	4/25/2008
Don Goldman	4/25/2008
Eric Goldsmith, Sanctuary Forest	5/1/2008
Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers	KMTGE/WB 5/1/2008
Roz Goldstein	4/25/2008
Reg Gooden	5/1/2008
Donald Gordon, Gordon Family Ranch	4/21/2008
Susan Gorin, City of Santa Rosa	8/6/2008
Keith Gorzell	5/1/2008

Judith Graham	4/25/2008
David Graves, Saintsbury	5/1/2008
Wayne D. Gray	5/1/2008
George Graziadei-Marin	4/25/2008
Dennis Gregg	4/25/2008
Branwen Gregory	4/25/2008
Probyn Gregory	4/25/2008
James Grizzell	5/1/2008
Dominic Grossi, Marin County Farm Bureau	4/18/2008
Sandra Goldman, Friends of Corte Madera Creek Watershed	5/1/2008
Anthon Hahne	4/25/2008
Jay Halcomb et al, Sierra Club Redwood Chapter	5/1/2008
Jay Halcomb, Diane Beck, and Daniel Myers, Sierra Club Redwood Chapter	4/30/2008, 5/1/2008
David Hall	4/25/2008
Stephen Hall, Friends of the Navarro Watershed	4/24/2008
Ted Hall, Long Meadow Ranch	4/16/2008
Emily Hamilton	4/25/2008
Marcella Hammond	4/25/2008
Phillip Hansen	4/25/2008
Katherine Harnden, Harnden Ranches	4/17/2008
Barbara Jane Harpe	4/25/2008
Shirley Harris	4/25/2008
Allen Harthorn	4/25/2008
Richard Harvey	4/25/2008
Craig Harzmann	4/25/2008
David Haskell	4/25/2008
Duncan Hatch	4/25/2008
Bobbie Hawkins	4/25/2008
Richard Heilman	4/25/2008
Paul Helliker, Marin Municipal Water District MMWD	5/1/2008
Stuart Helmintoller	4/25/2008
Mitch Hendrickson	4/25/2008
Michael Henstra	4/25/2008
John Hicks	4/25/2008
Thomas Hicks	4/25/2008
David Hickson	4/25/2008
Patrick Higgins, Consulting Fisheries Biologist/Sierra Club Redwood Chapter	4/15/2008
Douglas Higgs	4/25/2008
Mark Hilovsky and Rod Silva	5/1/2008
Megan Hockwalt	4/25/2008
Barry Hoffner	1/9/2008, 1/30/2008
Ryan Hogan	4/25/2008
Sylvia Holtz	5/1/2008
Alison Holzer	4/25/2008
Frank and Phyllis Hooper	5/1/2008
Lee Hudson, Hudson Vineyards	4/28/2008

Timothy Hunt		4/25/2008
Robert Hunter Jr.		5/1/2008
Joseph Hurlbut		4/16/2008
Leo Hurley, Wrath Cellars and Vineyard		4/16/2008
Gary Hurst		4/25/2008
Darrin Hutchins		4/25/2008
Nicole Hutchinson		4/25/2008
Gary Incaudo		4/25/2008
Drew Irby		4/25/2008
Alicia Jackson		4/25/2008
Linda Jameson		5/1/2008
Monroe Jeffrey		4/25/2008
Carey Jellison		5/1/2008
Karen Jine		4/25/2008
Chris Johnson		4/25/2008
Jesse Johnson		4/25/2008
Richard A. Johnson		4/25/2008
Sara Johnson		4/25/2008
Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society	TU/PAS	5/1/2008
Brian Johnson, Trout Unlimited; Peter Kiel, Ellison, Schneider & Harris LLP; Richard Roos-Collins, Peregrine Chapter of the National Audubon Society; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers	TU/PAS/WB/ESH	5/1/2008, 11/13/2008, 11/24/2008, 12/2/2008, 1/15/2009, 1/27/2009, 3/9/2009
Penelope Johnstone		4/25/2008
Tina Jones		5/1/2008
Eric Jorgensen		4/25/2008
Kenneth L. Kahn, Blue Rock		4/28/2008
Howard Kastan		4/25/2008
David Katz and Huey Johnson, Resource Renewal Institute		5/1/2008
George B. Kauffman		4/25/2008
Russell Keegan		4/25/2008
Sam Keen		5/2/2008
Colleen Keith		4/25/2008
Lawrence M. Kenney		4/25/2008
Douglas O. Keowen		4/25/2008
Dave King		4/25/2008
Mary Ann King		4/25/2008
Laurie Kirk		4/25/2008
Walter W. Kitagawa		4/25/2008
Steven Klei		4/25/2008
Tom Klein, Rodney Strong Vineyards		4/23/2008
Basey Klopp		4/25/2008
Kendra Knight		4/25/2008
Raymond Knittle		4/25/2008
Donald Koch, State of California Department of Fish and Game	DFG	5/1/2008

Bill Kocher, City of Santa Cruz Water Department		5/1/2008
Mike Kohle		4/25/2008
Keith Korporaal		4/25/2008
Julie Kramer		4/25/2008
Dan Kratville		4/25/2008
K Krupinski		4/25/2008
Catherine Kuhlman, State of California Regional Water Quality Control Board, North Coast Region	NCRWQCB	5/1/2008
Charles Kuhn		4/25/2008
Dean Kuvelis		4/25/2008
Wayne Lamb		4/16/2008
Juliet Lamont		4/25/2008
Linda Lansky		4/25/2008
David Lass		4/25/2008
Robert Le Duc		5/1/2008
Lynn Leary		4/25/2008
Peter Lee		4/25/2008
Skip Leonard		4/25/2008
Martin Leugers		4/25/2008
Michelle Leung		4/30/2008
Harvey Levin		5/1/2008
Alan Levine, Coastal Action Group	CAG	4/14/2008, 12/2/2008
Donna Lewis		4/30/2008
Jerry Lewis		5/1/2008
Rudolph Light		4/25/2008, 8/7/2008, 2/9/2009
Alan Lilly, Bartkiewicz, Kronick & Shanahan/North Gualala Water Company		5/1/2008
KJ Linarez		4/25/2008
Eric C. Lindberg		4/25/2008
Barbara Lindsey		4/25/2008
William Lindstrom		4/25/2008
Don Lintz		5/1/2008
Chris London		5/1/2008
Donna Longacre		4/25/2008
John Lucas		4/25/2008
Douglas Lumgair, Windsor Oaks Vineyards & Winery		4/17/2008
Cindy Lyle		4/25/2008
Greg Maars		5/1/2008
Kent MacIntosh, MacIntosh Guide Service		4/25/2008
Jake Mackenzie, Russian River Watershed Association	RRWA	5/1/2008
Jake Mackenzie, Water Advisory Committee		8/6/2008
Steven MacRostie, MacRostie Winery and Vineyards		5/1/2008
Daniel P. Maher		4/25/2008
Chris Malan, Earth Defense for the Environment Now, Living Rivers Council		5/1/2008

Terry Mar	4/25/2008
Kathleen Marble	4/25/2008
John Marion	4/30/2008
Michael Marsden	4/25/2008
Anne Smith Martin	4/25/2008
Brad Martin	4/30/2008
Tim Martin	4/25/2008
Adrian and Mary Martinez	5/5/2008
Eileen Massey	4/25/2008
Elliott Matchett	4/30/2008
Kevin Mather	5/1/2008
KL Matlock	4/25/2008
Richard Matlock	8/8/2008
Ann Maurice, Ad Hoc Committee for Clean Water	4/29/2008, 4/30/2008
Russell McBurney	4/25/2008
JJ McCarthy, Cain Vineyard & Winery	4/29/2008
Gregory J. McCollum	5/1/2008
Sudi McCollum	4/25/2008
Anthony McDonnell	4/25/2008
Peggy McGuire	4/25/2008
Timo McIntosh	4/25/2008
Neil McLellan	4/25/2008
Dennis Meisner	4/21/2008
Jim Melet	4/25/2008
EJ Melzer	4/25/2008
Harry Merlo, Lago di Merlo Vineyards and Winery	4/21/2008
Krista Merrimac	4/25/2008
Scott Milener	4/25/2008
Harriet Miller	4/25/2008
Nathaniel Miller	4/25/2008
Robert Minuzzo	4/25/2008
Thomas Mitchell	4/25/2008
Raja Mitry	4/25/2008
Mark Momberg	4/25/2008
Dean Monroe	4/25/2008
Dwight Monson	4/30/2008
Anthony Montapert	4/25/2008
James Mooney	4/16/2008
Eric Moore	4/25/2008
Linda Morgan	4/25/2008
David Morris	4/25/2008
Mike Morris, North Bay Agriculture Alliance	4/30/2008
Robert Mueller, McKenzie-Mueller Vineyards and Winery	4/30/2008
Lindsay Mugglestone	4/25/2008
Jeff Muscatine	4/25/2008
Guido Muzzarelli	4/25/2008
Scott Myers	4/25/2008
Gary Myerson	4/25/2008

Tomas Nakada		4/25/2008
Tim Nall, Brown-Forman Corporation		4/25/2008
Marc Nathanson		4/25/2008
NA, Ecology Center of Southern California		5/1/2008
NA, Maacama Watershed Alliance		5/1/2008
NA, Salmonid Coalition		5/1/2008
NA, Sierra Club Redwood Chapter		4/15/2008
NA, Trout Unlimited		1/0/1900
Charles Nelson		4/25/2008
Richard Nelson		4/30/2008
Don Neubacher, US National Park Service, Point Reyes National Seashore		5/1/2008
Alice Neuhauser		4/25/2008
Wendel Nicolaus, Middleridge Vineyard		5/1/2008
Jane Nielson, Sonoma County Water Coalition	SCWC	4/2/2008, 4/29/2008
Peter Nissen, Napa County Farm Bureau		4/17/2008, 5/1/2008
Fiona Nolan		4/25/2008
J. Richard Noss		4/25/2008
Sarah Nossaman		5/1/2008
Harris Nussbaum		4/14/2008
Mike O'Brien		4/25/2008
Theodore O'Hirok		4/25/2008
William O'Kelly		4/25/2008
Matthew Olrich		4/25/2008
Jack Olsen, San Mateo County Farm Bureau		4/21/2008
James Organ		4/25/2008
Mark Ostrom		4/25/2008
Duke Otoshi		4/25/2008
John Painter and Jean Gadiot		5/2/2008
Cheri Pan		4/25/2008
Rosiris Paniagua		4/25/2008
Marguerite Panzica		4/25/2008
Erika Parker		5/6/2008
Ian Parrott		4/25/2008
Butch Parton		4/17/2008
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Robert Zeches	4/25/2008
Ofer Zur	5/2/2008

LIST OF ACRONYMS AND ABBREVIATIONS

AB	Assembly Bill
ACL	Administrative Civil Liability
AF/year	acre-feet/year
APA	Administrative Procedure Act
BLM	Bureau of Land Management
BMI	Benthic Macroinvertebrate
BMP	Best Management Practices
BORPELS	Board of Registration for Professional Engineers and Land Surveyors
CAG	Coastal Action Group
CAO	NCRCD gage location, Carneros at Old Sonoma Road
CAS	NCRCD gage location, Carneros Creek at Sattui
CCR	California Code of Regulation
CDF	California Department of Forestry
CDF&G	California Department of Fish and Game
CDFG	California Department of Fish and Game
CDO	Cease-and-Desist Order
CEQA	California Environmental Quality Act
CESA	California Endangered Species Act
CFII	Cumulative Flow Impairment Index
CPI	Consumer Price Index
CRLF	California Red-Legged Frog
CSPA	California Sportfishing Protection Alliance
CWA	Clean Water Act
DA	Drainage Area
DFG	California Department of Fish and Game
DG FMF	Draft Guidelines February Median Flow
DMV	Department of Motor Vehicles
DS	Diversion Season
DSOD	Division of Safety of Dams
DWR	California Department of Water Resources
EF Russian River	East Fork Russian River Tributary
EIR	Environmental Impact Report
EQIP	Environmental Quality Incentives Program
ESA	Endangered Species Act
ESH	Ellison, Schneider & Harris LLP
EWRIMS	Electronic Water Rights Information Management System
FAS	Fully Appropriated Stream
FERC	Federal Energy Regulatory Commission
FHF	Fundamental Habitat Factors
FMF	February Median Flow
FPRs	Forest Practice Rules
GIS	Geographic Information System
IFIM	Instream Flow Incremental Methodology
IRS	Internal Revenue Service
IS	Initial Study
ITP	Incidental Take Permits
KMTGE	Kronick, Moskovitz, Tiedeman & Girard, P.C. and Ellison, Schneider & Harris LLP

KRIS	Klamath Resource Information System
LWD	Large Woody Debris
MBF	Minimum Bypass Flow
MCD	Maximum Cumulative Diversion
MMWD	Marin Municipal Water District
MOU	Memorandum of Understanding
MTTU	McBain and Trush and Trout Unlimited
NA	No Author Name Available
NCRCD	Napa County Resource Conservation District
NCRWQCB	North Coast Regional Water Quality Control Board
NFMA	National Forest Management Act
NGO	Non-Governmental Organizations
NHI	Natural Heritage Institute
NMFS	National Marine Fisheries Service
NMWD	North Marin Water District
NOAA	National Oceanic and Atmospheric Administration
NOP	Notice of Preparation
NPDES	National Pollutant Discharge Elimination System
NRC	National Research Council
NRCS	Natural Resources Conservation Service
NTMP	Nonindustrial Timber Management Plan
PAS	Peregrine Chapter of the National Audubon Society
PDO	Pacific Decadal Oscillation
PHABSIM	Physical Habitat Simulation
POD	Point of Diversion
PoE	Point of Evaluation
POI	Point of Interest
PSDA	Potential Streamflow Depletion Areas
QFP	Minimum Fish Passage Flow
Qm	Mean Annual Flow
QMBF	Minimum Bypass Flow
Qmean	Mean Annual Flow
QS	Spawning Flow
QWB	Winter Base Flow
RCD	Resource Conservation & Development Program
RCT	Riffle Crest Thalweg
RRWA	Russian River Watershed Association
RWQCB	Regional Water Quality Control Board
SB	Senate Bill
SCS	Soil Conservation Service
SCWA	Sonoma County Water Agency
SCWC	Sonoma County Water Coalition
SDU	Small Domestic Use
SED	Substitute Environmental Document
SEP	Supplemental Environmental Project
SFBWQCB	San Francisco Bay Regional Water Quality Control Board
SRCD	Sotoyome Resource Conservation District
SWPPP	Stormwater Pollution and Prevention Plan
SWRCB	State Water Resources Control Board
TMDL	Total Maximum Daily Load

TU	Trout Unlimited
TU Form Letter	Group of commenters that submitted the Trout Unlimited form letter
ULS	Upper Limit of Anadromy
UPA	Upper Point of Anadromy
USACE	United States Army Corps of Engineers
USDA	United States Department of Agriculture
USEPA	United States Environmental Protection Agency
USFWS	United States Fish and Wildlife Service
USGS	United States Geological Survey
UWMP	Urban Water Management Plan
WAA	Water Availability Analysis
WB	Wagner & Bonsignore
WDR	Waste Discharge Requirement
WRD	Water Rights Division
WRIMS	Water Rights Information Management System

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Parker Pringle	4/25/2008
Parker Proffitt	4/25/2008
James Provenzano	4/25/2008
Daniel Prows	4/25/2008
John F. Przonek	4/25/2008
Peter Przybylinski	4/30/2008
Jim Queen	4/25/2008
Michael Quinn	5/1/2008
Patricia Quinn	4/25/2008
Anne Rabago	4/25/2008
Billy Rainbow	4/25/2008
Ron Ramsey	4/25/2008
Dwain Raney	4/25/2008
Bruce Raskin	4/25/2008
Maryellen Redish	4/25/2008
Miriam Redstone	4/25/2008
John Reilly	4/25/2008
Thomas Reynolds	4/25/2008
Ann Rice	4/25/2008
Chris Rich	4/25/2008
Pamela Richard	4/25/2008
Matt Richardson	5/6/2008
Heather Rider	4/25/2008
Dale Riehart	4/25/2008
Kieran Ringgenberg	4/25/2008
Mike Rogers	4/25/2008
Rick Rosner	4/25/2008
Marie Ross	4/25/2008
Mary Rossi	4/25/2008
Henry Roux	4/25/2008
Paul J. "Chris" Rozmajzl	4/25/2008
Michael Rubin	4/25/2008
Ana Rudolph	4/25/2008
Alexander Rufus-Isaacs	5/6/2008
Kim Ryals	5/1/2008
Therese Ryan	4/25/2008
Cynthia Sabatini	5/1/2008
Thomas Sabol	5/1/2008
Joe Salazar	4/25/2008
Lisa Salazar	5/1/2008
Elsa Saldana	4/25/2008
Tim Samuel	4/25/2008
Gustavo Sandoval	4/25/2008
Ameer Sanghvi	4/25/2008
Norman A. Sauer, Yuba River Preservation Foundation	4/25/2008
Elizabeth Saveri	4/25/2008

Commenter Name and Affiliation	Date Received
Dan Saylor	5/1/2008
Matt Schaefer	4/25/2008
William Schneiderman	4/25/2008
Steve Schramm	4/25/2008
Charles Schultz	4/25/2008
Don Schwartz	4/25/2008
Frank Scott	4/25/2008
William Scrimpsheer	4/25/2008
Julie Sebenoler	4/25/2008
Robert Seltzer	4/25/2008
Gary Seput	4/25/2008
Ward Shandoff	4/25/2008
Sid Shapiro	4/25/2008
Mark Shelton	4/25/2008
Marcia Sherman	4/25/2008
Harold Shively	4/25/2008
Arthur Siegel	4/25/2008
Maja Silberberg	4/25/2008
Marc Silverman	4/25/2008
Philip Simon	4/25/2008
Robert Slocum	4/25/2008
Edwina Smith	4/25/2008
Jack Sohl	4/25/2008
Connor Soraghan	4/25/2008
Scott Stange	4/30/2008
George Starn	4/25/2008
David Steinberg	4/25/2008
Jack Stevens	4/25/2008
Matt Stoecker	4/25/2008
Amy Stone	4/25/2008
Stella Strand	4/25/2008
Arthur Strauss	4/25/2008
Gary Strawn, San Diego Stream Team	4/25/2008
William Stumpf	4/25/2008
Joseph Sturla	4/25/2008
Amber Sumrall	4/25/2008
Harry Surtees	4/25/2008
Richard Surwillo	4/25/2008
George and Nancy Sutherland	4/25/2008
JoAnne Sutton	5/6/2008
Larry Svelund	4/25/2008
John D. Swain	4/25/2008
Ernie Swanson	4/25/2008
Joseph Szabo	4/25/2008
Linda Tabor-Beck	4/25/2008
Ron Tatsui	4/25/2008
Tom Taylor	4/25/2008
Mary Tealdi	5/1/2008

Commenter Name and Affiliation	Date Received
James Tejani	4/25/2008
Lauren Temkin	5/1/2008
William J. Thoma	4/25/2008
Mo Tidemanis	4/25/2008
Bryan Todd	4/25/2008
Mark Tompkins	4/25/2008
Andy Tomsky	4/25/2008
Scott Trulik	4/25/2008
Eben Twombly	4/25/2008
Richard Unger	4/25/2008
Barbara Ungersma	4/25/2008
Mark Van Hoomissen	4/30/2008
Roy Vanderleelie	4/25/2008
Barb Varellas	5/1/2008
Anne Vitale	4/25/2008
Alan Voigt	5/2/2008
Barbara Voss	5/6/2008
Matthias Wagener	5/1/2008
Dan Waligora	4/25/2008
Roger Watson	4/25/2008
Susan Watts-Rosenfeld	4/25/2008
James Webb	4/25/2008
D. Eugene Wedge	4/25/2008
Gerald Weisbach	4/25/2008
Henry Wen	4/25/2008
Lori Wessely	4/25/2008
Jack West	4/25/2008
Rick Wheaton	5/1/2008
Jan Whitacre	4/25/2008
James White	5/1/2008
Michael White	4/25/2008
Jennifer Wilde	4/25/2008
Audrey Williams	4/25/2008
Roger A. Williams	4/25/2008
Leland Wilson	4/25/2008
Justin Wiltz	4/25/2008
Brent Wingett	5/1/2008
Joseph Wofford	4/25/2008
Tim Wood	4/25/2008
Lee Woods	4/25/2008
Nina Wouk	4/30/2008
James Wright	4/25/2008
Steviann Yanowitz	4/25/2008
Loretta Young	4/25/2008
Matt Young	4/25/2008
Guy Zahlier	4/25/2008
Robert Zeches	4/25/2008

18.0 Enforcement

Topic 18.1 Enforcement - General

Comment 18.1.1: This policy will never be effective without a functional and funded enforcement mechanism. Enforcements should be accomplished with the cooperation with the Department of Fish and Game and National Marine Fishery Service. *(Alan Levine, Coastal Action Group)*

Response: Comment noted. The State Water Board has for the past year been working with the National Marine Fisheries Service, the Department of Fish and Game, the North Coast Regional Water Quality Control Board, and the District Attorneys offices of both Mendocino and Sonoma Counties to identify opportunities for cooperative enforcement. Additionally, as a result of SBX7 1, the water rights enforcement program was enhanced by 25 additional staff.

Comment 18.1.2: Funding and fee schedules to support a compliance inspection process must be developed to assure attainment of water quality standards. The prioritization concept where "compliance inspection program initially will target high resource-value watersheds. Targeted watersheds will be selected annually based, in part, on input from the Regional Water Quality Control Boards, the Department of Fish and Game, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service" is valid. Working in concert with these agencies is necessary for a successful program. *(Alan Levine, Coastal Action Group)*

Response: The State Water Board is required to set water right fees to be consistent with the annual budget act allocations for the water right program, taking into account over- and under-collections from prior years. Therefore, the State Water Board has two options to enhance its water rights enforcement program: (1) the State Water Board can redirect staff from other water rights or seek approval to redirect staff from water quality programs or (2) the State Water Board can seek to augment its budget through the budget process consistent with direction from the Administration.

Comment 18.1.3: DFG provided written comments regarding enforcement in a memo dated June 5, 2007, Water Right Enforcement Workshop. *(Donald Koch, State of California Department of Fish and Game)*

Response: The December 2007 Draft Instream Policy contained provisions that addressed some of the comments received in DFG's June 5, 2007 memo submitted for the June 19, 2007 water right enforcement workshop. The remaining enforcement comments from DFG's memo are adequately covered in responses to other comments on the Draft Instream Flow Policy that are contained in this response document.

Comment 18.1.4: Policy 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." (*Rudolph Light*)

Response: Comment noted. Individuals are free to choose whether to file reports required by statute, regulations, or their water right permits, or whether to ignore reporting requirements and face the consequences of failure to report, which can include permit revocation or, in some instances, monetary penalties.

Topic 18.2 Enforcement - Permitting Process Effects on Compliance

Comment 18.2.1: The costs and difficulties proposed by the policy, will be borne solely by the Water Permit Applicant, and are so far out of line with even the theoretical benefits, that property owners will just stop applying for a permit to impound or divert water. Some will even drop pending applications as a result of the tortuous demands of the Division. While the Division may take credit for a reduction in the backlog of applications as a consequence of dropped applications, there will be no increased Instream Flow. People will still divert, but they just won't apply for the water right. The Division already confesses they cannot enforce the laws with regard to thousands of "illegal" diverters statewide. According to Division staff, there are over 1,000 such diversions in the Policy area alone. This Policy will add to those numbers without actually addressing the issues. (*Tim Buckner*)

Response: Water right applicants have the burden of showing that there is water available for appropriation. As demand for water rises and water is allocated for other uses, meeting that burden becomes more difficult and costly. As a result, some projects that may have been economically feasible in the past or other under circumstances may no be feasible. It is difficult to establish the "theoretical" benefit of improved fisheries. However, in 2008, Congress approved a \$170 million relief package for fishermen and related businesses to help reduce the economic impact that resulted from fishing restrictions imposed in response to declining fisheries. To the extent that economic information is available, the State Water Board will consider that information in balancing the protections that the policy provides to fisheries against the impacts to other users. The State Water Board intends to take enforcement action as appropriate and with budgeted resources to compel compliance with water rights law and the policy. In addition, the State Water Board staff has developed draft permits that could be used to speed up the permitting process in the Russian River and has been participating in stakeholder led efforts to expedite permitting approval where projects are designed to improve conditions for fish.

Comment 18.2.2: Commenter is aware of many unlicensed small dams built over the years because licenses weren't processed and the owner just gave up and built it. (*Larry Cadd*)

Response: The State Water Board is also aware of situations where project proponents have illegally constructed reservoirs and has initiated and taken enforcement action against some of these diverters. The State Water Board will continue to enforce against illegal diversions of water in the water as resources allow in accordance with the priorities set forth in the policy.

Comment 18.2.3: Water users should be brought into the Water Right system by fixing the

application process and use of informal enforcement tools. *(Brian Johnson, Trout Unlimited; Peter Kiel, Ellison, Schneider & Harris LLP; Richard Roos-Collins, Peregrine Chapter of the National Audubon Society; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers)*

Response: The State Water Board has successfully revised some of its permitting practices to make the process more efficient. The State Water Board has reduced its permitting backlog by 40 percent since 2003, despite staffing reductions in its water right permitting program. The average response time for a water right permitting decision is 43.7 months, longer if a permit is issued. The State Water Board agrees that permit applicants should receive a response to their applications more quickly. The State Water Board has evaluated a number of processing changes, including a pilot project to process water right applications on Anderson Creek, a tributary to the Navarro River, collectively, which was ultimately unsuccessful, due primarily to incomplete fisheries studies. The State Water Board intends to more quickly schedule unresolved permitting matters for hearing, recognizing that it cannot issue a permit without complying with the California Environmental Quality Act. The State Water Board believes that a more effective enforcement program will also help make permit processing more effective.

Topic 18.3 Enforcement - Removal of Existing Diversions (Incentives and Disincentives)

Comment 18.3.1: It seems like the multitude of diverters who built and/or maintain unauthorized diversions would not be adversely affected by the draft policy beyond the apparently reinforced mandate for allowing fish passage. By the same token, the draft policy does not offer incentives for removing/dismantling the unauthorized diversions, but it certainly should. *(Ashley Boren, Sustainable Conservation)*

Response: Existing illegal diverters are subject to enforcement, including administrative and civil monetary penalties and prosecution to enjoin the diversion of water. If an illegal diverter seeks a permit for the diversion, the State Water Board will review the permit application and either deny or conditionally approve the application. Although it is true that the prohibition against onstream dams does not apply to these diversions as a result of the policy, other provisions of the policy, in addition to the fish passage provision mentioned in the comment, will be included as appropriate permit conditions should the application be approved. It is unclear what kind of incentives the commenter is proposing should be included.

Comment 18.3.2: In order for this policy to satisfy the requirements of the law and given the time sensitive nature of the survival of species, a strong emphasis must be on identifying illegal diverters and permittees abusing their permits in over appropriated watersheds coupled with the vigorous pursuit of fines, penalties, and settlements commensurate to the harms perpetrated. *(Kimberly Burr)*

Response: As a result of the passage of Senate Bill X7 8 in November 2009 and other bills upon which it was contingent, the State Water Board will be increasing its water Rights enforcement staff by 25 positions. The State Water Board intends to use these positions to pursue enforcement of some of the water right violations that it has identified during prior enforcement sweeps in the AB 2121 area and to conduct new enforcement sweeps. In addition, the State Water Board has been working and will continue to work with other agencies to pursue joint enforcement where appropriate. Lastly, the State Water Board is investigating the use or remote sensing technology to assist in its enforcement efforts.

Comment 18.3.3: The map in the SED, Unauthorized Dams, Figure 6-2 shows the location

and extent of illegal dams concentrated in the subject area. While the identification of these 1771 illegal dams is important and beneficial, we find it difficult to understand why there has been so little effort to expose it in the past, considering it was not that difficult to obtain and very significant. Earlier studies in 1998 must have made the SWRCB aware there was a larger problem throughout this region. *(Jay Halcomb, Diane Beck, and Daniel Myers, Sierra Club Redwood Chapter)*

Response: This is not a comment on the proposed policy. Rather it is a criticism of the State Water Board's prior enforcement efforts.

Comment 18.3.4: No action is proposed for removal of more than 1771 unauthorized diversions and dams in the Policy area acknowledged in Appendices. It is apparent that the State Water Board has not enforced California Water Code § 1052, 1055, 1243, and 1375, leading to an epidemic of illegal dams that block migration and have dried up North Coast salmon and steelhead streams. *(Jay Halcomb et al, Sierra Club Redwood Chapter)*

Response: The State Water Board has identified all the impoundments on the Russian River for which it has no record of a water right. The State Water Board is continuing to pursue enforcement against owners and operators of those impoundments for which a water right is required. To date, the State Water Board has investigated about 300 of the approximately 800 impoundments on the Russian River that it identified. Unfortunately, some enforcement staff were redirected part way through the investigations to (1) validate data in the State Board's Water Rights database prior to migration to its new database and (2) to review water rights compliance in the Sacramento-San Joaquin Delta. Nevertheless, the State Water Board intends to continue to follow up on the compliance inspections it has already undertaken in the Russian River and to initiate new investigations in other areas subject to the AB 2121 policy, as resources allow and priorities dictate.

Comment 18.3.5: A shortcoming of the Draft Policy is that it shows the State Water Board refuses to enforce water law, and it does not provide a disincentive for unpermitted water use, creating an epidemic of illegal diversions. *(Stephen Hall, Friends of the Navarro Watershed; Patrick Higgins, Consulting Fisheries Biologist/Sierra Club Redwood Chapter; Patrick Porgans, Patrick Porgans and Associates, Inc./Pacific Coast Federation of Fishermen's Association)*

Response: Comment noted.

Comment 18.3.6: The fourth policy principle in Section 2.2 of the Draft Policy states "Construction or permitting of new on-stream dams shall be restricted. When allowed, onstream dams shall be constructed and permitted in a manner that does not adversely affect fish and their habitat." Although future permit activities may restrict the construction of new dams, there are 1771 illegal dams already constructed within the geographic area covered by the Policy (Stetson Engineers, 2007a) (Figure 3) for which permits are being considered. Avoiding cumulative effects from thousands of impoundments, many of which are on Class I streams that contain salmonids, will not be possible without widespread enforcement action to remove a significant number of these illegal dams. *(Jay Halcomb, Diane Beck, and Daniel Myers, Sierra Club Redwood Chapter; Patrick Higgins, Consulting Fisheries Biologist/Sierra Club Redwood Chapter)*

Response: The State Water Board concurs. The State Water Board will continue to enforce against illegal diversions as resources allow and priorities dictate.

Comment 18.3.7: The State Water Board has clear authority to regulate water extraction and to penalize those who appropriate water without a permit. The problem is the State Water Board's near absolute refusal to enforce the law. In Appendix E of the SED, Stetson Engineers lists 1771 unpermitted diversions in the Policy area. They note the potential need to remove 1569 structures, but also note that 519 unpermitted structures now have pending permit applications. The pattern of non-enforcement is clear in Marin, southern Sonoma, and southern Napa Counties. I have documented similar problems in northern California areas both inside and outside the Policy area (i.e. Napa, Navarro, Russian, Gualala, Scott, and Shasta). *(Patrick Higgins, Consulting Fisheries Biologist/Sierra Club Redwood Chapter)*

Response: The State Water Board has taken 35 formal enforcement actions in the AB 2121 area. In some cases those actions have resulted in litigation. Water right enforcement actions are extremely controversial and can be very resource intensive to pursue. A recent case took six years to resolve, including the time it took for the case to make its way through the courts. The State Water Board does not have sufficient resources to prosecute every case, and must rely on voluntary compliance efforts where voluntary actions can achieve compliance. The State Water Board must also set enforcement priorities. This policy attempts to do that.

Comment 18.3.8: The State Water Board has been derelict in its duty with regard to CA Water Code § 1243 and 1375, which require that they protect recreation, fish and wildlife and that they establish a surplus before issuing permits, respectively. It has failed to comply with these laws by simply not supplying permits other than after ponds and diversions have been illegally constructed. This has caused not only a loss of fish habitat but also treasured recreational opportunities enjoyed by past generations, such as swimming at the Scout Camp on the Wheatfield Fork of the Gualala or at Hendy Woods on the lower mainstem Navarro River. *(Patrick Higgins, Consulting Fisheries Biologist/Sierra Club Redwood Chapter)*

Response: See response to 18.3.7.

Comment 18.3.9: Despite pages of text on enforcement, the Draft Policy does not provide a specific plan for decommissioning dams that are high priority. Almost all dams in the region affect at-risk salmonids, and 308 illegal impoundments are on Class I streams (Appendix E of the SED). The Sierra Club (Pennington et al., 2008) points out that allowing diverters to avoid permit fees and costs of compliance offers them an unfair business advantage as well. *(Patrick Higgins, Consulting Fisheries Biologist/Sierra Club Redwood Chapter)*

Response: It is unclear what the commenter means by "decommissioning" dams. "Decommissioning" is a term that is used in the Federal Energy Regulatory Commission (FERC) licensing process, not in the water rights process. The only dam in the AB 2121 geographical area subject to a FERC license is Pacific Gas and Electric Company's Potter Valley project on the Eel River. There are currently no plans to decommission that dam.

Assuming that the commenter is referring to dam removal, each dam proposed for removal must be treated on a case by case basis. Dam removal can adversely affect the environment due short-term changes in flow, the release of accumulated sediments and any pollutants that the sediments may contain. Further, removal of dams that are upstream of other artificial or natural impediments to fish migration may not improve fish passage. The policy includes provisions to mitigate for the impact of onstream dams. Nevertheless, the State Water Board will consider ordering the removal of existing illegal dams where the facts indicate that dam removal is the appropriate action and following notice to the dam owner and an opportunity for hearing. The State Water Board is aware of the unfair business advantage that illegal dam

operation can create and is reviewing its options for eliminating that advantage, including higher monetary penalties and cooperative enforcement with local district attorneys.

Comment 18.3.10: The Policy should identify specific measures to bring non-filers into the water right system. *(Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society; Alan Levine, Coastal Action Group; Richard and Annette Rhodes, Rhodes Vineyards; Thomas Weseloh, California Trout Keeper of the Streams)*

Response: See response to 18.4.10.

Comment 18.3.11: Revise the proposed Policy to create a new section titled "Interim Operations" that establishes circumstances, if any, under which diversions will be allowed to continue while an application is pending. An applicant with an unauthorized diversion would not continue such diversion pending final decision on the application unless it agrees to interim mitigation implemented during the pendency of application. Interim measures would include, at a minimum, the regionally protective season of diversion and implementation of the terms for monitoring and reporting of both diversions and stream conditions (see Recommendations on Sections 4 and 8). The State Water Board could waive the requirement for interim conditions on a case by case basis if it finds on the basis of information provided by applicant, and DFG concurs, that interim measures would not benefit a Class I stream. The section could also state that any applicant who fails to either discontinue diversions or abide by the interim conditions will be subject to an ACL complaint for the statutory maximum. *(Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society)*

Response: Staff will consider revising the policy to address interim operation while a permit is pending.

Comment 18.3.12: It is imperative that the Policy, in whatever form it is adopted, contains implementation measures that have real teeth. In the past the State has failed to adequately monitor diversions and it makes no realistic effort to penalize violators of state law in regard to illegal water diversions. Instead of penalizing the already identified 1700-plus violators it has detected, the policy proposes to give the violators special treatment so that their unauthorized diversions can be duly permitted on a permanent basis. Without strong enforcement water diverters will just continue to ignore state law and do whatever they please. *(David Katz and Huey Johnson, Resource Renewal Institute)*

Response: Comment noted.

Comment 18.3.13: No action is discussed regarding removal of more than 1771 illegal diversions and dams in the Policy area acknowledged in Appendices. The Water Rights Division has not enforced California Water Code sections 1052, 1055, 1243, and 1375 leading to an epidemic of illegal dams that have dried up North Coast salmon and steelhead streams. *(NA, Sierra Club Redwood Chapter)*

Response: See response to 18.3.7.

Topic 18.4 Enforcement - Lack of Compliance Assurance and Funding

Comment 18.4.1: Without a mechanism for securing funding to ensure timely implementation, frequent compliance investigations, and vigorous enforcement of the proposed policy, the

policy cannot succeed in its noble and obligatory goals. Knowing approval of an unfunded policy will not satisfy the requirements to maintain instream flows. *(Kimberly Burr)*

Response: Comment noted. Twenty-five staffing positions were provided for water rights enforcement throughout the State as a result of the passage of SBX7 8. Those positions become effective in February 2010. The State Water Board anticipates that additional enforcement will have a ripple effect creating an additional need for hearing and permitting resources. Funding decisions are made by the Legislature and the Administration. The State Water Board will consider redirecting resources from other water right program areas to meet additional needs, but redirection decisions will be based on program priorities at the time.

Comment 18.4.2: Any policy or program for limiting environmental impacts of water diversions on coastal streams will contribute little protection of fish and wildlife resources if there is inadequate oversight and enforcement of those programs or policy. NMFS (2001) states that the "SWRCB must develop a credible compliance, monitoring, and enforcement program to ensure that requirements for bypass flows, rates of withdrawal, and a limited diversion season are met. SWRCB must also bolster its enforcement capability to discourage illegal appropriations of water". *(Alan Levine, Coastal Action Group)*

Response: See response to 18.4.1.

Comment 18.4.3: The Policy is essentially silent on enforcement. It would continue the policies that have created the current conditions. *(Jay Halcomb, Diane Beck, and Daniel Myers, Sierra Club Redwood Chapter)*

Response: See response to 18.4.1.

Comment 18.4.4: We would have hoped that AB 2121 would have resulted in more effective and protective regulations, but Section 11, Enforcement of the "Draft Policy For Maintaining Instream Flows In Northern California Coastal Streams" seems to have taken things several steps in the opposite direction. Now the bravado of "strong words, weak actions" that we had earlier seems to have been replaced with vague language that allows the state to do even less, on budgetary grounds, about the massive abuse of our public trust resources while the illegal diverters have their water given to them with ever more lenient policies like extending the diversion season and adapting the ill-advised use of "watershed groups". This "Draft Policy for Maintaining Instream Flows Northern California Coastal Streams" would not do what its title suggests, quite the contrary. *(Stephen Hall, Friends of the Navarro Watershed)*

Response: See response to 18.4.1.

Comment 18.4.5: The Draft Policy contains provisions for informal enforcement which read: "The purpose of an informal enforcement action is to quickly bring a violation to the water diverter's attention and to give the diverter an opportunity to voluntarily correct the violation and return to compliance as soon as possible." While quickly and voluntarily correcting violations is desirable, as one reads further into the Policy, deficiencies become apparent. Informal enforcement may only mean that State Water Board staff calls or emails the violator and then creates a file as a record of contact. *(Patrick Higgins, Consulting Fisheries Biologist/Sierra Club Redwood Chapter)*

Response: The goal of enforcement is to ensure compliance with laws, regulations, and policies. To the extent the voluntary compliance achieves compliance of minor individual

violations, the State Water Board will continue to rely on it. Where voluntary actions are not effective in achieving compliance, to the extent possible, given resources and priorities (including competing priorities for enforcement in areas outside of the area covered by the instream flow policy), the Division of Water Rights will continue to pursue formal enforcement actions within the policy area.

Comment 18.4.6: The State Water Board's lack of willingness to enforce also applies to the use of fines as a disincentive: "The ability to pay administrative civil liability is limited by diverter's revenues and assets. In some cases, it is in the public interest for the diverter to continue in business and bring operations into compliance. If there is strong evidence that administrative civil liability would result in widespread hardship to the service population or undue hardship to the diverter, it may be reduced on the grounds of ability to pay." I have added emphasis to the term "service population" because it shows the inherent bias of the State Water Board for diverters (their clients) as opposed to protection of public trust. They also express a willingness to skip the enforcement phase, if the diverters just agree to pay for cooperative management: "Accordingly, flexibility should be provided to groups of diverters who endeavor to work together to allow for cost sharing, real-time operation of water diversions, and implementation of mitigation measures." (*Patrick Higgins, Consulting Fisheries Biologist/Sierra Club Redwood Chapter*)

Response: The State Water Board can currently issue Administrative civil liability (ACL) only if there is either an illegal diversion, if the diverter fails to comply with a Cease and Desist Order, or if the diverter makes a willful misstatement on a Statement of Water Diversion and Use. As of February 2010, the State Water Board will also have the authority to issue an ACL for failure to file a Statement of Water Diversion and Use. If the Executive Director, or through delegated authority, the Division of Water Rights, issues a complaint seeking ACL, the responding party always has the ability to either immediately pay the penalty or to seek a hearing before the State Water Board. The State Water Board intends that monetary penalties provide a disincentive for illegal activity. However, the maximum fine allowable is \$500 per day, and the State Water Board must in setting the monetary penalty consider all relevant circumstances stated in Water Code section 1055.3. These circumstances include the extent of harm caused by the violation, the nature and persistence of the violation, the length of time over which the violation occurs, and the corrective action, if any, taken by the violator. In setting the penalty, the Division considers these factors relevant to other violations. The commenter may believe that the maximum violation is not high enough, and that relatively minor violations should be subject to higher penalties. If so, the commenter should seek to have the maximum penalty allowed by law to increase.

Comment 18.4.7: The Draft Policy includes a menu of enforcement actions that might be taken to encourage non-filers to submit an application or require them to cease the diversion, but it does not state whether the agency intends to take any of these actions. (*Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society*)

Response: The State Water Board has in the past and will continue to take any or all of the actions identified, as appropriate in each case.

Comment 18.4.8: On October 27, 2004, TU and PAS filed our "Petition for Timely and Effective Regulation of New Water Diversions in Central Coast Streams," ("Petition") which remains pending before the SWRCB and other agencies. (The 70 page Petition, its 31 attached exhibits, and comments presented at the Board's March 17, 2005 workshop on the Petition are available at www.waterrights.ca.gov/coastal_streams/tupetition.html and are

incorporated herein.) In the Petition, we exhaustively documented how water diversions along the north central coast have cumulatively contributed to the sharp decline of Coho salmon and steelhead fisheries within the Petition's geographic scope, which mirrors that of A.B. 2121. We demonstrated that the failure by the SWRCB, DFG, and other agencies to act on illegal diversions constitutes a systematic failure to discharge the agencies' duties under the Water Code, Fish and Game Code, and public trust doctrine. And we proposed numerous, specific recommendations for reform. (*Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society*)

Response: Comment noted. The petition filed by TU and PAS is not at issue here.

Comment 18.4.9: We strongly support a written enforcement policy. (See TU/PAS comments for the June 19, 2007 Workshop to Receive Information Regarding Policy Direction on Water Right Enforcement, available at http://www.waterrights.ca.gov/hearings/wrenf_comments.html and incorporated herein.) The alternative - an unwritten and inherently unpredictable enforcement policy - should be unacceptable to all. (*Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society*)

Response: Comment noted. This policy contains a written enforcement policy that will apply within the area covered by this policy.

Comment 18.4.10: In general, the draft Policy's discussion of compliance assurance, prioritization, and enforcement actions is sound. But the Policy does not state whether the State Water Board intends to take any of these actions. The Policy also fails to articulate a plan for bring known "non-filers" into compliance. Nor does it articulate a plan to identify or bring into compliance illegal diversions that aren't reservoirs. We worry that it will not do enough to reestablish a functioning water rights system. The recommendations that follow are intended not to extract punishment or to harm water users, but to ensure that unauthorized diverters are brought into the water right system, to protect beneficial uses, and to level the playing field so that water users who attempt to play by the rules will no longer be at an unfair disadvantage. (*Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society*)

Response: At the time that the answer to this comment was written, the State Water Board did not have an effective means to bring "non-filers" into compliance. The only means available to the State Water Board was to comply with Water Code section 5105, and investigate and determine in writing the facts required by Water Code sections 5103 and 5104, after giving the party making the diversion written notice of the Board's intention to investigate and determine the facts and 60 days to file the statement without penalty. This is a time consuming process likely to have only limited success in achieving broad compliance with filing requirements. Essentially, this statute encouraged water diverters and users to file reports only when doing so provided some benefit to the water diverter or user. If a failure to report was identified, the party always received an opportunity to comply with the reporting requirement voluntarily with no possibility of penalty. Further, there were no enforceable standards concerning the content of the reports if they were subsequently filed.

With the adoption of SBX7 1, the Legislature and Administration have provided the State Water Board with a more effective means of bringing non-filers into compliance. New Water Code section 5107, which becomes effective in February 2010, provides the State Water Board with the ability to issue monetary penalties for failure to file State of Water Diversion and Use reports. The section also provides the State Water Board with significant enforcement

authority where the reporter knowingly makes a material misstatement in the report. The State Water Board intends to exercise this authority to compel known water diverters and users, including users in the area covered by this policy, for which the State Water Board has no record of a water right, to file water diversion and use reports.

Comment 18.4.11: The problems that are supposed to be addressed by the Draft Policy emerging under the directives of AB2121 are a result of a lack of monitoring and enforcement by the designated state and federal agencies. The Draft Policy fails to provide any substantial guidance on this issue. The Draft Policy contains language that acknowledges that resources for enforcement are limited, but it fails to address any mechanism, either fees, fines, or legislative appropriations, that can provide adequate resources to support suitable enforcement of existing state laws or new the steps identified in the policy. Furthermore, the Draft Policy states that enforcement action must balance the impact of each violation with the cost of enforcement without giving any indication of how such costs will be determined and how the loss of public trust resources will be mitigated or resolved. *(David Katz and Huey Johnson, Resource Renewal Institute)*

Response: Staffing resources are provided by the Legislature, either upon request of the Administration, or on the Legislature's own action, and they must be approved by the Administration. This is the only mechanism to provide resources for water rights enforcement. Monetary penalties collected by the State Water Board are deposited into the Water Rights Fund, as are water right fees paid by water right permittees, licensees, and applicants. To the extent that these monies exceed the appropriation for the water rights program that is provided in the annual state budget act, those monies are used to offset water right fees. The State Water Board cannot expend money except as authorized by the Legislature and Administration. Enforcement penalties are based primarily on the number during the violation occurred, taking into consideration the factors identified in Water Code section 1055.3. When it issues a Administrative Liability Complaint, the Division of Water Rights also considers the economic benefit derived by the violator as a result of the violation. Where water is relatively inexpensive, the penalties tend to be lower. If the matter goes to a hearing, the State Water Board may increase or decrease the monetary penalty up to the allowable maximum, assuming it upholds the violation.

Comment 18.4.12: DFG recommends that Policy Section 11.1 (Compliance Assurance) include statements that the compliance process will be as transparent as possible, and that the State Water Board will make public documents, such as revised self-monitoring reports, compliance plans and reports of compliance, licensing and complaint investigations available on-line to the extent possible. *(Donald Koch, State of California Department of Fish and Game)*

Response: All documents submitted to or issued by the State Water Board, the Division of Water Rights, and its staff are available to the public. Many of these documents are already available online. As resources allow, the State Water Board is releasing additional documents online. In December 2010, the State Water Board released a module of its water rights data base, that allows water users to report their use online. Reports filed online are available online to the public. SBX7 8 authorizes the State Water Board to adopt emergency regulations to require water users to file reports online. The State Board anticipates that it will promulgate such regulations in 2010.

Comment 18.4.13: Policy Section 11.1.2 (Self Monitoring Reports) states that the State Water Board will revise its self-monitoring reports to require identification of violations of applicable requirements and to identify any corrective actions taken or planned within a specified time

schedule. DFG is concerned that the current interval between submission of self-monitoring reports (up to 3 years) is too long, and recommends that reporting of violations of requirements and the identification of corrective actions taken or planned should be submitted to the State Water Board at the time of each event occurs. (*Donald Koch, State of California Department of Fish and Game*)

Response: Comment noted. Water Right permittees and licensees are required to file reports when requested by the State Water Board. Permittees are currently requested to report every year. Licensees are requested to report every three years. The three year frequency for water right licenses is primarily associated with the State Water Board's resource limitations associated with processing the paper reports. The State Water Board will likely require water right licensees to report annually if it adopts emergency regulations that to require online reporting. The three-year reporting frequency associated with Statements of Water Diversion and Use is set forth in Water Code section 5104. The Legislature recently considered amendments that would have set forth an annual reporting frequency, but did not adopt those amendments. Without additional amendments to the statute, the three-year reporting requirement associated with Statements of Water Diversion and Use will remain in place.

Comment 18.4.14: The SWRCB has failed to enforce water laws in much of the State causing a culture of 'water grabs' that is prevalent and pervasive. Due to a lack of enforcement in the State our fresh water sources, in particular the Pacific North coastal streams are aquatic ecosystems in grave peril. (*Chris Malan, Earth Defense for the Environment Now, Living Rivers Council*)

Response: Historically, there was an assumption that water rights enforcement would be pursued through the courts. The original enforcement scheme, in place for decades, required the State Water Board to most matters related to illegal diversions to the Attorney General for prosecution through the courts. Due to resource limitations or other priorities, the Attorney General was not interested in pursuing water rights enforcement, particularly enforcement related to small diversions, such as those that occur as a result of diversions by individuals or businesses on the north coast. As a result, the culture of the Division of Water Rights was to always seek voluntary compliance. As a result of statewide droughts that occurred in 1977 and in the late 1980s and early 1990s, and increasing levels of conflict as a result of an expanding population, statutory changes were enacted, primarily in the 1990s, that provided significant improvements to the State Water Board's administrative enforcement authority. The changes in authority are bringing about cultural changes. However, many of the illegal diversions identified by the State Water Board have been in place for decades. The problem developed over a long period of time, and it is unrealistic to believe that the solution will be immediate.

Comment 18.4.15: The long-past deadline of July 2006 for the process to identify and assess the impacts of dams erected in Class I fish streams over the last twenty years or more, which have not been subject to any permitting process, was unreasonable. (*Jane Nielson, Sonoma County Water Coalition*)

Response: The State Water Board is not aware of the deadline that is the subject of this comment. To the extent such a deadline exists, the source of the deadline is unclear as is the agency to which the deadline applies.

Comment 18.4.16: The Instream Flow Policy, if adopted, will compel unauthorized diverters to spend, in many cases, 0.5 million to 1.5 million dollars to bring their diversions and their

reservoirs into compliance. Bluntly, who is going to make them spend it or shut down? (*Chris Shutes, California Sportfishing Protection Alliance*)

Response: This is not a comment on the policy or the environmental effects of the policy. Rather it appears to be a question as to the legal authority related to unauthorized diversion of water. The diversion of water other than as authorized in division 2 of the Water Code is a trespass against the State of California. The State Water Board is authorized to take action to prevent such a trespass and an affirmative duty to protect public trust uses where feasible.

Comment 18.4.17: A list of priorities for enforcement of water rights laws, appropriately applicable to the entire Policy geographical area, and not just to presently unauthorized diverters, is elaborated in section 11.2 of the Draft Policy. What does it mean if not one dollar is appropriated to carry it out, and if the Division of Water Rights whose personnel have just been cut from already grossly inadequate numbers is supposed to be responsible for seeing it through? (*Chris Shutes, California Sportfishing Protection Alliance*)

Response: See response to 18.4.1.

Topic 18.5 Enforcement - Prioritization of Enforcement (Coordinate with Fishery Agencies)

Comment 18.5.1: The SWRCB, CDFG and NMFS, should set up a program where unauthorized diversions and dams should be assessed and prioritized (ranked) by level damaging contributions to limiting factors for salmonids - where the most damaging diversions and dams should be dealt with first. (*Alan Levine, Coastal Action Group*)

Response: Comment noted. The staff from the State Water Board, the National Marine Fisheries Service, the Department of Fish and Game, and the District Attorney's Offices of Mendocino and Sonoma Counties have held several meetings on enforcement related to water diversions. The State Water Board intends to continue meeting with these agencies to coordinate enforcement efforts. In addition, the State Water Board has requested information from the fisheries agencies on dams that may be having an adverse effect on fishery resources.

Comment 18.5.2: Limited resources mandate prioritization. However, the SWRCB has been derelict in duty in the realm of discussion related the AB 2121 issues. Action must be taken. Coordination with other responsible agency can make the enforcement process more effective. (*Alan Levine, Coastal Action Group*)

Response: Comment noted.

Comment 18.5.3: Enforcement in Class I and II streams (see discussion above) should have priority over violations in Class III watercourses. Violations lower in a system are likely to be more important than violations higher in the system. Wild and Scenic River designation should be given consideration as well as streams known to support populations of listed fish. (*Alan Levine, Coastal Action Group*)

Response: Comment noted.

Comment 18.5.4: CAG requests enforcement of ongoing, yearly, violation by the North Gualala Water Company on the North Fork of the Gualala River. Flows in the area of this

diversion have been found by the SWRCB to be in the jurisdiction of the State. The Gualala River is designated Wild and Scenic, the North Fork supports coho and steelhead, and the diversion is in a Class I stream. The diverter continuously (yearly) violates conditions of License and makes no effort to remedy - with no action from the SWRCB. Where are the SWRCB priorities in this case? (*Alan Levine, Coastal Action Group*)

Response: This is not a comment on the proposed policy or its effects on the environment. The comment has been passed on to the Division's enforcement section. On June 9, 2009, the Executive Officer of the State Water Board issued Order WR 2009-0036 Approving Settlement Agreement and Imposing Terms for Cease and Desist against North Gualala Water Company

Comment 18.5.5: As an indication of the concern about the survival of our fisheries and the widespread understanding that streams are being overdrafted, the Mendocino County sheriff has indicated, through personal communication, that he is prepared to send deputies into the field to seize illegal diversion devices. (*Ellen Drell, The Willits Environmental Center*)

Response: Comment noted.

Comment 18.5.6: Although the Scott River is not within the Policy area, it has very well recognized water quality and fisheries problems related to surface and ground water extraction (NRC, 2004). The Scott River channel and many of its major tributaries are dried up annually, in violation of CDFG code 5937 (Figure 28 & 29), severely limiting rearing habitat for salmonids. Although the Scott River is adjudicated (SWRCB, 1980), flow levels fall below those required for months of the year (Figure 30). This causes major reductions in habitat quality in the lower Scott River, which formerly served as a summer refugia for juvenile salmonids. The Scott River has experienced major declines in surface flows coincident with installation of ground water pumps beginning in the 1970's. Pumps continue to be installed through NRCS and EQIP funding (Figure 31) and drops in ground water levels are becoming evident (Figure 32). The National Research Council (2004) makes a clear case that flow depletion is at the root of temperature problems in the Scott River. The SWRCB WRD needs to make the Scott River a priority for enforcement. Fall chinook are collapsing and coho salmon only have one strong year class of three, indicating a high risk of extinction. Immediate action is appropriate given the change in weather and flow patterns expected with a change of the Pacific Decadal Oscillation (PDO) expected sometime from 2015 to 2025 (Collision et al., 2003) and with longer term drought cycles expected with global warming (see *Climate Cycles and Change*). (*Patrick Higgins, Consulting Fisheries Biologist/Sierra Club Redwood Chapter*)

Response: The State Water Board currently has six enforcement staff available statewide. The State Water Board set the priority streams for enforcement following consultation with the Department of Fish and Game. The Scott River was not identified by the Department of Fish and Game as a high priority stream for the State Water Board's water rights enforcement resources. As the commenter notes, the Scott River is not affected by the proposed policy. The State Water Board anticipates that recent augmentations to the State Water Board's water rights (program 20) budget specifically for enforcement will result in additional resources being dedicated to the north coast area. The State Water Board will continue to work with the fisheries agencies to identify priorities for water rights enforcement.

Comment 18.5.7: Amend Section 11 of the Draft Policy to state that Division of Water Rights staff will work with DFG, the Regional Boards, and other agencies to adopt within 1 year of the Policy a program and schedule for completing a systematic investigation of Policy area

streams to identify unauthorized diversions, including those not viewable from aerial photos. *(Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society)*

Response: The Division of Water Rights will continue to work with the Department of Fish and Game, the Regional Boards, and other agencies to identify enforcement priorities throughout the State. This has been the Division's practice for several years. If streams in the policy area are identified as a high priority for water rights enforcement, the State Water Board will determine the most appropriate methods of identifying unauthorized diversions for the high priority streams.

Comment 18.5.8: Fix processing problems regarding enforcement actions. Use informal enforcement tools. Prioritize enforcement based on harm to species or senior right holders. Prioritize usage of formal enforcement (ACL, CDO, AG): (1) for situations that cause significant and measurable harm to the environment, or (2) to those who refuse to come into the system. *(Brian Johnson, Trout Unlimited; Peter Kiel, Ellison, Schneider & Harris LLP; Richard Roos-Collins, Peregrine Chapter of the National Audubon Society; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers)*

Response: The Division of Water Rights will continue to use the suite of enforcement tools available to achieve compliance. A primary goal of any enforcement program is deterrence from illegal activity. Voluntary compliance has not been proved effective in providing sufficient deterrence, based on the high number of facilities that do not appear to have a valid water right. Therefore, the State Water Board will not rely exclusively on voluntary compliance as an enforcement mechanism. In some cases, formal enforcement is used when then the widespread nature of a compliance problem creates a cumulatively significant problem for public trust resources or other water users, even if an individual diversion might not otherwise be considered significant.

Comment 18.5.9: Enforcement should be prioritize based on harm to species or senior right holders. *(Brian Johnson, Trout Unlimited; Peter Kiel, Ellison, Schneider & Harris LLP; Richard Roos-Collins, Peregrine Chapter of the National Audubon Society; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers)*

Response: Comment noted. See response to 18.5.8.

Comment 18.5.10: Formal enforcement (ACL, CDO, AG) should be directed to diversions causing significant and measurable harm, and unauthorized diverters who refuse to come into the system. *(Brian Johnson, Trout Unlimited; Peter Kiel, Ellison, Schneider & Harris LLP; Richard Roos-Collins, Peregrine Chapter of the National Audubon Society; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers)*

Response: Comment noted. See response to 18.5.8.

Comment 18.5.11: DFG recommends the language in Policy Section 11.2.1 (Enforcement) be changed to make this section consistent with the definitions in Policy Section 4.2 (Stream Classification System) with the following modification: "Class I streams contain habitat for fishery resources, and Class II streams contain habitat for aquatic non-fish vertebrates and/or aquatic benthic macroinvertebrates." *(Donald Koch, State of California Department of Fish and Game)*

Response: The State Water Board will consider the suggested change.

Comment 18.5.12: I have lived on the Mill Creek watershed located west of Laytonville, CA for the past 50 years and have anguished over the lack of flow over the 30 years. I missed the salmon making their runs up the stream in December/January and have watched the kingfishers and raccoons decimate the fingerlings in the drying up pools over the years. I have spoken with Fish and Game Wardens about my concerns and wrote your Board some years back regarding some factors I believe that have resulted in the ever-decreasing flow of Mill Creek. Over the years, I have observed the following: (1) If all the people with residences on the stream have water rights, the water has been oversubscribed for the amount of water flow. I have difficulty believing that the Water Resources Board would allow that to happen. (2) Ranchers have/are diverting water from the Mill Creek watershed to fill their dams or ponds. (3) A vineyard was approved to put in ponds that has dried up a tributary stream. (4) The stream has been dammed up by marijuana growers each year with impunity from law enforcement for constructing the dams. (5) Property owners that are diverting water from the watershed without authorization are not being prosecuted for their actions.

In the August 5, 2008 Board meeting, I heard other people share these same observations. Until there are policies and enforcement put in place, instream flows will continue to diminish along with our natural fisheries and our homes that have water rights will need to be abandoned. (*Richard Matlock*)

Response: Comment noted. The State Water Board intends to include enforcement provisions as a part of this policy. The State Water Board further intends to adopt a statewide water rights enforcement policy following the completion of the Draft Instream Flow Policy required by AB 2121. Effective enforcement cannot be achieved solely through the adoption of an enforcement policy or provision, however. It also requires education and outreach so that water users know what is required and an "on the ground" field presence to identify violations and provide deterrence. Lastly, consequences of illegal or harmful activities should be sufficient to provide a disincentive to those who might consider engaging in those activities. Some of these necessary components of an effective enforcement program are outside of the Board's direct control. The State Water Board encourages interested citizens to engage in other processes, such as the legislative process, to effect outcomes that they desire.

Comment 18.5.13: The draft Policy must include a program to prioritize removal of unauthorized structures, including dams, levees, and other diversion structures, which impede flows and thus impede steelhead and salmonid migration. The effects of these structures and alterations for water diversions also change streambed shapes and sediment distribution, destroying sites for spawning and hatchling nurturance. (*Jane Nielson, Sonoma County Water Coalition*)

Response: Article X, section 2 of the California Constitution prohibits the waste or unreasonable use of water, unreasonable method of use of water, or unreasonable method of diversion of water, regardless of the classification of the water or basis of right to divert and use the water. The State Water Board and the Department of Water Resources are directed to take "all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water" (Wat. Code, § 275.) The State Water Board will continue to work with the Department of Fish and Game and other agencies to identify those water diversion and use facilities that have the greatest potential to cause changes to physical, biological, and chemical processes and concomitant impacts to fishery resources. The provisions of this policy will be

applied as described in the policy to projects that are subject to this policy in order to eliminate or mitigate impacts of diversions and diversion facilities that are subject to this policy. In addition, the State Water Board may use its available enforcement tools, as appropriate, to address impacts of legal diversions, if there is substantial evidence that a particular diversion is causing a significant impact, and following notice to the diverter and opportunity for hearing. Diversions or methods of diversions that dewater streams or impede fish passage may be considered unreasonable, particularly where more reasonable methods exist.

Comment 18.5.14: Involved in 3-year battle to save Alder Creek in Willits, CA which is completely dewatered in the summer by 21 known diversions, of which only one is permitted. *(Tamara Pearn)*

Response: Comment noted. This comment will be provided to the State Water Board's Water Right Enforcement Section.

Comment 18.5.15: Many of the listed salmonid populations in the southern portion of the policy area appear to face a very high risk of extinction (Spence et al., 2007). Typically in these same streams, there also is a relatively high existing level of diversion. Therefore, we recommend that the adopted policy include a more detailed and specific description of the compliance inspection program actions, and their schedule. For example, we have mapped more than 1100 reservoirs within the Napa River watershed, over 400 of which are located on stream channels (Dietrich et al., 2004). It is unclear to the Regional Water Board how many of these reservoirs have or should have water rights. Both for the protection of fishery resources and the rights of legal water users, we recommend that the schedule for a survey of illegal storage in the Napa River watershed, and other highly appropriated watersheds, be considered as part of the adopted policy. These surveys should be completed promptly both to protect aquatic life and the rights of legal water users (Regional Water Board, 2007). *(Thomas Weseloh, California Trout Keeper of the Streams; Bruce Wolfe, State of California Regional Water Quality Control Board, San Francisco Bay Region)*

Response: See response to 18.5.7.

Topic 18.6 Enforcement - Timely and Appropriate Enforcement Actions

Comment 18.6.1: The Water Rights Division ("Division") currently has a backlog of over 500 pending water right applications and over 600 pending water transfer petitions. This backlog creates tremendous lag in the process of administering water rights. Water users are often left frustrated, frequently initiating diversions without State Water Board permission. Public trust resources are ultimately left unprotected due to lack of oversight. The Policy does nothing to tackle this implementation and enforcement roadblock. This is of particular concern in light of the fact that the Policy fails to discuss the removal of more than 1771 illegal diversions and dams that already exist. At a minimum, the Policy should commit the State Water Board to assess and post on its website its proposed workplan for implementing the first five years of this Policy and for addressing these illegal diversions and dams, and to provide a calculation of the resources required for these tasks. *(Joshua Basofin, Defenders of Wildlife; Don McEnhill, Russian Riverkeeper; and Linda Sheehan, California Coastkeeper Alliance)*

Response: The State Water Board has reduced the number of pending water right applications to 438 as of November 2009. The number of pending applications, petitions and complaints is updated and posted monthly on the Division of Water Right's Website at http://www.waterboards.ca.gov/waterrights/publications_forms/available_documents/progress_

reports/index.shtml. With current staffing resources, the Division has been able to process about 80 water right permit applications per year, resulting in the issuance of about 15 permits per year. Of the pending applications, about 263 are located within the policy area. The majority of these applications were filed in response to enforcement sweeps of illegal reservoirs conducted by the State Water Board in the late 1990s and early 2000s. As a result, about 80 percent of pending applications are for existing illegal reservoirs. Retrofitting these projects to bring them up to today's standards can be costly, and applicants are reluctant to make the necessary changes, which delays permitting. As the State Water Board has recently demonstrated, when applications are filed for projects that are designed to provide protections to fishery resources and other water right holders, the State Water Board can issue project approvals for new applications or petitions in as few as four months, even when the project proponent has not engaged an agent or water rights consultant. The State Water Board has the authority to condition water right permit and petitions approvals as appropriate to protect the public trust and public interested, but cannot do so in a timely manner unless the applicant or petitioner agrees to the proposed permit or license conditions. Applicants and petitioners are entitled to exercise their due process rights to review of staff-recommended permit terms and conditions by the State Water Board and judiciary; doing so will necessarily delay permit issuance, if for no other reason, as a result of the additional processes that are available for dispute resolution. In order to ensure that applicants are being kept apprised of requests for information related to their applications, the State Water Board will copy applicants and petitioners on correspondence related to their applications and petitions, even when an agent for the project is identified.

As required by law, the State Water Board annually updates the status of each pending application in the policy area, actions taken in the previous year, proposed actions for the upcoming year, and the proposed date for final action. This information is posted each December on the Board's website at http://www.waterboards.ca.gov/waterrights/water_issues/programs/coastal_streams/.

In regard to the 1771 water impoundments for which the State Water Board has no record of a water right, the State Water Board intends to implement the new provisions of SBX7 8 by contacting the property owners of record for those facilities. The State Water Board will inform those landowners that the State Water Board is aware of the impoundment on the property and advise the landowner that he or she must either file a Statement of Water Diversion and Use for the diversion of water at the facility or identify why a Statement of Water Diversion and Use is not required. The Division of Water Rights will issue administrative civil liabilities to those who fail to report. When the reports are filed, the State Water Board will review the reports and use the information provided to assess the potential for impacts of each diversion and use of water on other water right holders and the environment. The State Water Board will then consider whether and what type of enforcement is appropriate for each diversion. For diversions identified as having a potential impact to fishery resources, the State Water Board will work with the Department of Fish and Game to provide necessary technical expertise to support enforcement against the diverter, if the State Water Board determines that enforcement is appropriate.

It is difficult, if not impossible to identify the resources required to take enforcement against illegal diverters in the policy area. The number of illegal diversions is not known. It is likely that some of the water impoundments identified in the policy documents are wastepond or other impoundments that do not require a water right permit. The State Water Board does not know how the owner of an impoundment will respond when made aware of an illegal diversion, that is whether the owner will request a hearing before the Water Board to challenge the

proposed enforcement. Nor is it known whether the owner will seek to make the diversion legal by filing a water right application or to remove the illegal diversion. If an application is filed, the State Water Board cannot estimate whether the applicant will agree to proposed permit terms or challenge them or what the nature of the challenge, if one is filed, will be. All of these unknowns add significant uncertainty to the cost of implementing the policy. The State Water Board has in the past estimated that it expends in excess of \$20,000, on average, to process each water right application. The majority of that cost is associated with staffing resources. This does not include the cost of processing enforcement actions.

Comment 18.6.2: Waste and unreasonable use is a problem. Conservation: diversion during peak flow events and off stream storage are mitigations to the problem this policy is attempting to address. It is possible for resource owners and responsible agency to take action(s) that will result in remedy. If such actions were, historically, taken the current problem would be much less severe and much less costly to remedy - for diverters and the State alike. *(Alan Levine, Coastal Action Group)*

Response: Comment noted.

Comment 18.6.3: The Policy ignores illegal diversions from portable pumps floating on tires on class I, II, and III stream throughout the region all summer long, to onstream dams. *(Ellen Drell, The Willits Environmental Center)*

Response: The State Water Board relies on local citizens to help identify potentially illegal diversions because it lacks authority to enter properties without landowners' permission or court order. It is also more than likely that operators of many portable pumps are serving property contiguous to stream channels and therefore may have a legal riparian basis of right.

Comment 18.6.4: While the past lack of enforcement is not acceptable, language in section 11.2 of the Draft Policy indicates the SWRCB does not seriously intend to address correcting it. This is an irresponsible denial of the Board's statutory obligation. Are our water right laws to be enforced only if cost effective? And which costs are to be measured in that determination, just the administrative costs of the SWRCB or the cost of lost public trust resources? This Draft Policy, that states that SWRCB cannot afford to enforce the law, is the same mind-set that has produced this enormous problem in which we now find ourselves. But even if enforcement were limited to cost effective criteria, every illegal dam would have to individually be addressed. A bank robbery is a one-day event but an illegal dam steals water continuously day after day to which it has no right. It steals from the public trust uses, it steals from those dependent on fisheries resources and steals from farmers in their watershed who have respected the law. The identified 1771 illegal dams and those not yet identified each "deserve an appropriate enforcement response." *(Jay Halcomb, Diane Beck, and Daniel Myers, Sierra Club Redwood Chapter)*

Response: This comment ignores the reality that there are 38 million citizens in the State of California who each use water. The number of illegal diversions is not known, but is likely significant on a statewide basis. Significant attention has been brought to bear in the policy area in large part as a result of the enforcement sweeps that the State Water Board has conducted over the past 10 years. There is no doubt that if it had conducted similar enforcement sweeps in other watersheds involving similar effort, the State Water Board would have identified similar numbers of potentially illegal diversions in those watersheds as well.

The State Water Board has at present six enforcement staff statewide. Even with anticipated

augmentations, the scope of the problem is daunting. It is not only possible, it is likely, that diversions in areas of the state outside the policy area are having a greater effect on the state's fisheries resources than diversions within the policy area. Each of these diversions "deserves an appropriate enforcement response." However, due to resource limitations the State Water Board has no choice but to set enforcement priorities. Contrary to the commenter's assertion that section 11.2 of the proposed policy is included as an indication that the State Water Board does not seriously intend to address correcting illegal diversions, that section of the policy is included to indicate that the State Water Board is aware of the scope of the problem, the scope of the resources available to address the problem, and recognizes that the discrepancy will require prioritization. Although the State Water Board recognizes that some commenters will not be satisfied unless every illegal diverter is "punished" for their transgressions, the State Water Board recognizes that doing so is not possible, and that even if it was possible, it is not necessary an appropriate implementation of the State Water Board's fiduciary responsibility to the State. However, the State Water Board also recognizes that by providing detailed information on how enforcement priorities will be set, the State Water Board could inadvertently discourage compliance by allowing a diverter to calculate the potential risk and magnitude of enforcement as sufficiently small so as to invoke no voluntary action at all to comply with water rights law. The State Water Board believes that the text of the policy provides the regulated community and other stakeholders with sufficiently detailed information to indicate the factors that will be taken into consideration by the staff when it determines the appropriate enforcement response, and at the same time does not provide such detailed information that any individual diverter will be able to conclude that he or she is immune from consequences.

Comment 18.6.5: In the absence of any provision for restitution or fines for the many years of unlawful diversions, these dams owners will have "moved to the front of the line" over those who have complied with the law. This is not addressed. We would propose that the draft include strong economic disincentives for water taken without permit until such diverter physically brings the system into full compliance. We do not see that the 1771 illegal diverters will pay any penalty to the state or suffer any inconvenience from the Policy Draft for past illegal diversions or for their continued diversions over the next few years as they continue to delay compliance. (*Jay Halcomb, Diane Beck, and Daniel Myers, Sierra Club Redwood Chapter*)

Response: The commenter does not describe how illegal diverters will move to the "front of the line" in sufficient detail for the State Water Board to respond to the concern. The State Water Board is limited by maximum penalties provided under the law for illegal diversion. If the comment is that penalty provisions are not sufficiently high to compel compliance, the State Water Board agrees that the economic benefit to some diverters of illegal activity outweighs the direct deterrent effect of the available penalties. The State Water Board also recognizes that being the subject of an enforcement action, particularly one related to environmental protection, can have a deterrent effect due to public perceptions about the diverter, even if no monetary penalties are assessed.

Comment 18.6.6: Where the State Board has been willing to go beyond "informal enforcement" the record has been little better. We would cite the letter of the Friends of the Navarro watershed (Navarro Watershed 30 April 2008 comment letter) chronicling a ten-year enforcement case against a flagrant violation that is no closer to correction today than it was at the beginning. The Draft Policy does not address this laissez faire attitude prevalent within the administration. (*Jay Halcomb, Diane Beck, and Daniel Myers, Sierra Club Redwood Chapter*)

Response: Comment noted.

Comment 18.6.7: Stop post-permitting of illegal diversions and make fines sufficient to be disincentives. *(Patrick Higgins, Consulting Fisheries Biologist/Sierra Club Redwood Chapter)*

Response: Comment noted.

Comment 18.6.8: The reluctance of the State Water Board to enforce the law is evident in the following passage from the Policy: "Every violation deserves an appropriate enforcement response. Because resources may be limited, however, the State Water Board will balance the need to complete its non enforcement tasks with the need to address violations. It must also balance the importance or impact of each potential enforcement action with the cost of that action. Informal enforcement actions, described below, have been the most frequently used enforcement response. Such informal actions will continue to be part of this policy for low priority violations." *(Patrick Higgins, Consulting Fisheries Biologist/Sierra Club Redwood Chapter)*

Response: See response to 18.6.4.

Comment 18.6.9: Amend Section 11 of the Draft Policy to state that State Water Board intends to bring all "non-filer" owners of existing diversions into the water right system. State that the State Water Board will (1) deliver notices to owners of identified non-filer reservoirs to file a water right application or demonstrate the existence of an adequate basis of right and will process applications for non-filer reservoirs in a timely manner. (2) For unauthorized reservoirs identified in the SED, state that the State Water Board will deliver notices to owners of identified non-filer reservoirs to file a water right application within 6 months of the adoption of the final Policy, and publish a schedule for processing their applications. *(Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society)*

Response: The State Water Board has not concluded that all of the water impoundments identified in the SED are illegal diversions that require a water right permit from the State Water Board. The State Water Board will contact the owners of these facilities and inform them that they must either file a Statement of Water Diversion and Use or identify why the provisions of Water Code section 5100, et seq do not apply to the impoundment. Those who fail to file within the time allowed will be assessed a monetary penalty consistent with the provision of amendments to Water Code section 5107 that become effective in February 2010. The State Water Board will review the information contained in Statements of Water Diversion and Use that are filed as a result of this notification to identify which of the impoundments and diversions are likely to be illegal and to identify the potential impacts of the impoundment. This information will be used to determine enforcement priorities within the policy area.

Comment 18.6.10: Amend Section 11 of the Draft Policy to state that the State Water Board will issue a cease-and-desist order (CDO) against any unauthorized diversion for which the property owner has received notice to file an application or demonstrate an adequate basis of right, but did not file a timely permit application within 1 year of the notice. Publish a schedule for doing so. *(Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society)*

Response: A Cease and Desist Order (CDO) must be issued consistent with Water Code section 1831. The State Water Board prefers to have discretion in issuing CDOs, ACLs, or both on a case by case basis. Currently, the State Water Board has issued enforcement

actions separately, or jointly and those actions are posted on its website.

Comment 18.6.11: Amend Section 11 of the Draft Policy to state that the State Water Board will issue an administrative civil liability (ACL) complaint against any unauthorized diverter who fails to file an application for a water right within one year of the final adoption of this Policy, and state that this ACL penalty will be substantially greater than any ACL complaint issued for a unauthorized diverter who filed an application during that period. Develop and state the standard amount of an ACL for those who filed an application and those who did not, within one year of the Policy's adoption. Identify the circumstances, if any, under which the State Water Board will impose an ACL for diverters with pending applications as of the date the policy is adopted. *(Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society)*

Response: An ACL can only be issued for certain types of violations, described in Water Code section 1055. In setting the amount of an ACL, the State Water Board is required to consider the factors specified in Water Code section 1055.3, not just whether an unauthorized diverter filed an application.

Comment 18.6.12: Amend Section 11 of the Draft Policy to state that no permits for applicants with ongoing unauthorized diversions shall be granted while an enforcement proceeding for that applicant is ongoing. *(Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society)*

Response: The issue whether to approve an application is distinct from the issue whether to take enforcement action to address an unauthorized diversion, and the fact that a related enforcement proceeding is pending does not necessarily mean that action on an application should be delayed.

Comment 18.6.13: DFG recommends that the last sentence of the second paragraph of Policy Section 11.1.2 be revised to read: "A failure to report a violation, a failure to submit a self-monitoring compliance report, or falsification of diversion records will be taken into consideration in determining the scope and magnitude of enforcement." *(Donald Koch, State of California Department of Fish and Game)*

Response: The State Water Board declines to implement the suggestion in this comment because it is unnecessary to spell-out that failure to submit a self-monitoring compliance report also will be taken into consideration in determining the scope and magnitude of enforcement.

Comment 18.6.14: The Draft Policy places an explicit one year limitation on applications for onstream reservoirs on Class I streams that were constructed before July 19, 2006. The one year limitation should be extended to include all applications that involve existing unauthorized diversions. *(Chris Shutes, California Sportfishing Protection Alliance)*

Response: The commenter is referring to text contained in Draft Policy section 4.4.1 which discusses permitting requirements for onstream dams on class I streams. The one year limitation pertains to the proposed 1-year grace period that will allow owners of existing unauthorized onstream dams to file a water right application for the impoundment with the State Water Board. After the 1-year grace period, the policy would not allow the consideration of a new water right permit for an onstream dam on a Class I stream. Application of the 1-year grace period to all unauthorized diversions would likely encourage unauthorized diversions to continue. In addressing unauthorized diversions, the State Water Board may implement Water

Code section 5101.

Water Code section 5101 requires unpermitted water diverters to file a Statement of Water Diversion and Use unless certain exceptions apply. The Division intends to contact the owners of unpermitted diversions and inform them that they must file a Statement of Water Diversion and Use or explain why the provisions of Water Code section 5100 et seq. do not apply to the diversion. Those who fail to file within the time allowed will be assessed a monetary penalty consistent with amendments to Water Code section 5107 which become effective in February 2010. The State Water Board will review the information contained in submitted Statements of Water Diversion and Use to identify which of the diversions are likely to be illegal and to identify the potential impacts of the diversion. This information will be used to determine enforcement priorities within the policy area.

Topic 18.7 Enforcement - New Authority or Regulations Needed

Comment 18.7.1: The enforcement and compliance sections must set out the expectation that it will be the burden of applicants and diverters to prove where the water is coming from, year round, for their project, pond, dam, vineyard, etc. *(Kimberly Burr)*

Response: Comment noted. Water right applicants bear the burden of showing that water is available for appropriation for their proposed project(s). If insufficient water is available to meet their water demand, they must generally identify an alternative sources of water. Water diverters are required to report to the State Water Board how much water they divert and use each year, including the source of the water diversions.

Comment 18.7.2: In addition, the policy must make explicit that the standard of proof to which an enforcing agency will be held when seeking compliance with the law. That standard must be reasonable given the precarious circumstances in which the fishery finds itself. That is, if agency staff have probable cause or a reasonable belief that a diversion is illegal or a diverter is abusing its permit, a cease and desist order shall issue. This is reasonable given the lethal effects of a diversion that may last only an hour or two during a dry period will have on threatened and endangered species. (U.C. Berkeley team study: Surface water balance to evaluate the hydrological impacts of small instream diversions and application to the Russian River basin, California, USA, see Deitch, Kondolf, and Merelender et al.; pages 2, 12, 13; 2008). *(Kimberly Burr)*

Response: Water Code section 1831, subd. (d) specifies when the State Water Board may issue a Cease and Desist Order. The State Water Board may issue a Cease and Desist Order in response to a violation or threatened violation of: (1) the prohibition against unauthorized diversion and use of water, (2) a term or condition of a water right permit, license, certification, or registration, or (3) a decision or order issued by the State Water Board. The prosecution has the burden of proving that a violation has occurred. The court shall exercise its independent judgment on the evidence in any case involving judicial review of a cease and desist order. The Division of Water Rights will review each case to determine if the information is available to support the issuance of notice of Cease and Desist Order, which is the first step in issuing a Cease and Desist Order. The Division of Water Rights may initiate an investigation of any water diversion or use on its own, or may investigate in response to a complaint by another agency, individual or group. The State Water Board may request sufficient information from complaining parties to support the allegations of the complaint.

Comment 18.7.3: The State Water Board should set up a fee schedule for licensing

inspections. Policy without funding and a mechanism for enforcement is a recipe for disaster. *(Alan Levine, Coastal Action Group)*

Response: The State Water Board is required to annually adopt a fee schedule to collect sufficient resources to fund the allocations from the Water Rights Fund set forth each year in the State's annual Budget Act. The State Water Board could assess a fee for licensing inspections. However, the current fee schedule generates revenues for licensing inspections consistent with the allocation of resources for licensing activity. A separate fee would increase the State Water Board's administrative costs and would not increase the ability of the State Water Board to conduct licensing inspections. When it sets fees, the State Water Board is required to adjust the fees each year to provide for over or under collection of fees in the prior year. The fees are a zero sum game. To the extent that the Board collects more revenue from water right fees in a year than is needed to support the budget allocations for that year, the surplus revenues will reduce fee assessments in the following year. Additional staffing resources are provided as a the result of an increase in allocations of staff through the budget process, not as a result of a fee increase.

Comment 18.7.4: On the Navarro River we have experienced extensive unpermitted onstream dams constructed without bypass of any kind that discharge only when full, yet are represented by design consultants to the Division as being capable of bypassing stream flows prior to the start of the winter diversion season in December. Diverters do not act alone in their open disregard of the law. Design professionals who participate have knowledge of the law and must advise clients of those constraints. Where the consultant chooses to ignore the water rights law and actively participate in the design or representation of clients violating the water rights law they should be held equally responsible with the owner and denied the right to represent clients before SWRCB hearings and be subject to serious professional sanctions. The existing disconnect between the consultants participation and any negative consequences is a major reason for what has been an open season on taking water illegally. In the absence of design consultants willing to evade the law, most of the abuse that has taken place would end. Dealing with this one issue is perhaps the simplest and most effective action that should be taken by the Draft Policy to reverse the current abuses. *(Jay Halcomb, Diane Beck, and Daniel Myers, Sierra Club Redwood Chapter)*

Response: The suggestions in this comment are not within the authority of the State Water Board to implement. Compliance with legal and ethical standards for professional engineers is the responsibility of the Board of Registration for Professional Engineers and Land Surveyors (BORPELS). Ultimately, compliance with water rights law and permit and license conditions is the responsibility of party who diverts and uses water. The State Water Board speculates that market controls could influence the engagement of certain engineering professionals by water users if facilities designed by a particular engineer or consultant are routinely subject to enforcement.

Comment 18.7.5: The Policy ignores design consultants role of actively participating with diverters in the construction of illegal dams. *(Jay Halcomb, Diane Beck, and Daniel Myers, Sierra Club Redwood Chapter)*

Response: See response to 18.7.4.

Comment 18.7.6: We include a letter from NMFS that demonstrates the role design consultants have played as a contributor of the AB 2121 problems. We would also refer to CDF&G scoping comments that point out the role of the design consultant as a source of the

problem and the need for a "certification program" to correct that conduct. Most of the current problems caused by the illegal onstream dams could have been avoided by regulations imposing penalties on professional consultants who have designed illegal structures and represented those clients before the Water Board. (*Jay Halcomb, Diane Beck, and Daniel Myers, Sierra Club Redwood Chapter*)

Response: See response to 18.7.4.

Comment 18.7.7: Amend Section 11 to state that the State Water Board shall amend the standard form of application to require representations under oath, and with appropriate proof of the date when any existing diversion subject to the application began, and how much water has been stored or diverted. (*Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society*)

Response: The content of an a complete application are specified in Water Code section 1260 through 1266. Applicants are not required to include the date that diversion of water subject to the application began. California Code of Regulations, title 23, section 711 sets forth the documents that must be sworn to under penalty of perjury. These documents include water right applications an accompanying statements, reports of permittee and licensee, and petitions for change and extension of time.

Comment 18.7.8: Amend Section 11 of the Draft Policy to state that payment to a Supplemental Environmental Project (SEP) fund for the Policy Effectiveness Monitoring and Review Program is the preferred means to settle the ACL complaint. (*Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society*)

Response: Staff may consider revisions to the Draft Policy that would allow the State Water Board to consider supplemental environmental projects that are consistent with the provisions of the State Water Board's water quality policy on Supplemental Environmental Projects when issuing Administrative Civil Liability for water right violations.

Comment 18.7.9: Creating an instream flow policy without a sufficient level of trained staff dedicated to performing inspections, responding to complaints, or investigating violations does not provide disincentives for noncompliance and is unlikely to result in instream flow protection on a watershed level. DFG recommends that the State Water Board consider alternatives for effectively enforcing the policy and properly ensuring resource protection, including a dedicated funding source to support adequate enforcement staffing levels. (*Donald Koch, State of California Department of Fish and Game*)

Response: Comment noted. The Water Right Fund is available to fund water rights enforcement activities. Water Rights staffing levels are determined through the state's budgeting process.

Comment 18.7.10: The draft plan must include increased enforcement procedures and civil liabilities for violators that will fully cover cost of enforcement and environmental reparations. (*NA, Maacama Watershed Alliance*)

Response: Enforcement procedures are specified by statute and regulation. It is not clear what additional procedures are being recommended by the commenter. The maximum amount of civil liability and the factors that the water board must consider when determining the amount of liability to impose are specified by law.

Comment 18.7.11: Public monies for water-related projects should not be awarded to private interests that continue to violate the law, or have a history of violations on the subject of property or elsewhere. *(NA, Maacama Watershed Alliance)*

Response: Comment noted. The Division of Water Rights coordinates with the Division of Financial Assistance to ensure that those who receive grants and loans of public moneys awarded by the State Water Board have adequate water rights and to identify any enforcement issues that should be considered when determining whether to award those monies.

Comment 18.7.12: A system for substantiating compliance through monitoring must be funded primarily by fees for non-compliance, which must be both levied and collected *(Jane Nielson, Sonoma County Water Coalition)*

Response: Water code section 1525 specifies the activities for which the State Water Board may assess a water right fee. Fees are not assessed for non-compliance.

Topic 18.8 Enforcement - Complaint Program Deficiencies

Comment 18.8.1: Complaint investigations have historically been a problem. CAG has an outstanding complaint on the Garcia River (Garcia River/Walter Stornetta Ranch - License 6470 - Application 16700). In this case an unauthorized water transfer is occurring in sizable amounts (the landowner admits that 113 of its total diversion is used for irrigation outside of the watershed). This diversion, with unauthorized transfer, effects critical low flows. This complaint has been on file for about 4 years - without the SWRCB taking any action. Surely the SWRCB can perform better than this. *(Alan Levine, Coastal Action Group)*

Response: This is not a comment on the proposed policy or its environmental effects. Rather it is a comment on a specific enforcement matter.

Comment 18.8.2: Commenter filed a complaint years ago that neighbors planted willow trees that used up the water in the stream. *(Michael Dunn)*

Response: This is not a comment on the proposed policy or its environmental effects. Rather it is a comment on a specific enforcement matter.

Comment 18.8.3: Instead of active enforcement, the State Water Board relies on mechanisms like self-enforcement, whereby permit holders self-report violations, and on complaints from citizens. I know several individuals who have filed hundreds of complaints over several decades with the State Water Board and have had few resolved as a result (Bob Baiocchi; Stan Griffin, personal communication). *(Patrick Higgins, Consulting Fisheries Biologist/Sierra Club Redwood Chapter)*

Response: Comment noted. The comment identifies a need that the State Water Board intends to address by including guidance on enforcement of water right matters within the policy area as part of the instream flow policy.

Comment 18.8.4: I am familiar with the Navarro River having worked in the basin as a CDFG seasonal aid in 1972, commented on proposed timber harvests in Rancheria Creek and Indian Creek in 1993-1994, and more recently helped complete the KRIS Navarro project (IFR,

2003a). In 1994 the Sierra Club Legal Defense Fund (Volcker, 1994) filed a water rights complaint with the State Water Board for failing to adequately address instream flow needs under the Public Trust Doctrine in the Navarro River basin. In the complaint, Volker (1994) stated that: "Illegal and unreasonable water diversions from the Navarro River and its tributaries, primarily for agricultural purposes, have significantly impaired instream fish and wildlife beneficial uses, to the point where the river was literally pumped dry during August and September of 1992. Such illegal and unreasonable diversions threaten again this fall to eliminate the natural flow of the river and its tributaries necessary to sustain constitutionally and statutorily protected instream fish and wildlife beneficial uses." Volcker's (1994) assertion that the Navarro loses surface flow was correct at the time and the condition is still chronic in summer (Figure 9). In processing the complaint, the State Water Board (SWRCB, 1998) found 121 illegal impoundments (Figure 10), none of which were removed and many of which have now applied for permits (Pennington et al., 2008). The SWRCB (1998) declined to take public trust protection action: "The SWRCB could initiate a public trust action in the watershed. However, the cause of the anadromous fish decline may be principally due to factors other than flow, and there is not adequate information available regarding the flow needs of the fishery in the summer. Consequently, the Division recommends that a public trust action should not be initiated at this time. If the complainants, DFG, or some other entity develops adequate information regarding the summer flow needs of the anadromous fishery, this recommendation can be reevaluated." (*Patrick Higgins, Consulting Fisheries Biologist/Sierra Club Redwood Chapter*)

Response: This is not a comment on the proposed policy or its environmental effects. Rather it is a comment on a specific enforcement matter.

Comment 18.8.5: DFG recommends that Policy Section 11.1.5 (Complaint Investigations) be revised to include: 1. Complaint investigations involving harm to public trust resources should include field review by a State Water Board-qualified biologist or environmental scientist to ensure that adverse impacts are appropriately identified and corrected; 2. All complaints submitted by resource agencies concerning public trust issues should include a coordinated interagency agency site visit leading to resolution. (*Donald Koch, State of California Department of Fish and Game*)

Response: The State Water Board is currently staffed with a geologist, associate water resources control engineer, sanitary engineering associate and an environmental scientist in its water right complaint program. These positions are supervised by a senior water resource control engineer. When necessary, complaint staff can and do consult with other professional staff for expertise and opinions. Because not all complaint allegations are sufficiently supported with facts, the State Water Board will not commit to a policy requiring a field investigation for complaints involving harm to public trust resources. Before committing to such a field investigation, the complainant must include sufficient evidence supporting the public trust impact. The State Water Board supports the concept of interagency coordinated site inspections of public trust impact issues. Such coordinated inspections provide the expertise of each agency at one time and should provide for more timely action. However, this coordination would not be appropriate if the agency files the complaint with the State Water Board because State Water Board cannot be biased when dealing with the parties of a complaint. The State Water Board, DFG and other fishery agencies plan to hold meetings in early 2010 to discuss the coordination and potential enforcement options to prevent unreasonable use of water, including impacts to public trust resources.

Topic 18.9 Enforcement - Effect on Existing Permits and Licenses

Comment 18.9.1: Policy Section 11.1.1 (Enforceable Terms and Conditions) 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." (*Barbara Brenner; Rudolph Light*)

Response: Policy Section 11.1.1 restates existing law. The State Water Board has an affirmative duty to protect public trust resources, if feasible. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 437 [189 Cal. Rptr. 346], cert denied 464 U.S. 977 (1983).) Further, Water Code section 1701.3, subd. (a) authorizes the State Water Board to request information needed to demonstrate that the change being sought via a petition to the State Water Board will comply with any applicable requirements of the Fish and Game Code, including but not limited to Fish and Game Code section 5937, requiring the owner of any dam to allow sufficient water at all times to pass below the dam to keep fish below the dam in good condition, and with federal Endangered Species Act. The supporting documents to Policy correctly state that the Policy will affect only new and pending applications and changes to existing licenses or permits. The comment is noted but requires no changes to the policy or supporting documentation. It should be noted, however, that the State Water Board has the existing continuing authority to make changes to existing permits and licenses following notice to the permit or license holder and opportunity for a hearing, even if the permit or license holder is not requesting a change in the permit or license to protect public trust uses and prevent the waste, unreasonable use, unreasonable method of use or unreasonable method of diversion of water or to meet water quality objectives in Water Quality Control Plans. All water right permits and licenses are issued subject to this condition. (Cal. Code Regs., tit. 23, §780.)

Comment 18.9.2: The Policy says the SWRCB can modify existing licenses. Will this lead to the removal of legal, licensed, onstream dams? (*Roland Sanford, Mendocino County Water Agency; Jim Wattenburger, Mendocino County Board of Supervisors*)

Response: See response to 18.9.1. All permits and licenses issued by the State Water Board may be modified by the State Water Board after notice to the permit or license holder and opportunity for a hearing in order to protect the public trust, prevent waste or unreasonable and unreasonable method of use or method of diversion or if necessary to meet water quality objectives, including flow objectives, in water quality control plans adopted pursuant to the

Clean Water Act or the state Porter-Cologne Water Quality Act. The policy is intended to apply only to new and pending applications and changes to existing permits or licenses. However, the State Water Board could under its continuing authority over permits and licenses seek to modify the permit and license conditions, including the method of diversion, if conditions warrant.

19.0 Watershed Approach

Topic 19.1 Watershed Approach - General

Comment 19.1.1: A set of rigid diversion criteria may never be flexible enough to address the actual conditions in every North Coast stream. Some alternatives to consider may be to allow applicants to provide the appropriate hydrological and biological studies, have the State Water Board establish and follow a clear decision-making process, and to restore functionality to the water right administrative system. One approach the Board may wish to examine is the one referenced in the State Auditors' report regarding the coordinated "watershed approach" that is currently underway in a North Coast stream system. This appears to be a scientifically sound and efficient approach for evaluating site specific hydrologic and fisheries impacts and for water right administration generally, than regional criteria of a blanket policy. *(Sam Aanestad, Senator 4th District and Bob Dutton, Senator 31st District)*

Response: Comment noted. Some of the projects that were initial participants in the referenced coordinated "watershed approach" ended up receiving individual permits that were processed separately from the watershed approach effort. The remaining projects will be reviewed on a case-by-case basis as Division resources allow.

Comment 19.1.2: We appreciate the Watershed Approach, and would suggest a prioritization of incentives to those watershed councils that have the highest percentage of water users at the table. In this regard we wish to suggest that the Tomales Bay Watershed Council should be high on the list. *(Gordon Bennett, Sierra Club Marin Group)*

Response: Comment noted.

Comment 19.1.3: SWRCB must develop a process for providing notice for interested parties for watershed approach documents prepared for flow maintenance determinations, including technical documents, studies, assessments, and mitigations as all of these fall under CEQA. *(Alan Levine, Coastal Action Group)*

Response: Comment noted. Environmental review is part of the water right permitting process. Proposed permits are required to be noticed to the State Clearinghouse. All State Water Board records are open to the public. Any analysis supporting the proposed permit that has been submitted to the Division is part of the public record and a copy can be requested.

Comment 19.1.4: Information provided by watershed groups seeking permits or variance must be complete and accurate - and they must comply with CEQA mandates. Group planning can occur on a watershed basis. Limitations and Conditions must be affixed to individual permits for each diverter (see - discussion under Legal Framework - above). *(Alan Levine, Coastal Action Group)*

Response: Comment noted. Staff will consider this suggestion when developing modifications to the Watershed Approach provisions of the Draft Policy

Comment 19.1.5: The public and responsible agency must be noticed and be given opportunity to comment on technical documents submitted by watershed groups as CEQA applies. *(Alan Levine, Coastal Action Group)*

Response: See response to 19.1.3.

Comment 19.1.6: The second development we were pleased with is the idea of the Watershed Approach. The Watershed Approach allows flexibility for managing water across parcels and among users in a watershed; it is especially important for people who have need for water during periods of low natural availability (i.e., the growing season), but who do not have suitable conditions for storing water during periods of abundance. Further, it requires additional data reporting (e.g., streamflow monitoring, biotic habitat assessments) in addition to the requirements for surface water appropriation described in the new AB2121 Draft Policy to document the regional protective criteria in the AB2121 Draft Policy. This approach is an important first step toward comprehensive watershed assessment that is essential for sustainable water management, and can become the framework for a public process for watershed planning that would allow for assessment and proposed alterations needed to recover stream flows in watersheds containing critical habitat. Such a planning process could be coordinated in a similar multi-agency effort as the former Coastal Watershed Planning and Assessment Program and would focus on recovering natural flow regimes across the entire year for salmon recovery in addition to other restoration treatments needed to address other limiting factors. This approach would allow greater representation in the watershed planning process as well. *(Matthew Deitch and Adina Merenlender, University of California, Berkeley)*

Response: Comment noted.

Comment 19.1.7: This watershed approach to managing water rights and diversions is an alternative to the policy recommended and we feel it can support fish recovery and agriculture. It will require a different approach to permitting diversions than exists today. *(Nick Frey, Sonoma County Winegrape Commission)*

Response: Comment noted.

Comment 19.1.8: As proponents of environmentally sound agriculture production we would like to offer our support for the watershed-based management approach that will meet the needs of preserving fish and other natural resources while simultaneously serving the needs of agriculture. A viable watershed approach needs to include the following: 1) A baseline assessment of water demand and allocation, both individual and cumulative, within a given watershed; 2) Region specific scientific and technical data that identifies demands on resources; 3) Encouragement of winter offstream storage; 4) A collaborative approach to managing resources that provides improved efficiency, accuracy and cost effectiveness; 5) Facilitate compliance with the Federal Endangered Species Act, the California Endangered Species Act, Water Quality laws and the State Water Code. *(Nick Frey, Sonoma County Winegrape Commission)*

Response: Comment noted. Staff will consider this suggestion when developing modifications to the Watershed Approach provisions of the Draft Policy

Comment 19.1.9: Section 12 of the draft policy regarding the watershed approach appears designed to provide incentive for diverters in a watershed to work together to manage water

resources to achieve the goals of the policy. Sanctuary Forest feels that this section should be strengthened to provide greater incentive for the formation of watershed groups whose purpose is to not only meet the goals of the policy, but to enhance fisheries. Such incentives could come in the form of lower application fees or an expedited review process for group status and water rights applications under the group umbrella. *(Eric Goldsmith, Sanctuary Forest)*

Response: Comment noted. Staff will consider this suggestion when developing modifications to the Watershed Approach provisions of the Draft Policy

Comment 19.1.10: The City supports the concept of watershed-based water rights applications and decision making consistent with that described in Section 12 of the Draft Policy as a means of protecting fish and fish habitat, reducing applicants' cost and expediting SWRCB decisions. *(Susan Gorin, City of Santa Rosa)*

Response: Comment noted.

Comment 19.1.11: The Draft Policy gives illegal diverters the option to form watershed groups that could enable them to avoid individual compliance requirements for bypass flow. *(Jay Halcomb, Diane Beck, and Daniel Myers, Sierra Club Redwood Chapter)*

Response: Individual water right permits would address this concern. Staff will consider whether individual permitting in the watershed approach should be made a requirement.

Comment 19.1.12: We do not oppose the principle of a real watershed group working together on instream flow issues that would include all water users, agencies and advocates of the public trust uses. Until there is a group process with sufficient detail and enforcement provisions that assure individual compliance, it should not be included in the Policy. We suggest this be limited, if used at all, to a single pilot project demonstrating its merits, enforceability and utility. As proposed in the draft it appears to be a get-out-of-jail-free-card. *(Jay Halcomb, Diane Beck, and Daniel Myers, Sierra Club Redwood Chapter)*

Response: Staff will consider this comment when making revisions to the watershed approach provisions of the policy.

Comment 19.1.13: The Policy proposes to use watershed groups to fund studies, assess flow availability, and mitigate all problems related to diversions. A watershed group is defined as follows: "A watershed group is a group of diverters in a watershed who enter into a formal agreement to effectively manage the water resources of a watershed by maximizing the beneficial use of water while protecting the environment and public trust resources." Any watershed group formed by special interests that does not include public participation is unacceptable. Consultants working for water diverters would protect vested interests and the quality of science would not likely be as unbiased or equal to that collected by government scientists who have public trust responsibility. *(Patrick Higgins, Consulting Fisheries Biologist/Sierra Club Redwood Chapter)*

Response: Individual water right permits would address this concern. Staff will consider whether individual permitting in the watershed approach should be made a requirement.

Comment 19.1.14: The Policy should provide additional guidance and definition for the "watershed approach" and for similar methods to promote watershed-based management.

(Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society)

Response: Comment noted. Although this comment did not contain specifics, staff will consider this comment when making revisions to the watershed approach section of the policy.

Comment 19.1.15: The inclusion of a "watershed approach" in the draft is a significant, positive step. We will recommend ways to make it stronger, and to emphasize watershed-based management throughout the Policy. Trout Unlimited is one of the stakeholders who co-developed the concept for a watershed approach, which in its essence will permit a number of diverters to work with stakeholders and regulatory agencies to establish stream flow objectives for individual streams and to prepare management plans to accomplish those objectives. By focusing on physical solutions and coordinated management, the proposal promises better protection of stream flows and improved water supply reliability. *(Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society)*

Response: Comment noted.

Comment 19.1.16: The membership in the agreement and Project Charter of a watershed group should include a critical mass of pending applicants in a given watershed, as well as existing diverters if (as we recommend below) the charter addresses coordinated operation of new and existing diversions. Since the watershed approach is unprecedented, we do not recommend that the Draft Policy set a specific percentage or other quantified threshold for participation by pending applicants. Instead, the Group Charter should demonstrate that the membership will be sufficient to achieve the goals, responsibilities, and tasks proposed in the Group Charter, taking into consideration diversions by non-member diverters (whether pending applicants or existing diverters). *(Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society)*

Response: Staff will consider this comment when making revisions to the watershed approach provisions of the policy

Comment 19.1.17: Further, the agreement and Project Charter of a watershed group should provide for meaningful participation by non-diverters, including conservation groups, other community groups (such as the Farm Bureau), and other stakeholders who have direct interests or capacity to contribute to the goals and tasks of the Watershed Group. *(Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society)*

Response: Staff will consider this comment when making revisions to the watershed approach provisions of the policy

Comment 19.1.18: Require that the membership of the Watershed Group include on a voluntary basis existing diverters under all claims of right, as well as pending applicants, unless the Project Charter demonstrates that a more limited scope will be sufficient to achieve the goals, responsibilities, and tasks proposed in the Group Charter. *(Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society)*

Response: Staff will consider this comment when making revisions to the watershed approach provisions of the policy

Comment 19.1.19: Policy Section 12.4 provides that the State Water Board will review and approve technical documents for the watershed approach before issuing permits or approving petitions. (Draft Policy, p. 42.) It does not specifically state that these documents will be considered an element of the pending applications and thus will be subject to comment by other parties and ordinary hearing. It also does not address how the State Water Board will conduct the CEQA review. We believe that the hearings and CEQA reviews for applications subject to a Project Charter should generally be coordinated or indeed consolidated. Under this structure, common issues will be addressed once for all such applications, while issues idiosyncratic to individual applications will be addressed in a discrete manner (such as a specified hearing date, or subsections in the CEQA document). The Policy should state that hearings and CEQA reviews of applications subject to a Project Charter will be coordinated or consolidated. (*Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society*)

Response: Staff will consider this comment when making revisions to the watershed approach provisions of the policy

Comment 19.1.20: The commenters provide "Joint Principles" for the Watershed Management Approach. (*Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society*)

Response: Comment noted.

Comment 19.1.21: In March 2007, TU and ESH submitted a joint recommendation to the SWRCB to include a Watershed Management Alternative in the Draft Policy. We stand by those recommendations. We recommend that the Policy do more to articulate the essential elements to be included in projects proceeding with the watershed approach strategy, consistent with those recommendations. We believe that the Draft Policy's Watershed Alternative (Section 11) does not provide the utility of the approach we recommended. For all three approaches to permitting, the policy should advance the SWRCB's draft Strategic Plan objective to support a watershed framework to manage and protect water resources in order to satisfy competing environmental, land use, and water use interests by taking advantage of opportunities within a watershed, such as joint development of local solutions to watershed-specific problems, cost sharing, and coordination of diversions. (See 1/25/08 draft Strategic Plan, pp. 3, 8, 11.) A watershed management framework would be hydrologically focused, recognize the linkages between water quantity and water quality, and require a comprehensive, long-term approach to water resources management that takes system interactions into account. (1/25/08 draft Strategic Plan, p. 3.) A watershed management framework would not be an alternative to CEQA and public trust review. It would be a holistic strategy to evaluate resource impacts and limiting factors and identify conservation and mitigation opportunities on a comprehensive watershed scale, which are opportunities often missed through traditional project-specific analyses. For example, it may identify off-site mitigation opportunities that provide a higher resource value than mitigation opportunities at the point of diversion. Where applications are processed individually, the CEQA and public trust review should consider relevant watershed-scale issues wherever possible, and all pending applicants within a watershed should coordinate the CEQA and public trust analyses where feasible. In addition to the essential elements contained in the March 2007 paper, we are developing additional elements for a watershed approach including governance concepts. We request that the Board direct staff to meet with stakeholders to further define these elements. (*Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society; Brian Johnson, Trout Unlimited; Peter Kiel, Ellison, Schneider &*

Harris LLP; Richard Roos-Collins, Peregrine Chapter of the National Audubon Society; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers)

Response: Comment noted. The commenters updated this proposal in the Draft Joint Recommendations, dated April 30, 2009. Responses to these comments are provided in a separate document.

Comment 19.1.22: The joint stakeholders plan to provide recommendations on guidance for the watershed approach: (1) recommendations on governance, (2) development of performance measures; (3) development of diversion management plan. The guidance will define essential components but leaves flexibility for different solutions. *(Brian Johnson, Trout Unlimited; Peter Kiel, Ellison, Schneider & Harris LLP; Richard Roos-Collins, Peregrine Chapter of the National Audubon Society; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers)*

Response: Comment noted.

Comment 19.1.23: The joint stakeholders plan to provide Watershed Approach recommendations that focus on governance, development of performance measures, design of diversion management plan. They will define essential components but leaves flexibility for different solutions. Recommendations will be based on May 1, 2008 comments. *(Brian Johnson, Trout Unlimited; Peter Kiel, Ellison, Schneider & Harris LLP; Richard Roos-Collins, Peregrine Chapter of the National Audubon Society; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers)*

Response: Comment noted. These were provided in the Draft Joint Recommendations, dated April 30, 2009. Responses to these comments are provided in a separate document.

Comment 19.1.24: While we normally applaud efforts by state regulators to engage stakeholders in implementing natural resource management solutions, we find the proposed "Watershed Groups" concept in the Draft Policy to be fatally flawed. According to the Draft Policy, diverters may form a "Watershed Group" and together negotiate with the Water Board a group compliance arrangement. The concept of a watershed group that actively participates in the diversion decision, working in unison with each other and state regulators is a worthwhile concept. However, it is imperative that the watershed group be made up of all stakeholders who have interests in the water in the basin including riparian landowners, fisheries advocates, other landowners, and other residents that live in or own property in the basin. The watershed group cannot be limited to diverters, as proposed in the Draft Policy. In addition, procedures must be developed that allow the Water Board to provide oversight to a proposed watershed group process and to adequately analyze solutions proposed by the group process. There appears to be no indication that the Water Board has evaluated such a process or if it is feasible. *(David Katz and Huey Johnson, Resource Renewal Institute; Jane Nielson, Sonoma County Water Coalition)*

Response: Comment noted. Staff will consider this comment when making revisions to the watershed approach provisions of the policy

Comment 19.1.25: RWQCB1 supports the concept of a watershed approach in which diverters can conduct joint analyses to provide a more comprehensive depiction of flow conditions or site specific studies to determine specific protective flow needs. There are details that need to be explored, such as, but not limited to, watershed size, financial assurances of a

watershed group, interagency coordination, and an adaptive management framework to address changes in conditions. *(Catherine Kuhlman, State of California Regional Water Quality Control Board, North Coast Region)*

Response: Comment noted. Staff will consider this comment when making revisions to the watershed approach provisions of the policy

Comment 19.1.26: The Watershed Approach model has some positive aspects - including watershed based analysis and programmed diversion to help maintain higher instream flows. *(Alan Levine, Coastal Action Group)*

Response: Comment noted.

Comment 19.1.27: The Watershed Analysis and program development will take years to complete. What happens to the majority of instream diversions that are currently unlicensed and those that are stream migration blockers in the interim? The policy needs to address this issue. *(Alan Levine, Coastal Action Group)*

Response: Section 12.6 of the Draft Policy states that State Water Board approvals of the watershed group, project charter, and/or the watershed management plan may be retracted if the watershed group does not proceed with preparation of the technical documents in a timely manner.

Comment 19.1.28: The RRWA supports the watershed approach proposed in Section 12 of the Draft Policy to resolve water rights issues and help conserve salmonid species and other beneficial uses, because it will: (1) lead to a comprehensive rather than a piecemeal solution to water rights and habitat issues in the Russian River watershed. A comprehensive solution will more effectively balance competing interests and protect beneficial uses; (2) reduce the cost of necessary studies, applications and possibly facilities in the Russian River watershed and tributaries; and (3) expedite resolution of water rights applications by the State Water Board. *(Jake Mackenzie, Russian River Watershed Association)*

Response: Comment noted.

Comment 19.1.29: An alternative watershed approach for investigating impacts, processing water right applications, and managing water diversions is needed. *(Steven MacRostie, MacRostie Winery and Vineyards)*

Response: Comment noted.

Comment 19.1.30: Policy Page 41 section 12.0 Watershed Approach - the watershed approach should be encouraged so that users can attain a better understanding of the issues and characteristics relating to whole watersheds and not only a section of stream. This should in turn improve the efficiency of managing flows, and avoid or correct for injury to the native ecology as well as other users. *(Elliott Matchett)*

Response: Comment noted.

Comment 19.1.31: For those watersheds where listed species are normally found, encourage the applicants to work with CDFG and NMFS to develop a watershed-based water management plan while providing them with reliable data on the unappropriated water quantity.

Once the plan meets support by these agencies and an application is submitted accordingly, it should be assured of a water right permit. *(Mike Morris, North Bay Agriculture Alliance)*

Response: Comment noted. Staff will consider this comment when making revisions to the watershed approach provisions of the policy

Comment 19.1.32: The watershed approach must comply with all provisions of the Federal ESA and all Federal and State water quality laws. *(Jane Nielson, Sonoma County Water Coalition)*

Response: Comment noted. Environmental review of proposed permits would include consideration of whether the proposed projects are consistent with appropriate Federal and state regulations.

Comment 19.1.33: The watershed approach must be considered only an interim management policy, which has yet to be proved effective. Like an AB 3030 groundwater management plan (specified by CA Department of Water Resources), the watershed approach must be considered a work in progress, open to improvements as data show progress or lack of it. *(Jane Nielson, Sonoma County Water Coalition)*

Response: This Policy will be adopted by the State Water Board as a state policy for water quality control. Water Code Section 13143 states that state policy for water quality control shall be periodically reviewed and may be revised.

Comment 19.1.34: We support the idea of using a watershed approach to evaluate and govern water diversions. The watershed approach may provide a platform for policy adaptation and flexibility as well as a way to incorporate all stakeholder opinions. However, we do not support a monitoring program dependent on self-monitoring of diversions. *(Robert Pennington, Community Clean Water Institute)*

Response: Comment noted.

Comment 19.1.35: The watershed approach appears to be an efficient method to comply with the proposed Policy and will bring stakeholders together, as has been done under the State's Integrated Watershed Management Plans, and as contemplated under the Farm Bill's Regional Watershed Enhancement Program. *(Ron Roller, Sotoyome Resource Conservation District)*

Response: Comment noted.

Comment 19.1.36: The watershed group's Watershed Plan could also include how the proposed management measures are designed to accomplish specific regulatory permitting needs, particularly for the Endangered Species Act, California Fish and Game requirements including CESA and Fish and Game Code 1600, Regional Water Quality Control Board water quality requirements, and possibly others. Obtaining regulatory assurances and certainty are appropriate goals to include in the Management Plan. *(NA, Salmonid Coalition)*

Response: Comment noted. Staff will consider this comment when making revisions to the watershed approach provisions of the policy

Comment 19.1.37: Watershed groups should work with regulatory agencies, including NOAA Fisheries, US Army Corps of Engineers, Department of Fish and Game, California Water

Resource Control Board, and the North Coast Regional Water Quality Control Board to obtain regulatory approvals, assurances and/or permits under the ESA and CESA and state and federal water quality laws and regulations, including an incidental take statement and consistency determination, and to obtain funding for watershed improvement activities. *(NA, Salmonid Coalition)*

Response: Comment noted. Staff will consider this comment when making revisions to the watershed approach provisions of the policy

Comment 19.1.38: With the existing flow impairments caused by the entrenchment of the main Russian and Napa rivers, release operations by large main stem reservoirs and natural geologic and topographic limitations to connected stream flow, a watershed-based methodology is needed. Many of the farmers in the Fish Friendly Farming program have pending rights applications and are working with us [California Land Stewardship Institute] to formulate pilot watershed projects. Our organization is also currently working with the Farm Bureau and Wine Institute in developing a watershed-based hydrologic and geomorphic analysis of a number of tributaries in the Russian River in Mendocino County and the Napa River in Napa County including the development of pilot projects. The pilot projects would provide documentation of actual flow conditions to use in evaluating the effects of pending applications on the timing and volume of instream flows, measures to provide necessary bypass flow levels and to determine other methods to implement improved fish habitat conditions for in-migration and spawning. (Methodology included in comment letter and Appendices) We believe that by evaluating instream flows in a real world context, we can better determine how to revise diversions to produce the conditions needed for salmonid habitat. We will also be able to demonstrate other changes that need to be made to the larger watershed and river channel/ large reservoirs. *(Beverly Wasson, California Land Stewardship Institute)*

Response: Comment noted.

Topic 19.2 Watershed Approach - Definition of a Watershed Group

Comment 19.2.1: The "Watershed Approach" outlined on page 41 reflects the need to address water holistically. We support watershed-based management of water quality and flows. However, the definition of "Watershed Group" should be changed to allow and ensure the involvement of interested stakeholders and environmental groups other than diverters in management decisions. It is necessary to include groups whose mission is the protection of public trust resources to, at a minimum, assist the understaffed SWRCB in overseeing public trust management. The Policy should also flesh out the monitoring requirements for Watershed Groups and require continuous monitoring with instantaneous transmittal of data. *(Joshua Basofin, Defenders of Wildlife; Don McEnhill, Russian Riverkeeper; and Linda Sheehan, California Coastkeeper Alliance)*

Response: Comment noted. Staff will consider this comment when making revisions to the watershed approach provisions of the policy

Comment 19.2.2: NMFS supports in principal the proposed policy's alternative watershed approach in which a watershed group forms to address mutual water supply and water right permitting issues while protecting the environment and public trust resources. However, this approach needs substantial additional definition and boundaries. The Russian River and Napa Rivers are themselves watersheds with huge numbers of existing and pending water right

permits. A proposed group to address water rights throughout either of these large watersheds would be untenable. The size of a watershed must be limited for it to qualify for the watershed approach. *(Dick Butler, US National Marine Fisheries Service)*

Response: Comment noted. Staff will consider this comment when making revisions to the watershed approach provisions of the policy

Comment 19.2.3: In the watershed approach section of the policy, consider limiting the minimum percentage of the watershed area that is influenced by that group, or perhaps some minimum percentage of participating landowners in the watershed might be stipulated. Several landowners could pool resources and collaborate effectively in addressing instream flow needs for a watershed even though they represent a minority of the landowners within that watershed. Some criteria should be developed and applied to ensure that a watershed group has the capacity to effectively address historic water use and instream flow needs for fisheries throughout the subject watershed. *(Dick Butler, US National Marine Fisheries Service)*

Response: Comment noted. Staff will consider this comment when making revisions to the watershed approach provisions of the policy

Comment 19.2.4: The criteria for defining a watershed group need to be refined. Is there a minimum group size? How many groups can form in any watershed? What constitutes a watershed? *(Eric Goldsmith, Sanctuary Forest)*

Response: Comment noted. Staff will consider this comment when making revisions to the watershed approach provisions of the policy

Comment 19.2.5: Policy Section 12.1 provides that a watershed group is a group of diverters in a watershed who enter into a formal agreement to manage the water resources of a watershed. (Draft Policy, p. 41.) We support this definition. We recommend that the Final Policy further elaborate on the eligibility requirements, which plainly must be more than the mere existence of such a formal agreement. *(Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society)*

Response: Comment noted. The commenter clarified this comment in the Draft Joint Recommendations, dated April 30, 2009. Responses to these comments are provided in a separate document.

Comment 19.2.6: The Salmon Coalition proposes that participants in a watershed group could be identified by presenting results of preliminary regional analyses to water users in the area and by inviting participation from a coalition of water users in streams most likely to benefit from a Watershed Approach to maximize beneficial uses and instream flows. *(NA, Salmonid Coalition)*

Response: Comment noted. Staff will consider this comment when making revisions to the watershed approach provisions of the policy

Comment 19.2.7: The Policy proposes to use Watershed Groups to fund studies, assess flow availability, and mitigate all problems related to diversions, but these groups are defined as "a group of diverters in a watershed who enter into a formal agreement to effectively manage the water resources." In other words, the SWRCB wants to turn water allocation over to diverters! *(Jay Halcomb et al, Sierra Club Redwood Chapter; Patrick Higgins, Consulting Fisheries)*

Biologist/Sierra Club Redwood Chapter; NA, Sierra Club Redwood Chapter)

Response: Comment noted.

Topic 19.3 Watershed Approach - Project Charter

Comment 19.3.1: Provide that the goals for a Watershed Group include coordinated implementation of mitigation measures as well as operations, unless the Project Charter demonstrates that a more limited scope will be sufficient to achieve the overall purpose (stated in Policy Section 12.1) of effective management of water resources and protection of environmental quality. *(Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society)*

Response: Comment noted. Staff will consider this comment when making revisions to the watershed approach provisions of the policy.

Topic 19.4 Watershed Approach - Watershed Management Plan

Comment 19.4.1: NMFS recommends that the watershed approach include a reasonable time schedule for the conduct of studies, and the development and approval of those studies by SWRCB, in order to ensure due diligence. *(Dick Butler, US National Marine Fisheries Service)*

Response: Comment noted. Staff will consider this comment when making revisions to the watershed approach provisions of the policy

Comment 19.4.2: Given the unique nature of the watershed approach to addressing water right permits, NMFS recommends that DFG be consulted throughout the process of identifying seasons of diversion, cumulative rates of diversion, and minimum bypass flows for all projects evaluated by the watershed group. DFG should be consulted on matters related to study scopes before they are executed, and the results and interpretation of those studies following their completion. Given the responsibility of DFG as trustee of the state's natural resources, NMFS recommends that DFG be provided opportunity to comment on proposed study designs and study results as the assessments by a watershed group progress. NMFS could assist in that review, if needed. *(Dick Butler, US National Marine Fisheries Service)*

Response: Comment noted. Staff will consider this comment when making revisions to the watershed approach provisions of the policy

Comment 19.4.3: As recommended above, coordinated operations should be the rule, not the exception, for a watershed group and thus for the plan scope. As stated in our comments on Section 8, the monitoring should address habitat conditions affected by the diversions, not just compliance with bypass and other requirements of the terms and conditions. Further, the plan should specify reporting not just for new permits, but for all diversions included in the membership. It should also include provisions for internal governance and dispute resolution. The Policy should require that the watershed management plan include: (i) provision for coordinated operations, unless the Project Charter demonstrates that a more limited scope will achieve the purposes stated in Policy section 12.1; (ii) objectives for flow and other habitat conditions to be monitored, (iii) specific reporting procedures for all diversions included in membership, not just new permits; and (iv) provisions for governance and dispute resolution. *(Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National*

Audubon Society)

Response: Comment noted. Staff will consider this comment when making revisions to the watershed approach provisions of the policy

Comment 19.4.4: Procedures must be developed that allow the Water Board to provide oversight to a proposed watershed group process and to adequately analyze solutions proposed by the group process. There appears to be no indication that the Water Board has evaluated such a process or if it is feasible. *(David Katz and Huey Johnson, Resource Renewal Institute)*

Response: Comment noted. Staff will consider this comment when making revisions to the watershed approach provisions of the policy

Comment 19.4.5: DFG recommends provisions be added to Policy Section 12.0 (Watershed Approach) to include both 1) a requirement for a reasonable time schedule to ensure due diligence, approved by the State Water Board; and 2) language clarifying a reasonable number, or percentage, of participants within the watershed *(Donald Koch, State of California Department of Fish and Game)*

Response: Comment noted. Staff will consider this comment when making revisions to the watershed approach provisions of the policy

Comment 19.4.6: The watershed approach implementation must be based on known and ongoing pilot projects, which have collected significant data for salmon-supporting streams in the local area. Such data include: locally-recorded rainfall levels throughout the year; river and stream gauge records throughout the year, collected by USGS and(or) watershed/Ecology Center/academic research groups; total, volume and locations of river diversions; positions and extents of river barriers; groundwater levels measured in monitoring wells; and estimates of groundwater pumping levels. Also important are all data obtained by any agency of the Federal, State, or County government, or by academic programs, on the proportion and distribution of different land uses: the proportion of soil types and their erosion potentials (based on degree of slopes); and the proportion of undisturbed natural lands in each watershed. Other data types may be added. *(Jane Nielson, Sonoma County Water Coalition)*

Response: Comment noted.

Comment 19.4.7: For watershed approach implementation, any collected data must also have record of collection dates and locations so that diversion and river levels can be related, for example, and compared with salmon population and life cycle data. The data shall be used to calculate a water budget for each watershed, and also to improve calculated model parameters, such as bypass flows, minimum bypass flow and maximum cumulative diversion-as long as those concepts continue to be relied upon in determining stream flow levels. *(Jane Nielson, Sonoma County Water Coalition)*

Response: Comment noted.

Comment 19.4.8: The Salmon Coalition and other stakeholders suggest engaging in a three-part work plan to develop a watershed management plan: (1) perform a regional analysis to identify particular watersheds where the Watershed Approach will be most beneficial for meeting instream and agricultural water needs; (2) share analyses with water users to discuss

most beneficial locations for action; and (3) develop a Project Charter to specifically identify the means through which water will be managed in the watershed to meet agricultural needs and maintain instream flows. *(NA, Salmonid Coalition)*

Response: Comment noted. This analysis approach would be consistent with the watershed approach provisions of the policy.

Comment 19.4.9: The Salmon Coalition proposes conducting a regional-scale analysis to identify locations where a Watershed Approach would most benefit instream flows and fish using a GIS model to determine stream characteristics (water quality, water quantity, substrate quality, access to historic salmon habitat, channel complexity, and riparian quality), existing barriers to fish migration, water use, unimpaired daily stream flow, and annual discharge. Flow conditions for important salmonid life history stages for key points along the stream would be compared to the data collected in the GIS. *(NA, Salmonid Coalition)*

Response: Comment noted. This analysis approach would be consistent with the watershed approach provisions of the policy.

Comment 19.4.10: The Salmon Coalition recommends obtaining the following information for developing a watershed-specific Watershed Management Plan. (1) On the ground studies to determine the extent of habitat and instream flow needs for salmonids and salmonid habitat (including but not limited to the flow required for salmonids to migrate upstream) in many reaches in the watershed; (2) Measurement of the flow regime at different points in the watershed, and the frequencies and durations of instream flows at each location using stream flow gauges; (3) Growers' actual irrigation needs per acre and frost protection needs and actual reservoir volumes; and (4) Possible locations for reservoirs and points of diversion, in consultation with the growers. This data could be utilized to develop, or improve upon an existing, GIS model for cumulative water demand to determine how the proposed actions would mitigate cumulative water demand during the growing season; and to determine how proposed reservoirs and diversions affect streamflow through the drainage network at daily and annual scales for a normal and dry-type year, as described above, as per Draft Policy section A.5.1. The GIS model could also be used to evaluate effects of the proposed diversions (a) on senior right holders (as per Draft Policy sections A.5.4 - A.5.6); and (b) on instream flows, with particular attention to regional criteria and watershed-specific needs (Draft Policy sections A.5.7, A.5.8). The data could also be used to evaluate additional actions that might be taken to increase stream habitat value, such as removing instream barriers and increasing riparian shading. *(NA, Salmonid Coalition)*

Response: Comment noted. This analysis approach would be consistent with the watershed approach provisions of the policy.

Comment 19.4.11: Watershed groups should develop a coordinated Water Resources Watershed Management Plan that details a process for operation, maintenance, and monitoring water use, as well as detailing the monitoring, reporting, activities (such as BMPs, habitat improvements) and implementation schedule for achieving project objectives. It should also include management practices developed in consultation with private landowners that protect fisheries needs and are land use specific (NOAA Fisheries is developing practices for the group at this time). *(NA, Salmonid Coalition)*

Response: Comment noted. This is consistent with the watershed approach provisions of the policy.

Topic 19.5 Watershed Approach - Bioassessment

Comment 19.5.1: Section 12.5 Water Right Permit and License Terms

The Policy requires a special term in water right permits and licenses issued to members of a watershed group, which would require the performance of a biological assessment every five years to evaluate the condition of the fish and fish habitat in the watershed. This is an extremely burdensome requirement, and is not necessary. If minimum flows are being met, no further biological assessment should be required. (*Barbara Brenner*)

Response: Comment noted. See response to 19.5.5.

Comment 19.5.2: Section 12.6 Retraction of State Water Board Approvals

If the biological assessments required for watershed group permit holders show a decline in fish population or degradation of fish habitat, the Policy allows the Board to retract its approval of the watershed group. This policy is also too broad. The Policy should require a nexus between the diversions of the watershed group and any resulting decline in fish population. As written, the Policy would allow the Board to revoke approval of the watershed group even if the decline in fish population is due to causes completely unrelated from diversions or other activities of the watershed group. (*Barbara Brenner*)

Response: Comment noted. See response to 19.5.5.

Comment 19.5.3: As any "Watershed Approach", or group process, is subject to a mitigation and monitoring and reporting scheme, where the mitigating conditions may, or may not be accurate, such an adaptive management process indicates the need for periodic review. This review period should be, at a minimum, 5 years. (*Alan Levine, Coastal Action Group*)

Response: Comment noted. See response to 19.5.5.

Comment 19.5.4: Section 12.5 of the Draft Policy provides that a special term will require a biological assessment every five years to evaluate the condition of fish and fish habitat in the watershed. (Draft Policy, pp. 42-43.) We support this requirement. As stated above, we also recommend that the water management plan be required to propose and the special term specify, the objectives for fishery and habitat condition, as well as the methods to monitor and assess whether these objective are being achieved. (*Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society*)

Response: Comment noted. See response to 19.5.5.

Comment 19.5.5: The success of the watershed approach must be monitoring and evaluated using as criteria the number of redds for critical stream reaches, population sizes of steelhead-salmon smolts reaching the sea, the populations of returning fish, timing of opening for rivermouth bars on smaller streams to let smolts enter the sea, etc. (*Jane Nielson, Sonoma County Water Coalition*)

Response: It should be noted that any parameter measured as part of effectiveness monitoring should have the clearest linkage possible to evaluating effects of the watershed approach. If a linkage cannot be articulated in clear, concrete terms, then it is unlikely that a decision can be made upon which to change the watershed approach. It is one thing to measure something, it is another to make a decision based on the measurement, and this

principle should guide development of any monitoring plan. It is difficult to link changes in production to one action (e.g., instream flow protection) when there are multiple confounding factors. In addition, the characteristic generational lifecycle of salmon and steelhead is on the order of 5 years, and populations may exhibit adaptations to changed environmental conditions over a minimum of 4-5 generations. For these reasons, staff is reconsidering the provision in section 12.5 of the Draft Policy requiring a biological assessment every 5 years after a water right permit is issued. Water right permits already are required to contain standard permit terms stating that all rights and privileges, including method of diversion, method of use, and quantity of water diverted, are subject to the continuing authority of the State Water Board in accordance with law and in the interest of the public welfare to protect public trust uses and to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion. The continuing authority of the State Water Board also may be exercised by imposing further limitations on the diversion and use of water by the permittee in order to protect public trust uses. The State Water Board's exercise of these authorities may require public notice and an opportunity for hearing.

Comment 19.5.6: Monitoring in a watershed approach should consist of stream health indicators. Monitoring of stream health indicators should include collection and compilation of data including, but not limited to, discharge records, rainfall records, population of redds in critical streams, steelhead and salmon smolts reaching the sea, returning fish populations, and the opening of rivermouth bars in smaller streams. Groundwater levels, as obtained from monitoring wells and estimates of groundwater pumping, the types of nearby land usage and soil types - and their erosion potentials - as well as the proportion of undeveloped land within the watershed. *(Robert Pennington, Community Clean Water Institute)*

Response: See response to 19.5.5.

Comment 19.5.7: We stress that the watershed approach must be adaptable and based on achievable and quantifiable goals. There must be sufficient monitoring and analysis to assess if goals are met. If goals are not met then the policy must be adapted to achieve these goals. In this way the approval of a diversion permit must be considered provisional and subject to the achievement of set goals *(Robert Pennington, Community Clean Water Institute)*

Response: Water right permits contain standard permit terms stating that all rights and privileges, including method of diversion, method of use, and quantity of water diverted, are subject to the continuing authority of the State Water Board in accordance with law and in the interest of the public welfare to protect public trust uses and to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion. The continuing authority of the State Water Board also may be exercised by imposing further limitations on the diversion and use of water by the permittee in order to protect public trust uses. The State Water Board's exercise of these authorities may require public notice and an opportunity for hearing.

Topic 19.6 Watershed Approach - Water Right Permit Terms

Comment 19.6.1: Watershed groups: Water right permit and license terms must be a part of each diverters individual permit. Consideration of default, or necessary conditions to mitigate, conditions and terms must be in place if there is failure to attain "group" objectives. *(Alan Levine, Coastal Action Group)*

Response: See response to 19.6.3.

Comment 19.6.2: Diverters may form a "Watershed Group" and together negotiate with the Water Board a group compliance arrangement. We believe that individual responsibility for compliance would be lost in an as yet undefined group process. Diverters who have chosen in the past to openly disobey the law, may well use the opportunity to obfuscate and delay compliance. The fox would now be in charge of the hen house and would periodically report to the Division that the chickens are all fine. *(Jay Halcomb, Diane Beck, and Daniel Myers, Sierra Club Redwood Chapter; David Katz and Huey Johnson, Resource Renewal Institute)*

Response: See response to 19.6.3.

Comment 19.6.3: A watershed approach, if adopted by the Final Policy, will implement and may not amend the Water Code and existing rules. As a result, the State Water Board may grant a permit under this approach only in compliance with the minimum requirements for such approval, including findings that water is available for appropriation by the applicant, and that the diversion as mitigated will protect other beneficial uses of the affected water. Further, the State Water Board must comply with the California Environmental Quality Act in making its decision on the application. As a result, the watershed approach does not change the individual nature of the permit, or the individual obligation to comply with the permit terms and conditions. Instead, the approach has two potential benefits. First, it will encourage permit applicants to cooperate in the environmental reviews and hearings on their applications. Second, it will authorize the new permittees to cooperate with existing diverters to jointly manage their diversions, mitigation measures, or both. It is recommended that a statement be added to section 12 of the Draft Policy recognizing that a right issued under watershed approach is individual to the diverter. *(Dick Butler, US National Marine Fisheries Service; Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society; Alan Levine, Coastal Action Group; Thomas Weseloh, California Trout Keeper of the Streams)*

Response: Comment noted. Staff will consider this suggestion when developing modifications to the Watershed Approach provisions of the Draft Policy.

Comment 19.6.4: Section 12.5 of the Draft Policy provides that a permit or license for a diversion under a Project Charter will include a special term for assessing the effectiveness of the watershed management plan in meeting the requirements of the policy. (Draft Policy, p. 42.) We believe that it should also include a special term regarding coordinated operations which will occur as long as the Project Charter is in effect. For example, a term for minimum flows on a stream could be stated in the alternative: X cfs at the POD if the diversion is operated on a stand-alone basis (e.g., if the Project Charter is retracted under Section 12.6), or a specified range of variance around Y cfs at another location, in coordination with other diversions (e.g., as long as the charter is in effect). *(Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society)*

Response: Comment noted. Staff will consider this suggestion when developing modifications to the Watershed Approach provisions of the Draft Policy.

Comment 19.6.5: It is imperative that neither the compliance nor effectiveness monitoring be waived for diversions under a watershed approach and that additional environmental review, protective terms, and a required adaptive management component be included prior to permitting diversions. *(Donald Koch, State of California Department of Fish and Game)*

Response: Comment noted. Environmental review is required in the water right permitting process. Water right permits include permit terms addressing the operation of the diversion, including monitoring and reporting of diversion amounts.

Comment 19.6.6: The watershed approach concept in the Draft Policy must not repeat the fatal error of the Ag Waiver program in the Central Valley. The central institutional flaw of the Ag Waiver program was to allow monitoring at the downstream end of a group of water users, with a tiered response that requires added monitoring if a problem at the downstream end is discovered. However, when problems have been detected, the next tier has not been implemented to determine the source or sources of problems. Rather, the water user group has acted as an established lobbying force to change the criteria by which problems are identified, a source of delay, a vocal opponent of needed expenditures to determine culpability. The simplest and most basic measure that can be taken to prevent this when implementing the watershed concept in the Draft Policy is to require that gaging be done for each individual diversion within a watershed group, and the group must be held accountable collectively for gaging failures or reporting failures by each of its members. Individual responsibility must be assignable, not after a problem is identified, but as soon as a problem is identified. *(Chris Shutes, California Sportfishing Protection Alliance)*

Response: Individual water right permits would address this concern. Staff will consider whether individual permitting in the watershed approach should be made a requirement.

Topic 19.7 Watershed Approach - Retraction of SWRCB Approvals

Comment 19.7.1: Section 12.6 of the Draft Policy provides that the State Water Board may retract its approval of the Project Charter and related documents, if the tasks (whether preparation of technical documents, or implementation of special) are not being timely or adequately performed. We recommend that the State Water Board use a range of procedures, including ACLs, to address and correct such non-performance. Retraction may be an unnecessary or counterproductive remedy for unintentional and infrequent non-performance. *(Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society)*

Response: Comment noted. Staff will consider this comment when making revisions to the watershed approach provisions of the policy.

Topic 19.8 Watershed Approach - Salmon Coalition Proposal

Comment 19.8.1: The proposed policy attempts to prescribe methods to maintain instream flows, applying a single approach to all streams in the 5 Northern California Counties. We feel the generic approach proposed will be costly to implement and may not address the water rights backlog that currently exists. The watershed approach alternative is one we have been pursuing in Sonoma County for two years. The group is called the Salmon Coalition and includes landowners, regulatory agency representatives and environmental groups. We have relied on research by Dr. Adina Merenlender and her team to model stream flows in order to determine when and how much water might be diverted during peak winter flows in order to reduce direct appropriation of water for irrigating vineyards from streams in the summer. The group has also surveyed streams and prioritized projects that will remove barriers and improve fish habitat. We feel such stream-specific and local initiatives for a watershed approach to managing instream flows is superior to the generic alternative outlined in your proposed policy. *(Nick Frey, Sonoma County Winegrape Commission)*

Response: Comment noted.

Comment 19.8.2: The Sonoma County Winegrape Commission represents nearly 1800 vineyard owners in Sonoma and Marin Counties. We have been actively involved in developing a watershed approach for managing instream flows in Sonoma County. We feel this approach can address existing problems in obtaining water rights and in protecting threatened and endangered species of fish. The current water rights process is not working to the detriment of landowners and the fish. We ask that Sonoma County be supported in its efforts to implement a watershed approach to water rights that will serve agriculture and better manage instream flows that support salmonid recovery in Sonoma County streams. The approach is adaptable to other watersheds in other California counties. *(Nick Frey, Sonoma County Winegrape Commission)*

Response: Comment noted.

Comment 19.8.3: In the Dry Creek, Alexander and Knights Valleys of Sonoma County many of the growers that we represent are participating in a collaborative process, the Sonoma County Salmon Coalition. The Salmon Coalition promotes all the above. Working with Dr. Merenlender, UC Berkeley Cooperative Extension, and Dr. Deitch, this group has supported the development of their spatially explicit GIS model that details demand and supply. Along with NMFS and DFG the Coalition is in the process of reviewing and developing best management practices applicable to the agriculture producers land use activities. As part of the Salmon Coalition many of our members have worked with federal and state agencies responsible for managing fisheries and water resources in identifying restoration and enhancement projects. Once implemented, these projects will contribute to recovery of fisheries and stream flow in many of our streams. *(Nick Frey, Sonoma County Winegrape Commission)*

Response: Comment noted.

Comment 19.8.4: The principal advocates who have generated this [watershed approach] alternative were Robert Anderson, the Executive Director of the Sonoma County Winegrowers, Wagner and Bonsignore design consultants for many of the dams in questions, and their attorneys. Those "winegrowers" they represent have a vested economic interest in reducing the costs to correct the problems of their illegal dams. Based upon the past conduct and financial interests of those who knowingly violated the water rights laws, we do not believe they should be entrusted to voluntarily correct the situation. *(Jay Halcomb, Diane Beck, and Daniel Myers, Sierra Club Redwood Chapter)*

Response: Comment noted.

Comment 19.8.5: RWQCB1 supports the Sonoma County Salmonid Coalition's collaborative approach to water rights permitting using a watershed approach which includes selecting a target watershed, assessing instream flow needs, and developing a water management plan. *(Catherine Kuhlman, State of California Regional Water Quality Control Board, North Coast Region; Jake Mackenzie, Russian River Watershed Association; Jake Mackenzie, Water Advisory Committee)*

Response: Comment noted.

Comment 19.8.6: Coordinative efforts associated with the Salmon Coalition are not yet evident. Watershed Approach planning efforts are subject to policy set under AB 2121 (Please review comments on this subject in the Coastal Action Group comments). In general there is a problem with agricultural use in the Dry Creek and Russian River basin that needs resolution. Desired outcomes are, in part, dependent on how the final application of the Policy to Maintain Instream Flows is resolved. *(Alan Levine, Coastal Action Group)*

Response: Comment noted.

Comment 19.8.7: In the case of one proposed pilot project involving Sonoma County participants (from a group known as the Sonoma County Salmon Coalition), it appears that their co-operation and participation is based on their need for anonymity with near stream ground water use diversion and privately hired studies to be excluded from public view and held as proprietary information and they are counting on group diversion permitting that would inhibit focus on any single diverter. First, group licensing or permitting is inconsistent with the California Water Code. Second, all relevant information must be included in analysis for CEQA review that is necessary under the Watershed Approach. Private and secret planning is not an option. Any programs and policy that would keep information needed for determinations secret are programs or policy that is very unlikely to deliver the intended results. *(Alan Levine, Coastal Action Group)*

Response: Comment noted. Staff will consider whether individual permitting in the watershed approach should be made a requirement. Environmental review is required in the water right permitting process. All State Water Board records are open to the public. Any analysis supporting the proposed permit that has been submitted to the Division is part of the public record and a copy can be requested.

Comment 19.8.8: Commenter endorses comments by Sonoma County Water Coalition in their letter dated April 29, 2008 to the State Water Board.. *(NA, Maacama Watershed Alliance)*

Response: Comment noted.

Comment 19.8.9: The Sonoma County Salmonid Coalition (Coalition) is made up of the federal and state agencies with jurisdiction over water quality and endangered species issues, local governments, private landowners, trade associations, and NGO's. Participation in the Coalition has provided all parties a better understanding of the inter-relatedness of Salmonid needs, agricultural needs and potable water supply needs for our region. We recognize that urban representatives need to work closely with agricultural producers to develop a watershed approach to improve the health of our fisheries and maintain a vital economy. The watershed approach appears to be an efficient method to comply with the proposed Policy and will bring stakeholders together, as has been done under the States Integrated Watershed Management Plans, and as contemplated under the Farm Bills Regional Watershed Enhancement Program. *(Jake Mackenzie, Water Advisory Committee)*

Response: Comment noted.

Comment 19.8.10: The Commenter and its member organizations have chosen not to participate and otherwise legitimize the Salmon Coalition's process. The Commenter is concerned that the Salmon Coalition wants to give the appearance of an environmental protection and sustainability coalition that includes all "stakeholders." In truth, we feel that it falls far short of this representation, and actually is an alliance of industry and property rights

groups, such as the Russian River Property Owners Association, which do not represent public interests. In our experience, such processes, conceived and managed by those having a "property rights" biased agenda - including many Salmon Coalition members - have produced unsatisfactory outcomes for water and biotic resources. (NA, Maacama Watershed Alliance; Jane Nielson, Sonoma County Water Coalition)

Response: Comment noted. Other commenters also noted the watershed group should be required to include non-diverters. Staff will consider adding provisions to address this concern.

Comment 19.8.11: The Commenter fears that in the Policy the State Water Board may make the kind of allowances proposed by the Salmon Coalition. The following partial list of Salmon Coalition goals are especially disconcerting: (1) Granting of Incidental Take Permits for Endangered Species to landowners; (2) Granting of Incidental Take protection for the purpose of manipulating riparian zones and instream flows, for stream channel maintenance, and the use of recycled water for agriculture; (3) Granting a degree of control over Coyote Dam releases to some coalition members; (4) Retention of existing agricultural diversions; (5) Approval of permits for water storage impoundment, including existing non-permitted (illegal) impoundments, and protection for diversion and storage rights; and (6) Pre-approval for ESA Section 7 Biologic Opinions on projects handled by NRCS. The Commenter also has been reviewing the State Water Resources Control Board's draft Policy for Maintaining Instream Flows in Northern California Coastal Streams, and fears that the Board might make the kinds of allowances proposed by the Salmon Coalition. In contract, the Commenter supports strict adherence to regulations for maintaining stream flows required to support salmonids. (Jane Nielson, Sonoma County Water Coalition)

Response: Comment noted. Section 12.0 of the Draft Policy requires proposed watershed management approaches to be consistent with the principles for maintaining instream flows provided in section 2.2.

Comment 19.8.12: The Sonoma County Water Coalition (SCWC) rejects the notion that the limited participation of some environmental groups reflects a consensus as to what is required for fish recovery. Until the Salmon Coalition demonstrates an intent to adopt the necessary elements for recovery of fish populations, SCWC cannot participate in or support its process. We therefore ask you to insist that Salmon Coalition members subscribe to full oversight and enforcement of all laws pertaining to Federal & State Clean Water Acts & Endangered Species Acts. (Jane Nielson, Sonoma County Water Coalition)

Response: Comment noted. Environmental review of proposed permits would include consideration of whether the proposed projects are consistent with appropriate Federal and state regulations.

Comment 19.8.13: Please give careful scrutiny to any applications for restoration money or Salmon Coalition projects. We strongly urge the use of taxpayer dollars to fund public agency staff for conservation and enforcement duties. Taxpayer monies released to private stakeholder groups must be tied to results associated with maintaining and increasing instream flows, enhancing habitat values, and increasing population of threatened and endangered aquatic species for the good of the general public and protection of public trust resources. (Jane Nielson, Sonoma County Water Coalition)

Response: Comment noted.

Comment 19.8.14: The Sotoyome Resource Conservation District (SRCD) is a cooperator in and supports Salmonid Coalition efforts in watershed approach. (*Ron Rolleri, Sotoyome Resource Conservation District*)

Response: Comment noted.

Comment 19.8.15: A truly effective instream flows policy should also, at a minimum... encourage and incentivize collective, watershed-based approaches to instream flow management similar to the watershed approach detailed in the comment letter from the Sonoma County Salmonid Coalition. (*Leonard Stein, Jackson Family Investments, LLC*)

Response: Section 12.0 of the Draft Policy contains provisions for watershed approaches.

Comment 19.8.16: We also agree with and support the separate comments of the Sonoma County Salmonid Coalition (on which our affiliate, Jackson Family Wines, Inc., is a co-signatory), which propose the adoption of a watershed alternative to protect salmonids in the Alexander Valley, Dry Creek and Knights Valleys of Sonoma County in lieu of the Proposed Policy (*Leonard Stein, Jackson Family Investments, LLC*)

Response: Comment noted.

Comment 19.8.17: The central goal of the Salmonid Coalition Watershed Approach Work Plan is to develop projects to restore ecological flows and provide increase water security for rural agriculture. The purpose of Salmonid Coalition Watershed Approach Work Plan is to establish water management solutions to improve water supply reliability and maintain instream flows for fish. (*NA, Salmonid Coalition*)

Response: Comment noted.

Comment 19.8.18: The commenter submitted a report titled "Draft Habitat Restoration and Conservation Plan for Anadromous Salmonid Habitat in Selected Tributaries of the Russian River Basin, November 16, 2007", which provides assessment of current habitat conditions and habitat restoration priorities in 12 streams in Alexander, Dry Creek and Knights Valleys based on 4 Fundamental Habitat Factors (FHF): channel complexity, substrate quality, riparian quality, and unimpeded access to historic habitat. (*NA, Salmonid Coalition*)

Response: Comment noted.

20.0 Case by Case Exceptions

Comment 20.0.1: The Draft Policy's case-by-case exceptions to policy provisions seem complete. Again - this is a CEQA based process with public and responsible agency notice and review and comment provisions. (*Alan Levine, Coastal Action Group*)

Response: Comment noted.

Comment 20.0.2: Policy Section 13.0 (Case-By Case Exceptions): DFG recognizes that under specific circumstances, exceptions to the Policy may be appropriate. However, the Policy should be applicable in most circumstances and requests for exceptions should be carefully examined and each proposal supported by scientific evidence based on the best available science that demonstrates no degradation to the fish and wildlife resources and the

public interest will be served if the exception is granted. Any proposal for case-by-case exceptions should be considered under CEQA and evaluated by State Water Board in consultation with DFG and other trustee agencies prior to a public meeting and recommendation for actions by the State Water Board. *(Donald Koch, State of California Department of Fish and Game)*

Response: The case-by-case exceptions provisions pertain to requests for exception to policy provisions that are not flow-related. Policy section 13.0 already requires approvals of case-by-case exceptions to granted at a meeting of the State Water Board.

Comment 20.0.3: DFG further recommends that projects that are inconsistent with the biological recommendations in the Task 3 Report should be evaluated under Policy Section 13 as a Case-by-Case Exception to the Policy Provisions. DFG also states that any approval of case-by-case exceptions involving the biological recommendations of the Task 3 Report should receive concurrence from DFG to ensure that projects authorized by the State Water Board are consistent with Fish and Game code sections 5931, 5933, and 5937. *(Donald Koch, State of California Department of Fish and Game)*

Response: This comment seems related to approvals of site specific studies and site specific flow-related criteria recommendations. The case-by-case exceptions provisions pertain to requests for exception to policy provisions that are not flow-related. Staff will consider these comments when revising the site specific studies section of the Draft Policy.

21.0 Cost of Compliance

Comment 21.0.1: Your proposal requires that approximately 1,800 ponds, in the five counties that are affected by these regulations, be required to construct large channels to bypass a substantial percentage of water flowing to each pond, or to put in a system to put a substantial amount of water back into the Class I, II, or III stream that it came from. If each of these projects averaged only \$150,000 the total cost would be \$270,000,000. I suspect the cost for your proposal would be many times this conservative estimate. Your proposal will solve little, or nothing, except to impoverish the land owners that own ponds in these counties. *(R. Stuart Bewley, Bewley/Motluk Family Limited Partnership)*

Response: Staff has not prepared a detailed evaluation of the costs for the "approximately 1,800 (unauthorized) ponds" to which the commenter refers, because, as indicated in the Direct Cost Analysis Report, these costs could vary widely from applicant to applicant. The commenter's claim that the estimated costs of compliance for these ponds could average \$150,000 per pond and total \$270,000,000 is neither impossible nor inconsistent with the range of typical costs given in Table 3-6 of the Direct Cost Analysis Report.

Comment 21.0.2: Cost estimates submitted by Draft Policy consultants in various appendices, for everything from application consultants to bypass construction, were unrealistically low even at the time the Draft Policy was released for comment. By the time these rules are implemented, such estimates will be ridiculously low. For the 300 plus applications currently stalled by (often irrelevant) protests, cumulative costs from start to finish will easily exceed \$40-60 million. *(Tim Buckner)*

Response: The Direct Cost Analysis Report provides the bases for the cost estimates for application-related costs and construction-related costs along with the estimated costs. Staff believes that the cost bases are reliable and the resulting cost estimates are reasonable. It is

impossible to predict how these costs may change from the time that the Direct Cost Analysis Report was prepared to the time the Policy is ultimately adopted; however, so far costs have shown little change based on standard price indices. From December 2007, the date of the Direct Cost Analysis Report, to April 2009, consumer prices and construction prices have shown little change. The U.S. Bureau of Labor Statistics Consumer Price Index (CPI), a general measure of consumer prices for goods and services which can be used as a general index of inflation, has increased by 1.5% from December 2007 to April 2009. Engineering News Record's 20-city average Construction Cost Index, a general measure of construction costs, has increased 5.5% from December 2007 to April 2009.

Subsequent to the initial version of the Direct Cost Analysis Report dated December 2007, the State Water Board received several comments from the public asking that the Draft Policy be revised to describe the site-specific study requirements in more detail. After careful consideration, in response to these comments, Staff revised the Policy to describe the site-specific study requirements in more detail. Staff then re-examined the December 2007 Direct Cost Analysis Report to determine whether or not the estimated cost to complete typical a site specific study should be revised to reflect the more detailed study requirements contained in the Policy. Table 3-4 in this Revised Direct Cost Analysis report presents updated estimated costs that reflect the level of effort that would be required to comply with the more detailed site-specific study requirements described in the revised Policy.

The commenter's claim that the estimated aggregated costs could "exceed \$40 million" is noted; however, the commenter did not provide sufficient information to provide a specific response.

Comment 21.0.3: The Policy as written will result in delays in water right processing. When I began to consider purchasing this property the state was 10 to 15 years behind in granting water rights permits, I was aware of AB2121 and expected some type of permitting process to ensue. The complication of this particular draft is absurd, lacking any attempt at simplification, and having all the earmarks of student engineers and biologists short on practical application. Will the majority of applicants, myself included, be required to seek variances, hire consultants, and biologists, and engineers to meet the bypass or diversion rate limitations? Won't this lead to further delays in permit processing due to the complication? In the case of Application 31618, a horse trough float would fix the problem, provide the desired result, and I could do it for a few hundred dollars as opposed to using my granddaughter's college education funds. *(Larry Cadd)*

Response: As proposed, the Draft Policy would allow the State Water Board to consider processing water right applications submitted prior to January 1, 2008 using the DFG-NMFS guidelines. Analysis and studies already completed for this water right application may be considered as part of the documentation in support of the water right application. Proposals for complying with potential permit terms would be considered while the water right application is being processed.

Comment 21.0.4: By focusing on waterflows only, you are neglecting the impact of the policy on people. You will force pond owners to modify or remove existing ponds at disastrous expense. *(John Curry and Janice Crow)*

Response: The analysis and discussion of the impacts of the Policy on the environment, including the human environment, is presented in the SED. The analysis of the potential direct costs to applicants to comply with the Policy is presented in the Direct Cost Analysis Report.

The commenter's concerns regarding the disastrous expense of modifying or removing existing ponds is noted; however, the commenter did not provide sufficient information to provide a more specific response.

Comment 21.0.5: For existing reservoirs, particularly those on Class III watercourses, the sediment bypass requirements and passive system requirements are unrealistic; the environmental impact of constructing the bypass, and the cost of said construction will make these projects infeasible. *(Mark D. Edwards, North Coast Resource Management)*

Response: The Draft Policy proposes that applicants develop mitigation plans for gravel and wood augmentation. Requirements for gravel and wood augmentation will be determined based on the applicant-developed mitigation plan. The level of mitigation required would be based on site-specific conditions described in the mitigation plans.

For new or existing unauthorized dams without pending water right applications, the Policy requires that passive bypass systems be employed to ensure compliance with the flow requirements of the Policy. Upon State Water Board approval, if physical site conditions prevent the construction of a passive bypass system, then the Policy allows a computer-controlled automated bypass system to be employed. Staff believes that passive bypass and automated bypass systems are feasible using modern construction methods and computer-control technologies. The environmental impact of project-specific passive bypass or automated bypass construction would be conducted by the State Water Board or by another lead agency in future project-specific CEQA reviews. Any significant project-specific environmental effects would need to be mitigated to less-than-significant levels.

The commenter expressed concern that the costs to construct bypass structures for existing unauthorized reservoirs to bring them into compliance with policy requirements would make some projects infeasible. As described in the Direct Cost Analysis Report, there are many variables that could affect construction costs, which is why it provided a range of estimated costs to comply with the policy. Construction costs for passive bypass systems could range from \$25,000 to \$175,000 (Direct Cost Report, Table 3-6) depending on site specific conditions.

Comment 21.0.6: The cost and complication of undertaking the studies necessary to apply for an appropriative right constitute a considerable barrier and disincentive to obtaining such rights for conservation or any purpose. Technical documentation supporting the draft policy suggest that the costs of the studies needed to prepare an appropriative right application is approximately \$15,000. Furthermore there are no timelines for the submission and agency response to an application. The result of these proposed new requirements under the draft policy is to create a system whereby only those who can afford the studies and the time to shepherd the application through the process can develop an appropriative right to water. This is an unjust system that creates a form of economic discrimination. Those of modest means should have the same rights to put the public resource of water to beneficial uses as those who are wealthier. *(Eric Goldsmith, Sanctuary Forest; Rudolph Light)*

Response: Water right applicants are required by law to show that there is water available for diversion. This includes accounting for senior water diversions and water that is needed for recreation and preservation and enhancement of fish and wildlife resources. Even without an adopted policy, water right applicants would need to demonstrate water availability. Currently, they have the option of demonstrating this by showing the project complies with the NMFS-DFG Draft Guidelines. Most, if not all, of the hydrologic analysis recommended by the NMFS-

DFG Draft Guidelines would be utilized as part of the analysis requirements for the proposed policy. The NMFS-DFG Draft Guidelines allow for site specific study, so does the proposed Policy. Although the Draft Guidelines did not delineate the biological studies required, staff does not anticipate the costs for site specific biological studies under the Draft Policy to be substantially different than under the NMFS-DFG Draft Guidelines. The Draft Policy requires preparation of mitigation plans, which are not required under the NMFS-DFG Draft Guidelines.

Subsequent to the initial version of the Direct Cost Analysis Report dated December 2007, the State Water Board received several comments from the public asking that the Draft Policy be revised to describe the site-specific study requirements in more detail. After careful consideration, in response to these comments, Staff revised the Policy to describe the site-specific study requirements in more detail. Staff then re-examined the December 2007 Direct Cost Analysis Report to determine whether or not the estimated cost to complete typical a site specific study should be revised to reflect the more detailed study requirements contained in the Policy. Table 3-4 in this Revised Direct Cost Analysis report presents updated estimated costs that reflect the level of effort that would be required to comply with the more detailed site-specific study requirements described in the revised Policy.

By adoption of this policy, the State Water Board does not intend to discriminate against those who lack the finances to comply. By law, the State Water Board is required to adopt a policy to maintain instream flows to protect habitat for fish species that are threatened with extinction. In doing so, the Board is required to consider balancing the needs of the water users against the needs of natural resources. Staff has developed a policy that contains provisions allowing a water right applicant to either utilize numeric criteria that staff believe will be protective of fish habitat, or to pay for additional biological studies to develop protective site specific criteria that may increase the amount of water the applicant could divert. If the applicant receives adequate water yield through use of the numeric criteria, staff does not anticipate the applicant would have a need to pay for additional biological studies.

Staff notes the concern regarding timelines for submission of reports and agencies responses to water right applications, and will consider these concerns when making revisions to the Draft Policy.

Comment 21.0.7: The March 31 end date is too early for residents to stop diverting water. Residents in Humboldt and Northern Mendocino Counties have been encouraged to stop collecting water between August 1 through the first heavy rains in late October. Water storage tanks cost 50 cents per gallon. A seven month period of no diversion would require storage on the order of 116,000 gallons which would be way too large for most properties to place in this rugged terrain as well as being too expensive (\$58,000) for the average household to afford. *(Mark Hilovsky and Rod Silva)*

Response: The March 31 diversion season end date is necessary to protect fishery resources, including fish habitat, by preventing water diversions when stream flows are low and water temperatures are high. However; the Policy provides for an alternative means of compliance through site specific study to justify a variance from the regional criteria, including an extension of the season of diversion beyond the March 31 regional criterion. The study would need to be conducted by a qualified fisheries biologist, as defined in the Policy (Policy, section 4.1.5), and would need to demonstrate that sufficient water is available for the proposed project while providing protective instream flows for fish and their habitat.

The commenter could evaluate whether an earthen pond could be used, because, depending

on site-specific conditions, it may be feasible and possibly less expensive to use an earthen pond for off-stream storage as opposed to a tank.

Comment 21.0.8: There is absolutely no attention paid to the potential economic costs involved to land owners, many of whom have already spent upwards of \$50,000 to \$100,000 on studies for State Water Board while waiting as much as 10 years to have their water rights processed. In your own draft, the estimated costs are \$100,000 to \$3,000,000 per permit to comply with this policy. As I understand, in Sonoma County alone there are more than 850 "on-stream" reservoirs. Thus, if I take an average cost of \$200,000 per reservoir (which is not unreasonable), it will cost Sonoma County farmers alone \$170 Million dollars by your own estimate. This is an incomprehensible amount of money for farmers who generally do not make that much money. (*Barry Hoffner*)

Response: See response to 21.0.23.

Comment 21.0.9: The previous owner of my property filed for a water right permit in 1999 for a small diversion of water into a reservoir for a few rainy months per year. In the meantime, expenses were incurred for a number of studies which had to be done (Biological study, Engineering study, Water availability analysis, anthropological study) in addition to consulting fees needed to interact with the State Water Resources Board, which have added up to more than \$65,000. Many of us farmers incurred these over-the-top expenses because we were lead to believe that at the end of the road, we would get a water right for our reservoirs. We put up with this bureaucracy which saw only a very small number of water rights permits acted upon during the past nine years. If the draft policy is made law, many of us farmers will either have to incur significant additional expenses in engineering and construction fees to have a significant portion of the water, flowing from these small streams into our reservoirs, bypass our reservoirs. In addition, we will, need to incur the expense of monitoring systems. We are the lucky ones. Some farmers, who have reservoirs built on more important streams/tributaries, will need to remove their reservoirs. The estimated cost of this is \$500,000. This amount will obviously put many farmers into bankruptcy. (*Barry Hoffner*)

Response: Water right applicants are required by law to show that there is water available for diversion. This includes accounting for senior water diversions and water that is needed for recreation and preservation and enhancement of fish and wildlife resources. Even without an adopted policy, water right applicants would need to demonstrate water availability. Currently, they have the option of demonstrating this by showing the project complies with the NMFS-DFG Draft Guidelines. Most, if not all, of the hydrologic analysis recommended by the NMFS-DFG Draft Guidelines would be utilized as part of the analysis requirements for the proposed policy. The NMFS-DFG Draft Guidelines allow for site specific study, so does the proposed Policy. Although the Draft Guidelines did not delineate the biological studies required, staff does not anticipate the costs for site specific biological studies under the Draft Policy to be substantially different than under the NMFS-DFG Draft Guidelines. The Draft Policy requires preparation of mitigation plans, which are not required under the NMFS-DFG Draft Guidelines.

Subsequent to the initial version of the Direct Cost Analysis Report dated December 2007, the State Water Board received several comments from the public asking that the Draft Policy be revised to describe the site-specific study requirements in more detail. After careful consideration, in response to these comments, Staff revised the Policy to describe the site-specific study requirements in more detail. Staff then re-examined the December 2007 Direct Cost Analysis Report to determine whether or not the estimated cost to complete typical a site specific study should be revised to reflect the more detailed study requirements contained in

the Policy. Table 3-4 in this Revised Direct Cost Analysis report presents updated estimated costs that reflect the level of effort that would be required to comply with the more detailed site-specific study requirements described in the revised Policy.

Although the commenter expressed concern that onstream reservoirs will need to be removed, the Draft Policy does not require removal of onstream dams. The Draft Policy states that water right permits would not be considered for existing unauthorized onstream dams under certain specific provisions detailed in policy section 4.4, and this is only if those owners were unable to implement the mitigation prescribed in the Draft Policy. The owners of those dams for which permits could not be authorized would be asked to render the dams incapable of storing water.

Comment 21.0.10: I am very concerned that the stringent bypass and diversion rate limitation criteria set forth in the Policy are severe and would be very costly to implement. (*Lee Hudson, Hudson Vineyards; Robert Hunter Jr.*)

Response: Comment noted. The commenter did not provide sufficient information to provide a more detailed response.

Comment 21.0.11: If the need arose to repair our existing (permitted) reservoir dam, or we had to move or alter the reservoir to conform with the proposed policy, the disruption, cost and loss of productive farmland would be extremely onerous. (*Robert Hunter Jr.*)

Response: Repairs to existing permitted reservoirs would not be affected by the Draft Policy. However, if the owner proposes altering the project, it would need to be evaluated to determine whether the policy provisions regarding petitions would apply. The analysis and discussion of the impacts of the Policy and analysis of the proposed mitigation for significant impacts are presented in the SED. The concern regarding the disruption, cost, and loss of productive land is noted; however, the commenter did not provide sufficient information to provide a detailed response.

Comment 21.0.12: The cost of mitigation or removal of onstream dams will force land owners off their land. (*Sam Keen*)

Response: The comment regarding land owners being forced off their lands due to the cost of mitigation or removal of onstream dams is noted; however, the commenter did not provide sufficient information to provide a detailed response.

Comment 21.0.13: It is highly questionable whether the fishery resource will benefit significantly from the severe and costly compliance measures imposed on our and other's existing storage reservoirs and which will result in drastically reduced water yields. (*Robert Hunter Jr.; Tom Klein, Rodney Strong Vineyards; Harry Merlo, Lago di Merlo Vineyards and Winery*)

Response: Watersheds in the Policy area are often highly regulated, extensively developed and subject to significant levels of impairment. Depletion and storage of streamflows have significantly altered natural hydrological cycles and adversely affected aquatic habitats and resources, in particular habitats of native fish populations including anadromous salmonids. The criteria proposed in the Draft Policy were developed from scientific analyses and recommendations by fisheries biologists, which were documented in R2 Resource Consultants, 2007. The criteria are protective of instream flows for native fish populations, with a particular focus on anadromous salmonids and their habitat.

The comment regarding reductions in yield due to severe and costly compliance measures is noted. The estimated costs of complying with the Draft Policy are documented in the Direct Cost Analysis Report. Appendix D of the Draft SED provides an evaluation of the potential indirect impacts of the Policy on water use and related indirect impacts on other environmental resources. Results of this evaluation were summarized in the Draft SED Section 6, Assessment of Environmental Impacts. The analysis and discussion of the impacts of the Policy on water yields and analysis of the proposed mitigation for significant impacts are presented in the SED.

Comment 21.0.14: The direct cost of compliance with the Draft Policy was not adequately evaluated. The estimated direct cost of compliance for projects within the Policy area is far greater than estimated in the Draft Policy. It would range from \$250 million to \$1.8 billion. *(Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers)*

Response: See response to 21.0.23.

Comment 21.0.15: The Executive Summary of the Direct Cost Analysis states that "The estimated potential costs represent typical costs based on the professional judgment and experience of Stetson Engineers, Inc., R2 Resource Consultants, Inc., and Chambers Group, Inc." However, "real world" data in support of the cost information presented is lacking. The analysis would have benefited greatly from a discussion of actual projects the preparers have been involved with pertaining to construction of bypass facilities and dam removal within the Policy area, or in similar environs. Also, it is unstated in the document whether site visits were made to the existing authorized projects that the conceptual designs and cost estimates are based upon, thus one is left to assume that site visits were not made. Certain shortcomings in the analysis likely could have been avoided had site visits been made. *(Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers)*

Response: Staff agrees that the Direct Cost Analysis Report would have benefited from site visits to the case study sites. However, site visits were not practical due to budget and time constraints. Instead, the Direct Cost Analysis Report relied partially on conceptual designs of case study sites and identification and breakdowns of estimated costs for the major specific design features and construction components. These included earthwork associated with construction of bypass channels and dam removals or relocations, site stabilization and revegetation, installation of hydraulic components including pipes, pumps, valves and gates, and weirs, and installation of automatic monitoring and control systems. Staff believes that the approach taken is reasonable considering budget and time constraints and adequate given the level of uncertainty associated with other key aspects of the analysis, such as the estimated number of unauthorized dams and which/how applicants would choose to comply.

Comment 21.0.16: Table 3-6 in the Direct Cost Analysis, which is a matrix of estimated item costs associated with various compliance alternatives for various alternative project types, is almost indecipherable, and the ranges in estimated costs for certain cost categories are so broad so as to be of little informative value to the regulated community. Examples: the

estimated cost of passive bypass for an onstream storage dam on a Class III stream ranges from \$25,000 to \$150,000; the estimated cost of fish passage for an existing onstream storage dam on a Class I stream ranges from \$10,000 to \$250,000. In either case, there is no parameter disclosed that would lead a particular project owner to determine which cost would be applicable to his/her project, and hence the information presented is of little value. (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: Table 3-6 in the Direct Cost Analysis Report is meant to serve as a "tool box" for the reader to use for estimating a range of representative typical implementation costs for a given onstream dam. This "tool box" functionality allows the table to be applied to the full spectrum of Policy requirements that could apply to a given type of onstream dam. For example, for an onstream storage type of dam on a Class II stream employing passive bypass, the range would be \$63,000 plus \$4,000/yr to \$263,000 plus \$11,000/yr. For the same type of dam on a Class II stream employing automated bypass, the range would be \$128,000 plus \$5,000/yr to 473,000 plus \$14,000/yr. The tables in Appendix A of the Direct Cost Analysis Report give breakdowns of estimated costs for the major specific design features and construction components of the case studies. These tables can be used to identify major factors driving the costs to modify existing unauthorized dams. For example, for passive bypass, major factors driving these costs include (1) the amount of earthwork involved in constructing the bypass channel; (2) the amount of structural work, such as concrete work, involved in construction of the diversion structure. For automated bypass, major factors driving these costs include (1) the size and length of outlet pipe, (2) the size and type of motor-operated gate on the outlet pipe, and (3) the type of automatic controller and amount of electrical work.

Comment 21.0.17: Additionally, Table 3-6 in the Direct Cost Analysis lacks explanation for certain cost category items and their applicability to particular project types. It is unclear whether there is an interrelationship among the column headings/subheadings "Fish/Passage", "Fish/Screen", and "Bypass". If only one of these items apply to a dam on a Class I stream, then a high cost would be \$250,000, whereas if all three apply, a high total cost would be \$675,000. Again, the information as presented is of little value for decision-making purposes. (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: Explanations for certain cost category items are given in sections 3.1.2, 3.2.1, and 3.2.2 of the report. Footnote "a" in Table 3-6 indicates that the cost given for fish passage includes the fish passage structure at the diversion. This cost does not include the fish screen at the point where water enters the delivery system for use. Accordingly, these two cost categories are additive, and the commenter is correct in that the high cost range would be \$675,000.

Comment 21.0.18: The "smorgasbord" presentation of potential item costs in Table 3-6 of the Direct Cost Analysis also omits an estimate of total costs that might be incurred for a particular type of project. It would appear, therefore, that project owners are left to rely on the conceptual designs and cost estimates provided in Appendix A of the Direct Cost Analysis to get an idea of what the cost of implementation might be for their particular project; in fact this appears to be the intent of Appendix A. However the project cost estimates in Appendix A have several shortcomings that render them questionable for purposes of disclosing the actual cost that

would be expected to be incurred for compliance with the Draft Policy. (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: The total costs for a particular type of project were not provided in Table 3-6 primarily to avoid any misinterpretations that could arise by providing a total. There would be variations in the total depending on whether passive or automated bypass are selected as the bypass method. Some costs across a given row for a given project type cannot be added because most are one time capital costs and others are recurring costs for the life of the diversion or for a limited time (e.g., annual flow monitoring and annual gravel/wood augmentation implementation lasting for life, annual riparian monitoring lasting for five years). Explanations for the cost category items are given in sections 3.1.2, 3.2.1, and 3.2.2 of the report. Using these explanations project owners can use Table 3-6 to estimate a range of cost for a particular project type. Using the tables in Appendix A, project owners can develop an understanding of the major specific design features and construction components that drive the costs.

Comment 21.0.19: Figure A-1 in Appendix A of the Direct Cost Analysis shows a bypass/passage channel around a "large dam" and reservoir, situated on a Class I stream. Fish would utilize the channel to pass upstream and downstream around the facility, and the channel would also facilitate required bypass flows. In Figure A-1, a proposed fish passage structure is identified upstream of the reservoir, which would be required for fish to overcome the minimum bypass flow diversion weir. Figure A-1 also shows that the bypass/passage channel is on a 20 percent slope immediately above the "Outlet" as it passes near the dam. Based on supporting information appended to the Draft Policy, a 20 percent channel slope would preclude access by fish, absent a fish passage facility such as a fish ladder. (See R2 Resource Consultants, Inc., Technical Memorandum dated July 9, 2007 regarding GIS Analysis Criteria for Upstream Distribution Limit of Steelhead.) However, no passage facility is shown at that location on Figure A-1. Table A-1, which displays the estimated cost associated with the project, should have included the cost of another fish ladder at the Outlet. Inclusion of the costs for design, environmental permitting, construction management, unlisted items, and contingencies (based on stated percentages), would increase the estimated total project cost from \$473,000 to over \$800,000. Based on this example, the potential estimated "typical" cost of a project involving the construction of a bypass/passage facility for a large dam on a Class 1 stream was greatly understated. Appropriate disclosure and analysis of the cost of this type of project has not been provided. The stated objective of disclosing a "range of representative typical costs" is not fulfilled for this type of project. (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: The commenter appears to assume that the slope of the bypass channel would be designed to match the slope of the land surface, which would not necessarily need to be the case. The bypass channel in Figure A-1 would be designed and built to as near to a constant slope of 2.2% as practical, from the diversion to the outlet, regardless of the variable slope of the natural grade of the land. A 2.2% slope would not preclude fish passage. Therefore, no fish passage facility would be needed for the bypass channel.

Comment 21.0.20: The estimated cost of removal of a dam from a Class 1 stream is not adequately supported. Figure A-2 in Appendix A of the Direct Cost Analysis shows the conceptual design for the case study involving the removal of an existing "large" earthen dam from a Class 1 stream. Estimated costs of major construction activities associated with the

project are provided on Table A-2. Apart from line item costs for earthwork and stabilization/revegetation (from which estimated unit costs can be deduced), neither the Direct Cost Analysis nor Appendix A include any information with regard to the basis for this estimate. No case histories for actual dam removal projects and associated costs are provided in these documents.

The "large dam" shown in Figure A-2, having an impoundment capability of 70 acre-feet and material volume of about 33,100 cubic yards per Table A-2, is actually not so large. Wagner and Bonsignore comments that their Table 10-1 shows that the average material volume for DSOD-jurisdictional dams within the Policy area, having reservoir surface areas of 10 acres and less, is about 42,100 cubic yards. At a unit cost for earthwork of about \$25/cubic yard, the added direct cost for the average project would be \$225,000. Including the percentage allowance for design, etc., the additional cost would be about \$337,000, and the total estimated dam removal cost in Table A-2 would increase from \$1,489,000 to about \$1.8 million. In addition, based on information for an actual dam-removal project being undertaken by the City of St. Helena, the costs in Table A-2 appear to be greatly underestimated.

Additionally, for about a decade, the City of St. Helena has been working on a project involving the removal of an earthen dam located on York Creek, which is a Class I stream tributary to the Napa River. As of August 2007 construction activities had not commenced, however, the City had already expended about \$800,000 on design and permitting. The total project cost is estimated to go as high as \$5 million. (St. Helena Star newspaper article "No York Creek Construction This Year," August 30, 2007.) This is over 3 times the estimated cost of dam removal and restoration shown in Table A.2. While admittedly this is just one real-world project, it is one more than disclosed in the Direct Cost Analysis, and the estimated cost of the St. Helena project is vastly outside of the "range of representative typical costs" that the Direct Cost Analysis purports to disclose. Based on the foregoing, the Direct Cost Analysis misinforms the public and the regulated community of the costs likely to be incurred for removal of a "large dam" from a Class I stream. The stated objective of disclosing a "range of representative typical costs" is not fulfilled for this type of project. (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: The major specific design features and construction components that drive the cost of dam removal are earthwork and site stabilization and revegetation. The basis for the line item costs for these components are \$25/cubic yard of earthwork and \$27,000/acre for site stabilization and revegetation. Staff considers these reasonable estimates of unit costs. Staff notes the commenter did not question the unit cost of \$25/cubic yard of earthwork. In addition to the line item cost for these major specific design features and construction components, Table A-2 also include costs for design, environmental permitting, and construction management and unlisted and contingencies. The large dam shown in Figure A-2 is large compared to other unauthorized impoundment dams. Based on Figures 2 and 3 in Appendix E of the Draft SED, the dam's 70 acre-feet of storage and 4.7 acres of surface area place it in approximately the 95th percentile, meaning that it is as large or larger than about 95 percent of the unauthorized impoundment dams.

Comment 21.0.21: The Direct Cost Analysis distinguishes estimated costs of dam removal on the basis of stream class, rather than on the basis of dam size. Stream class is an inappropriate metric for generalized estimation of dam removal costs. Figures A-2 , A-5, and A-8 of Appendix A of the Direct Cost Analysis show conceptual designs for the removal of large, medium, and small dams on Class I, Class II, and Class III streams, respectively. Cost

estimates corresponding to each conceptual project are provided in Tables A-2, A-5, and A-8, respectively. However, the assumption that dam size (and removal cost) is related only to stream class is misleading.

In estimating the cost of the removal of a dam from a Class I stream, a dam having an earthwork volume of about 33,000 cubic yards was assumed. In estimating the cost of removing of a dam from a Class II stream, a dam having an earthwork volume of about 10,500 cubic yards was assumed. However, no basis is provided in the Direct Cost Analysis to conclude that 33,000-cubic-yard dams only exist on Class I streams, while 10,500-cubic-yard dams only exist on Class II streams. The Direct Cost Analysis provides no information to indicate that the earthwork volumes and their relative differences are representative of existing projects on particular stream classes within the Policy area.

The estimates for all alternatives appear to use a unit cost basis for estimating earthwork and stabilization/restoration costs (\$25/cubic yard for earthwork and about \$27,000/acre for stabilization/restoration). Based on this approach, the estimated cost of removing a dam on Class II stream would be the same as the estimated cost for removing a dam on a Class I stream if the two dams were of similar size. Accordingly, instead of an estimated cost of \$540,000 for removal of a dam on a Class II stream (Table A-5), the cost could be \$1,489,000 (per Table A-2) if it is similar in size to the Table A-2 project. Or, the cost could be \$5 million per the estimate for the City of St. Helena's dam removal project discussed in the preceding section.

According to Table 11 in the document entitled "Potential Indirect Environmental Impacts of Modification or Removal of Existing Unauthorized Dams" in Appendix E of the SED, of the estimated 1,569 existing unauthorized impoundment dams in the Policy area, 212 are situated on Class I streams, while 1,357 are on Class II and III streams. If the Direct Cost Analysis has underestimated the cost of removing 1,357 dams on Class II and Class III streams, the costs associated with removal of about 86 percent of the existing unauthorized dams has not been accurately estimated and disclosed in the Direct Cost Analysis. The State Water Board should conduct a more detailed and comprehensive evaluation of the affected facilities in order disclose to the public and to the regulated community more realistic costs associated with dam removal.

(Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers)

Response: The approach taken in the Appendix A case study cost estimates whereby a large sized dam was coupled with Class I requirements, medium sized dam with Class II requirements, and a small sized dam with Class III requirements, is reasonable because it yields results that capture the full range of costs. Coupling a large dam with the most restrictive requirements of a Class I stream yields a conservatively high end of range cost. Coupling a small dam with the least restrictive requirements of a Class III stream yields a low end of range cost. Staff partially agrees with the commenter, for example, that dams on Class I streams are not necessarily, in all cases, larger than dams on Class III streams, but the purpose of the case study cost estimates was to aid in the estimation of typical representative costs and the development of the cost ranges in Table 3-6.

Comment 21.0.22: The costs for mitigation of terrestrial impacts caused by construction of bypass facilities were not considered. In Appendix A of the Direct Cost Analysis, the three passive bypass alternatives (Figures A-1, A-4, and A-7) show varying types of natural

vegetation along the bypass channel alignments. Figure A-1 for a large dam on Class 1 stream shows a treeless alignment over a distance of 1,540 feet long. Figure A-4 for a medium dam on a Class II stream shows treed and treeless reaches over a total bypass channel distance of 1,180 feet. Figure A-7 for a small dam on Class 3 stream shows what appears to be dense mature woodland over a bypass channel distance of 940 feet. The construction of a bypass channel capable of bypassing the 1.5-year peak flow is expected to be relatively substantial, and would result in the loss of a swath of natural vegetation along its entire reach.

Based on our experience with regulatory permitting for water projects, the Department of Fish and Game would consider the loss of dense mature woodland, as shown for the smallest project (Figure A-7) to be a significant terrestrial impact. Mitigation would likely require the planting of new native trees elsewhere on the project site at some multiple of the removed trees (likely at a ratio of 3-to-1 or greater), and professional services for ongoing survival monitoring would be required for a period of years. However, the cost estimate for the project shown on Table A-7 does not include an allowance for mitigation and monitoring of woodland impacts associated with bypass channel construction; such cost are not included in Table 3-6 either. In fact, none of the cost estimates for alternatives having passive bypass facilities include consideration of costs for mitigation of terrestrial impacts, and hence understate the cost of compliance for these types of projects.

(Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers)

Response: The Direct Cost Analysis Report provides estimates of costs to comply with the Draft Policy. The Draft Policy does not address all environmental issues a diversion project would need to evaluate as part of the CEQA process for individual water right projects. It contains principles and guidelines for minimizing the effects of water diversion on instream flows needed for fish habitat. Although mitigation of potential terrestrial impacts caused by construction of bypass facilities would need to be evaluated under CEQA on an individual project basis, the Draft Policy itself does not contain requirements for mitigation of terrestrial impacts that might result from the construction of passive bypass facilities.

Comment 21.0.23: The Direct Cost Analysis did not disclose estimated project costs in proper perspective. Based on an assumption that the estimated costs of compliance presented in Appendix A of the Direct Cost Analysis are accurate, the range in the estimated cost to the regulated community of complying with the Draft Policy ranges from about \$250 million to \$1.8 billion, as shown in the table in section 10.7.1 of Wagner and Bonsignore's comment letter. The costs in the table are staggering, and to the extent that they underestimate the actual costs of compliance as discussed in earlier comments, they represent a non-conservative estimate of the total cost to comply with the Policy. Further, this quantification does not include removal of regulatory dams, of which there alleged to be 202 such dams in the Policy area per Table 11 in the document entitled "Potential Indirect Environmental Impacts of Modification or Removal of Existing Unauthorized Dams" in Appendix E of the SED. Given that the neither the Draft Policy or the supporting documentation quantitatively identify benefits to instream resources, the notion put forth that the expenditure of nearly \$2 billion (possibly more) by the regulated community, not to mention the cost incurred by governmental agencies in administering compliance with the Draft Policy, for undefined and perhaps minimal resource benefits, is highly irresponsible. *(Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers)*

Response: Because the Draft Policy is not a project level document, the cost of compliance will vary widely from applicant to applicant. Multiplying the estimated maximum cost of compliance by the estimated total number of projects would not be the most appropriate way to represent the costs of compliance for an individual applicant. There are many options an applicant could take to comply with the policy, much of which is site specific. For instance, the Draft Policy does not require the removal of an onstream dam. Some applicants might choose to make modifications to conform with policy requirements, others might decide to render the dam incapable of storing water in a manner other than removal. Therefore, the costs associated with removal of an onstream dam would not be borne by all applicants, because some applicants would choose a different option. Providing a range of costs on a per unit basis for the elements that would comprise compliance with the policy would be the most realistic representation of the costs to comply for an individual applicant. Table 3-6 in the Direct Cost Analysis Report acknowledges this by providing ranges of costs for potential compliance measures.

Comment 21.0.24: There must also be recognition of the incredible expense connected with this Policy. Cost estimates provided by Wagner and Bonsignore state that the direct costs of initial implementation of the Policy will cost landowners somewhere between a quarter of a billion and \$1.8 billion and that there will also be high costs incurred by the agencies to administer the Policy. *(Rudolph Light)*

Response: See response to 21.0.23.

Comment 21.0.25: We ranchers and farmers have become disposable in the eyes of the Division of Water Rights staff. Trout Unlimited and Natural Heritage Institute and Peregrine Audubon Society first marginalized landowners, then demonized us in the last decade. Many of their supporters echo this and if you don't believe it, read the letters in the Final Scoping Report for the North Coast Instream Flow Policy and the letters pertaining to the Water Right Enforcement Policy Workshop of June 2007. They consider landowners to be primarily responsible for the loss of salmon habitat and loss of fish runs without regard to the effects of the two major diversions, Lake Mendocino and Lake Sonoma. If this Draft Policy goes through as written, the exorbitant cost of complying coupled with the inability to divert water from any but the largest of watersheds will result in many landowners being forced to sell their property. *(Rudolph Light)*

Response: Water right applicants are required by law to show that there is water available for diversion. This includes accounting for senior water diversions and water that is needed for recreation and preservation and enhancement of fish and wildlife resources. Even without an adopted policy, water right applicants would need to demonstrate water availability. Currently, they have the option of demonstrating this by showing the project complies with the NMFS-DFG Draft Guidelines. Most, if not all, of the hydrologic analysis recommended by the NMFS-DFG Draft Guidelines would be utilized as part of the analysis requirements for the proposed policy. The NMFS-DFG Draft Guidelines allow for site specific study, so does the proposed Policy. Although the Draft Guidelines did not delineate the biological studies required, staff does not anticipate the costs for site specific biological studies under the Draft Policy to be substantially different than under the NMFS-DFG Draft Guidelines. The Draft Policy requires preparation of mitigation plans, which are not required under the NMFS-DFG Draft Guidelines.

Subsequent to the initial version of the Direct Cost Analysis Report dated December 2007, the State Water Board received several comments from the public asking that the Draft Policy be

revised to describe the site-specific study requirements in more detail. After careful consideration, in response to these comments, Staff revised the Policy to describe the site-specific study requirements in more detail. Staff then re-examined the December 2007 Direct Cost Analysis Report to determine whether or not the estimated cost to complete typical a site specific study should be revised to reflect the more detailed study requirements contained in the Policy. Table 3-4 in this Revised Direct Cost Analysis report presents updated estimated costs that reflect the level of effort that would be required to comply with the more detailed site-specific study requirements described in the revised Policy.

The commenter is also concerned that there is a perceived inability to divert water from any but the largest of watersheds using the draft policy's regional criteria. The staff presentation at the February 6, 2008 technical staff workshop showed that the amount of yield available to water diversion projects using the proposed regional criteria is site specific. This is because the draft policy's methodology for assessing water availability requires the consideration of site-specific conditions, which include: (1) the drainage area at the point of diversion; (2) the unimpaired flow at the point of diversion; (3) the proximity of fish relative to the point of diversion; and (4) the existing level of impairment resulting from senior diversions in the watershed.

Comment 21.0.26: Do you agree with the cost estimates provided by the engineering firm of Wagner and Bonsignore that the direct costs to landowners to implement the Policy will be somewhere between a quarter of a billion dollars and 1.8 billion dollars? (Wagner and Bonsignore Commentary Sec. 10.7.1) and that there will also be high costs incurred by the agencies to administer the Policy? (*Rudolph Light*)

Response: See response to 21.0.23.

Comment 21.0.27: I am concerned that the severe and costly compliance measures imposed on my project (estimated in the documents published in connection with the Policy to be in the hundreds of thousands of dollars) will result in drastically reduced water yields and possibly loss of my productive farmland. (*Vincent Bartolomei, Bartolomei Brothers Vineyard; Edward T. Bennett; Larry Cadd; Jon-Mark Chappellet; Jack L. Cox, Cox Vineyards; Greg and Karen Crouse; Mark D. Edwards, North Coast Resource Management; Jonathan Frey, Frey Vineyards; Frank and Phyllis Hooper; Lee Hudson, Hudson Vineyards; Kenneth L. Kahn, Blue Rock; Douglas Lumgair, Windsor Oaks Vineyards & Winery; JJ McCarthy, Cain Vineyard & Winery; Dwight Monson; Wendel Nicolaus, Middleridge Vineyard; Steve Pride, Pride Mountain Vineyards; Annette Rhodes, Rhodes Vineyards; Richard Rhodes, Rhodes Vineyards; Michael Vellutini, TriValley Vineyard Management; Brian and Helen White; James Young, Robert Young Family Limited Partnership*)

Response: The comment that severe and costly compliance measures will result in drastic reductions in yields and possible loss of productive farmland is noted; however, the commenter did not provide sufficient information to provide a detailed response. The estimated costs of complying with the Draft Policy are documented in the Direct Cost Analysis Report. Appendix D of the Draft SED provides an evaluation of the potential indirect impacts of the Policy on water use and related indirect impacts on other environmental resources. Results of this evaluation were summarized in the Draft SED Section 6, Assessment of Environmental Impacts. The analysis and discussion of the impacts of the Policy on water yields and analysis of the proposed mitigation for significant impacts are presented in the SED.

Comment 21.0.28: While my pond is not fed by any class of stream, I am concerned by what I read in your proposed new policy. The possibility that I may have to prove that my pond is not

riparian in nature, by your own estimates, will cause extreme financial burdens on this landowner. *(Heidi Porch)*

Response: The Draft Policy does not affect diversions of water based on riparian right or from groundwater, unless it is flowing through known and definite channels, nor did the Direct Cost Analysis provide estimates on costs for proving ponds are not riparian.

Comment 21.0.29: In peer reviews I read costs provided by SWRCB to comply are in fact under estimated. The reviewer states only large corporations or municipalities will be able to afford application. *(Heidi Porch)*

Response: The commenter is correct in that one of the peer reviewers did opine that the direct costs are underestimated and that only large corporations or municipalities will be able to afford application. However, the peer reviewer did not provide any substantiation for this opinion. Staff points out that the Policy does not apply to riparian users. The Direct Cost Analysis did not assess the affordability of complying with the Policy to the regulated community, nor was it required to do so pursuant to Water Code § 13141.

Subsequent to the initial version of the Direct Cost Analysis Report dated December 2007, the State Water Board received several comments from the public asking that the Draft Policy be revised to describe the site-specific study requirements in more detail. After careful consideration, in response to these comments, Staff revised the Policy to describe the site-specific study requirements in more detail. Staff then re-examined the December 2007 Direct Cost Analysis Report to determine whether or not the estimated cost to complete typical a site specific study should be revised to reflect the more detailed study requirements contained in the Policy. Table 3-4 in this Revised Direct Cost Analysis report presents updated estimated costs that reflect the level of effort that would be required to comply with the more detailed site-specific study requirements described in the revised Policy.

Comment 21.0.30: With this Policy, applicants must now hire a hydrologist/engineer and an environmental consultant to prepare documents. Costs, even for small projects, run \$30,000 to \$80,000 for consultant fees. *(Roland Sanford, Mendocino County Water Agency; Jim Wattenburger, Mendocino County Board of Supervisors)*

Response: Water right applicants are required by law to show that there is water available for diversion. This includes accounting for senior water diversions and water that is needed for recreation and preservation and enhancement of fish and wildlife resources. Even without an adopted policy, water right applicants would need to demonstrate water availability. Currently, they have an option to demonstrate this by showing the project complies with the NMFS-DFG Draft Guidelines. Most, if not all, of the hydrologic analysis recommended by the NMFS-DFG Draft Guidelines would be utilized as part of the analysis requirements for the proposed policy. The NMFS-DFG Draft Guidelines allow for site specific study, so does the proposed Policy. Although the Draft Guidelines did not delineate the biological studies required, staff does not anticipate the costs for site specific biological studies under the Draft Policy to be substantially different than under the NMFS-DFG Draft Guidelines. The Draft Policy requires preparation of mitigation plans, which are not required under the NMFS-DFG Draft Guidelines.

Subsequent to the initial version of the Direct Cost Analysis Report dated December 2007, the State Water Board received several comments from the public asking that the Draft Policy be revised to describe the site-specific study requirements in more detail. After careful consideration, in response to these comments, Staff revised the Policy to describe the site-

specific study requirements in more detail. Staff then re-examined the December 2007 Direct Cost Analysis Report to determine whether or not the estimated cost to complete typical a site specific study should be revised to reflect the more detailed study requirements contained in the Policy. Table 3-4 in this Revised Direct Cost Analysis report presents updated estimated costs that reflect the level of effort that would be required to comply with the more detailed site-specific study requirements described in the revised Policy.

Comment 21.0.31: What consideration has been given to the costs to the applicant of implementing this Policy's requirements? *(Roland Sanford, Mendocino County Water Agency; Jim Wattenburger, Mendocino County Board of Supervisors)*

Response: Staff prepared a Direct Cost Analysis report that provides estimated costs for complying with the Draft Policy. This document was released with the Draft Policy in December 2007. In making its decision on adopting the Policy, the State Water Board will consider the information presented in the Direct Cost Analysis Report, public comments pertaining to the report, the SED, and all other information in the administrative record.

Comment 21.0.32: An applicant may have already spent \$35,000 on consultants and can not afford to spend another \$35,000-50,000 in additional engineering work and construction to maintain the minimum bypass flow requirement. Most applicants can't afford to comply with this Policy's requirements. What good will the Policy achieve if people are forced off their land? *(Roland Sanford, Mendocino County Water Agency; Jim Wattenburger, Mendocino County Board of Supervisors)*

Response: The comment regarding potential loss of land because most applicants cannot afford to comply with the policy is noted; however, the commenter did not provide sufficient information to provide a detailed response.

Water right applicants are required by law to show that there is water available for diversion. This includes accounting for senior water diversions and water that is needed for recreation and preservation and enhancement of fish and wildlife resources. Even without an adopted policy, water right applicants would need to demonstrate water availability. Currently, they have the option of demonstrating this by showing the project complies with the NMFS-DFG Draft Guidelines. Most, if not all, of the hydrologic analysis recommended by the NMFS-DFG Draft Guidelines would be utilized as part of the analysis requirements for the proposed policy. The NMFS-DFG Draft Guidelines allow for site specific study, so does the proposed Policy. Although the Draft Guidelines did not delineate the biological studies required, staff does not anticipate the costs for site specific biological studies under the Draft Policy to be substantially different than under the NMFS-DFG Draft Guidelines. The Draft Policy requires preparation of mitigation plans, which are not required under the NMFS-DFG Draft Guidelines.

Subsequent to the initial version of the Direct Cost Analysis Report dated December 2007, the State Water Board received several comments from the public asking that the Draft Policy be revised to describe the site-specific study requirements in more detail. After careful consideration, in response to these comments, Staff revised the Policy to describe the site-specific study requirements in more detail. Staff then re-examined the December 2007 Direct Cost Analysis Report to determine whether or not the estimated cost to complete typical a site specific study should be revised to reflect the more detailed study requirements contained in the Policy. Table 3-4 in this Revised Direct Cost Analysis report presents updated estimated costs that reflect the level of effort that would be required to comply with the more detailed site-specific study requirements described in the revised Policy.

The estimated costs of complying with the Draft Policy are documented in the Direct Cost Analysis Report. Appendix D of the Draft SED provides an evaluation of the potential indirect impacts of the Policy on water use and related indirect impacts on other environmental resources. Results of this evaluation were summarized in the Draft SED Section 6, Assessment of Environmental Impacts. The analysis and discussion of the impacts of the Policy on water yields and analysis of the proposed mitigation for significant impacts are presented in the SED.

Comment 21.0.33: I am concerned that the severe and costly compliance measures imposed on my project will result in drastically reduced water yields and possibly loss of my productive farmland. This year we are at risk of running out of water for frost protection and are unable to protect our crop. It will leave us very short of available water to irrigate later in the season. *(Edward Wallo, Yorkville Vineyards)*

Response: The comment that severe and costly compliance measures will result in drastic reductions in yields and possible loss of productive farmland is noted; however, the commenter did not provide sufficient information to provide a detailed response. The estimated costs of complying with the Draft Policy are documented in the Direct Cost Analysis Report. Appendix D of the Draft SED provides an evaluation of the potential indirect impacts of the Policy on water use and related indirect impacts on other environmental resources. Results of this evaluation were summarized in the Draft SED Section 6, Assessment of Environmental Impacts. The analysis and discussion of the impacts of the Policy on water yields and analysis of the proposed mitigation for significant impacts are presented in the SED.

Comment 21.0.34: To abandon our onstream pond and construct another offstream is not an option for us. To do so would involve removing many acres of vineyard and the cost would certainly be outside our means and we would also suffer from the economic loss of the reduced vineyard acreage making such a project untenable. *(Edward Wallo, Yorkville Vineyards)*

Response: The Draft Policy allows an unauthorized onstream pond constructed prior to July 19, 2006 to remain onstream provided that it is modified in accordance with the applicable Policy provisions. In addition, the Draft Policy allows the State Water Board to consider processing water right applications submitted prior to January 1, 2008 using the DFG-NMFS guidelines.

Comment 21.0.35: For existing ponds which are not yet permitted (and maybe for those that are), the Policy will require the construction of a bypass structure and channel that physically moves water away from the inlet of the pond, around the pond, and must empty below the outlet of the dam. This structure is prohibitively expensive, impractical and unnecessary in small watersheds. Ask staff to draw a picture of one and discuss the cost. It entails hundreds of feet of large culvert or concrete channels, and large concrete boxes and weirs to make sure water goes in the bypass channel until a certain flow volume is going downstream. (The construction of this structure, at least around an existing pond, will probably trigger CEQA involvement.) *(Roland Sanford, Mendocino County Water Agency; Jim Wattenburger, Mendocino County Board of Supervisors)*

Response: The Draft Policy does not specify how the passive bypass should be designed or constructed. Conceptual design layouts showing modifications to existing case study dams to comply with the Policy were presented in the figures in Appendix A of the Direct Cost Analysis

Report for costing purposes, only. Estimated costs are presented in the accompanying tables. In most cases, project level CEQA review will be triggered.

Pond owners with existing water right permits will not have to bypass or remove their permitted ponds to comply with the Policy, unless they make changes to the project that may result in reduced instream flows.

Comment 21.0.36: The Policy emphasizes storage as the answer to providing sustainable water resources year round. This will require a considerable land base to hold reservoirs and tanks. In the coastal zone, property for the storage of water is very costly and such features may never be permitted by the coastal commission. Water stored over long periods of time is likely to severely degrade in quality. *(Stephen Whitaker, Irish Beach Water District)*

Response: The State Water Board is developing a policy for maintaining instream flows for the purposes of water right administration because of the endangered species status of steelhead, Coho salmon, and Chinook salmon in the north coast region of the state. NMFS and DFG have documented probable causes of salmonid population decline, and water diversion was identified as one of them. Summer flow reductions are a large factor contributing to population decline. The Draft Policy precludes new water diversions during the summer, thereby protecting summer flows. Appendix E of the SED discusses how the Draft Policy could lead to water users to start using alternative water supplies and the potential environmental impacts of using them. The Draft Policy contains procedures for case by case exceptions to policy provisions.

22.0 Public Participation

Comment 22.0.1: The additional 75 days provided for review of the 800+ page Draft Policy was inadequate to properly evaluate it or to examine other possible alternatives. *(Sam Aanestad, Senator 4th District and Bob Dutton, Senator 31st District; Keith Gorzell; Richard and Annette Rhodes, Rhodes Vineyards; Roland Sanford, Mendocino County Water Agency)*

Response: Preliminarily, the Draft Policy and supporting documentation, including the Task 3 Report and Substitute Environmental Document, were approximately 800 pages, but the Draft Policy itself, including appendices, was less than 100 pages. Moreover, staff disagree that the review and comment period was inadequate. Interested persons had from December 28, 2007, when the Draft Policy and supporting documentation were released, until May 1, 2008, to review the Draft Policy and prepare comments, a total of 125 days. In addition, the State Water Board held a technical workshop on February 6, 2008, to explain the technical basis for the Policy, describe how it could be applied to water right projects, and answer questions.

Comment 22.0.2: The State Water Board should hold an evidentiary hearing on the Draft Policy so that the regulated stakeholders are given a fair opportunity to present their own evaluation and examine the evaluations, opinions and documents of State Water Board staff and consultants. *(Sam Aanestad, Senator 4th District and Bob Dutton, Senator 31st District)*

Response: An evidentiary hearing is not required, nor is it warranted. Interested persons have had ample opportunity to examine the Draft policy and supporting documentation and comment on the documents. In addition to a lengthy review and comment period, the State Water Board held a technical staff workshop on February 6, 2008, to explain the technical basis for the Policy, describe how it could be applied to water right projects, and answer questions. The Board held two additional workshops on August 5 and 6, 2008. The Board

also posted a list of frequently asked questions and answers on its project-dedicated website.

Comment 22.0.3: The State Water Board failed to provide notice to hundreds of impacted farmers. *(Corrin Amaral; Vincent Bartolomei, Bartolomei Brothers Vineyard; Carrie Brown; Jeffery Carlton, Dutton Ranch Corporation; Thomas Carpenter; Annette Cooley, Cooley Logging; Christopher Dohring; Brian Fedora; Nicholas Ferrari; Tom Gamble, Gamble Ranch; Katherine Harnden, Harnden Ranches; Leo Hurley, Wrath Cellars and Vineyard; Wayne Lamb; Dennis Meisner; Peter Nissen, Napa County Farm Bureau; Jack Olsen, San Mateo County Farm Bureau; Frost Pauli; Heidi Porch; Barbara Reed; Steve Reese, Denner Ranches Inc.; Annette Rhodes, Rhodes Vineyards; Richard Rhodes, Rhodes Vineyards; Gary Sack, California Farm Bureau; Tito Sasaki, Sasaki Vineyards; Janet Sclar, Amity Heritage Roses; Al Wagner, Clos Du Val Wine Company; Gary Wilsey, Wilsey Vineyard, LLC; Windy Wilson)*

Response: The State Water Board provided ample public notice of the availability of the December, 2008 Draft Policy. The notice provided far exceeded what was legally required. Water Code section 13147 sets forth the notice requirements that apply to adoption of policy for water quality control. Section 13147 requires the Board to notify any affected Regional Boards 60 days prior to holding a hearing to consider adoption of the policy and give notice by publication within the affected region pursuant to section 6061 of the Government Code. Section 6061 provides only that publication of notice shall be for one time. The State Water Board has not yet scheduled a hearing to consider adoption of the Draft Policy, and was not required to provide public notice of the availability of the Draft Policy. Nonetheless, the Board published notice of availability of the Draft Policy for one day in six newspapers in the policy area (on December 30, 2007, and January 1, 2008), sent notice via Lyris to 537 interested persons, via separate E-mail to 29 interested persons, and via U.S. mail to 4,532 water right applicants, small domestic and livestock users, governmental agencies, environmental groups, attorneys, environmental firms, and engineering firms. The Board also posted notice at the County Clerk's offices in all five counties within the Policy area.

Comment 22.0.4: Why was Trout Unlimited given the opportunity to write this policy, especially considering they were a party to both the protests and the petitions that blocked the permit process for the last 15 years? Is this not a conflict? Why were applicants not invited to the table? *(Tim Buckner)*

Response: The Draft Policy was written by State Water Board staff, with technical assistance from the Board's consultants, Stetson Engineers, Inc. and R2 Resource Consultants, Inc. The Draft Policy was not written by Trout Unlimited. In developing the Draft Policy, the Board has and will continue to consider input from all stakeholders, including water right applicants.

Comment 22.0.5: I am writing to request that the Division add two additional workshops on the Draft Policy Instream Flow Regulations because the 2/6/08 Technical Workshop was: (1) held at a facility where the attending stakeholders could not possibly have been accommodated. The room could hold 100, but was overfilled with dozens more, and dozens of people were turned away; (2) the State Water Resources Control Board staff said to those turned away that there would be a second session for them later in the day, which was canceled and not conducted as promised; (3) even those that were allowed to stay at the workshop were not able to have all of their questions dealt with because they were required to leave at 5:00; (4) The Santa Rosa location required people from the northern communities in the Mattole River Basin in Humboldt County to drive as much as 4 hours each way to attend a workshop from which they could be turned away. (5) The video that was to be made available to the public is of such low sound and visual quality that it serves little value as public record

for those unable to attend, or for those who were able to attend but not understand the proceedings; and (6) the 1:00 time slot reduced attendance by working people who may not have had the scheduling flexibility to miss a day's work, particularly considering the travel time factor. *(Tim Buckner)*

Response: The Board held two additional workshops on August 5 and 6, 2008. The August 5 workshop was held in Ukiah, in order to accommodate stakeholders from areas north of Santa Rosa. The Board also posted a list of frequently asked questions and answers on its project-dedicated website.

Comment 22.0.6: Further justification for additional workshops is the fact that these regulations will cost the group of applicants many millions of dollars (at a minimum) to implement. It would seem that the Division should do nothing less to serve the public from whom they are demanding so much. Project applicants have had virtually no input during the development of the Draft Policy. Even the contributions of the consultants and lawyers listed in the Policy Appendix have not helped to reduce the extraordinary costs associated with attempted compliance with the proposed Policy. In truth, the Policy will create exponential growth in demand and costs for legal and consulting services. These workshops might be the only real "face time" that project applicants, both present and future, will get with division staff before the Policy moves to the next level. *(Tim Buckner)*

Response: After holding a staff technical workshop on February 6, 2008, the Board held two additional workshops on August 5 and 6, 2008. In developing the Draft Policy, the Board and its staff have and will continue to consider input from all stakeholders, including water right applicants.

Comment 22.0.7: I respectfully request that the SWRCB hold two additional workshops before the end of the public comment period that will meet the following basic requirements: (1) Use a large enough venue to accommodate the large turnout that the first workshop demonstrated could be in attendance; (2) Conduct a double session that will provide an opportunity for those who cannot take time off work. Hold a session after 5:00 p.m. (3) Have two locations, one in Santa Rosa or Petaluma, and one in Ukiah or Willits, to make the meetings more accessible to the working people; (4) have more staff available, perhaps in break-out sessions, to answer the multitude of questions that were far too much to handle at the first workshop; (5) guarantee qualified personnel and equipment on site to provide an adequate video and sound record of the proceedings, since these "watershed" changes of in-stream flow regulations will affect thousands of stakeholders in the numerous coastal watersheds of five counties. *(Tim Buckner)*

Response: Although they were not held prior to the end of the public comment period, the Board did hold two additional workshops, on August 5 and 6, 2008. The August 5 workshop was held in Ukiah and the August 6 workshop was held in Santa Rosa.

Comment 22.0.8: It is truly unfortunate that the instructions for comment on the Draft Policy limit submissions to those pertaining to the content of the Draft Policy itself. As a result, legislators, administrators, and the general public may never learn what a travesty this Draft Policy is until it tragically becomes a real Policy. They may never know of the extraordinary influence that Trout Unlimited has exerted over the Division of Water Rights for over 15 years. They may never understand that the Division apparently stalled processing Applications by accepting invalid or irrelevant Protests. They may never know of the outrageous costs and delays the Applicants have had to endure at the doorstep of the Division. They may never ask

why applicants receive so much grief while the scofflaws go unregulated. Worse yet, people will not learn how or why the AB 2121 Legislation (which enables this Draft Policy) was snuck through the Assembly as a trailer to another bill, bypassed discussion and review, and passed by a 3 vote majority at 3:00 a.m. People won't find out why the Division has spent \$1.5 million on the consultants (plus the Board only knows how much money on staff time) but cannot afford further workshops to educate the public about the Draft Policy. And last, they may never understand why permit Applicants feel like "water boarding" is not just a CIA interrogation technique, but also a punishment for Applicants who attempt to follow the law. I sincerely hope the Division has not become so entrenched in the position outlined in the Draft Policy that they waste more time and money trying to justify buying a "bum steer". Limiting public comments to "Draft Policy content" only appears to serve the purpose of obscuring how badly flawed was the process of developing the Draft Policy. *(Tim Buckner)*

Response: The notice of availability of the Draft Policy stated that comments on the content of the Policy were welcome. This statement was not intended to preclude comments on procedural issues, and the State Water Board has accepted such comments, including this one. Staff disagree with the assertion that Trout Unlimited has exerted extraordinary influence over the Division of Water Rights. In developing the Draft Policy, the Board and its staff have and will continue to consider input from all stakeholders, including water right applicants. As to the comment regarding workshops, after holding a staff technical workshop on February 6, 2008, the Board held two additional workshops on August 5 and 6, 2008. The Board also posted a list of frequently asked questions and answers on its project-dedicated website.

Comment 22.0.9: We were surprised and extremely disappointed that, at the Instream Flow workshop held in Mendocino County last Tuesday April 22, our County Board of Supervisors failed to acknowledge that they or their constituents had any role to play in protecting the fish in Mendocino County's streams. We can assure you that the members of the Willits Environmental Center and other organizations and individuals in Mendocino County actually do care that there is sufficient water in our streams to protect fish, and understand that our land use decisions have a major impact on the success or failure of salmonid survival in Mendocino County. *(Ellen Drell, The Willits Environmental Center)*

Response: Comment noted.

Comment 22.0.10: I have enclosed a copy of a petition that is being circulated from Mendocino County residents to our Board of Supervisors urging them to be part of the solution. We hope that this and other communications with our Supervisors will awaken them to the crisis of salmonid survival that has precipitated the issuing of the Draft Policy. *(Ellen Drell, The Willits Environmental Center)*

Response: Comment noted.

Comment 22.0.11: Despite our Supervisor's present failure to recognize their responsibility in protecting endangered species, we the people, the sheriff's department, and our State representative (Senator Wiggins) are prepared to work with the State Water Board on a policy to save our fishery. *(Ellen Drell, The Willits Environmental Center)*

Response: Comment noted.

Comment 22.0.12: Many residents of the affected communities have not received notice of the Instream Flow Policy and have not been able to fully understand its potential effect. The

public's ability to fully participate in the public process is being foreclosed. I request that you call for legislative hearing on the proposed Policy. (*Patrick Garvey, Flora Springs Wine Company; Peggy Phelan; Jan Shrem, Clos Pegase*)

Response: The State Water Board provided ample public notice of the availability of the December, 2008 Draft Policy. The notice provided far exceeded what was legally required. Water Code section 13147 sets forth the notice requirements that apply to adoption of policy for water quality control. Section 13147 requires the Board to notify any affected Regional Boards 60 days prior to holding a hearing to consider adoption of the policy and give notice by publication within the affected region pursuant to section 6061 of the Government Code. Section 6061 provides only that publication of notice shall be for one time. The State Water Board has not yet scheduled a hearing to consider adoption of the Draft Policy, and was not required to provide public notice of the availability of the Draft Policy. Nonetheless, the Board published notice of availability of the Draft Policy for one day in six newspapers in the policy area (on December 30, 2007, and January 1, 2008), sent notice via Lyris to 537 interested persons, via separate E-mail to 29 interested persons, and via U.S. mail to 4,532 water right applicants, small domestic and livestock users, governmental agencies, environmental groups, attorneys, environmental firms, and engineering firms. The Board also posted notice at the County Clerk's offices in all five counties within the Policy area.

Comment 22.0.13: As I mentioned, many farmers care deeply about habitat restoration, water conservation and fish. I do not understand why the State Water Board cannot get a bi-partisan group together to help draft a policy, including Water Right specialists (engineers, consultants, and lawyers) together with State Water Board personnel, farmers, the Sierra Club and relevant organizations (Sonoma County Agricultural Commission, Sonoma County Farm Bureau). This would surely lead to something more balanced than simply a small, closed group of people drafting policies that can very realistically cause great economic hardship to the real lives of farmers for very little benefit to the State. (*Barry Hoffner*)

Response: The policy development process has been open and inclusive. After releasing the Draft Policy on December 29, 2007, the State Water Board held three local workshops to answer questions about the Draft Policy and hear input from interested persons. The workshops were held on February 16, 2008, August 5, 2008, and August 6, 2008. Two of the workshops were held in Santa Rosa, and one of the workshops was held in Ukiah. The Board also provided stakeholders with an extensive period of time to review the Draft Policy and prepare written comments.

The policy development process also has been scientifically rigorous. The Draft Policy was written by State Water Board staff, with technical assistance from the Board's consultants, Stetson Engineers, Inc. and R2 Resource Consultants, Inc (R2). R2 conducted extensive scientific research to support the technical basis for the Draft Policy. R2's research is described in the Task 3 Report, dated August 6, 2007. In addition, the scientific basis for the Policy has been subjected to an external, scientific peer review pursuant to Health and Safety Code section 57004.

Comment noted.

Comment 22.0.14: With leadership from Art Baggett and helpful assistance from Victoria Whitney and her staff, TU and PAS later joined a stakeholder working group to develop recommendations for reform. That group, known informally as the North Coast Water Rights Working Group, consists of representatives for winemakers and grape growers, water

developers, urban water users, other conservation groups, state and federal water agencies, and local governments. The concept for the "watershed approach" to water rights, as well as the procedural recommendations set forth in the joint principles submitted with Wagner & Bonsignore and Ellison, Schneider & Harris, are a result of that effort. *(Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society)*

Response: Comment noted.

Comment 22.0.15: Notice and the opportunity to comment on the Draft Policy were procedurally inadequate and have been inconsistent with the California Administrative Procedure Act. Multiple errors in the Draft Policy, inadequate response to requests for data used to support the Draft Policy development, and insufficient explanation of the Draft Policy's provisions and application have compromised the public's ability to fully understand and comment on the Draft Policy. *(Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers)*

Response: The adoption of state policy for water quality control, such as the proposed Policy, is exempt from the notice and public participation requirements set forth in the Administrative Procedure Act. (Gov. Code, § 11353.) Water Code section 13147 sets forth the notice and public participation requirements that apply to adoption of the Policy. Section 13147 requires the State Water Board to (1) hold a hearing prior to adoption of the policy, (2) notify any affected regional boards 60 days prior to the hearing, and (3) give notice by publication within the affected region pursuant to section 6061 of the Government Code. Section 6061 provides only that publication of notice shall be for one time. In addition, the Board must consult with concerned federal, state, and local agencies during the process of formulating state policy for water quality control. (Wat. Code, § 13144.) The Board will comply with these provisions prior to adoption of the Policy.

Staff disagree with the assertion that the public's ability to fully understand and comment on the Draft Policy has been compromised for the reasons stated by the commenter. First, the assertion that the State Water Board has not provided a sufficient explanation of the Draft Policy's provisions and applications is unsupported. The State Water Board and its staff have provided explanations of the Draft Policy on numerous occasions, both in workshops and in writing. The State Water Board held a technical staff workshop on February 6, 2008, to explain the technical basis for the Policy, describe how it could be applied to water right projects, and answer questions. The Board held two additional workshops on August 5 and 6, 2008. State Water Board staff also posted a list of frequently asked questions and answers on its project-dedicated website. The assertion that errors in the Draft Policy have compromised the public's ability to understand and comment on the Policy is also unsupported. State Water Board staff issued two memoranda, dated January 7, 2008, and March 14, 2008, explaining in detail corrections that had been made to the Draft Policy and supporting documentation. The public had adequate time to review the memoranda and corrected documents prior to the May 1, 2008 comment deadline. Finally, staff are unaware of any data requests that were not answered in time for interested persons to review and comment on the Draft Policy. To the extent that staff were unable to provide explanations in response to questions regarding the Policy before the comment deadline, staff recommended that interested persons submit their questions in the form of comments on the Policy.

Comment 22.0.16: Water Code section 185 requires the Water Board to adopt rules for the conduct of its affairs in conformity with Chapter 3.5 (commencing with Section 11340) of the

Government Code, procedures adopted by the Water Board in 23 CCR section 649.1. The chapter is commonly known as the California Administrative Procedure Act ("APA"). The APA requires state agencies proposing to adopt a regulation to provide adequate notice of the proposed regulation, and sets forth the information that must be included in such a notice. Such a notice must provide the time, place and nature of proceedings for adoption, and include "an informative digest drafted in plain English" that includes a concise and clear summary of the effect of the proposed action. (Gov't Code 11346.5; see also Gov't Code section 11353(b)(2)(A).) The notice of the Draft Policy provided by the Water Board did not meet the requirements of the APA. (Although, arguably, the Water Board may be exempt from the strict and detailed notice requirements of the APA, because of Government Code section 11353(b)(7), the principle underlying these notice requirements - that fair and wise decision-making requires broad informed public input - is as applicable to the Water Board's decisions as to the decisions of other agencies. And, broad and informed public input requires that the governed be afforded notice of governmental actions that may affect their interest - a practice that was contravened by the manner in which the public generally, and water users specifically, were given notice of the Draft Policy.) (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: The State Water Board provided ample public notice of the availability of the December, 2008 Draft Policy. The notice provided far exceeded what was legally required. The adoption of state policy for water quality control, such as the proposed Policy, is exempt from the notice requirements set forth in the Administrative Procedure Act. (Gov. Code, § 11353.) Water Code section 13147 sets forth the notice requirements that apply to adoption of the Policy. Section 13147 requires the State Water Board to (1) hold a hearing prior to adoption of the policy, (2) notify any affected regional boards 60 days prior to the hearing, and (3) give notice by publication within the affected region pursuant to section 6061 of the Government Code. Section 6061 provides only that publication of notice shall be for one time. In addition, the Board must consult with concerned federal, state, and local agencies during the process of formulating state policy for water quality control. (Wat. Code, § 13144.) The State Water Board has not yet scheduled a hearing to consider adoption of the Draft Policy, and was not required to provide public notice of the availability of the Draft Policy. Nonetheless, the Board published notice of availability of the Draft Policy for one day in six newspapers in the policy area (on December 30, 2007, and January 1, 2008), sent notice via Lyris to 537 interested persons, via separate E-mail to 29 interested persons, and via U.S. mail to 4,532 water right applicants, small domestic and livestock users, governmental agencies, environmental groups, attorneys, environmental firms, and engineering firms. The Board also posted notice at the County Clerk's offices in all five counties within the Policy area.

Comment 22.0.17: Those most directly affected by the Draft Policy were given inadequate notice and thereby deprived of the opportunity for meaningful comment. The notice that was provided was not calculated to advise water users of the Draft Policy and its effects. The notice itself did not offer even a cursory description of the Draft Policy or its potential effects. It merely directed the recipient to a website address for further information. Such notice was clearly inadequate for those without access to the internet. No physical locations were identified where a paper copy of the Draft Policy could be reviewed. Even for those recipients with internet access, the website did not offer a summary of the Draft Policy, merely a daunting array of enormous downloads with minimal descriptors. Only after February 6, 2008, in response to numerous requests by water users and their representatives for an explanation of the Draft Policy, were powerpoint slides posted on the Water Board's website with a summary of the Draft Policy's provisions. And not until April 14, a mere two weeks before the comment

deadline, did the Water Board staff post a "frequently asked questions" fact sheet on its website. Additionally, many of the answers to the "frequently asked questions" were either purposefully vague, misleading, or altogether incorrect. (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: Contrary to this comment, the notice of availability of the Draft Policy contained a three-paragraph description of the Draft Policy, an explanation that the Policy could have indirect environmental impacts, and a list of the resources that could be impacted. The notice also advised interested persons that, as an alternative to obtaining copies of the Draft Policy and supporting documentation on the State Water Board's website, copies on CD could be obtained by contacting Board staff, whose names and phone numbers were provided in the notice.

Staff disagree with the unsubstantiated assertion that the answers provided by State Water Board staff to "frequently asked questions" were vague, misleading, or incorrect.

Comment 22.0.18: Notice was provided by bulk mail, with a Colorado return address (of a Water Board contractor). There was no indication on the envelope that its contents contained notice from the California State Water Resources Control Board or dealt with matters that could affect the water rights of the addressee. Many of these bulk-mailed notices were not received until the last few weeks of January or early February 2008, despite the Board's claims that notices were mailed out at the end of December 2007. (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: The Board provided notice of the availability of the Draft Policy via U.S. mail to 4,532 water right applicants, small domestic and livestock users, governmental agencies, environmental groups, attorneys, environmental firms, and engineering firms. For a mailing this size, bulk mail is the best choice because it is less expensive than regular mail. Moreover, the State Water Board was not legally required to provide notice of availability of the Draft Policy, much less provide some indication of the contents of the notice on the envelope. Assuming for the sake of argument that the commenter is correct, and some interested persons did not receive notice until early February, 2008, more than a month after the notices were mailed, those interested persons would have had ample time to review and comment on the Draft Policy before the May 1, 2008 comment deadline.

Comment 22.0.19: Additionally, notice was not sent to formally designated agents of water users. The water users' designated agents and their addresses were known to the Water Board because they had been officially designated in the water users' water right files, and the agents are those to whom the Water Board routinely sends all notices concerning water rights. (See Gov't Code section 11346.4(a)(1).) Due to the unmarked bulk mailing to individual water right holders, and the failure of the Water Board to send notice of the Draft Policy to designated agents, many water right holders were unaware of the issuance of the Draft Policy until and unless informed of it by other means. (For example, the Water Board sends notice to these agents of proposed water right appropriations that might adversely affect the water right holder's rights, and sends its requests for filing of progress reports and licensee reports to these agents, rather than to the holder of the water right. Water right holders rely on the Water Board's notification of their agents to remain informed of potential threats to their rights. When designation of an agent has been made, the Water Board does not send notices directly to the water right holder.) (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman &*

Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers)

Response: The Board provided notice of the availability of the Draft Policy via U.S. mail to 4,532 water right applicants, small domestic and livestock users, governmental agencies, environmental groups, attorneys, environmental firms, and engineering firms. The mailing list was comprised of information contained in the WRIMS database maintained by the Division of Water Rights. Applicants' agents as a separate group were not added to the mailing list, but they were included if they were listed in the database as an attorney, environmental firm, or engineering firm. The State Water Board was not legally required to provide notice of availability of the Draft Policy to applicants or their agents. Government Code section 11346.4, subdivision (a)(1), which provides only that an agency must give notice of a proposed rulemaking to those who have requested notice of regulatory actions, does not apply to the adoption of state policy for water quality control, and has no bearing on this issue. (Gov. Code, § 11353.)

Comment 22.0.20: Electronic notice of the proposed adoption of the Draft Policy was posted on the Water Board's website in the waning days of 2007, immediately before the New Year's holiday. As a result, many water right professionals did not become aware of the Draft Policy until well into January 2008. The notice set a deadline of February 19, 2008 for comments on this 800+ page, highly technical Draft Policy, a wholly inadequate timeframe for those affected to understand the Draft Policy and determine its effects. *(Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers)*

Response: Preliminarily, the Draft Policy and supporting documentation, including the Task 3 Report and Substitute Environmental Document, were approximately 800 pages, but the Draft Policy itself, including appendices, was less than 100 pages. In addition, the comment deadline was extended from February 19, 2008, to May 1, 2008. With this extension, the review and comment period was more than adequate.

Comment 22.0.21: The APA requires that notice of a proposed regulation be mailed to a representative number of small business enterprises or their representatives that are likely to be affected by the proposed action. (Gov't Code section 11346.4(a)(3).) Such representatives are identified by the statute as including trade associations, industry associations and professional associations. Commenters, which include trade and industry associations whose members will be directly affected by the Draft Policy, were furnished no notice by the Water Board. Again, even if the Water Board is exempt from this provision of the APA, the quality of its decision-making could only be improved by adhering to the practice of consulting the governed public. *(Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers)*

Response: The adoption of state policy for water quality control, such as the proposed Policy, is exempt from the notice requirements set forth in the Administrative Procedure Act. (Gov. Code, § 11353.) Water Code section 13147 sets forth the notice requirements that apply to adoption of the Policy. Section 13147 requires the State Water Board to (1) hold a hearing prior to adoption of the policy, (2) notify any affected regional boards 60 days prior to the hearing, and (3) give notice by publication within the affected region pursuant to section 6061 of the Government Code. Section 6061 provides only that publication of notice shall be for one time. In addition, the Board must consult with concerned federal, state, and local agencies

during the process of formulating state policy for water quality control. (Wat. Code, § 13144.) The Board will comply with these provisions prior to adoption of the Policy.

Comment 22.0.22: The Draft Policy was supplemented by two errata documents: one of which was issued on March 14, 2008, correcting a fundamental error in a major element of the Draft Policy that infected basic analyses throughout the document. Despite the enormous changes arising as a result of the March 14 errata document, no further extension of time was given for analysis and comment. Despite repeated requests, significant underlying data was unavailable until April 7, 2008, and some responses by Water Board staff misidentified the data used in calculations, forcing a costly and time-consuming reevaluation at the eleventh hour. In addition, the March 14 errata document corrected errors that infected basic analyses throughout the document. The correction required professional consultants retained by concerned water users to dedicate considerable time reworking their own analyses of the Draft Policy, at considerable additional expense - in the thousands of dollars. No additional time for submitting comments on the Draft Policy was allowed, despite the substantial additional work occasioned by the Draft Policy's errors. And, although errata sheets were posted on the website, no other notice of the errors was provided to water users. *(Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers)*

Response: Staff disagree with that the error was "fundamental" and the associated corrections were "enormous." Staff also maintain that the public had adequate time to review the corrections to the Draft Policy described in the March 14, 2008 memorandum prior to the May 1, 2008 comment deadline. Staff are unaware of any data requests that were not answered in time for interested persons to review and comment on the Draft Policy. To the extent that staff were unable to provide explanations in response to questions regarding the Policy before the comment deadline, staff recommended that interested persons submit their questions in the form of comments on the Policy. The assertion that notice of errors was not provided to water users is incorrect. The State Water Board sent notice of both the January and March, 2008 errata via Lyris to 537 and 594 interested persons, respectively, via separate E-mail to 29 interested persons, and to the State Clearinghouse.

Comment 22.0.23: Direct outreach by the Water Board staff was similarly lacking. At the insistence of the water user community, a workshop was held in Santa Rosa on February 6, 2008 at the North Coast Regional Water Quality Control Board's offices. Because of the widespread interest in the Draft Policy, attendance at the workshop was high and overfilled the meeting room's capacity. Not everyone who attempted to attend could be accommodated and many were turned away after an effort to find a larger venue delayed the commencement of the workshop proved fruitless. The Water Board staff did not tape the workshop, and videotapes that private consultants arranged for proved unusable. The workshop itself was truncated, due to the need to vacate the room at 5:00 p.m., and many individuals who had questions were unable to obtain answers. The Water Board staff promised a subsequent workshop, but did not schedule one despite requests by water users. In response to a formal request made by the Mendocino County Board of Supervisors, a second presentation was made to the Board of Supervisors on April 22. As a result of the minimal and grudging outreach, there has been inadequate explanation of the Draft Policy's provisions and proposed implementation; most water users remain frustrated in their efforts to understand the Draft Policy sufficiently to allow them to comment effectively. *(Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers)*

Response: Staff disagree with the statement that the public's ability to understand the Draft Policy and effectively comment has been frustrated by minimal and grudging outreach, and an inadequate explanation of the Draft Policy's provisions and implementation. The State Water Board and its staff have provided explanations of the Draft Policy on numerous occasions, both in workshops and in writing. In addition to the technical staff workshop on February 6, 2008, the Board held two additional workshops on August 5 and 6, 2008. The Board also posted a list of frequently asked questions and answers on its project-dedicated website.

Comment 22.0.24: Another factor hampering effective comment on the Draft Policy was the slow pace at which the Water Board staff responded to requests for data used in the preparation of the Draft Policy. The data was needed for a thorough evaluation of the Draft Policy's basis and effects. A record of the requests is attached to this memorandum. (Attached, Exhibit 1). Responses were never received to some of the data requests. (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: Staff are unaware of any data requests that were not answered in time for interested persons to review and comment on the Draft Policy. To the extent that staff were unable to provide explanations in response to questions regarding the Policy before the comment deadline, staff recommended that interested persons submit their questions in the form of comments on the Policy.

Comment 22.0.25: Comments to the Final Scoping Report were essentially ignored with the exception of the TU/NHI letter (*Rudolph Light*)

Response: Staff disagree with the unsubstantiated assertion that CEQA scoping comments were ignored except for scoping comments submitted by TU/NHI.

Comment 22.0.26: Commenter includes a report by Tim Buckner, Mendocino Winegrowers Alliance, on the North Coast Water Rights Working Group that states the group was not collaborative, had no intention in helping the Division process applications, and proposed many new and more time-consuming regulations. (*Rudolph Light*)

Response: Comment noted. Although the North Coast Water Rights Working Group dealt with some related issues, the group did not develop the Draft Policy.

Comment 22.0.27: 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 publicly, can a fair policy be written when there is so much influence from a single-focus group? 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.

(Rudolph Light)

Response: The Draft Policy was written by State Water Board staff, with technical assistance from the Board's consultants, Stetson Engineers, Inc. and R2 Resource Consultants, Inc. The Draft Policy was not written by Trout Unlimited (TU) or the Natural Heritage Institute (NHI). The assertions that the State Water Board excluded applicants from the process of developing the Policy and favored TU's and NHI's involvement are unsubstantiated and incorrect.

Comment 22.0.28: 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. *(Rudolph Light)*

Response: Staff disagree with the assertion that the Draft Policy is not fair, balanced, and workable. In developing the Policy, the State Water Board's goal has been to develop a policy that is protective of anadromous fish, while minimizing water supply impacts. In developing the Policy, the Board and its staff have and will continue to consider input from all stakeholders, not just TU and NHI.

Comment 22.0.29: 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. This policy is the result of the overwhelming influence of Trout Unlimited/Natural Heritage Institute with an agenda that started in 1997- 1998.

(Rudolph Light)

Response: Staff disagree with the assertion that the public has been shut out of the Policy development process. Interested persons have had ample opportunity to examine the Draft policy and supporting documentation and comment on the documents. In addition to a lengthy review and comment period, the State Water Board held a technical staff workshop on

February 6, 2008, to explain the technical basis for the Policy, describe how it could be applied to water right projects, and answer questions. The Board held two additional workshops on August 5 and 6, 2008. The Board also posted a list of frequently asked questions and answers on its project-dedicated website.

Staff also disagree with the assertion that the Policy is not based on scientific research. The Draft Policy was written by State Water Board staff, with technical assistance from the Board's consultants, Stetson Engineers, Inc. and R2 Resource Consultants, Inc (R2). R2 conducted extensive scientific research to support the technical basis for the Draft Policy. R2's research is described in the Task 3 Report, dated August 6, 2007. In addition, the scientific basis for the Policy has been subjected to an external, scientific peer review pursuant to Health and Safety Code section 57004.

Finally, Staff disagree with the assertion that the Policy is the result of the "overwhelming influence" of TU and NHI. In developing the Policy, the Board and its staff have and will continue to consider input from all stakeholders, not just TU and NHI.

Comment 22.0.30: 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 TU/NHI letters, and were either accepted outright or with only slight modifications. (*Rudolph Light*)

Response: The Draft Policy was written by State Water Board staff, with technical assistance from the Board's consultants, Stetson Engineers, Inc. and R2 Resource Consultants, Inc. The Draft Policy was not written by TU or NHI. In developing the Policy, the Board and its staff have and will continue to consider input from all stakeholders, not just TU and NHI.

Comment 22.0.31: I object to the adoption and implementation of the Draft Policy stemming from the closed door policy of the "Elite Group". The formation of that group, the actions it has taken with the absence of equitable representation of Mendocino County, its residents, and its stakeholders in my opinion is disingenuous. It is not in the public interest to conduct meetings barring the interested public from attending and having their voice heard. (*Richard and Annette Rhodes, Rhodes Vineyards*)

Response: The Draft Policy was drafted by State Water Board staff, with technical assistance from the Board's consultants, Stetson Engineers, Inc. and R2 Resource Consultants, Inc. The Draft Policy was not drafted by an "Elite Group". In developing the Policy, the Board and its staff have and will continue to consider input from all stakeholders, including Mendocino County, its residents, and its stakeholders.

Comment 22.0.32: I object to the adoption/implementation of the Draft Policy stemming from the cloak and dagger manner in which AB 2121 was introduced and passed in the Assembly. It is not in the public interest to attack a small group of its citizens for a condition that exists, when the reason or reasons for that condition are unknown. It is not in the public interest to attack separate groups of citizens throughout the state using a divide and conquer philosophy

to impose special interest legislation upon the entire state or any part of the state. (*Richard and Annette Rhodes, Rhodes Vineyards*)

Response: The purpose the Draft Policy is not to attack a small group or groups of citizens. The purpose of the Policy is to ensure that water rights are administered in a manner that maintains instream flows needed for the protection of fishery resources.

Comment 22.0.33: I attended the workshop on the Draft Policy conducted by the State Water Board on February 7th. The meeting room was inadequate to allow all attendees to listen to the presentation, and I was told they would repeat it later in the afternoon. When I returned at the appointed time, the presentation was not repeated. (*Barry and Phyllis Rogers*)

Response: After holding a staff technical workshop on February 6, 2008, the Board held two additional workshops on August 5 and 6, 2008. The Board also posted a list of frequently asked questions and answers on its project-dedicated webpage.

Comment 22.0.34: Please do not be swayed by resistance to the Instream Flow Policy by special interests. (*Cynthia Sabatini*)

Response: Comment noted.

Comment 22.0.35: During the development of this Policy, water rights applicants and landowners were denied admission to the meetings which developed these regulations (*Roland Sanford, Mendocino County Water Agency; Jim Wattenburger, Mendocino County Board of Supervisors*)

Response: In developing the Policy, the Board and its staff have and will continue to consider input from all stakeholders, including water right applicants and landowners.

Comment 22.0.36: We are now faced with a Policy that the SWRCB states as its only goal is to take care of the needs of anadromous fish. The Endangered Species Act is a powerful and needed law, but can be applied where it is not genuinely necessary. Many people do not agree with what this Policy states these needs are. Not all fishery scientists are in agreement. Putting such tremendous regulations and restrictions on the backs of ag water users when the causes of the decline of salmonids are many and even global is unconscionable. Ag applicants and rural people who apply for small domestic use have become an easy target, much easier than taking on large urban users. What this Policy requires landowners to do will not help much to bring salmonids back and this is agreed upon by many professional biologists and hydrologists throughout the Project Area. This Policy needs to be rewritten with input from applicants as well as from agencies and TU/NHI. The Policy must have compromises made that everyone can live with. (*Roland Sanford, Mendocino County Water Agency; Jim Wattenburger, Mendocino County Board of Supervisors*)

Response: Applicability of the Draft Policy is not limited to agricultural water users, and large, urban users are not exempt. The instream flow-related criteria contained in the Draft Policy do not apply to the Russian River below Lake Mendocino and Dry Creek below Lake Sonoma because instream flows in those streams are regulated separately pursuant to State Water Board Decision 1610. Staff will consider clarifying that this exemption should be applied to other streams where minimum instream flows for the protection of fishery resources have been established by State Water Board Decision or Order.

Although water diversions are not the sole cause of the decline in salmonid fisheries, water diversions have contributed to the decline. (Draft SED, pp. 32-33.)

In developing the Policy, the Board and its staff have and will continue to consider input from all stakeholders, including water right applicants.

Comment 22.0.37: Many residents of the affect communities have not received notice of the Policy, and those that are aware of it have not been able to fully understand its potential effects. The Policy is more than 800 pages of highly technical analysis. The implications of the policy and the data offered in support of the proposed policy will require extensive effort by highly qualified and experienced engineering firms to understand. Because of this, the public's ability to fully participate in the public process is being foreclosed. (*Jan Shrem, Clos Pegase*)

Response: The State Water Board provided ample public notice of the availability of the December, 2008 Draft Policy. The notice provided far exceeded what was legally required. Water Code section 13147 sets forth the notice requirements that apply to adoption of policy for water quality control. Section 13147 requires the Board to notify any affected Regional Boards 60 days prior to holding a hearing to consider adoption of the policy and give notice by publication within the affected region pursuant to section 6061 of the Government Code. Section 6061 provides only that publication of notice shall be for one time. The State Water Board has not yet scheduled a hearing to consider adoption of the Draft Policy, and was not required to provide public notice of the availability of the Draft Policy. Nonetheless, the Board published notice of availability of the Draft Policy for one day in six newspapers in the policy area (on December 30, 2007, and January 1, 2008), sent notice via Lyris to 537 interested persons, via separate E-mail to 29 interested persons, and via U.S. mail to 4,532 water right applicants, small domestic and livestock users, governmental agencies, environmental groups, attorneys, environmental firms, and engineering firms. The Board also posted notice at the County Clerk's offices in all five counties within the Policy area.

Staff disagree with the statement that the public's ability to fully participate in the public process is being foreclosed. Preliminarily, the Draft Policy and supporting documentation, including the Task 3 Report and Substitute Environmental Document, were approximately 800 pages, but the Draft Policy itself, including appendices, was less than 100 pages. Moreover, interested persons have had ample opportunity to examine the Draft policy and supporting documentation and comment on the documents. In addition to a lengthy review and comment period, the State Water Board held a technical staff workshop on February 6, 2008, to explain the technical basis for the Policy, describe how it could be applied to water right projects, and answer questions. The Board held two additional workshops on August 5 and 6, 2008. The Board also posted a list of frequently asked questions and answers on its project-dedicated website.

Comment 22.0.38: My family and the other residents of the North Coast are relying on your assistance in facilitating an open and public dialog to develop the Policy as a collaborative watershed approach that will provide fishery protection while satisfying the California Constitution's mandate that our water supply be put to beneficial use (*Jan Shrem, Clos Pegase*)

Response: The Draft Policy allows for a watershed approach for determining water availability and the environmental impacts of multiple diversions, as an alternative to using the regionally protective criteria set forth in the Policy.

The State Water Board's goal is to develop a Policy that will ensure that water rights are administered in a manner that is protective of fishery resources, while minimizing water supply impacts resulting from the Policy.

Comment 22.0.39: The State Board's process for developing, considering and adopting the Draft Policy is notable for its lack of openness or meaningful early stakeholder input. Rather than being an inclusive process based on a series of local workshops, with extensive input from knowledgeable local consultants, the process was relatively closed. Although there was one opportunity for providing "scoping" comments in 2006, the State Board staff engaged thereafter in what appeared to be a very secretive process. For example, the State Board chose not to circulate advance drafts and not to seek public input on what is a completely new and scientifically complex policy before publishing it in draft form in December 2007. Given the major environmental, social and financial considerations at stake, the State Board should have adopted a more inclusive, open and scientifically rigorous process with all of the relevant stakeholders at a meaningful early time. Accordingly, Golden Vineyards requests that the State Board adopt such a process at the present time. *(Paul "Skip" Spaulding, Farella Braun + Martel LLP/Golden Vineyards)*

Response: The policy development process has been open and inclusive. After releasing the Draft Policy on December 29, 2007, the State Water Board held three local workshops to answer questions about the Draft Policy and hear input from interested persons. The workshops were held on February 16, 2008, August 5, 2008, and August 6, 2008. Two of the workshops were held in Santa Rosa, and one of the workshops was held in Ukiah. The Board also provided stakeholders with an extensive period of time to review the Draft Policy and prepare written comments.

The policy development process also has been scientifically rigorous. The Draft Policy was written by State Water Board staff, with technical assistance from the Board's consultants, Stetson Engineers, Inc. and R2 Resource Consultants, Inc (R2). R2 conducted extensive scientific research to support the technical basis for the Draft Policy. R2's research is described in the Task 3 Report, dated August 6, 2007. In addition, the scientific basis for the Policy has been subjected to an external, scientific peer review pursuant to Health and Safety Code section 57004.

Comment 22.0.40: I believe that this bill flies in the face of public participation in government decision making. *(Michael Vellutini, TriValley Vineyard Management)*

Response: Comment noted.

23.0 CEQA

Topic 23.1 CEQA - General Compliance

Comment 23.1.1: The Draft Policy fails to follow California water law. *(Pat Geib Alexander, Geib Ranch Vineyards; Corrin Amaral; Myles Anderson; Anne Arns; Peter Bradford, Bradford Ranch; Carrie Brown; Jeffery Carlton, Dutton Ranch Corporation; Thomas Carpenter; Brian Churm, Potter Valley Growers, Inc.; Ned Coe, Bill Coe & Sons; Annette Cooley, Cooley Logging; Casey Cooley; Christopher Dohring; Alfred Edelbacher; Sandy Elles, Napa County Farm Bureau; Brian Fedora; Nicholas Ferrari; Tom Gamble, Gamble Ranch; Sara and Gary Giannandrea, Three G's Hay and Grain; Donald Gordon, Gordon Family Ranch; Dominic*

Grossi, Marin County Farm Bureau; Ted Hall, Long Meadow Ranch; Katherine Harnden, Harnden Ranches; Joseph Hurlbut; Leo Hurley, Wrath Cellars and Vineyard; Wayne Lamb; Dennis Meisner; James Mooney; Robert Mueller, McKenzie-Mueller Vineyards and Winery; Peter Nissen, Napa County Farm Bureau; Jack Olsen, San Mateo County Farm Bureau; Butch Parton; Frost Pauli; Loren Poncia; George Rau; Barbara Reed; Steve Reese, Denner Ranches Inc.; Annette Rhodes, Rhodes Vineyards; Richard Rhodes, Rhodes Vineyards; Jay Russ, J. Russ Company; Erin Russell; Gary Sack, California Farm Bureau; Tito Sasaki, Sasaki Vineyards; Janet Sclar, Amity Heritage Roses; R. Simcoe, Mast Ranch Vineyard, FLP; William Smith; Al Wagner, Clos Du Val Wine Company; Gary Wilsey, Wilsey Vineyard, LLC; Silvie Wilson; Terrence Wilson, Rancho Chimiles; Windy Wilson; Kristi Wrigley)

Response: Staff disagree with this assertion.

Comment 23.1.2: Development of such policy must also be consistent with other water code sections and the federal Clean Water Act. Consistency with Water Code Section(s) 13140, 13141, 13142, and 13146 is required. It must also comply, as a water quality control action, with state and federal anti-degradation language as well as Water Code Section 13242 - where such principles and guidelines (policy - as a water quality control plan) must fully describe all actions to take place and necessary to attain Water Quality Standards, provide a time line for compliance with such standards, and monitor and enforce such standards. (*Alan Levine, Coastal Action Group*)

Response: Article 3 (commencing with section 13140) of chapter 3 of division 7 of the Water Code governs adoption of state policy for water quality control, including the proposed Policy. Sections 13140, 13141, 13142, and 13146 are part of article 3, and therefore the commenter is correct that the Policy must be consistent with those sections.

The draft Policy is consistent with the State antidegradation policy (set forth in State Water Board Resolution No. 68-16) and the federal antidegradation policy (set forth in 40 C.F.R. § 131.12). In general, where existing water quality exceeds applicable water quality objectives, the State and federal antidegradation policies allow a reduction in water quality only if instream beneficial uses will be maintained and protected, and the reduction in water quality is necessary to accommodate important social and economic development. In this case, the Policy itself will operate to protect water quality by ensuring that water rights are administered in a manner designed to maintain the instream flows necessary to protect anadromous fish. As disclosed in the draft SED, however, the Policy could cause affected persons to take certain actions, including increasing groundwater extraction and use, increasing diversions under claim of riparian rights, relying on other alternative water sources, removing or modifying onstream dams, and constructing offstream storage facilities, and those activities could in turn adversely affect water quality. (Draft SED, pp. 54, 57, 60, 66, 68, 71.)

Whether or to what extent the Policy will cause a reduction in water quality is speculative because it is impossible to predict who will take what action in response to the Policy. (It merits note that a significant increase in riparian diversions in particular seems unlikely, given the fact that directly diverting under riparian rights is an option now, yet the Division of Water Rights has a backlog of water right applications for storage projects. The number of pending applications indicates that a storage right may be necessary to ensure a reliable water supply, and reliance on riparian rights may not be a viable option for many diverters.) Similarly, it is uncertain whether any reduction in water quality would impair instream beneficial uses.

To the extent that instream beneficial uses would be impaired, the State and Regional Water

Boards can take independent regulatory action to the extent necessary to ensure that instream beneficial uses are maintained and protected, in satisfaction of one of the requirements of the State and federal antidegradation policies summarized above. In satisfaction of the other requirement, any reduction in water quality is necessary to accommodate the protections afforded to anadromous fish under the Policy, which constitute an important social and economic development.

Section 13242 is not contained in article 3, and is not applicable to the proposed Policy. That section concerns the program of implementation required to be included in regional water quality control plans.

Comment 23.1.3: The Policy fails to meet California Environmental Quality Act (CEQA) requirements of dealing with cumulative effects: (1) All the diversions acting together cause problems off site; (2) Changes due to land use have caused reduced water supply and water availability that need to be considered in Water Rights Permit issuance; (3) Groundwater withdrawal is ignored, although it is likely to increase as a result of the Policy, and is recognized as contributing to surface water depletion and loss of fisheries productivity in the region. (*Jay Halcomb et al, Sierra Club Redwood Chapter; NA, Sierra Club Redwood Chapter*)

Response: A discussion of potential cumulative impacts can be found in response to 23.6.11.

The nature of the second category of impacts listed by the commenter, and how these impacts relate to the proposed Policy, is unclear. The Policy would require water right applicants to prepare a water supply report, which would include an estimate of the amount of water available to supply the applicant's project, taking into consideration the demand of senior water right holders.

Comment 23.1.4: The Water Board released a Draft Substitute Environmental Document ("Substitute Document" or "SED") as CEQA compliance for the Draft North Coast Instream Flow Policy ("Draft Policy"). This document, however, does not satisfy CEQA's substantive requirements. CEQA provides exemptions from preparing environmental impact reports ("EIRs"), negative declarations, and initial studies for certified regulatory programs such as the Water Quality Control (Basin)/208 Planning Program and instream beneficial use protection program. (See, Cal Pub. Resources Code section 21080.5; Cal. Code of Regs., tit. 14, section 15251.) If the Instream Flow Policy falls within one of these programs, it is generally exempt from the CEQA requirements contained in Chapters 3 and 4, and Public Resources Code section 21167. (Cal. Pub. Resources Code section 21080.5(c).) However, the exemption does not excuse the Water Board from complying with the substantive requirements of CEQA. "A certified program remains subject to other provisions in CEQA such as the policy of avoiding significant adverse effects on the environment where feasible." (Cal. Code of Regs., tit. 14, section 15250.) "Documents prepared by certified programs are considered the 'functional equivalent' of documents CEQA would otherwise require." (*City of Arcadia, et al. v. State Water Resources Control Board, et al. (2006) 135 Cal. App. 4th 1392, 1423, citing, Mountain Lion Foundation v. Fish and Game Commission (1997) 16 Cal. 4th 105, 127.*) (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: The commenter is correct that certified regulatory programs, including adoption of the Policy, are exempt from chapter 3 (commencing with section 21100), chapter 4 (commencing with section 21150) and section 21167 of the Public Resources Code. Other

provisions of CEQA, including the policy of avoiding significant, adverse effects on the environment where feasible, apply to certified regulatory programs. The SED complies with applicable CEQA requirements.

Comment 23.1.5: The Substitute Document states that environmental review of the Draft Policy "was conducted at a programmatic level." (SED, p. ii). Unfortunately, the Substitute Document is unlawfully attempting to use the programmatic structure to avoid doing the required environmental analysis, deferring all meaningful environmental review until the indefinite future. The environmental analysis is so inadequate that the Substitute Document fails to satisfy the most basic legal requirements for programmatic documents. The CEQA Guidelines provide that: "A program EIR will be most helpful in dealing with subsequent activities if it deals with the effects of the program as specifically and comprehensively as possible. With a good and detailed analysis of the program, many subsequent activities could be found to be within the scope of the project described in the program EIR, and no further environmental documents would be required." (Cal. Code of Regs., tit. 14, section 15168(c)(5).) The Substitute Document does not do any of the things specified in Cal. Code of Regs., tit. 14, section 15169(b)(1)-(4) regarding an appropriate programmatic analysis. (a) The Substitute Document's consideration of effects and alternatives was anything but exhaustive. There is no analysis of cumulative impacts; instead, the Substitute Document provides that the "[Water] Board and other state and local agencies will need to address potential cumulative impacts in project-specific documentation." (SED, p. 84.) By so doing, the Substitute Document slights the analysis of cumulative impacts rather than facilitating adequate review. (b) The Substitute Document also fails to provide mitigation recommendations for either direct or cumulative impacts. While the mitigation analysis does state "other regulatory mechanisms can be expected to provide opportunities for minimizing and avoiding significant environmental impacts," those mechanisms are not identified. (SED, p. 87.) The Substitute Document should have considered broad policy alternatives that would have dealt with and mitigated many of the basic problems associated with crafting an Instream Flow Policy for an entire region. Instead, only a couple of narrowly defined alternatives were considered. (c) And finally, the Substitute Document certainly will not allow any reduction in paperwork. The Water Board will likely require CEQA documentation for essentially all pending water rights applications and petitions, because the Substitute Document does not deal with the potential environmental effects "as specifically and comprehensively as possible." Since the Substitute Document does not evaluate cumulative impacts or provide any mitigation measures, every subsequent activity will need its own environmental documentation to address those issues. Because so much of the environmental analysis is deferred to the project level review, water right applicants will gain few benefits from tiering to the programmatic document. (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: The degree of specificity required in an EIR (or SED) depends on the type of project that is the subject of the environmental analysis. As explained by the CEQA Guidelines, "[a]n EIR on a project such as the adoption or amendment of a comprehensive zoning ordinance or a local general plan should focus on the secondary effects that can be expected to follow from the adoption, or amendment, but the EIR need not be as detailed as an EIR on the specific construction projects that might follow." (Cal. Code, Regs., tit. 14, § 15146, subd. (b).) When an action is reasonably foreseeable in general terms, an EIR must include a general discussion of the action and its environmental effects; but an EIR need not include a detailed analysis of specific actions that cannot be reasonably foreseen. (*Ebbetts Pass Forest Watch v. California Dep't of Forestry and Fire Protection* (2008) 43 Cal.4th 936, 954.) The scope of an EIR's review of potential future environmental consequences is guided by

standards of reasonableness and practicality, and speculation concerning the environmental consequences of future activities that are unspecified and uncertain is not required. (Environmental Council of Sacramento v. City of Sacramento (2006) 142 Cal.App.4th 1018, 1031-1032.) The sufficiency of an EIR as an informative document depends on what is reasonably feasible. (Cal. Code Regs., tit. 14, § 15151.)

Here, a more general or programmatic level of review was appropriate because the project is the adoption of a policy for water quality control, as opposed to the approval of an individual water development project or projects. In addition, all of the potential impacts of the Policy are indirect impacts that could result if third parties take certain actions in response to the Policy, and it cannot be predicted with certainty who might take what specific actions. The draft SED made a good faith effort to identify the types of activities that affected persons might take, and evaluate the potential impacts of those activities. For example, Appendix E to the draft SED is an extensive report that estimates the number, location, onstream storage volume, and surface area of existing, onstream dams within the Policy area, for purposes of disclosing the potential impacts of dam modification or removal that may occur as a result of the Policy. The draft SED identified 1,771 existing, unauthorized dams, but it cannot be predicted with certainty which of those dams might be modified or removed as a result of the Policy. Conducting a project-level review of the potential modification or removal of all 1,771 dams would not be reasonable or feasible under the circumstances.

A discussion of potential cumulative impacts can be found in response to 23.6.11.

A discussion of mitigation measures can be found in response to 23.7.1.

Staff disagree with the comment that the draft SED considered only a couple of narrowly defined alternatives. The draft SED considered three comprehensive alternatives: a No-Project Alternative, the CDFG-NMFS Draft Guidelines Alternative, and a Maximum Protectiveness Alternative. In addition, the draft SED considered a number of alternatives to certain elements of the Policy, including diversion season alternatives, minimum bypass flow alternatives, maximum cumulative diversion alternatives, and alternatives in permitting onstream dams. Some of these alternatives were recommended by stakeholders, and some were developed by R2 Resources Consultants. It is unclear what the commenter means by alternatives that would deal with and mitigate the problems associated with crafting a policy for the entire region, nor does the commenter specify any alternatives that would address the commenter's concerns, and that would be consistent with the project goal of adopting a policy to maintain stream flows in order to protect fishery resources.

The project analyzed in the SED is adoption of the Policy, not all pending water right applications and petitions. Accordingly, the commenter is correct that CEQA documentation may be required for individual applications and petitions, provided that they are not exempt from CEQA requirements. The review process may be streamlined, however, for those projects that meet the regionally protective instream flow criteria set forth in the proposed Policy.

Comment 23.1.6: The CEQA Guidelines require discussion of "any inconsistencies between the proposed project and applicable general plans and regional plans" including "water quality control plans." (CEQA Guidelines, section 15125(d).) The analysis of project impacts is flawed because the SED fails to analyze consistency with the north coast and San Francisco Bay basin plans, TMDLs, and other planning documents. (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and*

Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers)

Response: The Policy is consistent with the basin plans and TMDL's. In general, the proposed Policy will improve water quality by protecting instream flows. As disclosed in the draft SED, however, the Policy could cause affected persons to take certain actions, including increasing groundwater extraction and use, increasing diversions under claim of riparian rights, relying on other alternative water sources, removing or modifying onstream dams, and constructing offstream storage facilities, and those activities could in turn adversely affect water quality. (Draft SED, pp. 54, 57, 60, 66, 68, 71.) In addition, Appendix E to the SED includes a list of streams that have been listed as water quality impaired pursuant to section 303(d) of the Clean Water Act, and explains that water quality impacts due to dam removal would be of particular concern in those streams. (Appendix E, pp. 23-27.)

Whether or to what extent the Policy will cause a reduction in water quality is speculative because it is impossible to predict who will take what action in response to the Policy. (It merits note that a significant increase in riparian diversions in particular seems unlikely, given the fact that directly diverting under riparian rights is an option now, yet the Division of Water Rights has a backlog of water right applications for storage projects. The number of pending applications indicates that a storage right may be necessary to ensure a reliable water supply, and reliance on riparian rights may not be a viable option for many diverters.) Similarly, it is uncertain whether any reduction in water quality would be inconsistent with the applicable basin plan or any applicable TMDL. To the extent that any reduction in water quality would be inconsistent with the applicable basin plan or any applicable TMDL, the State or Regional Water Board could take independent regulatory action to the extent necessary to ensure compliance with the basin plan or TMDL.

Comment 23.1.7: Neither the Policy, Substitute Environmental Document, nor technical documents adequately assess water quality requirements of the Basin Plan. (*Catherine Kuhlman, State of California Regional Water Quality Control Board, North Coast Region; Bruce Wolfe, State of California Regional Water Quality Control Board, San Francisco Bay Region*)

Response: The Policy is consistent with the basin plans. In general, the proposed Policy will improve water quality by protecting instream flows. As disclosed in the draft SED, however, the Policy could cause affected persons to take certain actions, including increasing groundwater extraction and use, increasing diversions under claim of riparian rights, relying on other alternative water sources, removing or modifying onstream dams, and constructing offstream storage facilities, and those activities could in turn adversely affect water quality. (Draft SED, pp. 54, 57, 60, 66, 68, 71.) In addition, Appendix E to the SED includes a list of streams that have been listed as water quality impaired pursuant to section 303(d) of the Clean Water Act, and explains that water quality impacts due to dam removal would be of particular concern in those streams. (Appendix E, pp. 23-27.)

Whether or to what extent the Policy will cause a reduction in water quality is speculative because it is impossible to predict who will take what action in response to the Policy. (It merits note that a significant increase in riparian diversions in particular seems unlikely, given the fact that directly diverting under riparian rights is an option now, yet the Division of Water Rights has a backlog of water right applications for storage projects. The number of pending applications indicates that a storage right may be necessary to ensure a reliable water supply, and reliance on riparian rights may not be a viable option for many diverters.) Similarly, it is uncertain whether any reduction in water quality would be inconsistent with the applicable basin plan. To the extent that any reduction in water quality would be inconsistent with the

applicable basin plan, the State or Regional Water Board could take independent regulatory action to the extent necessary to ensure compliance with the basin plan.

Comment 23.1.8: The Policy does not reference the role of the Regional Boards in basin planning, monitoring, and permitting, nor the need for the Policy and any subsequent water rights actions to consider the requirements of the Basin Plan. *(Catherine Kuhlman, State of California Regional Water Quality Control Board, North Coast Region)*

Response: In general, the proposed Policy will improve water quality by protecting instream flows, and therefore the Policy will assist water right applicants in meeting the requirements of the basin plan.

In acting on water right applications, the Water Code requires the State Water Board to consider a variety of factors, including basin plan requirements. (See Wat. Code, §§ 1253-1259.) The focus of the Policy is the maintenance of instream flows needed to protect fishery resources. The Policy does not need to list all of the factors that the State Water Board must consider in acting on water right applications.

Comment 23.1.9: Therefore, I think it would be a good idea if before policy adoption is even considered, the Board request staff to: (1) carefully examine the Final Scoping Report with reference to all the comments that were made. Many people brought up excellent points; (2) address the criticisms and comments made in the SED or other document; (3) modify the Policy to resolve the issues that were raised. *(Rudolph Light)*

Response: Staff has carefully examined the Final Scoping Report and all the public comments that were received. As part of the policy adoption process, the State Water Board is required to prepare a response to public comment document. Staff will consider all comments received when developing recommended modifications to the proposed Policy. The State Water Board will consider the issues raised by commenters and staff recommendations when it considers adopting the Policy.

Comment 23.1.10: The CEQA review process is unclear. Will an Environmental Impact Statement be prepared for the proposed Policy? *(Don Neubacher, US National Park Service, Point Reyes National Seashore)*

Response: No, an Environmental Impact Statement will not be prepared, nor will an Environmental Impact Report (EIR) be prepared. (Environmental Impact Statements are prepared pursuant to the National Environmental Policy Act, which does not apply to the adoption of the Policy.) Because adoption of the Policy is a certified regulatory program, which is exempt from certain provisions of CEQA, including the requirement to prepare an EIR, a Substitute Environmental Document (SED) will be prepared. (See Pub. Resources Code, § 21080.5, subd. (c).)

Comment 23.1.11: The State Board Staff has prepared a Substitute Environmental Document in connection with its consideration of the Draft Policy. According to the State Board, it is entitled to prepare this document, in lieu of an Environmental Impact Report under CEQA, because this policy comes within the certified regulatory program for State Board establishment of instream beneficial use protection programs. CEQA Guidelines, section 15251(k). However, if this SED is allowed by CEQA in lieu of an EIR (and it appears that the Draft Policy may not qualify for this alternative), it must still comply with a full range of CEQA goals and policies. See, e.g., CEQA Guidelines, section 15250. *(Paul "Skip" Spaulding,*

Farella Braun + Martel LLP/Golden Vineyards)

Response: Certified regulatory programs, including adoption of the Policy, are exempt from chapter 3 (commencing with section 21100), chapter 4 (commencing with section 21150) and section 21167 of the Public Resources Code. The commenter is correct that other provisions of CEQA, including the policy of avoiding significant, adverse effects on the environment where feasible, apply to certified regulatory programs.

Comment 23.1.12: The Proposed Policy fails to achieve its intended goals for many reasons, but not least because it violates California and federal law. The Proposed Policy fails to balance the competing needs for water, as required under the California Constitution. It does not weigh the benefits derived from agricultural, domestic and industrial uses of water, nor does it consider the environmental benefits derived from existing ponds, which provide habitat to a number of endangered species other than salmon. Adopting a policy that fails to consider these other interests would violate Article X, Section 2 of the California Constitution, the California Water Code and the California Environmental Quality Act. In addition to this basic substantive legal defect, procedural defects, including insufficient notice and explanation, have compromised our ability to comment meaningfully on the Proposed Policy and, thus, violated our guarantees of procedural due process under the U.S. and California Constitutions as well as the California Administrative Procedures Act. (*Leonard Stein, Jackson Family Investments, LLC*)

Response: Contrary to this comment, agricultural, domestic and industrial beneficial uses were considered in developing the draft Policy. In fact, the draft SED concluded that the Maximum Protectiveness Alternative was infeasible because a policy that favored the protection of fishery resources above all other beneficial uses did not meet the project goal of minimizing water supply impacts resulting from the Policy. (Draft SED, pp. 42-43.) In addition, the draft SED discloses the potential loss of habitat, and associated impacts to special-status species, such as the western pond turtle and red-legged frog, if onstream dams are removed as a result of the Policy. (Draft SED, pp. 62-63, 67-68, Appendix E, pp. 18-21.)

To the extent that the Policy limits future appropriations in order to protect fishery resources, such limitations are appropriate in light of the fact that anadromous fish species in the Policy area have been listed as threatened or endangered species, due in part to existing water diversions. (Draft SED, pp. 32-33.)

Topic 23.2 CEQA - Existing Environmental Settings

Comment 23.2.1: Commenter provides discussion and data for watersheds with flow levels that already limit salmon: Napa River, Navarro River, Russian River, Sonoma Creek, Gualala River, and West Marin Tributaries (Salmon, Americano, Stemple and Walker creeks); and outside of the Policy area: Scott, Shasta, Klamath and Eel rivers (*Patrick Higgins, Consulting Fisheries Biologist/Sierra Club Redwood Chapter*)

Response: Comment noted. The State Water Board recognizes that decreased flows already have adversely affected salmonid fisheries in some streams in the project area. (Draft SED, pp. 32-33.)

Comment 23.2.2: I am intimately familiar with the Napa River watershed from having commented (Higgins, 2006a) on the Napa River Sediment TMDL (SFBWQCB, 2006) and on several proposed vineyard conversions (Higgins, 2006b; 2007). The diminishment of flow from

historic levels is most clearly seen through examining what would have been coho salmon habitat. USFWS (1968) estimated the historic coho population in the Napa River at 2000-4000 fish. Coho prefer reaches with a gradient of less than <2% and suitable water temperature, with juveniles spending one year in freshwater. Figure 6 illustrates where coho are likely to have ranged in the middle Napa River watershed. The majority of low gradient mainstem and tributary reaches were found to be dry (Figure 7) or stagnant in 2001 by Stillwater and Dietrich (2002). Figure 8 is taken from Stetson Engineers (2007a) and shows the number of permitted and unpermitted diversions in the lower Napa River, including Carneros Creek. Stetson Engineers (2007a) noted that 43% of winter flow in Carneros Creek is likely diverted. While Napa River coho are extinct, steelhead are still present, although there is a homogeneous disturbance in the watershed because of urbanization, timber harvest, vineyard development, dams for municipal water supply and changes in the stream channel.

Steelhead are blocked from 30% of the Eastside of the watershed by large municipal water supply dams, the mainstem Napa River is now either dry or unsuitable for steelhead rearing, and Westside tributaries sustain steelhead in isolated pools. Stillwater and Dietrich (2002) noted that steelhead juveniles stranded in isolated pools lost weight during summer due to lack of insect drift delivered not being delivered by flows. Given the precipitous decline in steelhead habitat, it is my professional opinion that their population is likely dropping significantly. Chinook salmon still return to the Napa River, but their population is small and also at risk of loss.

My Napa River TMDL comments (Higgins, 2006a) conclude that sediment and flow problems cannot be remedied without limiting watershed disturbance and that temperature and fish problems cannot be remedied without additional flows: "The State Water Resources Control Board Water Rights Division has the authority to install stream gages where ever necessary to insure protection of public trust, water quality and water rights. The TMDL should make explicit reference to reaches affected by low flows and call on the SWRCB WRD to take appropriate monitoring and enforcement actions." (*Patrick Higgins, Consulting Fisheries Biologist/Sierra Club Redwood Chapter*)

Response: Comment noted.

Comment 23.2.3: I am familiar with the Russian River due to work on a KRIS Russian database (IFR, 2003a) and from having provided comments on the Bohemian Grove NTMP (Higgins, 2007b). As one of the centers of the booming wine industry, the Russian River is one of the most heavily diverted streams in northwestern California, as indicated by the prevalence of unpermitted diversions (Figure 11). Major tributaries lose surface flow during summer and early fall (Figure 12) and significant numbers of large pumps have been installed to tap ground water, some immediately adjacent to the river (Figure 13). The Sierra Club (2006) documented problems with over-diversion and widespread illegal water use in Maacama Creek causing severe damage to public trust. Coho salmon are increasingly rare in the Russian River, but still known to occur in some tributary subbasins. Figure 14 shows the existing appropriative rights and those proposed for all tributaries known to have harbored coho salmon in the past. Coho were present in Green Valley Creek all three years of CDFG surveys from 2000-2002, but present in Dutch Bill Creek only one year in that period. While there is only one permit on Green Valley Creek, there were 17 applications as of 2001 and Dutch Bill had 7 water rights permitted, but an additional 10 in the application process. Figure 15 shows identified illegal water withdrawal specifically on these streams (Stetson Engineers, 2007a). Legal and illegal diversions pose significant risk to the last streams where coho still persist in the Russian River. California Department of Fish and Game habitat typing surveys of Green

Valley Creek and Dutch Bill Creek show that both streams lose surface flow in some reaches (Figure 15). Pool frequency is also low relative to the CDFG (2004) target of 40% as optimal for salmonids and coho juveniles are known to require pools for freshwater rearing (Reeves et al., 1988). Additional permitted extraction of surface water is likely to both raise water temperatures and decrease depth and cover for juvenile coho salmon. The extent of dry habitats suggests that both streams are fully or possibly over-allocated and that coho habitat is already significantly diminished. (*Patrick Higgins, Consulting Fisheries Biologist/Sierra Club Redwood Chapter*)

Response: Comment noted.

Comment 23.2.4: My familiarity with Sonoma Creek is primarily due to my participation in the KRIS East Marin-Sonoma database project. Similar types of evidence are available to those used to demonstrate problems on the Russian River above. Habitat typing data (Figure 16) from upper Sonoma Creek indicates that reaches downstream of the headwaters go dry in summer. The cause of this loss of surface flow might be partially related to aggradation, but is still a sign that surface water availability has been diminished and that fish habitat is currently compromised. Figure 17 shows the dry bed of Carriger Creek, a tributary of Sonoma Creek, with what appears to be a large diversion pipe upstream. While Sonoma Creek itself has some problems with unpermitted diversion (Figure 18), diversion in the Tolay Creek basin indicates major illegal over-appropriation. It is likely that steelhead in Tolay Creek are at a very low level, if they persist at all. (*Patrick Higgins, Consulting Fisheries Biologist/Sierra Club Redwood Chapter*)

Response: Comment noted.

Comment 23.2.5: I am familiar with the Gualala River from having worked on the KRIS Gualala database (IFR, 2003), completed a literature search and data assessment (Higgins, 1997), and commented on several proposed vineyard conversions (Higgins, 2003; 2004a, 2004b). The Gualala River lies within southern Mendocino and northwestern Sonoma counties. It is recognized as impaired with regard to sediment (NCRWQCB, 2004) and has major problems with loss of surface flow and high water temperature (IFR, 2003b). CDFG (2001) characterized coho salmon in the Gualala River as "extirpated or nearly so." The following passage from KRIS Gualala (IFR, 2003b) characterizes the State Water Board's prior actions in the North Fork: "The California Department of Fish and Game (Hunter, 1996) expressed concern about the diversion of the North Fork Gualala by the North Gualala Water Company, citing reduction in fish habitat if minimum stream flows were not retained. The State Water Resources Control Board (1999) prohibited diversion of surface water when the North Fork dropped below four cubic feet per second (cfs), then in August 2000, ruled that this order applied to two NGWC groundwater wells (SWRCB, 2000). This decision recognizes the importance of North Fork flows to the lower mainstem Gualala as well." The Gualala River's combination of aggradation and increased water use due to vineyard expansion has created an expanding problem with stream reaches in this basin losing surface flow (Figure 19), including the lower mainstem, Wheatfield Fork, South Fork, Buckeye Creek and Rockpile Creek (Higgins, 2003; 2004). Habitat typing surveys by CDFG (2001), as part of the North Coast Watershed Assessment Program, found mainstem reaches going dry (Figure 20) where they maintained surface flow during the 1976-77 drought (Boccione and Rowser, 1977). Although rainfall in 1976-77 was only 16.0 inches, total rainfall in 2001 was 24.6 inches, yet flows in 1976-77 were 12.5 cfs and all major tributaries contributed surface flow. This indicates a major decrease in water yield and water supply. The extensive loss of surface flows in the Gualala River represents a major threat to the continuing survival of steelhead, which are still a

major part of the local tourist-based economy. (*Patrick Higgins, Consulting Fisheries Biologist/Sierra Club Redwood Chapter*)

Response: Comment noted.

Comment 23.2.6: West Marin Tributaries: Salmon, Americano, Stemple and Walker creeks all have agricultural water extraction that both compromises water quality and limits habitat for steelhead and coho salmon. Figure 21 shows a close up of these West Marin tributaries with all impoundments, 1) permitted, 2) those with applications pending, and 3) illegal diversions with no contact from the operator. The epidemic problem of over diversion and potential for cumulative effects is self-evident. All these West Marin tributaries have extensive agricultural land use, mostly by dairies. Cattle may deposit fecal material directly into streams or it may enter as a result of overland flow. Grazing takes place up to stream banks leaving no riparian buffer capacity (Figure 22). Lack of canopy also promotes stream warming and flow depletion contributes promotion of both increased water temperatures and nutrient pollution. Charts from KRIS West-Marin Sonoma (IFR, 2003a) show the degree of water quality impairment due to the cumulative effects of agricultural activity and flow depletion. Salmon Creek is the most northerly of tributaries considered, entering the Pacific Ocean north of Bodega Bay. Figure 23 shows dissolved oxygen (DO) values from several stations sampled by CDFG on Salmon Creek that are indicative of nutrient pollution. Super-saturated DO of greater than 10 mg/l at Highway 1 is linked to very high biological activity of algae blooms that thrive in the stagnant, nutrient-rich waters. Minimum DO levels at the Bodega location approached the recognized lethal limit for salmonids of 3.8 mg/l (WDOE, 2002). While D.O. is super-saturated during daylight hours due to photosynthesis, D.O. becomes depressed as algae respire at night or as algae dies off. Merritt and Smith Consulting (1996) studied Americano Creek for the City of Santa Rosa. Figure 24 shows flow measurements indicating that surface flow near Garicke Road (Station E-6) was not present from April until November 1988 and from May-September 1989. Flow depletion also contributes to major pollution problems similar to those in neighboring creeks. Stemple Creek shows another symptom of nutrient pollution, high pH (Figure 25). A pH value of over 9.5 is directly lethal to rainbow trout (Wilkie and Wood, 1995). Walker Creek had coho salmon historically (Figure 26) but flow depletion and nutrient pollution have contributed to their disappearance. Kelly (1976) used electrofishing and netting for the Marin Municipal Water District sponsored studies that found coho, abundant Pacific lamprey juveniles and steelhead juveniles of all age classes in Walker Creek. Flows now annually fall to near 5 cfs or less from July through September (Figure 27). Reduced flow and grazing impacts have resulted in water quality problems similar to previously discussed tributaries related to nutrient pollution. (*Patrick Higgins, Consulting Fisheries Biologist/Sierra Club Redwood Chapter*)

Response: Comment noted.

Comment 23.2.7: My experience on the Shasta River parallels that described for the Scott River and my TMDL comments (Higgins, 2006d) also serve as the source for information below. The Shasta River Adjudication (CDPW, 1932) does not require a minimum flow level similar to the Scott River Adjudication (CSWRCB, 1980) and average daily flows can fall to near 20 cfs (Figure 36), which has major consequences for elevated stream temperatures (NRC, 2004). Major increases in diversion of surface and groundwater have changed the temperature regime of the Shasta River. The NCRWQCB (2006b) recommends that flows increases at Big Springs to at least 50 cfs to restore water quality. The Shasta River and Scott River will also be where new private Watermaster service will be pioneered. The service has been ineffective in protecting instream flows in these basins (Kier Associates, 1991; 1999).

The cost of DWR Watermaster service is born by the water users and it has been rising in recent years. Recent legislation now allows the water users to hire private contractors to render the same service. Questions have been raised as to whether a private contractor working for the water users can be expected to elevate public trust interests over those of his clients. Dwinnell Reservoir (Figure 37) blocks the headwaters of the Shasta River and is a major source of pollution itself (NCRWQCB/UCD, 2005). The NRC (2004) asked for consideration of removal of Dwinnell Dam in order to restore fish passage and increase flows. *(Patrick Higgins, Consulting Fisheries Biologist/Sierra Club Redwood Chapter)*

Response: The Shasta and Scott Rivers are outside the project area.

Comment 23.2.8: The majority of the peer reviewers of the Policy (Lang, 2008; Gearheart, 2008; Band, 2008; McMahan; 2008) stated that SWRCB WRD needed to factor climate change into their planning. As mentioned above, NRC (2004) asserts that the Shasta River has the greatest restoration potential in the Klamath Basin in the face of global warming. The Pacific Decadal Oscillation (PDO) cycle causes major shifts in ocean productivity from favorable to unfavorable for salmon approximately every 25 years off the coast of California, Oregon and Washington (Hare et al., 1999). Good ocean conditions are linked to wetter weather cycles and prevailed from 1900-1925 and 1950-1975 and returned to favorable again in 1995 (Collison et al., 2003). Poor ocean productivity and dry on-land cycles from 1925-1950 and 1976-1995 created very adverse conditions for salmon, particularly coho. The wet climatic cycle from 1950 to 1975 included the 1955 and 1964 floods. As the PDO cycle shifted, the 1976-1977 drought combined with highly aggraded stream beds to create a freshwater habitat bottleneck. Hopefully the WRD and DWR will get more water back in the Shasta River before the PDO switches in 2015-2025. *(Patrick Higgins, Consulting Fisheries Biologist/Sierra Club Redwood Chapter)*

Response: Comment noted. Staff also note that periodic review of the Draft Policy criteria could include revision of unimpaired hydrology to reflect climate change. The Shasta River is outside of the project area.

Comment 23.2.9: The existing environment was not adequately described in the Substitute Environmental Document. The existing environment of the North Coast is described in broad brush strokes at the regional level of detail, instead of by watershed and stream where the Draft Policy will be applied. Without at least a watershed-level description of the existing environment, the reader cannot determine either the efficacy or the impacts of the Draft Policy and the Water Board will lack sufficient information to make an intelligent decision on the Policy. *(Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers)*

Response: The existing environmental setting is adequately described in the SED because it provides a balance between setting and impact evaluation. The SED assesses potential indirect environmental impacts at a programmatic level, which is more general than a project-specific assessment. The SED's assessment of impacts is conservative, in that if any reasonably foreseeable outcome of implementing the Policy at any one water diversion project could conceivably have a significant indirect impact on the environment, then the impact was judged to be significant in all cases. The SED concludes that there are potentially significant indirect environmental impacts that might occur in the Policy area in regard to several resource issue areas. The SED cannot, and does not, indicate where (or when) these impacts might occur.

How affected parties respond to implementation of the Policy and which parties, in which watersheds, and in which streams these actions may occur cannot be predicted with certainty. Accordingly, the environmental setting of the Policy area is described to a level of detail that matches and provides proper context for the impact evaluation.

Comment 23.2.10: In the SED, for the analysis of potentially significant impacts to be meaningful, the description of the existing environment must be sufficiently detailed, with an analysis that provides decision makers with sufficient information to make intelligent decisions. (County of Amador vs. El Dorado County Water Agency (1999) 76 Cal. App. 4th 931,955.) The courts have recognized that even though a reader may be able to "cobble together" the information contained in the environmental document to gain a better understanding of the existing hydrology and other components of the environment, such efforts should not be necessary. (Id.) However, even with some cobbling together of information in the Substitute Document and information buried in the various appendices, the description of the existing environment in the Substitute Document is insufficient. The environment of the North Coast is described in broad brush strokes at the regional level of detail, instead of by watershed and stream where the Draft Policy will be applied. (See generally, SED, Ch. 4.) Without at least a watershed-level description of the existing environment, the reader cannot determine either the efficacy or the impacts of the project. (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: "The description of the environmental setting shall be no longer than is necessary to an understanding of the significant effects of the proposed project and its alternatives." (Cal. Code Regs., tit. 14, § 15125, subd. (a).) In this case, the environmental setting of the Policy area is described to a level of detail that matches and provides proper context for the impact evaluation, and a more detailed description of the environmental setting is not necessary to an understanding of the potentially significant effects the Draft Policy.

The SED assesses the potential indirect environmental impacts of the Draft Policy at a programmatic level, which is more general than a project-specific assessment. As explained in response to comments concerning the SED's evaluation of environmental impacts, a more general or programmatic level of review was appropriate because the project is the adoption of a policy for water quality control, as opposed to the approval of an individual water development project or projects. In addition, all of the potential impacts of the Policy are indirect impacts that could result if third parties take certain actions in response to the Policy, and it cannot be predicted with certainty who might take what specific actions.

Describing the environmental setting by watershed and stream, as the commenter suggests, is not necessary to an understanding of the potential indirect impacts of the Policy, which are not evaluated at that level of detail. In addition, it would not be reasonable or feasible to describe the environmental setting by watershed and stream because the Policy area comprises approximately 5,900 stream miles and 3.1 million watershed acres (4,900 square miles) in five different counties. (Draft SED, p. 15; see Cal. Code Regs., tit. 14, § 15151[the sufficiency of an EIR as an informative document depends on what is reasonably feasible].)

The description of the environmental setting is set forth in chapter 4 of the draft SED, and in Appendices B and C, which contain complete lists of the special-status plants and animals, respectively, that exist in the Policy area. Contrary to the commenter's assertion, the reader is not required to cobble together information in the SED and "buried in the various appendices."

The draft SED's use of appendices is consistent with the CEQA Guidelines, which discourage the placement of highly technical and specialized analysis and data in the body of an EIR (or SED), and recommend that such supporting information and analysis be included as appendices. (Cal. Code Regs., tit. 14, § 15147.)

Comment 23.2.11: The hydrology and topography of each watershed and stream vary dramatically throughout the region, and these differences must be described as being part of the existing environment. For example, the streams and tributaries to the mainstem of the Russian River are significantly influenced by the operation of Warm Springs and Coyote dams. The Substitute Document should have explained how the operation of the large dams in the area impact flow. There are also areas in the upper watersheds that have very little flow during much of the year, even under unimpaired conditions. The Substitute Document should have described the environment in these watersheds. A proper description of the existing environment would explain the differences in the environment in large versus small watersheds, and streams that are high in the watershed, and possibly above the point of anadromy, and those that are not (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: The draft SED does describe, in general terms, the variation in hydrology and topography throughout the Policy area. (Draft SED, pp. 15-19.) The draft SED also describes, again in general terms, the impact that Warm Springs Dam and Coyote Dam have on flow in the mainstem Russian River and Dry Creek. (Id. at p. 32.)

Comment 23.2.12: The Draft Policy proposes a new stream classification system in setting permitting requirements for instream dams. (See, e.g., SED, p. 8.) In order to understand the potential impacts of the Draft Policy, the description of the existing environment needs to identify the Class I, Class I, and Class III streams according to the Draft Policy's classification system. The discussion of the hydrology for the existing environmental setting does not provide those classifications. (SED, Section 4.2.) The identification of the classification of the streams within the affected area, as part of the existing environment is necessary to understand how the proposed Draft Policy would apply to those streams. While Appendix E of the Substitute Document appears to provide information about stream classification, the classification scheme used in that appendix does not match the classification scheme used in the policy. The description of the stream classification system in Appendix E is based on the stream classification system used by the Department of Forestry and Fire Protection (CDF) stream classification system, which is different than the classification system used in the policy. The policy modified the CDF classification system to reflect concerns expressed in Appendix D to the Scientific Basis Report. (SED, fn. 9, p. 8.) The stream classifications of the streams in the policy area are therefore not described in the Substitute Document or its appendices. (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: Although the commenter is correct that the draft SED describes the Board of Forestry's stream classification system, which may be slightly different from the stream classification system in the Draft Policy, the difference between the two systems does not affect the analysis contained in the draft SED.

The only difference between the two stream classification systems concerns the definition of a Class II stream. Both classification systems define Class II streams to include streams that

provide aquatic habitat for non-fish species, but the Board of Forestry has interpreted "non-fish aquatic species" to mean only aquatic vertebrates, not aquatic plants or invertebrates, whereas the Draft Policy's definition clarifies that non-fish aquatic species include aquatic benthic macroinvertebrates. As a result of this clarification, more streams are likely to be classified as Class II streams, as opposed to Class III streams, for purposes of applying the Draft Policy's permitting requirements for onstream dams.

The Draft Policy's permitting requirements for onstream dams vary depending on the stream classification of the stream where a given dam is located. Accordingly, the stream classification system is relevant to the analysis of the potential indirect environmental impacts of modification or removal of existing, unauthorized dams, contained in Appendix E and summarized in section 6.5 of the draft SED. The analysis does not differentiate, however, between Class II and Class III streams, and therefore the minor difference between the Board of Forestry's stream classification system and the Draft Policy's stream classification system does not change the analysis.

Comment 23.2.13: The Substitute Document also fails to include a description of existing agricultural resources in each watershed and stream. (See, e.g., *Galante Vineyards v. Monterey Peninsula Water Management District* (1997) 60 Cal. App. 4th 1109.) The Substitute Document provides some countywide agricultural acreage totals, and lifeform/landcover information for some of the counties. (SED, pp. 33-37.) However, this listing of facts is not an adequate description of the existing environment because there is no description of the types of crops and soils that exist along each stream and in each watershed in the affected area. The magnitude of the impacts to agricultural resources that will likely result from the policy can only be understood and measured if the existing agricultural resources are sufficiently described in the environmental baseline. (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: The environmental setting for land use, which includes agricultural land use, is adequately described in the SED (pp. 34 - 37) because it provides a balance between setting and impact evaluation. The SED assesses potential indirect environmental impacts at a programmatic level, which is more general than a project-specific assessment. The SED's assessment of impacts on agricultural resources is conservative, in that if any reasonably foreseeable outcome of implementing the Policy at any one water diversion project could conceivably have a significant indirect impact on agricultural resources, then the impact was judged to be significant in all cases. The SED concludes that there are potentially significant indirect environmental impacts on agricultural resources that might occur in the Policy area. The SED cannot, and does not, indicate where (or when) these impacts might occur.

How affected parties respond to implementation of the Policy and which parties, in which watersheds, and in which streams these actions may occur cannot be predicted with certainty. Accordingly, the environmental setting for land use in the Policy area is described to a level of detail that matches and provides proper context for the impact evaluation.

Comment 23.2.14: The Substitute Document must also make clear that the existing unpermitted dams are a part of the existing environmental baseline. Existing unpermitted water impoundments are a part of the environmental baseline from which the potentially significant impacts of the project must be measured. (See, e.g., *Fat v. County of Sacramento* (2002) 97 Cal. App. 4th 1270; *Riverwatch v. County of San Diego* (1999) 76 Cal. App. 4th 1428 [illegal activity part of environmental baseline]; Water Board Chief Counsel Memorandum,

Baseline for Analysis of Water Right Projects under the California Environmental Quality Act, June 1, 2005 [existing unpermitted diversions are a part of the environmental baseline.] Any changes to these existing structures will impact the physical environment. The information about where these structures may be located is hidden within Appendix E. However, their location should be included in the description of the existing environment in the Substitute Document. (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: The description of the environmental setting set forth in chapter 4 of the draft SED does describe, in general terms, the existence of numerous small dams and diversion structures in the Policy area. (Draft SED, p. 32.) The draft SED also recognizes that changes to existing, unauthorized dams could have environmental impacts. The analysis of these impacts is summarized in section 6.5 of the draft SED and described in more detail in Appendix E.

Contrary to the commenter's assertion, including the location of existing, unauthorized dams in the body of the draft SED was not necessary or required. The draft SED's use of appendices is consistent with the CEQA Guidelines, which discourage the placement of highly technical and specialized analysis and data in the body of an EIR (or SED), and recommend that such supporting information and analysis be included as appendices. (Cal. Code Regs., tit. 14, § 15147.)

Comment 23.2.15: It is likely that the proposed policy implementation measures will impact currently funded stream and river flood and restoration projects. Many of the flood protection and riparian restoration projects in Napa County have been hydraulically designed based upon current flow conditions. Modifications to the timing and volume of current stream flows may influence the effectiveness and performance of these projects and could reduce the value of public and private dollars invested in these projects. (*Brad Wagenknecht, Napa County Board of Supervisors*)

Response: It is difficult to respond to this comment without more information concerning the particular flood and restoration projects that the commenter believes will be impacted by the Draft Policy, and without knowing what actions individual diverters will take in response to the Draft Policy. In general, the Draft Policy should serve to preserve existing instream flows, and therefore the Policy should complement restoration projects, not impair their effectiveness.

Topic 23.3 CEQA - Alternatives to the Proposed Policy

Comment 23.3.1: The SED contains some discussion of what it terms "non-filer" surface water reservoirs, and identifies 1,253 estimated to exist, to go with 518 unauthorized dams with pending applications. (SED App. E, pp. 9, 13.) The SED does not contain a discussion of the consequences of the decision whether to allow unauthorized diversions to continue unchecked, or evaluation of an alternative that would require "non-filers" to file an application, or another that might require them to cease diversions without a permit. (*Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society*)

Response: The SED did not include a discussion of the consequences of the decision nor an evaluation of the alternatives to which the commenter is referring because the State Water Board is not contemplating these actions. As it has in the past, the State Water Board will continue to take appropriate enforcement action against unauthorized diverters, including "non-

filers." Section 11.0 of the Policy provides a framework for identifying and investigating instances of non-compliance with the Policy, including "non-filers", prioritization of enforcement cases, and timely and appropriate enforcement actions.

Comment 23.3.2: All alternatives analyzed in the SED focused exclusively on the question of whether and how to issue permits for new water rights and process a narrow class of new petitions for change. (SED, pp. 40-47.) The draft Policy and SED generally do not address questions such as how to encourage people with valid rights to engage in proactive stewardship activities; how to get people who should file applications or petitions to file one; how the State Water Board could collect information about stream flows and existing diversions by unauthorized diverters, diverters with a non-registered riparian or pre-1914 right, or diverters of connected groundwater - all of which is necessary to make an informed decision on a new permit; what the Board intends to do to ensure compliance for those who do have a valid right; how to improve the application process; or any of the other topics that would generally be considered administration of water rights. (*Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society*)

Response: Notwithstanding that the Policy applies only to applications to appropriate water and, as such, does not directly apply to existing water rights, the State Water Board encourages holders of valid water rights to proactively engage in activities that maintain adequate instream flows that are protective of native fish habitat. In this regard, by providing clear guidelines for the State Water Board to follow for purposes of water rights administration, the State Water Board intends that the Policy will help improve and streamline the processing of pending and future water rights change petitions. In this context, the Policy may encourage holders of valid water rights to proactively petition to modify their existing water rights in a manner that helps maintain adequate instream flows as well as encourage "non-filers" to file applications. The Policy contains provisions for identifying and investigating instances of non-compliance with the Policy, including "non-filers", prioritization of enforcement cases, and timely and appropriate enforcement actions.

Comment 23.3.3: The SED and Draft Policy take a similar approach with diversions from subterranean streams flowing through a known and definite channel, and with unauthorized direct diversions that cannot be discerned from an aerial photo. That is, the policy alternatives assume that such diversions would be subject to the Policy if an application is filed, but there is no analysis of alternatives that might identify such diversions or encourage them to file. Nor does it disclose sufficient data to make informed decisions about pending applications. Unlike "non-filer" diversions from surface reservoirs, the SED does not disclose how many "non-filer" diversions from subterranean streams or unauthorized direct diversions there might be. (*Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society*)

Response: A direct diversion typically consists of a pump or pipe that directly withdraws water from a stream without the need for a dam to make the diversion possible. Similarly, a diversion from a subterranean stream usually consists of a well nearby to the active streamflow that is equipped with a pump that directly withdraws water from the subterranean stream. In both cases, removal of such a diversion would simply entail removal of the pump or pipe or well, and would not have an environmental impact comparable to removal of an onstream regulatory dam or impoundment dam. For these reasons, the SED attempted to identify and estimate the locations and numbers of onstream dams, but it did not identify nor estimate the locations and

number of "non-filer" direct diversions or subterranean diversions. As it has in the past, the State Water Board will continue to take appropriate enforcement action against unauthorized diverters, including "non-filers" who use direct diversion or who divert from subterranean streams. Section 11.0 of the Policy provides a framework for identifying and investigating instances of non-compliance with the Policy, including "non-filers", prioritization of enforcement cases, and timely and appropriate enforcement actions.

Comment 23.3.4: There is no discussion at all about diversions based on a riparian, pre-1914, or percolating groundwater right, even though such diversions plainly affect instream flows and the ability of the agency to make informed decisions. (See SED, p. 16.) The SED analysis treats such diversions as thoroughly beyond the influence of the SWRCB - except, ironically, as methods to avoid complying with the Policy. (See SED, p. 49.) This is unfortunate not only because it understates the scope of the agency's constitutional obligation but also because it underestimates the opportunity to create incentives for positive stewardship. (*Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society*)

Response: The Policy applies to water diversions from all streams and tributaries in the Policy area that are subject to the State Water Board's water right permitting authority, including extractions from subterranean streams. The Policy does not apply to diversions under riparian or pre-1914 water rights nor does the Policy apply to extractions from percolating groundwater because such diversions and extractions are not subject to the State Water Board's water right permitting authority. However, Staff points out that the State Water Board is concerned about increases in diversions under existing water rights and the potential increases in groundwater extraction resulting from the Policy, including extraction of percolating groundwater, which can reduce instream flows needed to protect fish habitat. Accordingly, the SED points out that the Policy could give rise to increases in diversions under riparian rights or increases in groundwater extraction as affected parties take actions in response to the Policy requirements. As indicated in the SED (p. 13), the State Water Board may exercise its authority under the doctrines of reasonable use and the public trust to address diversions of surface water or groundwater that reduce instream flows in the Policy Area and thus adversely affect fish, wildlife, or other instream beneficial uses. Certain actions that affected parties take to increase diversion under riparian or pre-1914 water rights or to increase groundwater extraction might be subject to CEQA review at the "project-level" and the lead agency would be required to adopt mitigation measures to reduce significant project impacts, including cumulative impacts such as reduction in stream flow, to a level of less than significant.

Comment 23.3.5: The APA requires an agency to include in the Initial Statement of Reasons ". . . a description of the alternatives to the regulation considered by the agency and the agency's reasons for rejecting those alternatives" and a ". . . description of any alternatives the agency has identified that would lessen any adverse impact on small businesses." (Government Code section 11346.2(b)(4).) The APA also requires the agency to include in the Final Statement of Reasons: "(4) A determination with supporting information that no alternative considered by the agency would be more effective in carrying out the purpose for which the regulation is proposed or would be as effective and less burdensome to affected private persons than the adopted regulation." (Government Code section 11346.9(a)(4)) and "(5) An explanation setting forth the reasons for rejecting any proposed alternatives that would lessen the adverse economic impact on small businesses" (Government Code 11346.9(a)(5).) The Draft Policy fails to seriously consider alternatives that achieve the goals of maintaining protective instream flows that lessen the adverse impact on small businesses. Instead, the

Draft Policy proposes standards which could effectively wipe out many small businesses that rely on water diversions throughout the year. Additionally, no credible explanation is given for why other less drastic proposals for instream flows received by the Water Board during the scoping period were discarded in favor of what is proposed in the Draft Policy. (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: The adoption of state policy for water quality control, such as the proposed Policy, is exempt from the provisions of the Administrative Procedure Act cited by the commenter. (Gov. Code, § 11353.) Although the State Water Board is not required to determine the economic impact of the Policy on small businesses pursuant to the APA, the State Water Board's goal has been to develop a policy that is protective of anadromous fish, while minimizing water supply impacts that could adversely affect small businesses. In fact, the draft SED concluded that the Maximum Protectiveness Alternative was infeasible because a policy that favored the protection of fishery resources above all other beneficial uses did not meet the project goal of minimizing water supply impacts resulting from the Policy. (Draft SED, pp. 42-43.) In addition, the State Water Board has prepared an analysis of the direct costs of foreseeable methods of compliance with the Draft Policy, as may be required by Water Code section 13141.

With respect to the comment that the Draft Policy could effectively wipe out small businesses that rely on water diversions, it merits note that the regionally protective instream flow criteria contained in the Draft Policy apply to future appropriations, not existing, authorized diversions. Existing, unauthorized diversions could be affected by the Policy, but it is not reasonable for small businesses to rely on unauthorized diversions.

Comment 23.3.6: The basic objectives or goals of the Draft Policy are: (1) protect instream flows through the administration of water rights in order to provide comprehensive, multi-species ecosystem protection for streams within the Policy Area; (2) stabilize and enhance fish and wildlife resources in the Policy area; (3) minimize the impact of the new guidelines on water supply reliability throughout the Policy Area; and (4) provide meaningful regulatory stability by adopting criteria that meet all foreseeable State and Federal requirements. (SED, p. 7.) The salmonid fisheries-based policy principles directly conflict with the goals in a number of ways, including the failure to include a principle that advances the goal to minimize the impact on water supply reliability. As a result of the lack of project objectives, and the premature selection of overly narrow "policy principles," alternatives that might be protective without having every major component of the preferred alternative were never considered. The overly narrow project principles largely predetermined the results of the CEQA analysis by defining the only project that could be considered. By not considering a truly reasonable range of alternatives, the Substitute Document also failed to analyze the relative importance of the various aspects of its preferred alternative, and balance the needs of the fishery with other beneficial uses of water. For example, the Substitute Document should have considered an alternative that did not include a minimum bypass flow or maximum rate of diversion for channel forming flows in locations where such limitations may not provide a biological benefit, or the requirement that diversions have a passive or computer automated bypass. If such an alternative had been considered, the Substitute Document might have determined that requiring a passive bypass facility around onstream reservoirs would have significantly greater adverse effects and cost than an active bypass built into the dam itself. As a result of the Water Board staff's overly narrow project principles, the selection of an alternative that required each of these elements was a foregone conclusion, even though potentially inappropriate in

many locations in the project area. A similar analysis should have been completed for all of the policy components identified in the project principles. (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: Staff disagree with the comment that a reasonable range of alternatives was not considered. The draft SED considered three comprehensive alternatives: a No-Project Alternative, the CDFG-NMFS Draft Guidelines Alternative, and a Maximum Protectiveness Alternative. In addition, the draft SED considered a number of alternatives to certain elements of the Policy, including diversion season alternatives, minimum bypass flow alternatives, maximum cumulative diversion alternatives, and alternatives in permitting onstream dams.

Staff also disagree with the comment that the policy principles are overly narrow and conflict with the project goals. The Policy principles are necessary to achieve the first and second project goals of providing comprehensive ecosystem protection for streams within the Policy area and stabilizing and enhancing fish and wildlife resources. The policy principles do not directly conflict with the project goal of minimizing the impact of the Policy on water supply reliability. Rather, this project goal informed the development and evaluation of policy alternatives consistent with the policy principles. For example, the draft SED concluded that the Maximum Protectiveness Alternative was infeasible because a policy that favored the protection of fishery resources above all other beneficial uses did not meet the project goal of minimizing water supply impacts resulting from the Policy. (Draft SED, pp. 42-43.)

The commenter implies that the Policy principles precluded consideration of an alternative that does not contain certain limitations where those limitations would not provide a biological benefit. But by their terms the policy principles call for limitations to be imposed only to the extent necessary to protect fish and their habitat. (Draft SED, p. 7.) For example, one of the policy principles is that water should only be diverted when stream flows are higher than the minimum instream flows needed for fish spawning and passage. Contrary to the commenter's implication, this policy principle did not preclude consideration of an alternative that did not include a minimum bypass flow requirement where such a requirement was not needed for fish spawning and passage.

Comment 23.3.7: The Draft Policy and each of its alternatives include four components: (1) diversion season; (2) maximum cumulative diversion; (3) minimum bypass flows; and (4) limitation of onstream dams. The environmental impacts of the various components of the alternatives are never actually assessed. Instead, the Substitute Document only compares how well the alternatives satisfy the policy's overly narrow principles, particularly the poorly defined concept of "protectiveness" and to a lesser extent "water cost." (SED, p. 40.) (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: The assertion that the environmental impacts of the various components of the alternatives were not assessed is incorrect. The potential indirect environmental impacts of the alternatives were assessed in chapter 6 of the draft SED (pp. 48-84), and in Appendices D and E. Given the nature of the project, and the degree of uncertainty concerning the actions that affected persons might take as a result of the Policy, environmental impacts were assessed at the programmatic level. It was not feasible to conduct a project-level review, or to specify the impacts that would occur as a result of a particular alternative or alternative component.

Comment 23.3.8: In Section 5, the Substitute Document provides a comparison of the Maximum Protectiveness Alternative, the CDFG-NMFS Guidelines, and the No-Project Alternative. (SED, p. 40.) Within the Maximum Protectiveness Alternative, there is a comparison of a limited number of variations of the four alternative policy components to measure the relative protectiveness of the alternatives to measure fit to the policy principles. (SED, pp. 44-47.) "Protectiveness" is defined as "the degree to which a possible policy element protects fishery resources, and habitat." (SED, p. ii.) The methodology to assess "protectiveness" is not provided; instead the Substitute Document simply concludes that each alternative is either "considered to be regionally protective of fishery resources," "considered potentially protective," or "are not considered to be protective." (SED, p. 74.) Ultimately, the method used to determine protectiveness is not as important as the fact that the comparison of "protectiveness" is not intended to measure whether the alternatives may have environmental impacts. The required analysis of environmental impacts would require the use of a methodology different than the undefined concept of "protectiveness." (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: The Notice of Availability of Documents, dated December 28, 2007, lists the report entitled, "North Coast Instream Flow Policy: Scientific Basis and Development of Alternatives Protecting Anadromous Salmonids" (R2 Resource Consultants 2007; Task 3 report). The SED (p. 43) refers to the Task 3 report as the source of the assessment of protectiveness. The Task 3 report (sections 5 through 8) describe the methodology and criteria used to assess protectiveness. The commenter is correct in that "the comparison of "protectiveness" is not intended to measure whether the alternatives may have environmental impacts. The required analysis of environmental impacts would require the use of a methodology different than the undefined concept of 'protectiveness.'" Staff points out that the terms, "protectiveness" and "environmental impacts" have different meanings. The Task 3 report assesses the protectiveness of the alternatives and the SED assesses their indirect environmental impacts.

Comment 23.3.9: The alternative policy components ultimately combined to create the Draft Policy are never evaluated as a separate assemblage. It was inappropriate to separately analyze the environmental impacts of each component of the project rather than analyze the components as a complete package, because the environmental impacts of the Draft Policy change based on how the components are combined. (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: As pointed out in the NOP (p. 7), it is impossible to predict which affected parties will take any of the actions described in the SED, in response to any assemblage of Policy components, which could result in indirect environmental impacts, or exactly how many affected parties will take any of those actions. Accordingly, the SED does not evaluate the absolute indirect environmental impacts of any specific assemblage of alternative Policy elements. Rather, the SED evaluates the potential maximum indirect environmental impacts of all alternatives, collectively, at a programmatic level, which is more general in nature. For these reasons, the SED (p. 73) describes its approach to comparing the alternatives as follows: "Alternatives to the proposed Policy criteria that allow more diversion to occur have a lower chance of causing significant changes to offstream environmental resources than alternatives that allow less diversion. [Note: The potential impacts of the Draft Policy's flow related criteria on water diversion (agriculture) were evaluated in section 6.8 of the SED.] The relative degree to which one alternative may constrain diversion of water versus another alternative can be inferred by comparing the volumes of water potentially available for diversion under each

alternative." The SED then goes on to analyze and compare the volumes of water potentially available for diversion under each alternative. The SED concludes: "Based on this comparison, the relative degree to which the proposed Policy may lead affected persons to take actions that could result in indirect environmental effects would be expected to the least for the proposed Policy. It follows then that the proposed Policy, by virtue of it being the least restrictive, would result in the least environmental effects. But the relative reduction in environmental effects cannot be determined because actions taken by affected parties cannot be accurately predicted. The potential benefits of the Draft Policy to fish habitat are described in the Task 3 Report. Maximum potential indirect environmental impacts of the onstream dam provisions are described in Appendix E of the SED. In assessing the maximum potential indirect environmental impacts, the appendix takes a worst case scenario approach. This approach was also used for the evaluation of potential impacts to other resource areas.

Comment 23.3.10: The Substitute Document "must consider a reasonable range of potentially feasible alternatives that will foster informed decision making and public participation." (Cal. Code of Regs., tit. 14, section 15126.6(a).) The Substitute Document does not contain an analysis of a range of feasible alternatives that would mitigate some of the potentially significant impacts of the policy. Several parties provided recommendations for feasible policy alternatives or ideas for inclusion in alternatives during the development of the policy that were not analyzed in the Substitute Document. More specifically, the watershed-based approach described in the Principle Recommendations of our comment letter is a feasible alternative to the Draft Policy that would mitigate or reduce the effects of some of the potentially significant impacts of the Draft Policy. (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: The SED does consider a reasonable range of potentially feasible alternatives that would mitigate some of the potentially significant impacts of the Policy. As pointed out in the SED (p. 73): "Alternatives to the proposed Policy criteria that allow more diversion to occur have a lower chance of causing significant changes to offstream environmental resources than alternatives that allow less diversion." Appropriately, the SED then goes on to describe the range of alternatives that that would mitigate some of the potentially significant impacts of the policy by developing a range of alternatives that constrain water diversions to various degrees. The SED concludes that the proposed Policy, by virtue of it allowing more diversion to occur (and, while still being protective of fish habitat), would result in the least environmental effects. The SED considered all recommendations or ideas for Policy alternatives received during development of the Policy that were sufficiently developed and formulated to allow for environmental review. Specifically, the watershed-based approach described in the commenter's comment letter was not sufficiently developed and formulated to allow for environmental review. Staff points out that the Policy, nonetheless, does provide general parameters and allow for an applicant to develop and propose a watershed-based approach to comply with the Policy.

Comment 23.3.11: The Substitute Document does not analyze all components of the preferred alternative. The flow alternatives for minimum bypass flows were analyzed, but only in terms of passage and spawning. (See, Scientific Basis and Development of Alternatives, Appendix I.) These minimum bypass flow alternatives were never combined with the other elements of the policy, like diversion season and maximum cumulative diversion. It is impossible to evaluate the potentially significant impacts by incrementally evaluating each of the design elements. The direct impact of the policy's flow regime on aquatic species and the environment should have been considered. (*Janet Goldsmith and Becky Sheehan, Kronick,*

Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers)

Response: As pointed out in the NOP (p. 7), it is impossible to predict which affected parties will take any of the actions described in the SED, in response to any assemblage of Policy components, which could result in indirect environmental impacts, or exactly how may affected parties will take any of those actions. Accordingly, the SED does not evaluate the absolute indirect environmental impacts of any specific assemblage of alternative Policy elements. Rather, the SED evaluates the potential maximum indirect environmental impacts of all alternatives, collectively, at a programmatic level, which is more general in nature, and provides a comparative assessment of the relative severity of the impacts among the alternatives. The SED (p. 73) describes this approach to analyzing the alternatives as follows: "Alternatives to the proposed Policy criteria that allow more diversion to occur have a lower chance of causing significant changes to offstream environmental resources than alternatives that allow less diversion. The relative degree to which one alternative may constrain diversion of water versus another alternative can be inferred by comparing the volumes of water potentially available for diversion under each alternative." The SED then goes on to analyze and compare the volumes of water potentially available for diversion under the alternatives, which are comprised of various combinations of minimum bypass flow, diversion season, and maximum cumulative diversion. The SED concludes: "Based on this comparison, the relative degree to which the proposed Policy may lead affected persons to take actions that could result in indirect environmental effects would be expected to be the least for the proposed Policy. It follows then that the proposed Policy, by virtue of it being the least restrictive of the protective combinations of criteria, would result in the least environmental effects of the protective combinations of criteria. But the relative reduction in environmental effects cannot be determined because actions taken by affected parties cannot be accurately predicted. The Policy is designed to be protective of the aquatic environment and, as such, the Policy would not result in any direct environmental effects. All potential environmental effects are indirect effects associated with implementation, which would occur later in time and might be subject to project-specific environmental review.

Comment 23.3.12: The SED failed to analyze small watersheds. There is no analysis of the impacts of the proposed Instream Flow Policy on aquatic habitat and spawning in watershed under 2.75 sq. miles and smaller. This direct impact of the policy's flow regime on aquatic species and the environment should have been considered. *(Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers)*

Response: In general, the Policy is designed to be protective of the aquatic environment and, as such, the Policy would not result in any direct environmental effects. All potential environmental effects are indirect effects associated with implementation, which would occur later in time and might be subject to project-specific environmental review. The SED evaluates the maximum potential indirect environmental impacts at a programmatic level, in all watersheds throughout the Policy area, large and small.

Comment 23.3.13: The SED failed to analyze the movement of aquatic food sources, gravel, and woody debris. The draft policy states that restrictions on the rate of diversion even above the point of anadromy in a watershed is important because these flows facilitate the movement of beneficial insects, gravel, and woody debris downstream to areas where anadromous fish are located. However, there is no analysis either in the draft policy or in the SED of how, when, and the extent to which this movement of food sources and habitat materials would

generally occur. (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: The Task 3 Report (Appendix D, section D.4) describes the fundamental ecological principles of how anadromous salmonid populations depend on the delivery of wood, gravel, and nutrients from upstream stream channels, irrespective of stream classification. For purposes of developing regionally protective criteria, it would not be practical to analyze how, when, and the extent to which this delivery would occur, as suggested by the commenter. Previous studies and data for use on a regional scale could not be found. Thus, staff relied upon these principles in developing the regional criteria contained in the Policy to protect this stream function.

In general, the Policy is designed to be protective of the movement of aquatic food sources, gravel and woody debris and, as such, the Policy would not result in any direct environmental effects that need to be addressed in the SED. The Policy does not allow new onstream dams on Class I streams. Onstream dams are allowed upstream of Class I streams only with passive bypass systems and implementation of gravel and wood augmentation plans which protect aquatic food sources, gravel and woody debris.

Comment 23.3.14: As thoroughly explained by HDR/SWRI and Wagner & Bonsignore, the statistical analysis and data management that formed the basis of the minimum bypass flow alternatives are flawed. Therefore, the evaluation of the impacts of the minimum bypass flow alternatives based on that analysis is similarly flawed. Similarly, because the development of these alternatives is flawed, the limited comparison of alternatives that was completed relating to "water cost" and "protectiveness" is also flawed. As discussed above, the SED does not contain an analysis of the environmental impacts of even these flawed alternatives as required by CEQA. The only analysis that was completed measures fit of the alternatives to the policy principles, not impacts. (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: In general, HDR/SWRI and Wagner & Bonsignore argued in their comments that the minimum bypass flow requirement in the Policy was overly protective of fishery resources. It does not follow from this argument that the SED did not properly identify and disclose the potential environmental impacts of the Policy, or that the alternatives analysis was flawed. Moreover, the SED does in fact contain an analysis of the potentially significant impacts of the Policy alternatives. The SED (p. 73) describes its approach to analyzing the alternatives as follows: "Alternatives to the proposed Policy criteria that allow more diversion to occur have a lower chance of causing significant changes to offstream environmental resources than alternatives that allow less diversion. The relative degree to which one alternative may constrain diversion of water versus another alternative can be inferred by comparing the volumes of water potentially available for diversion under each alternative." The SED then goes on to analyze and compare the volumes of water potentially available for diversion under the alternatives, which are comprised of various combinations of minimum bypass flow, diversion season, and maximum cumulative diversion. The SED concludes: "Based on this comparison, the relative degree to which the proposed Policy may lead affected persons to take actions that could result in indirect environmental effects would be expected to the least for the proposed Policy. It follows then that the proposed Policy, by virtue of it being the least restrictive, would result in the least environmental effects among the regionally protective alternatives. But the relative reduction in environmental effects cannot be determined because

actions taken by affected parties cannot be accurately predicted."

Comment 23.3.15: The SED has utilized a semantic sleight-of-hand to define the no-project alternative as unacceptable. Although it is true that the Legislature has directed the State Board to adopt an instream flow policy, it did not specifically dictate the contents of the policy. The true no-project alternative would be for the State Board to adopt a policy that incorporates all of its current practices, guidelines and standards (including its instream flow practices) for issuing appropriative water rights. By so defining the no-project alternative, the State Board would be able to discuss the no project alternative in a meaningful way throughout the document and consider it as a realistic alternative to the Draft Policy. Its failure to do so is a fatal deficiency in the document. (*Paul "Skip" Spaulding, Farella Braun + Martel LLP/Golden Vineyards*)

Response: The CEQA Guidelines explain that "[t]he purpose of describing and analyzing a no project alternative is to allow decision makers to compare the impacts of approving the proposed project with the impacts of not approving the proposed project." (Cal. Code Regs., tit. 14, § 15126.6, subd. (e)(1).) Consistent with the CEQA Guidelines, the draft SED defined the "no project" alternative to mean an alternative under which the State Water Board would not adopt the Draft Policy. Under this alternative, the State Water Board would continue to administer water rights consistent with its current practices and statutory requirements. (Draft SED, p. 40.)

As the commenter indicates, the draft SED also includes the statement that the "no project" alternative is not feasible or reasonable in light of the fact that Water Code section 1259.4 requires the State Water Board to adopt a policy for maintaining instream flows for purposes of water right administration. Notwithstanding this statement, however, the "no project" alternative was considered in the draft SED for purposes of comparing the impacts of project approval to the impacts of not approving the project. (Draft SED, p. 40.) The draft SED evaluates the potential indirect environmental impacts of certain actions that affected persons might take if the Policy is adopted. Implicit in this evaluation is the assumption that affected persons might not take those actions, and the indirect impacts that stem from those actions might not occur, if the Policy is not adopted. Accordingly, the draft SED will allow a comparison of the impacts of adopting the draft Policy with the impacts of not adopting the draft Policy.

Comment 23.3.16: The State Board has failed to identify or discuss a reasonable and full range of alternatives to the Draft Policy. Most significantly, it has failed to propose and analyze a balanced instream flow policy that protects and enhances agricultural supply and other beneficial uses without applying the most conservative assumptions utilized in the Draft Policy. This policy would provide significant protections for salmonid species, while at the same time recognizing and protecting other uses. This alternative should promote greater balance of beneficial uses and incorporate mitigation measures to address the potentially significant impacts on agriculture, including the wine grape industry. Indeed, the State Board could certainly identify and analyze several types of more balanced alternatives. (*Paul "Skip" Spaulding, Farella Braun + Martel LLP/Golden Vineyards*)

Response: Staff disagree with the comment that the State Board has not identified or discussed a reasonable and full range of alternatives. The draft SED considered three comprehensive alternatives: a No-Project Alternative, the CDFG-NMFS Draft Guidelines Alternative, and a Maximum Protectiveness Alternative. In addition, the draft SED considered a number of alternatives to certain elements of the Policy, including diversion season

alternatives, minimum bypass flow alternatives, maximum cumulative diversion alternatives, and alternatives in permitting onstream dams. The State Water Board's goal, which has informed the development and evaluation of alternatives, is to develop a Policy that provides an adequate level of protection for fishery resources, while minimizing the water supply impacts of the Policy on agriculture and other beneficial uses. In order to minimize water supply impacts, the State Water Board conducted a sensitivity analysis that evaluated the relative protectiveness of the proposed regional criteria against other possible permutations using the same regression approach. The sensitivity study results suggested that a minimum bypass flow using the 0.7 ft regression line plus 3 standard errors would provide a similar level of steelhead passage and spawning opportunities and slightly higher potential diversion volume (+0.8%) as compared to the March 2008 Draft Policy regional criteria. In the revised Draft Policy, staff will recommend using the 0.7 ft regression line plus 3 standard errors because it allows slightly more diversion volume and is as protective as the previous draft regional criteria. Although it might have been possible to develop more "balanced" alternatives that provided some level of protection for fishery resources, it was not possible to develop more "balanced" alternatives that also meet the project goal of providing an adequate level of protection for fishery resources.

Topic 23.4 CEQA - Assessment of Environmental Impacts

Comment 23.4.1: Your proposal will endanger more fish than it helps. If it is approved, the vast majority of the 1,800 affected pond owners will have only partially filled ponds. These land owners will be forced to use their riparian right to draft water from Class I and II streams that flow through their property or to drill wells near those streams to draw off underground water near those streams. This is the real problem that California's fish now face and this plan will only make it worse. (*R. Stuart Bewley, Bewley/Motluk Family Limited Partnership*)

Response: The Policy will not endanger fish; rather, it will protect the aquatic environment, including fish habitat, by ensuring that water rights are administered in a manner designed to maintain instream flows. The SED does, however, recognize that the Policy may give rise to potential indirect environmental impacts resulting from action that affected parties take to comply with or avoid the Policy. The SED assesses these potential indirect environmental impacts, including those resulting from the modification or removal of the estimated 1,800 onstream dams which may be affected by the Policy. The SED also assesses the potential indirect environmental impacts of actions that affected parties might take to avoid the Policy by diverting water under a different basis of right that is not covered by the Policy because it is not subject to the State Water Board's water right permitting authority, such as diversion under riparian right or pumping of percolating groundwater. The Policy does apply to diversion of water from subterranean streams. As indicated in the SED (p. 13), the State Water Board may exercise its authority under the doctrines of reasonable use and the public trust to address diversions of surface water or groundwater that reduce instream flows in the Policy Area and thus adversely affect fish, wildlife, or other instream beneficial uses. Certain actions that affected parties take to increase diversion under riparian or pre-1914 water rights or to increase groundwater extraction might be subject to CEQA review at the "project-level" and the lead agency would be required to adopt mitigation measures to reduce significant project impacts, including cumulative impacts such as reduction in stream flow, to a level of less than significant.

Surface water may be diverted and used under a riparian water right. Unless the right has been lost through severance, any owner of a parcel immediately adjacent to a water course has the right to divert water at any time to be used directly and beneficially on the land that

borders and is contiguous with the stream. The water that is diverted cannot be seasonally stored. Riparian rights do not require approval from the State Water Board and are not subject to the Policy restrictions on diversions. Similarly, the use of percolating groundwater does not require State Water Board approval, and is not subject to the Policy's restrictions.

As a result of the policy, there could be an increase in riparian diversion of surface water or pumping of percolating groundwater if water users choose to utilize riparian basis of right or percolating groundwater in addition to or in lieu of utilizing an appropriative water right subject to the Policy's limitations. Increased riparian diversion and pumping of interconnected groundwater could reduce stream flows in the spring and summer, which are critical periods for fish habitat.

The California Constitution, article X, section 2, and Water Code section 100 prohibit the waste, unreasonable use, unreasonable method of use, and unreasonable method of diversion of water. The constitutional doctrine of reasonable use applies to all water users, regardless of basis of water right, serving as a limitation on every water right and every method of diversion. (*Peabody v. Vallejo* (1935) 2 Cal.2d 351, 367, 372 [40 P.2d 486].) Water Code section 275 directs the State Water Board to take all appropriate proceedings or actions to prevent waste or violations of the reasonable use standard. Thus, the State Water Board has jurisdiction to regulate water use in accordance with article X, section 2 of the Constitution. (See *Imperial Irrigation District v. State Water Resources Control Board* (1986) 186 Cal.App.3d 1160 [231 Cal.Rptr. 283] [holding that jurisdiction extends to pre-1914 rights].)

The California Constitution also declares that the general welfare requires that the State's water resources be put to beneficial use to the fullest extent to which they are capable. (Cal. Const., art. X, § 2.) Therefore, in determining the reasonableness of a particular use of water or method of diversion, other competing water demands and beneficial uses of water must be considered. A particular water use or method of diversion may be determined to be unreasonable based on its impact on fish, wildlife, or other instream beneficial uses. (*Environmental Defense Fund, Inc. v. East Bay Municipal Utility District* (1980) 26 Cal.3d 183 [161 Cal.Rptr. 466].) What constitutes a reasonable water use depends on the entire circumstances presented and varies as current conditions change. (*Id.* at p. 194.)

The State Water Board also has an affirmative duty to take the public trust into account in the planning and allocation of water resources. The purpose of the public trust doctrine is to protect navigation, fishing, recreation, environmental values, and fish and wildlife habitat. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 434-435 [189 Cal.Rptr. 346].) Under the public trust doctrine, the State retains supervisory control over the navigable waters of the state and the lands underlying those waters. (*Id.* at p. 445.) In applying the public trust doctrine, the State Water Board has the power to reconsider past water allocations even if the Board considered public trust impacts in its original water allocation decision. Thus, the State Water Board may exercise its authority under the doctrines of reasonable use and the public trust to address reduced instream flows in the policy area and adverse affects fish, wildlife, or other instream beneficial uses due to riparian diversions or the pumping of percolating groundwater.

The five counties in the Policy area also may mitigate the potential impacts of increased groundwater pumping by regulating groundwater use pursuant to their police powers. Local regulation of groundwater pumping exists in Napa and Mendocino Counties. Napa County's Ordinance 1162, Napa County Code Chapter 13.15, regulates the extraction and use of groundwater in the county and requires the issuance of a groundwater permit before

development may occur. The groundwater permit cannot be issued if evidence exists showing that the proposed agricultural, commercial or residential development will increase the existing water use or take more than its fair share of groundwater if there is no pre-existing use. In Mendocino County, Chapter 20.744 of Division III of Title 20 of the Mendocino County Zoning Code contains requirements for the evaluation of the adequacy of groundwater resources for new developments in the Town of Mendocino. It allows local government to mandate the amount of naturally occurring groundwater that can be withdrawn from the Town of Mendocino's aquifer on a sustained basis to help prevent depletion of the Town's groundwater by not exceeding the aquifer's perennial or safe yield, which is the amount of water that can be pumped regularly and permanently without dangerous depletion of the storage reserve. Current groundwater management policies for the Town of Mendocino are to collect and analyze current groundwater and rainfall data to assist the Board of Directors with their groundwater management decision-making responsibilities, to increase the use of reclaimed water to reduce groundwater extraction, and to promote water conservation measures.

Sonoma County has implemented a non-regulatory Sonoma Valley Groundwater Management Plan. The Plan, implemented by Sonoma County Water Agency in 2007, identifies a range of water management actions to sustain resources for future generations. The goal of the Plan is to locally manage, protect, and enhance groundwater resources for all beneficial uses, in a sustainable, environmentally sound, economical, and equitable manner. The Plan contains basin management objectives; groundwater availability forecasts developed through modeling; actions to attain groundwater sustainability, including increased use of recycled water to offset groundwater pumping, increased conservation, groundwater monitoring, integration of water management planning on a regional scale, and stakeholder involvement; and plan implementation through a collaborative process.

Groundwater management plans, and codes or ordinances regulating groundwater use were not found for Humboldt or Marin Counties.

In addition to the regulatory authorities discussed above, under certain circumstances the State Water Board will have the opportunity to identify and mitigate for the potential impacts of increased riparian diversions as part of the State Water Board's review of individual water right applications. To the extent that a diverter might increase riparian diversions in connection with a storage project that requires a water right permit, and the increase in riparian diversions would not occur in the absence of the storage project, the State Water Board can mitigate the impacts of the increased riparian diversions through the imposition of a permit term.

Inclusion of the following permit term, substantially as follows, in permits issued under this Policy, may reduce potential stream flow reductions due to riparian diversion during spring and summer:

For all projects where the SWRCB has determined that riparian water has been used on the proposed place of use:

- *Permittee shall not use more water under the basis of riparian right on the place of use authorized by this permit than permittee would have used absent the appropriation authorized by this permit. Based on the information in the Division's files, approximately XX acre-feet per year of riparian water has been used on the place of use. Therefore, consistent with this term, permittee may not divert any additional riparian water for use on the place of use authorized by this permit under basis of riparian right. With the Chief of the Division's approval, this information may be*

updated, and permittee may use water under basis of riparian on the authorized place of use, provided that permittee submits reliable evidence to the Chief of the Division quantifying the amount of water that permittee likely would have used under the basis of riparian right absent the appropriation authorized by this permit. The Chief of the Division is hereby authorized to approve or reject any proposal by permittee to use water under the basis of riparian right on the place of use authorized by this permit.

For all projects where the SWRCB has determined that riparian water has not been used on the proposed place of use

- *Permittee shall not use more water under the basis of riparian right on the place of use authorized by this permit than permittee would have used absent the appropriation authorized by this permit. Based on the information in the Division's files, riparian water has not been used on the place of use. Therefore, consistent with this term, permittee may not divert any additional riparian water for use on the place of use authorized by this permit under basis of riparian right. With the Chief of the Division's approval, this information may be updated, and permittee may use water under basis of riparian on the authorized place of use, provided that permittee submits reliable evidence to the Chief of the Division quantifying the amount of water that permittee likely would have used under the basis of riparian right absent the appropriation authorized by this permit. The Chief of the Division is hereby authorized to approve or reject any proposal by permittee to use water under the basis of riparian right on the place of use authorized by this permit.*

In addition, if additional riparian diversion facilities are constructed, the construction activity should be undertaken in a manner that does not adversely affect fish and wildlife resources, per Fish and Game Code section 1602, described above. If DFG determines that the construction activity may substantially adversely affect fish and wildlife resources, a Lake or Streambed Alteration Agreement would be prepared. The Agreement would include reasonable conditions necessary to protect those resources and must comply with the California Environmental Quality Act (CEQA).

Comment 23.4.2: In reading the Substitute Environmental Document associated with the Draft Policy, I discovered a number of omissions of testimony that disagree with the conclusions of the Division of Water Rights (Division). In particular, there is a loss of information regarding "Potential Indirect Impacts on Municipal, Industrial, and Agricultural Water Use and Related Impacts on Other Environmental Resources. Quite the opposite of what the Division claims, the loss of, or cost of retrofitting existing farm ponds, and the extreme cost of permitting new farm ponds will cause: (1) Loss of agricultural production capacity for crops and livestock; (2) Loss of Williamson Act Status; (3) Subdivision of property; (4) Land use changes from agricultural toward suburban and urban uses; and (5) Loss of wildlife habitat. (*Tim Buckner*)

Response: CEQA requires the assessment of the reasonably foreseeable environmental impacts of the Policy. Because the Policy allows flexibility in compliance, and because the responses by the regulated community cannot be predicted with reasonable certainty, the SED assess indirect environmental impacts at a programmatic level. The SED's programmatic assessment of the potential environmental impacts of the Policy on agricultural resources, including impacts on Williamson Act contracts, land use, and biological resources, including wildlife habitat, is adequate.

Comment 23.4.3: The Draft Policy will result in some water users discontinuing their use of winter-impounded water. They will instead, revert to their riparian rights to the tributaries or pump from the ground during the summer months. The result will be increased loss of salmonid juveniles due to lower water levels and higher water temperatures. The Division actually admits to this possibility in the Draft Policy, but apparently doesn't think it serious enough to temper their regulation back to a reasonable position. It seems that small farms will not be the only victims of death by regulation. The fish they are trying to save will suffer the same fate. *(Tim Buckner)*

Response: The SED assesses the potential indirect environmental impacts of actions that affected parties might take to avoid the Policy by diverting water under different bases of right that are not covered by the Policy because they are not subject to the State Water Board's water right permitting authority, such as diversion under riparian right or pumping of percolating groundwater. The Policy does apply to diversion of water from subterranean streams. The State Water Board may exercise its authority under the doctrines of reasonable use and the public trust to address diversions of surface water or groundwater that reduce instream flows and thus adversely affect instream beneficial uses.

As to the comment regarding the restrictiveness of the Draft Policy, staff is reevaluating the flow related criteria in the Draft Policy based on consideration of the comments and suggestions that have been received.

Comment 23.4.4: If dams on Class I streams are to be exempted from regulation (not part of the mandated application and permitting process - with complete mitigation for flow and passage issue), this issue must be dealt with in the environmental review for this policy - and mitigated via CEQA environmental review process. Most (a large percentage of the universe of unauthorized dams) existing and unpermitted dams on Class I streams were built before 2006. The proposed policy, as it stands in terms of mitigation and remedy for ongoing harm, would not achieve the desired results - if dams built prior to 2006 are exempted from State Code and the intent of this new policy. It must be acknowledged that full mitigation of onstream structures should be considered to be very unlikely. Environmental review of any permitting process (under DFG Code, State Water Code, and CEQA - as mandated) would indicate the level of adverse impact and potential for mitigation. Any exemption of pre 2006 dams from a process that would require full mitigation for flow and passage issue would be omitting State responsibility to address such issue as well as committing this policy to process where the desired goals will certainly not be attained. *(Alan Levine, Coastal Action Group)*

Response: The Draft Policy does not exempt from regulation dams on Class I streams built before 2006. Instead, the draft Policy would permit water right applications to be filed for dams on Class I streams built prior to July 19, 2006, provided that a number of requirements are met. Any such applications will be processed in accordance with applicable law, including the Water Code, the Fish and Game Code, and CEQA, unless a particular project qualifies for a CEQA exemption. The Draft Policy would not permit applications for onstream dams to be filed unless the applicant meets requirements for fish passage, fish screens, a passive or automated bypass system, and mitigation plans for non-native species eradication, gravel and wood augmentation, and riparian habitat replacement. Although the requirements in the Draft Policy are designed to ensure that applicable legal requirements will be met, additional requirements could be imposed as a result of the environmental review process for individual applications.

Comment 23.4.5: We own a 26 acre parcel in Napa County and have an existing pond on the

property consisting of approximately 9.7 acre feet. The pond has been on the property for as long as anyone can remember and is not only a distinct physical feature of the property but also home to many fish, birds, frogs, snakes, and other forms of wildlife that have come to inhabit the pond. The direct implementation of the Policy as written would have a drastic and debilitating impact on the existence of our pond. The policy not only threatens the existing ecosystem on our pond but the cost of implementing the proposed policy would have a critical financial impact on us personally and severely impacts our ability to produce grapes on our property which affects our family business. *(Karen Fontanella, Fontanella Family Winery)*

Response: The draft SED discloses the potential loss of habitat if onstream dams are removed as a result of the Policy. (Draft SED, pp. 62-63, 67-68, Appendix E, pp. 18-21.) In developing the Policy, the State Water Board's goal has been to develop a policy that is protective of anadromous fish, while minimizing water supply impacts.

Comment 23.4.6: In dry years, there will be a rush to secure water in many watersheds that will lead to unnecessary conflict among users and between the resources that the Water Code is intended to protect and promote. *(David Graves, Saintsbury)*

Response: Comment noted.

Comment 23.4.7: There is a second way the draft SED and Policy might fail to fully disclose foreseeable environmental consequences. Specifically, neither the draft Policy nor the SED explain the decision to focus exclusively on new permits and petitions, or how that decision will result in water rights administration sufficient "for maintaining instream flows." This is particularly troublesome because existing diversions during the dry season months are perhaps the biggest threat to salmon and steelhead. We are not arguing that the State Water Board should have reopened existing permits or initiated a public trust proceeding to investigate other diversions. There are other actions that the Policy could take to improve summer flows and help the State Water Board fulfill its statutory mandate. We suggest a number of them here, such as with an increased emphasis on watershed-based management, incentives for voluntary stewardship, and a work plan to bring "non-filers" into the fold. (See Recommendations on Sections 4, 11, and 12.) The State Water Board may have reasoned that conditioning pending and yet-to-be-filed permits for existing but unauthorized diversions is sufficient to fulfill the A.B. 2121 mandate and protect the public trust. The agency may also be planning additional action, unstated in the Policy, to bring "non-filers" into the water right system. If that is indeed the State Water Board's reasoning, the agency should say so, and explain how such actions will fulfill its statutory obligations. *(Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society)*

Response: The commenter does not explain how the Policy's focus on new permits and petitions, as opposed to unauthorized diversions, relates to the draft SED's supposed failure to fully disclose foreseeable environmental consequences. This comment is germane to the adequacy of the Policy itself, not the CEQA analysis contained in the draft SED. Staff's considerations for modifying sections 4, 11, and 12 of the Draft Policy include, but are not limited to, modifications for how diversions upstream of anadromy evaluate whether for instream impacts to fishery resources; the extent of consultation with DFG that will be specified for upper limit of anadromy and stream classification determinations; revisions that provide more detail in the site specific studies language; the inclusion of provisions allowing revisions to projects for the purposes of enhancement of fish and wildlife; and additional definition in the watershed approach section of the policy.

Comment 23.4.8: Potentially significant impacts of the Draft Policy were not identified. Direct effects caused by the Draft Policy's requirements, such as breach of existing dams, loss of pond habitat, construction of bypass channels (with the concomitant loss of productive agricultural land) and eradication of some resident animal and plant species are not discussed. (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: The assertion that potentially significant impacts of the Draft Policy were not identified is incorrect. In particular, the draft SED discloses the potential effects of modifying or removing existing dams. (Draft SED, pp. 62-68, Appendix E, pp. 18-31.) These effects are potential indirect effects of the Draft Policy, however, not direct effects.

Comment 23.4.9: Discussion of indirect environmental impacts of the Draft Policy was impermissibly deferred. The Substitute Environmental Document concludes (without any analysis) that the Draft Policy will have no direct impacts, and impermissibly defers all analysis of its indirect impacts to future project level review. The potentially significant environmental impacts of the Draft Policy and the alternatives to the Draft Policy are therefore not sufficiently evaluated, and cumulative impacts not acknowledged. (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: The draft SED does not defer all analysis of indirect environmental impacts to future project level review. The potential indirect environmental impacts of the Draft Policy were assessed in chapter 6 of the draft SED (pp. 48-84), and in Appendices D and E. The draft SED analyzes the potential indirect environmental impacts of the Policy at a programmatic level. This level of analysis is sufficient in this case, as explained below.

The degree of specificity required in an EIR (or SED) depends on the type of project that is the subject of the environmental analysis. As explained by the CEQA Guidelines, “[a]n EIR on a project such as the adoption or amendment of a comprehensive zoning ordinance or a local general plan should focus on the secondary effects that can be expected to follow from the adoption, or amendment, but the EIR need not be as detailed as an EIR on the specific construction projects that might follow.” (Cal. Code, Regs., tit. 14, § 15146, subd. (b).) When an action is reasonably foreseeable in general terms, an EIR must include a general discussion of the action and its environmental effects; but an EIR need not include a detailed analysis of specific actions that cannot be reasonably foreseen. (*Ebbetts Pass Forest Watch v. California Dep’t of Forestry and Fire Protection* (2008) 43 Cal.4th 936, 954.) The scope of an EIR’s review of potential future environmental consequences is guided by standards of reasonableness and practicality, and speculation concerning the environmental consequences of future activities that are unspecified and uncertain is not required. (*Environmental Council of Sacramento v. City of Sacramento* (2006) 142 Cal.App.4th 1018, 1031-1032.) The sufficiency of an EIR as an informative document depends on what is reasonably feasible. (Cal. Code Regs., tit. 14, § 15151.)

Here, a more general or programmatic level of review was appropriate because the project is the adoption of a policy for water quality control, as opposed to the approval of an individual water development project or projects. In addition, all of the potential impacts of the Policy are indirect impacts that could result if third parties take certain actions in response to the Policy, and it cannot be predicted with certainty who might take what specific actions. The draft SED made a good faith effort to identify the types of activities that affected persons might take, and

evaluate the potential impacts of those activities. For example, Appendix E to the draft SED is an extensive report that estimates the number, location, onstream storage volume, and surface area of existing, onstream dams within the Policy area, for purposes of disclosing the potential impacts of dam modification or removal that may occur as a result of the Policy. The draft SED identified 1,771 existing, unauthorized dams, but it cannot be predicted with certainty which of those dams might be modified or removed as a result of the Policy. Conducting a project-level review of the potential modification or removal of all 1,771 dams would not be reasonable or feasible under the circumstances.

A discussion of potential cumulative impacts can be found in response to 23.6.11.

Comment 23.4.10: The practical consequences of the Draft Policy are not disclosed. The Substitute Environmental Document does not assess impacts of the Draft Policy on actual applications and petitions pending before the Water Board. For example, the construction of bypass channels as described in the Draft Policy will likely result in loss of riparian vegetation, significant erosion problems and water quality degradation due to the Franciscan geology of the north coast area. That information, easily available to the Water Board staff, was not included in the environmental baseline or considered in the assessment of the potential impacts of the Draft Policy. *(Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers)*

Response: CEQA requires the assessment of the reasonably foreseeable environmental impacts of the Policy. Because the Policy allows flexibility in compliance, and because the responses by the regulated community cannot be predicted with reasonable certainty, the SED assesses indirect environmental impacts at a programmatic level. Future environmental review of applications and petitions pending before the Water Board can be expected to identify any significant project-specific environmental effects. The SED's programmatic assessment of the potential environmental impacts of the Policy on biological resources, including riparian vegetation, water quality and hydrology and geology/soils, including erosion, is adequate.

Comment 23.4.11: Not only does the Substitute Document lack comparison of the environmental impacts of the alternatives, it also lacks an analysis of the environmental impacts of the Draft Policy itself. As discussed in detail below, the Substitute Document concludes (without any analysis) that the Draft Policy will have no direct impacts, and defers the analysis of the indirect and cumulative impacts to future project level review. The potentially significant environmental impacts of the policy and the alternatives to the policy are insufficiently evaluated, and the cumulative impacts are never acknowledged. *(Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers)*

Response: The draft SED does not defer all analysis of indirect environmental impacts of the Draft Policy to future project level review. The potential indirect environmental impacts of the Draft Policy and alternatives were assessed in chapter 6 of the draft SED (pp. 48-84), and in Appendices D and E. Chapter 6 also contains a comparison of the impacts of the alternatives and a discussion of cumulative impacts.

The draft SED analyzes the potential indirect environmental impacts of the Policy and alternatives at a programmatic level. Given the nature of the project, and the degree of

uncertainty concerning the actions that affected persons might take as a result of the Policy, environmental impacts were assessed at the programmatic level. It was not feasible to conduct a project-level review, or to specify the impacts that would occur as a result of the Draft Policy or any particular alternative.

A discussion of potential cumulative impacts can be found in response to 23.6.11.

Comment 23.4.12: The Substitute Document failed to adequately consider the potentially significant direct impacts of the policy. Instead, it defers all project-specific analyses and flatly asserts that "[a]doption and implementation of the Policy has no direct effects on the environment; all the environmental effects are indirect effects." (SED, p. 48.) This conclusion is incorrect. The Draft Policy's direct effects are the changes in the environment caused by its requirements. These impacts are different than the environmental impacts associated with the regulated community's reactions to the policy. These changes in the environment are caused by implementation of the policy and must be evaluated by the Substitute Document, even if it is believed that some of the impacts are beneficial. (See, e.g., *Wildlife Alive v. Chickering* (1976) 18 Cal. 3d 190, 206; Cal. Code of Regs., tit. 14, section 15063(b)(1).) The courts require an analysis of projects that are designed to benefit the environment because even well intentioned projects may have unintended negative consequences. The inadequate impacts analysis largely results from the fundamental inadequacies in the Draft Policy, the deficiencies in the description of the existing environment, as well as the statistical methods and assumptions used in the Draft Policy's development. The analysis completed by HDR/SWRI and Wagner & Bonsignore Consulting Engineers contains a detailed discussion of the significant problems with the policy itself. (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.*; *Peter Kiel, Ellison, Schneider & Harris LLP*; and *Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: The potential effects of the Policy are correctly characterized as indirect because they will not occur unless affected persons take certain actions in response to the Policy's requirements, and it is uncertain what actions affected persons will take. For example, a diverter with an unauthorized dam might decide to remove the dam and switch to groundwater as a source of supply, or the diverter might decide to apply for a water right permit and make any necessary modifications to the dam in order to comply with the Policy. The commenter asserts that the Policy should have considered the direct effects of the Policy, but it is unclear what the commenter means by changes in the environment directly caused by the Policy.

In general, HDR/SWRI and Wagner & Bonsignore argued in their comments that the Policy was overly protective of fishery resources. It does not follow from this argument that the SED did not properly analyze the potential environmental impacts of the Policy.

Comment 23.4.13: In determining whether it is required to consider the indirect effect of compliance with the Instream Flow Policy, the Water Board should follow the guidance provided by *County Sanitation District No. 2 v. County of Kern* (2005) 127 Cal. App. 4th 1544. In that case, the agency was required to analyze the environmental impacts associated with people's reactions to an environmental policy, which necessarily includes identifying mitigation measures that would mitigate these effects of the policy. (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.*; *Peter Kiel, Ellison, Schneider & Harris LLP*; and *Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: The draft SED does consider the potential environmental effects of reasonably foreseeable methods of compliance with the Draft Policy.

A discussion of mitigation measures can be found in response to 23.7.1.

Comment 23.4.14: The actions water users will take to comply with the Instream Flow Policy are highly foreseeable. Many parties identified easily foreseeable indirect impacts of the Draft Policy in their scoping comments. Many of the potential reactions to the policy are identified in the Substitute Document, and its appendices. The analysis of indirect impacts is legally inadequate, however, because the Substitute Document, while identifying the predictable reactions of the regulated community with a high degree of specificity, fails to complete the analysis by discussing potentially significant impacts resulting from those reactions with equal specificity. (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: The environmental impacts analysis contained in the draft SED is sufficiently specific, taking into consideration the nature of the proposed project.

The degree of specificity required in an EIR (or SED) depends on the type of project that is the subject of the environmental analysis. As explained by the CEQA Guidelines, “[a]n EIR on a project such as the adoption or amendment of a comprehensive zoning ordinance or a local general plan should focus on the secondary effects that can be expected to follow from the adoption, or amendment, but the EIR need not be as detailed as an EIR on the specific construction projects that might follow.” (Cal. Code, Regs., tit. 14, § 15146, subd. (b).) When an action is reasonably foreseeable in general terms, an EIR must include a general discussion of the action and its environmental effects; but an EIR need not include a detailed analysis of specific actions that cannot be reasonably foreseen. (*Ebbetts Pass Forest Watch v. California Dep’t of Forestry and Fire Protection* (2008) 43 Cal.4th 936, 954.) The scope of an EIR’s review of potential future environmental consequences is guided by standards of reasonableness and practicality, and speculation concerning the environmental consequences of future activities that are unspecified and uncertain is not required. (*Environmental Council of Sacramento v. City of Sacramento* (2006) 142 Cal.App.4th 1018, 1031-1032.) The sufficiency of an EIR as an informative document depends on what is reasonably feasible. (Cal. Code Regs., tit. 14, § 15151.)

Here, a more general or programmatic level of review was appropriate because the project is the adoption of a policy for water quality control, as opposed to the approval of an individual water development project or projects. In addition, all of the potential impacts of the Policy are indirect impacts that could result if third parties take certain actions in response to the Policy, and it cannot be predicted with certainty who might take what specific actions. The draft SED made a good faith effort to identify the types of activities that affected persons might take, and evaluate the potential impacts of those activities. For example, Appendix E to the draft SED is an extensive report that estimates the number, location, onstream storage volume, and surface area of existing, onstream dams within the Policy area, for purposes of disclosing the potential impacts of dam modification or removal that may occur as a result of the Policy. The draft SED identified 1,771 existing, unauthorized dams, but it cannot be predicted with certainty which of those dams might be modified or removed as a result of the Policy. Conducting a project-level review of the potential modification or removal of all 1,771 dams would not be reasonable or feasible under the circumstances.

Comment 23.4.15: There are inconsistencies between the analysis in the Substitute Document and its appendices. Repeatedly, the Substitute Document states that the impact is

unknown because the Water Board cannot determine how the regulated community will react. As the appendices contain a rather detailed analysis of how the regulated community will react, the contrary statements in the Substitute Document are inconsistent. For example, the Substitute Document says that the Water Board cannot foresee how the regulated community will react to having less water available for diversion, so an analysis of reactions to the policy must be deferred to the future. (SED, p. 85.) However, Appendix D to the Substitute Document identifies possible (although often unlikely) alternative supplies that could be developed. The Substitute Document should have acknowledged the analysis buried in the appendices, and considered the potential environmental impacts of developing alternative water supplies. The Substitute Document should also have considered the feasibility and timing of developing alternative water supplies. (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: CEQA requires the assessment of reasonably foreseeable environmental impacts of the Policy. Because the Policy allows flexibility in compliance, and because the responses by the regulated community cannot be predicted with reasonable certainty, the SED assess indirect environmental impacts at a programmatic level. In consideration of the uncertainty, the SED's programmatic assessment is conservative. In particular, Appendix D of the Draft SED identifies the potential actions that potential future water diverters could (not will) take in response to the Policy and assesses the potential indirect environmental impacts that could result from these actions. These assessments provide the upper limit of potential impacts because they are based on the conservative assumption that all future diversion demands would have to be supplied from water supplies under other bases of right or, if water supplies are inadequate, not supplied at all. The SED identifies potentially significant indirect environmental impacts in numerous environmental issue areas.

Comment 23.4.16: In the absence of other regulatory tools, implementation of the proposed policy will cause many diverters to turn to riparian diversion and/or groundwater pumping which could reduce summer flows. This was presented in the Substitute Environmental Document as a potentially significant impact for which no mitigations are suggested. The technical analysis should have assessed summer flows as a limiting factor to salmonid success and considered the effect of the policy alternatives on summer flows and water quality, including the importance of groundwater flow to summer flow. Further, the potentially significant impacts predicted in the CEQA analysis should have triggered a reassessment of the approach, or at least the development of upfront mitigations to better ensure the policy's success (*Catherine Kuhlman, State of California Regional Water Quality Control Board, North Coast Region*)

Response: Comment noted. The SED points out that the Policy could give rise to increases in groundwater extraction as affected parties take actions in response to the Policy requirements. Section 6.2 of SED, in particular Table 6-3, describes the possible environmental impacts resulting from increased groundwater extraction, including reduction in stream flow. Certain actions that affected parties take to increase groundwater extraction would be subject to CEQA review at the "project-level" and the lead agency would be required to adopt mitigation measures to reduce significant project impacts, including cumulative impacts such as reduction in stream flow, to a level of less than significant.

Comment 23.4.17: Issues raised by staff in the Initial Study Checklist and Notice of Preparation for the Draft Policy and issues raised by commenters and described in the Final Scoping Report, 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. *(Rudolph Light)*

Response: The commenter does not provide specific examples, Staff cannot provide a detailed response. Staff maintains that the Policy and the SED do consider issues raised in the IS checklist, NOP, and the Scoping Report. For example, numerous scoping comments were received concerning fisheries, with several commenters pointing out that summertime diversions can reduce base flows resulting in adverse impacts to aquatic habitat. In response, the SED (pp. 32-33) describes how summertime diversions have contributed to the decline in anadromous salmonid populations, and the Policy (p. 3) limits the diversion season to the non-summertime period.

Comment 23.4.18: 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. *(Rudolph Light)*

Response: Since the commenter does not provide specific examples, Staff cannot provide a detailed response. Staff maintains that the Policy does not ignore topics and adverse consequences discussed in the IS Environmental Checklist, Scoping Report, and SED. The Policy carries out the mandate of AB2121 by establishing a framework for how the State Water Board will make decisions in the context of water right administration that maintain instream flows to protect native fish populations. The SED identifies and adequately assesses potentially significant indirect environmental impacts that may arise from Policy implementation in numerous environmental issue areas.

Comment 23.4.19: 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. *(Rudolph Light)*

Response: The potential impacts of the Draft Policy's flow related criteria on agricultural resources were evaluated in sections 6.7 and 6.8 of the draft SED. The potential impact to agricultural resources that could result from the construction of offstream storage facilities is discussed in section 6.6.2 of the draft SED and in Appendix E at page 18. The draft SED also discloses the potential loss of habitat, and associated impacts to wildlife, if onstream dams are removed as a result of the Policy. (Draft SED, pp. 62-63, 67-68, Appendix E, pp. 18-21.)

Comment 23.4.20: 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. *(Rudolph Light)*

Response: The potential impacts of dam removal on fire protection and recreation are

disclosed in Table 6-10 of the draft SED and discussed in Appendix E at pages 28-29.

Comment 23.4.21: 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. (*Rudolph Light*)

Response: The draft SED examines the potential indirect impacts of the Draft Policy on agricultural resources. (Draft SED, pp. 70-83, Appendix E, p. 18.) The potential impact on urban growth if the indirect impacts to agricultural resources cause rural people to move to urban areas is too speculative to warrant examination.

Comment 23.4.22: 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 in the SED. These people are using water only for domestic purposes, and the Policy can affect their goodwill intentions in detrimental ways. (*Rudolph Light*)

Response: An effect to a person's "goodwill intention" is not an environmental impact. (See Cal. Code Regs., tit. 14, § 15382.)

Comment 23.4.23: Groundwater impacts and the function of streams in recharging wells must be addressed in the consideration of applications for new water rights or changes in existing permits or licenses. Maintaining stream flows while increasing reservoir storage for dry season uses may affect ground water levels and well recharge for existing water users. (*NA, Maacama Watershed Alliance*)

Response: This comment is unclear. To the extent that the Policy serves to maintain instream flows, and instream flows contribute to groundwater recharge, the Policy will not adversely affect groundwater levels or well recharge for existing water users. Any effect that a particular proposed diversion project may have on groundwater levels and well recharge would need to be considered in project-level CEQA review.

Comment 23.4.24: The Policy lacks a thorough analysis of the effects of global warming and climate change. (*Chris Malan, Earth Defense for the Environment Now, Living Rivers Council*)

Response: Section 6.9 of the draft SED (updated March 2008) discusses the adverse and beneficial effects of the Draft Policy on global climate change.

Comment 23.4.25: While the policy is focused on the protection of instream flows for anadromous salmonid migration, it could inadvertently mandate substantial negative impacts to California red-legged frog (CRLF) breeding habitat. The proposed policy refers to a large number of unauthorized dams within the CRLF listing area that would be subject to retrofit to comply with the proposed policy. In Marin and Sonoma County, these unauthorized ponds are designated by the US Fish and Wildlife Service as critical breeding habitat for the CRLF, a federally threatened species. The requirements of the proposed policy, to bypass flow through the pond site without storing water could negatively impact the breeding habitat for CRLF. The US Fish and Wildlife Service would require Endangered Species Act consultation on each of these facilities. The implications of this should be fully described in the Substitute Environmental Document for the proposed policy. (*Don Neubacher, US National Park Service, Point Reyes National Seashore*)

Response: The SED (Appendix C) identifies the CRLF as a special-status animal occurring in

the Policy area. The SED (pp. 54, 57, 60, 65, 68, 71) further identifies disturbance of special-status species and degradation of their habitat as a potentially significant indirect environmental impact. Future CEQA reviews of actions proposed by persons in response to implementation of the Policy, including retrofit of onstream dams, can be expected to identify any significant project-specific environmental effects, such as adverse impacts to CRLF, and mitigate them to a less-than-significant level. Furthermore, any such action identified in CEQA review as potentially impacting the CRLF could require an incidental take permit from the USFWS in accordance with the federal ESA.

Comment 23.4.26: One predictable consequence [of implementing the proposed regional criteria] is that groundwater pumping in the growing season would be greatly increased, with potentially negative effects on the spring and summer flows which are particularly critical for steelhead. (*Clinton Pridmore, Napa County Resource Conservation District*)

Response: The Policy applies to water diversions from all streams and tributaries in the Policy area that are subject to the State Water Board's water right permitting authority, including extractions from subterranean streams. The Policy does not apply to extractions from percolating groundwater because such extractions are not subject to the State Water Board's water right permitting authority. However, Staff points out that the State Water Board is concerned about potential increases in groundwater extraction resulting from the Policy, including extraction of percolating groundwater. Accordingly, the SED points out that the Policy could give rise to increases in groundwater extraction as affected parties take actions in response to the Policy requirements. Section 6.2 of SED, in particular Table 6-3, describes the possible environmental impacts resulting from increased groundwater extraction, including reduction in stream flow. Certain actions that affected parties take to increase groundwater extraction might be subject to CEQA review at the "project-level" and the lead agency would be required to adopt mitigation measures to reduce significant project impacts, including cumulative impacts such as reduction in stream flow, to a level of less than significant. Furthermore, the State Water Board has completed mapping of subterranean streams and areas where groundwater pumping could potentially cause streamflow depletion areas in the Policy area. New information and site specific studies may in the future result in some areas currently mapped as Potential Streamflow Depletion Areas being reclassified as subterranean streams. This mapping information is available from the State Water Board in a compilation of technical memoranda and maps entitled "Delineated Subterranean Streams and Potential Streamflow Depletion Areas," dated November 14, 2008 by Stetson Engineers Inc. And finally, as indicated in the SED (p. 13), the State Water Board may exercise its authority under the doctrines of reasonable use and the public trust to address diversions of surface water or groundwater that reduce instream flows in the Policy Area and thus adversely affect fish, wildlife, or other instream beneficial uses. The State Water Board may utilize the mapped subterranean streams and PSDAs in these efforts.

Comment 23.4.27: Another predictable consequence [of implementing the proposed regional criteria] is that those growers who maintain cover crops for soil retention under approved erosion control plans would have a powerful incentive to remove them; growing grass is a luxury when water is scarce, since it competes with the actual crop for water. Since the Napa River is under a TMDL for sediment, this last possibility is particularly troubling. (*Clinton Pridmore, Napa County Resource Conservation District*)

Response: The commenter is correct in that the SED does not specifically consider the environmental impacts of erosion and sedimentation into nearby watercourses resulting from vineyards choosing not to plant and maintain cover crops due to water unavailability or extra

expense as a result of the Policy. The final SED will include an assessment of this potential indirect environmental impact. Staff points out that the SED does, however, consider the environmental impacts of erosion and sedimentation into watercourses resulting from other actions that affected parties may take to comply with or avoid the Policy.

Comment 23.4.28: I hired an engineering firm at my own expense to review one of my properties that border the West Fork of the Russian River in Redwood Valley. Adding more water to that specific site would further erode the bank, adding hundreds or thousand cubic yards of dirt into the river. The additional water flow would continually worsen the depth of the base of the channel as well as the incredible speed of high current during the spring flow. Adding more water to this river would further damage the conditions for healthy fish habitat. *(Annette Rhodes, Rhodes Vineyards; Richard Rhodes, Rhodes Vineyards)*

Response: It is difficult to respond to this comment without more information about the property in question, and more information about whether and to what extent the draft Policy could lead to an increase in flows at this location.

Comment 23.4.29: Adoption of AB2121 will have significant land use implications for Mendocino County, some more immediate and obvious than others. We are troubled by the fact that these land use impacts are largely ignored or "glossed over" in the Substitute Environmental Document prepared in support of the AB 2121 Policy. *(Roland Sanford, Mendocino County Water Agency)*

Response: The SED (pp. 59 – 60, Appendix D, pp. 24-32) adequately describes the potentially significant indirect environmental impacts of the Policy on land use, including the reduction in future development of lands for urban or agricultural use.

Comment 23.4.30: As noted in the Substitute Environmental Document and illustrated (in the example and table above), the AB 2121 Policy will restrict water availability and in turn the geographic scope of urban and agricultural activities in Mendocino County. Land values, in areas where the AB 2121 Policy will restrict or preclude the development of surface water supplies, will be impacted and there will be increased competition between urban and agricultural water users for the existing developed or developable water supplies. Much of the developed agricultural water supply in Mendocino County consists of small storage facilities owned and operated by private individuals and entities. For example, within the Mendocino County portion of the Russian River basin there are, excluding Potter Valley, approximately 16,000 irrigated acres that collectively use roughly 18,000 acre-feet of water a year. Roughly 15,000 acre-feet of that total is derived from small privately owned facilities - facilities that will or may be impacted by the AB 2121 Policy. *(Roland Sanford, Mendocino County Water Agency)*

Response: Comment noted.

Comment 23.4.31: The proposed AB 2121 Policy largely ignores ecological benefits provided by water storage facilities. As noted by the Substitute Environmental Document, the water storage facilities on the North Coast - permitted or otherwise - provide lake and pond-based habitats that would otherwise be unavailable to aquatic and wildlife species. In some instances habitat is provided for Federally listed species, such as the Red Legged Frog. We are concerned that the AB 2121 Policy, as presently drafted, provides little guidance with respect to meeting the instream flow requirements of salmonids while at the same time protecting State or Federally listed species that rely on pondbased habitats for their survival. How will the State

Water Resources Control Board balance the ecological benefits provided by water storage facilities with the stream flow requirements of salmonids? *(Roland Sanford, Mendocino County Water Agency)*

Response: Natural hydrologic function is protected by the Policy requirement for passive bypass systems along with the regionally protective flow criteria. The policy requires water right applicants to demonstrate in the required water availability analysis using the regionally protective flow criteria or the results of an optional site-specific study that their projects will not adversely affect fish habitat. The policy also contains conditions under which onstream dams may be permitted. The State Water Board and other state and local agencies will need to address potential cumulative impacts, such as potential impacts that onstream dams may have on biological resources, in project-specific reviews for water right permit applications for proposed onstream dams. These individual projects will be subject to the appropriate level of environmental review at the time they are proposed, and mitigation is likely to be required to avoid or reduce these impacts to a level of less than significant. Section 6.5.2 of the Draft SED assesses the impact of the removal of unauthorized dams on special status species. Appendix C of the Draft SED lists the special-status animals occurring in riparian, freshwater marsh and vegetated lacustrine habitat in the Policy Area. Appendix E of the Draft SED discusses the potential loss of biological resources that could result from loss of wetlands, open water and riparian habitat.

Comment 23.4.32: The land use implications illustrated by this example are significant and regrettably, not fully vetted in the Substitute Environmental Impact Document. For the most part, Mendocino County consists of comparatively rugged terrain with numerous small drainages and tributary streams. Accordingly, much of the land currently zoned for rural residential and to a lesser extent agricultural purposes is located in comparatively small drainages - drainages in which as illustrated above, surface water supply development would be effectively precluded by the AB 2121 Policy. The net effect is the near exclusion of rural residential development and irrigated agricultural activities from a large fraction of Mendocino County. Needless to say, the social and economic implications of these land use exclusions are not adequately addressed in the Substitute Environmental Document, which as noted earlier, leads us to question how the State Water Resources Control Board will be able to fulfill its responsibility to reasonably balance the competing beneficial uses of water - instream and out of stream in Mendocino County if the AB 2121 Policy, as presently crafted, is adopted. *(Roland Sanford, Mendocino County Water Agency)*

Response: The SED (pp. 59 – 60, Appendix D, pp. 24-32) adequately describes the potentially significant indirect environmental impacts of the Policy on land use, including the reduction in future development of lands for agricultural use. CEQA does not require review of social and economic impacts.

Comment 23.4.33: The Policy ignores all benefits of existing ponds to other wildlife, such as migratory ducks and geese, deer, mountain lion, insects, etc. The Commenter expresses concern regarding the impacts that these biological resources will suffer if ponds are removed. *(Roland Sanford, Mendocino County Water Agency; Jim Wattenburger, Mendocino County Board of Supervisors)*

Response: The SED (pp. 62, 65, 68, Appendix E, pp. 18-21, 30) discloses that removal of onstream reservoirs or ponds could result in disturbance of special-status species, degradation of their habit, and disturbance of sensitive natural communities. Future CEQA reviews of actions proposed by persons in response to implementation of the Policy, including retrofit or

removal of onstream dams, can be expected to identify any significant project-specific environmental effects, such as adverse impacts to wildlife, and mitigate them to a less-than-significant level.

Comment 23.4.34: Landowners will be forced to pump groundwater or use riparian rights (which dewater streams in summer and harms salmonid habitat) or buy water from water districts. What effect will this have on other water sources and will agriculture get the water it needs? *(Roland Sanford, Mendocino County Water Agency; Jim Wattenburger, Mendocino County Board of Supervisors)*

Response: Appendix D of the Draft SED examines alternative sources of water supply potentially available to affected parties whose access to surface water is limited by the Policy. The report finds that many sources of supply may not be adequate to meet future demands, including the demands of agriculture. The SED finds that the lack of future water supply could have a potentially significant impact on agricultural resources and land use.

Comment 23.4.35: The Draft Policy will dramatically reduce the amount of water available for small farmers. This result could have a drastic adverse impact on the wine grape industry in Mendocino and other counties, as many vineyards will not obtain the water that they need for their crops. Many vineyards do not have other cost-effective options for obtaining a water supply and, if they are even able to obtain a supply, it will likely be significantly more expensive. This result, in turn, may force some grape growers out of business, thereby changing fundamental land use patterns, and it will undoubtedly exert upward price pressure on wine grapes and products. None of these anticipated impacts have been analyzed in the Draft Policy, the SED or the other accompanying documents. *(Paul "Skip" Spaulding, Farella Braun + Martel LLP/Golden Vineyards)*

Response: The potential impacts of the Draft Policy's flow related criteria on agricultural resources were evaluated in sections 6.7 and 6.8 of the draft SED and in Appendix D. CEQA does not require evaluation of economic impacts, such potential increased prices of wine grapes and products.

Comment 23.4.36: On page ii of the SED Summary, the State Board states: "Because the alternatives allow flexibility in compliance, and because the responses by the regulated community cannot be predicted with reasonable certainty, comparisons among the alternatives do not lead to clear differences in terms of the potential, indirect environmental effects of Policy implementation." By this statement, the State Board appears to be saying that it cannot distinguish among the alternatives in terms of their environmental effects, which is an astonishing and unacceptable admission. It is absolutely clear to Golden Vineyards that there are dramatically different environmental and other impacts caused by the different alternatives, and it is essential that these differences be addressed. The State Board's apparent concession that it cannot reasonably analyze such differences for alternatives cuts the heart out of the CEQA/SED process and renders the document insufficient under law. *(Paul "Skip" Spaulding, Farella Braun + Martel LLP/Golden Vineyards)*

Response: The SED (p. 73) describes its approach to comparing the alternatives as follows: "Alternatives to the proposed Policy criteria that allow more diversion to occur have a lower chance of causing significant changes to offstream environmental resources than alternatives that allow less diversion. The relative degree to which one alternative may constrain diversion of water versus another alternative can be inferred by comparing the volumes of water potentially available for diversion under each alternative." The SED then goes on to analyze

and compare the volumes of water potentially available for diversion under each alternative. The SED concludes: "Based on this comparison, the relative degree to which [affected persons might] take actions that could result in indirect environmental effects would be expected to the least for the proposed Policy. It follows then that the proposed Policy, by virtue of it being the least restrictive, would result in the least environmental effects. But the relative reduction in environmental effects cannot be determined because actions taken by affected parties cannot be accurately predicted." (Draft SED, p. 82.)

In summary, the alternatives analysis does distinguish between alternatives in terms of their environmental effects, albeit on a programmatic level.

Comment 23.4.37: The SED does not provide an adequate description of what the impacts of implementing the Draft Policy would be on the regulated community. For example, it does not identify how many diverters would be directly impacted by the Draft Policy and exactly how those impacts would occur by location, time of year, amount of diversion, location in a watershed, etc. Accordingly, given the SED's lack of necessary descriptive detail, it is not possible to understand and address the significant impacts on particular diverter categories such as vineyard diverters. (*Paul "Skip" Spaulding, Farella Braun + Martel LLP/Golden Vineyards*)

Response: The analysis contained in the draft SED of the potential impacts of the Draft Policy on the regulated community, and the indirect environmental impacts that could occur as a result, is sufficiently detailed, taking into consideration the nature of the proposed project.

The degree of specificity required in an EIR (or SED) depends on the type of project that is the subject of the environmental analysis. As explained by the CEQA Guidelines, "[a]n EIR on a project such as the adoption or amendment of a comprehensive zoning ordinance or a local general plan should focus on the secondary effects that can be expected to follow from the adoption, or amendment, but the EIR need not be as detailed as an EIR on the specific construction projects that might follow." (Cal. Code, Regs., tit. 14, § 15146, subd. (b).) When an action is reasonably foreseeable in general terms, an EIR must include a general discussion of the action and its environmental effects; but an EIR need not include a detailed analysis of specific actions that cannot be reasonably foreseen. (*Ebbetts Pass Forest Watch v. California Dep't of Forestry and Fire Protection* (2008) 43 Cal.4th 936, 954.) The scope of an EIR's review of potential future environmental consequences is guided by standards of reasonableness and practicality, and speculation concerning the environmental consequences of future activities that are unspecified and uncertain is not required. (*Environmental Council of Sacramento v. City of Sacramento* (2006) 142 Cal.App.4th 1018, 1031-1032.) The sufficiency of an EIR as an informative document depends on what is reasonably feasible. (Cal. Code Regs., tit. 14, § 15151.)

Here, a more general or programmatic level of review was appropriate because the project is the adoption of a policy for water quality control, as opposed to the approval of an individual water development project or projects. In addition, all of the potential impacts of the Policy are indirect impacts that could result if third parties take certain actions in response to the Policy, and it cannot be predicted with certainty who might take what specific actions. The draft SED made a good faith effort to identify the types of activities that affected persons might take, and evaluate the potential impacts of those activities. For example, Appendix E to the draft SED is an extensive report that estimates the number, location, onstream storage volume, and surface area of existing, onstream dams within the Policy area, for purposes of disclosing the potential impacts of dam modification or removal that may occur as a result of the Policy. The draft SED

identified 1,771 existing, unauthorized dams, but it cannot be predicted with certainty which of those dams might be modified or removed as a result of the Policy. Conducting a more detailed review of the potential modification or removal of all 1,771 dams would not be reasonable or feasible under the circumstances.

Comment 23.4.38: The SED fails to identify, fully evaluate and address a full range of significant environmental impacts. For example, it does not address such reasonably foreseeable environmental impacts from implementation of the Draft Policy such as vineyards choosing not to plant and maintain cover crops due to water unavailability or extra expense, thereby resulting in significantly increased land erosion and sedimentation into nearby watercourses. *(Paul "Skip" Spaulding, Farella Braun + Martel LLP/Golden Vineyards)*

Response: The commenter is correct in that the SED does not specifically consider the environmental impacts of erosion and sedimentation into nearby watercourses resulting from vineyards choosing not to plant and maintain cover crops due to water unavailability or extra expense as a result of the Policy. The final SED will include an assessment of this potential indirect environmental impact. Staff points out that the SED does, however, consider the environmental impacts of erosion and sedimentation into watercourses resulting from other actions that affected parties may take to comply with or avoid the Policy.

Comment 23.4.39: Although the SED does contain a brief discussion of agricultural diverters switching to use of other water sources, it does not adequately analyze the close interactions between groundwater and surface water and the resulting impact on groundwater supply and use that could result from implementation of the Draft Policy. *(Paul "Skip" Spaulding, Farella Braun + Martel LLP/Golden Vineyards)*

Response: Appendix D of the Draft SED examines alternative sources of water supply potentially available to affected parties whose access to surface water is limited by the Policy, including groundwater. The report finds that many groundwater sources of supply may not be adequate to meet future demands.

Staff understands the connectivity of groundwater and surface water and shares the commenter's concerns about potential increases in groundwater extraction resulting from the Policy. Accordingly, the SED points out that the Policy could give rise to increases in groundwater extraction as affected parties take actions in response to the Policy requirements. Section 6.2 of SED, in particular Tables 6-2 and 6-3, describe the adequacy of groundwater to meet future demands and the possible environmental impacts resulting from increased groundwater extraction, respectively, including reduction in stream flow and associated degradation of fish habitat. Certain actions that affected parties take to increase groundwater extraction might be subject to future CEQA review at the "project-level" and the lead agency would be required to adopt mitigation measures to reduce significant project impacts, including cumulative impacts such as reduction in available groundwater and reduction in streamflow, to a level of less than significant. And finally, as indicated in the SED (p. 13), the State Water Board may exercise its authority under the doctrines of reasonable use and the public trust to address groundwater pumping that reduces instream flows in the Policy Area and thus adversely affects fish, wildlife, or other instream beneficial uses.

Comment 23.4.40: The Policy also fails to undertake any kind of analysis, much less a sufficient analysis, of the physical impacts caused by the social and economic consequences of the Policy. The most glaring deficiency relates to the environmental impacts arising from the dramatic reduction in water supply and huge increase in financial costs caused by the Draft

Policy. The SED appears to assume that it does not need to discuss any aspect of the financial or social impacts of the policy on the regulated community, except for possible environmental impacts resulting from potential increased use of alternative water supplies (which it also fails to discuss in a legally sufficient manner). The SED completely misses the fact that, because many vineyard and other agricultural diverters may not have other affordable sources of water and/or will not be able to afford to pursue water rights applications under the Draft Policy, they will leave the wine grape or agricultural business, thereby leading to a dramatic change in land use patterns and property uses. This could lead to a variety of potential environmental impacts that must be analyzed in the SED, including the potential of increased conversion of farm land to commercial and residential developments. There are undoubtedly a variety of other social and economic impacts that could further result from these physical impacts. *(Paul "Skip" Spaulding, Farella Braun + Martel LLP/Golden Vineyards)*

Response: CEQA does not require review of social and economic impacts, unless they result in an impact to the physical environment. The SED (pp. 59 - 60, Appendix D, pp. 24-32) adequately describes the potentially significant indirect environmental impacts of the Policy on land use, including the reduction in future development of lands for agricultural use.

Comment 23.4.41: The SED fails to identify, fully evaluate and address a full range of significant environmental impacts. *(Paul "Skip" Spaulding, Farella Braun + Martel LLP/Golden Vineyards)*

Response: Contrary to the commenter's assertion, the draft SED evaluates the potential indirect impacts of the Draft Policy and alternatives in a broad range of environmental issue areas, from aesthetics to utilities.

Comment 23.4.42: The SED fails to identify, fully evaluate and address a full range of significant environmental impacts. For example, it does not discuss the foreseeable adverse environmental impacts of dam removal activities on species, such as federally listed California tiger salamanders and California red-legged frogs, that may inhabit or utilize such reservoirs. *(Paul "Skip" Spaulding, Farella Braun + Martel LLP/Golden Vineyards)*

Response: The Appendix C of the SED identifies the CRLF as a special-status animal occurring in the Policy area. However, although it was included in the Initial Study, the tiger salamander does not appear on the list in Appendix C of the SED because it was inadvertently omitted. The tiger salamander will be added to list in Appendix C of the final SED. The SED (pp. 54, 57, 60, 65, 68, 71) further identifies disturbance of special-status species and degradation of their habitat as a potentially significant indirect environmental impact. Future CEQA reviews of actions proposed by persons in response to implementation of the Policy, including removal of onstream dams, can be expected to identify any significant project-specific environmental effects, such as adverse impacts to CRLF and tiger salamander, and mitigate them to a less-than-significant level. Furthermore, any such action identified in CEQA review as potentially impacting the CRLF and salamander could require an incidental take permit from the USFWS in accordance with the federal ESA.

Comment 23.4.43: The policy does not address foreseeable secondary impacts of the increased groundwater pumping that may result from restrictions on surface water diversions, and the Water Board should consider likely changes in groundwater interflow to both "gaining" and "losing" stream reaches. The policy does not consider locally increasing needs of surface and groundwater resources due to increasing populations and likely changes in long term climatic conditions (i.e., sustained droughts and/or global warming). The policy area covers a

diverse landscape of rural and urban populations, high-value cropland and vast areas of open space. If the social and economic reliance on water is not fully considered in the policy's regulatory mechanisms, we are concerned that the indirect consequences may be detrimental to the watershed services and endangered species the policy intends to protect. (*Brad Wagenknecht, Napa County Board of Supervisors*)

Response: Appendix D of the Draft SED examines alternative sources of water supply potentially available to affected parties whose access to surface water is limited by the Policy, including groundwater. Appendix D of the Draft SED uses projections of population and water demand in its assessment of the adequacy of available sources of supply to meet future demands. The report finds that many groundwater sources of supply may not be adequate to meet future demands.

Staff understands the connectivity of groundwater and surface water and shares the commenter's concerns about potential increases in groundwater extraction resulting from the Policy. Accordingly, the SED points out that the Policy could give rise to increases in groundwater extraction as affected parties take actions in response to the Policy requirements. Section 6.2 of SED, in particular Tables 6-2 and 6-3, describe the adequacy of groundwater to meet future demands and the possible environmental impacts resulting from increased groundwater extraction, respectively, including reduction in stream flow and associated degradation of fish habitat. Certain actions that affected parties take to increase groundwater extraction might be subject to future CEQA review at the "project-level" and the lead agency would be required to adopt mitigation measures to reduce significant project impacts, including cumulative impacts such as reduction in available groundwater and reduction in streamflow, to a level of less than significant. And finally, as indicated in the SED (p. 13), the State Water Board may exercise its authority under the doctrines of reasonable use and the public trust to address groundwater pumping that reduces instream flows in the Policy Area and thus adversely affects fish, wildlife, or other instream beneficial uses.

CEQA does not require review of social and economic impacts, unless those impacts result in an impact to the physical environment.

Topic 23.5 CEQA - Water Cost Analysis

Comment 23.5.1: How much water will be available to divert under the Policy and did you assess the availability of other water supplies for current water users? (*Nick Frey, Sonoma County Winegrape Commission*)

Response: The water cost analysis and the sensitivity study (Stetson, 2009) assessed the total amount of surface water that would be available for diversion in the validation sites under potential Draft Policy regional criteria. The amount of surface water that will be available for new diverters under the Policy at a specific location will be determined by water right applicants as part of the required water availability analysis which takes existing water rights and fishery resource needs into account.

The availability of other water supplies for current authorized water users was not assessed. However, the Draft Policy requires water right applicants to account for senior water rights when performing the water availability analysis.

Comment 23.5.2: The Draft Policy did not evaluate specific flow conditions that would have indicated the relative impacts associated with most diversions. The hydrographic analysis by

Wagner & Bonsignore clearly indicates the severe reductions in yield for various projects despite their negligible impact on streamflow. (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: This commenter is concerned that the instream flow analysis requires evaluation of flow conditions at the POD, regardless of its location in the watershed. Staff will reassess whether a POI is needed at the POD if the POD is located above the limit of anadromy. Staff will also take into consideration points raised in other comments regarding diversion constraints for projects located above anadromy that do not cause significant changes to hydrology at the upper limit of anadromy.

Comment 23.5.3: The "Water Cost" analysis leads to a primary conclusion in the SED (p. 82) that "...the proposed Policy alternative would allow a larger average volume of water to be diverted than if the CDFG-NMFS Guidelines criteria were applied." It continues on that page to explain that this is important because "...the proposed Policy may lead affected persons to take actions that could result in indirect environmental effects" associated with obtaining an alternative supply of water and that "[i]t follows then that the proposed Policy, by virtue of it being the least restrictive, would result in the least environmental effects among the regionally protective alternatives." This conclusion is opposite of fact for drainage areas less than about 2 square miles. This is important because most pending applications are for projects with drainage areas far less than 2 square miles. The median drainage area of pending applications from Wagner & Bonsignore Engineers sampling is about 50 acres. Because most pending applications are on small watersheds, the Draft Policy would allow less diversion than the DFG-NMFS Draft Guidelines. According to the logic of the SED, it would then follow that the Draft Policy, by being more restrictive, would result in more indirect environmental effects than the Draft Guidelines. However, there is no basis to conclude that the Draft Guidelines are the appropriate standard for comparison. (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: The Scientific Basis Report concluded that the CDFG-NMFS Draft Guidelines are not fully protective. The statement on page 82 of the SED is in reference to fully protective alternatives.

The comment regarding the restrictiveness of the Draft Policy in small drainage areas is noted. Staff is reevaluating the flow related criteria in the Draft Policy based on consideration of the comments and suggestions that have been received.

The water cost analysis provided a relative comparison of the amount of water that could be diverted under not only the Draft Policy and Draft Guidelines regional criteria, but under each combination of each minimum bypass flow, maximum cumulative diversion and diversion season alternative regional criteria (Tables 6-12 to 6-14) that was considered in the Task 3 Report (R2, 2007). Comparisons to the Draft Guidelines were provided because the public is familiar with the Draft Guidelines.

Comment 23.5.4: The "Water Cost" analysis was not an economic analysis. Nor was it an estimate of water available for diversion while maintaining streamflows protective of anadromous salmonids. It was an estimate of water available for diversion as constrained by the three Design Elements: diversion season (DS1, DS2 or DS3), maximum cumulative diversion (MCD1, MCD2, MCD3, or MCD4), and minimum bypass flow (MBF1, MBF2, MBF3,

or MBF4). These Elements were combined into 48 possible scenarios. Both the Draft Guidelines and the Draft Policy make clear that the quantitative regional criteria are intended to be sufficiently conservative to be applicable in all situations to provide a threshold of diversions under which protectiveness of fisheries is assured without further study. Both the Draft Guidelines and the Draft Policy provide for site specific analyses to evaluate whether diversions in excess of the regional threshold would impact fishery resources. Thus the CFII criteria in the Draft Guidelines and the regional criteria in the Draft Policy are screening criteria, rather than an assessment of how much water may be diverted without significant impact to fishery resources. (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: As stated by the commenter, the Draft Guidelines and the Draft Policy made clear that the regional criteria are intended to be sufficiently conservative to be applicable in all situations to provide a threshold of diversions under which protectiveness of fisheries is assured without further study. The Draft Policy allows applicants to rely on the results of a site-specific study instead of the regional criteria to more accurately assess how much water may be diverted without significant impact to fishery resources at a specific location.

Comment 23.5.5: The "Water Cost" analysis was applied to 11 of the 13 "validation sites" studied by R2 Resource Consultants and Stetson Engineers. These sites varied in drainage area from 0.25 to 15.7 sq mi. The analysis involved calculating on a daily basis, based on the gage record, the total amount of water that could be diverted at that location as constrained by the three Design Elements: diversion season, minimum bypass flow, and maximum cumulative diversion. Results of the analysis for 3 of the 48 possible combinations were summarized in Figure 6-5 of the SED. This figure is misleading because the results were averaged together. Wagner and Bonsignore's comment letter illustrates the numbers presented in Tables 6-12 and 6-14 of the SED without averaging the results. When larger values are averaged in with smaller values, the larger values have a dominating effect. The Draft Policy allows more water available for diversion relative to the Draft Guidelines for larger drainage areas, but less for smaller watersheds. Because of the way the minimum bypass flow was formulated, the Draft Policy is particularly restrictive in small drainage areas. Most pending applications for storage are not down near the base of the watershed where the validation sites were located, but rather are located higher in the watershed with much smaller drainage areas. Wagner and Bonsignore conducted an analysis using the same algorithm as used in the water cost analysis, but with smaller drainage areas for Santa Rosa Creek and Salmon Creek. As the drainage area decreases, the Draft Policy becomes dramatically more restrictive to diversions as compared to the Draft Guidelines. (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: In addition to Figure 6-5, the Draft SED included the results of the water cost analysis in terms of percent of mean average flow, which greatly reduces the dominating effect of the larger values (Figure 6-6) and detailed results by validation site that were not averaged (Tables 6-12 to 6-14).

The Scientific Basis Report, Appendix E (R2, 2007) describes how the percentage of instream flow needed for fish increases with decreasing drainage area. This discussion was reflected in the formulation of the minimum bypass flow equation as a function of drainage area. The Draft Policy allows applicants to rely on the results of a site-specific study instead of the regional criteria to more accurately assess how much water may be diverted without significant impact

to fishery resources at a specific location.

The comment regarding the restrictiveness of the Draft Policy in small drainage areas is noted. Staff is reevaluating the flow related criteria in the Draft Policy based on consideration of the comments and suggestions that have been received.

Comment 23.5.6: The "Water Cost" analysis was biased because streamgage records of very short duration were utilized. Short records are not representative of long-term average hydrology. Note that the Draft Policy (page A1-3) recommends use of gage records of at least 10 years length. (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: The data set used was adequate for its intended purpose. This purpose was to provide a relative comparison of the amount of water that could be diverted under different combinations of potential Policy minimum bypass flow, maximum cumulative diversion and diversion season criteria.

The Water Availability Analysis described in the Draft Policy requires at least ten years of record because these data are used to quantitatively estimate the unappropriated water rather being used for a relative comparison.

Comment 23.5.7: As explained by Wagner & Bonsignore and HDR/SWRI, the validation sites are relatively large watersheds that are not representative of the majority of the pending water right applications. The analysis of water cost is therefore flawed, as it does not provide a meaningful measure of the reduction in water supplies that will result from the policy. Regardless, the analysis in the Substitute Document is only intended to measure fit with the policy principles, and not evaluate whether the reduction in water supply resulting from the alternatives would result in environmental impacts. A different methodology would have to be applied to compare the environmental impacts of the policy. (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: The water cost analysis presented in the SED was not intended to provide a measure of the reduction in water supplies that will results from the Policy but rather to provide a relative comparison of the amount of water that could be diverted under different combinations of potential Policy minimum bypass flow, maximum cumulative diversion and diversion season regional criteria.

Appendix E of the Draft SED provided an evaluation of the potential indirect impacts of the Policy on water use and related indirect impacts on other environmental resources. Results of this evaluation are summarized in the Draft SED Section 6, Assessment of Environmental Impacts.

Comment 23.5.8: 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. (*Rudolph Light*)

Response: The Scientific Basis Report, Appendix E (R2, 2007) describes how the percentage of instream flow needed for fish increases with decreasing drainage area. This discussion was reflected in the formulation of the minimum bypass flow equation as a function of drainage area.

The comment regarding the shortcomings of the MBF formula for upstream water users is noted. Staff is reevaluating the flow related criteria in the Draft Policy based on consideration of the comments and suggestions that have been received.

The Draft SED statement that "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" was a general statement supported by the water cost analysis. Detailed results by validation site were clearly presented in Tables 6-12 to 6-14, from which comparisons among watershed sizes can be made.

Topic 23.6 CEQA - Cumulative and Long Term Impacts

Comment 23.6.1: The SED should discuss potential cumulative effects on downstream flows that could potentially be caused by interactions of diversions in the upper reaches of a watershed. Even if all of the diversions in a watershed were operating in accordance with the proposed regional criteria, they may cumulatively result in significantly reduced stream flows. While each diversion might only capture less than 5% of the 1.5 recurrence interval flow at one location, Band (2008) calculated the interaction between diversions in the stream system could increase to 28% downstream. In addition, multiple diversions in a watershed could cumulatively cause accumulations of fine sediment that could affect spawning in lower reaches. (*Patrick Higgins, Consulting Fisheries Biologist/Sierra Club Redwood Chapter*)

Response: The Policy (p. 5) defines the maximum cumulative diversion (MCD) as "the largest value that the sum of the rates of diversion of all diversions upstream of a specific location in the watershed can be in order to maintain adequate peak stream flows". The Policy regional MCD criteria is equal to five percent of the 1.5-year instantaneous peak flow. If the MCD criterion is used, the permitting of new water diversions that increase cumulative diversions to 28% is not possible because the MCD limits the total instantaneous diversions by all diverters, not the instantaneous diversion allowed by each diverter.

Sediment balance is also addressed by the MCD element of the Policy, which maintains natural flow variability, including during the months of October and November. Flows most affected during this period would likely be those transporting predominantly fine grained sediments; larger flows transporting coarse bedload would not be adversely affected. The Task 3 report projects that the primary consequence on sediment transport and channel form by diversions in compliance with the Policy would be a small reduction in channel size and grain size characteristics.

Comment 23.6.2: The SED should discuss the cumulative effects potentially associated with

dams on ephemeral streams (Class III). These headwater swales may constitute 50% of a watershed's area and "the vast majority of coarse grained material delivered to larger streams with salmonid habitat are generated from small, headwater catchments" (Band, 2008). There is significant likelihood of advanced cumulative effects from interactions of releases from these types of diversions. (*Patrick Higgins, Consulting Fisheries Biologist/Sierra Club Redwood Chapter*)

Response: The SED discusses the cumulative effects of implementing the Policy, including the potential impacts of the modification or removal of onstream dams on Class I streams to comply with the Policy. Because the Policy limits the permitting of onstream dams, the Policy has a beneficial rather than negative impact on the releases from these types of diversions.

Throughout the Scientific Basis Report (sections 2, 3, 8, and 9), the issue of potential impairment of habitat needs by onstream dams is considered. The Policy allows new onstream dams on Class III stream only if a mitigation plan for non-native species eradication and riparian habitat replacement is implemented and flow criteria are met with a passive bypass system. The State Water Board and other state and local agencies will need to address potential cumulative impacts, such as potential impacts that impairment of gravel and wood transport may have on fish habitat, in project-specific reviews for proposed onstream dams on Class III streams. These individual projects will be subject to the appropriate level of environmental review at the time they are proposed, and mitigation is likely to be required to avoid or reduce these impacts to a level of less than significant.

Comment 23.6.3: The SED should discuss the potential cumulative effects of onstream dams on biological resources. Onstream dams are ideal habitat for bull frogs which decimate native amphibian populations. They are also often stocked with warm water game fish that escape into water bodies below and may predate upon salmonids or displace them through competition (Higgins et al., 1992). (*Patrick Higgins, Consulting Fisheries Biologist/Sierra Club Redwood Chapter*)

Response: The SED discusses the cumulative effects of implementing the Policy, including the potential impacts of the modification or removal of onstream dams on Class I streams to comply with the Policy. Section 5.5 of Appendix E of the Draft SED discusses the potential loss of biological resources that could result from loss of wetlands, open water and riparian habitat due to dam removal or modification. Because the Policy limits the permitting of onstream dams, it will limit the decimation of native amphibian populations by bull frogs.

The Scientific Basis Report (p. 8-1) describes how onstream dams can create habitats that favor non-native species that may either prey on anadromous salmonids or compete for food and shelter. Accordingly, the Policy is highly restrictive in its provisions for onstream dams on Class I, II, and III streams. Under all circumstances where an onstream dam would be considered, the applicant would be required to implement a non-native species eradication plan and a riparian habitat replacement plan (Class I and II streams only). The State Water Board and other state and local agencies will need to address potential cumulative impacts, such as potential impacts that onstream dams may have on biological resources, in project-specific reviews for water right permit applications for proposed onstream dams. These individual projects will be subject to the appropriate level of environmental review at the time they are proposed, and mitigation is likely to be required to avoid or reduce these impacts to a level of less than significant.

Comment 23.6.4: The SED should discuss the cumulative effects to stream flows caused by

overextraction of groundwater. Overextraction of groundwater is known to contribute to diminished water quality and greatly reduced fish habitat in many streams within the region. Peer reviewers (Band, 2008; Gearheart, 2008; McMahon, 2008) point out that no real water budget can be calculated without knowing the influence of ground water withdrawals. (*Patrick Higgins, Consulting Fisheries Biologist/Sierra Club Redwood Chapter*)

Response: Staff shares the commenter's concerns about potential increases in groundwater extraction resulting from the Policy. Accordingly, the SED points out that the Policy could give rise to increases in groundwater extraction as affected parties take actions in response to the Policy requirements. Section 6.2 of SED, in particular Table 6-3, describes the possible environmental impacts resulting from increased groundwater extraction, including reduction in stream flow and degradation in water quality. As indicated in the SED (p. 13), the State Water Board may exercise its authority under the doctrines of reasonable use and the public trust to address diversions of surface water or groundwater that reduce instream flows in the Policy Area and thus adversely affect fish, wildlife, or other instream beneficial uses. In addition, certain actions that affected parties take to increase groundwater extraction might be subject to CEQA review at the "project-level" and the lead agency would be required to adopt mitigation measures to reduce significant project impacts, including cumulative impacts such as reduction in stream flow and degradation in water quality, to a level of less than significant to the extent feasible.

Comment 23.6.5: The SED should discuss the cumulative effects that may result from potential additional water withdrawal under riparian water rights. (*Patrick Higgins, Consulting Fisheries Biologist/Sierra Club Redwood Chapter*)

Response: The SED assesses the potential indirect environmental impacts of actions that affected parties might take to avoid the Policy by diverting water under different bases of right that are not covered by the Policy because they are not subject to the State Water Board's water right permitting authority, such as diversion under riparian right. (Draft SED, pp. 55-58, Appendix D.) The SED points out that the State Water Board may exercise its authority under the doctrines of reasonable use and the public trust to address diversions of surface water or groundwater, including diversions under riparian right, that reduce instream flows and thus adversely affect instream beneficial uses.

A discussion of potential cumulative impacts can be found in response to 23.6.11.

Comment 23.6.6: The SED should discuss the cumulative effects that may result from tailwater. Band (2008) mentions tailwater as a major issue needing consideration by the State Water Board as a potential effect. Agricultural waste water may have elevated temperature and nutrients and its impact is recognized as substantial on the Shasta River (NCRWQCB, 2006a). (*Patrick Higgins, Consulting Fisheries Biologist/Sierra Club Redwood Chapter*)

Response: This comment is unclear. The commenter has not explained how the Policy could cause an increase in agricultural tailwater. In addition, the Shasta River is outside the Policy area.

Comment 23.6.7: The SED should discuss the cumulative impacts to surface water availability caused by (a) Logging and associated road networks. Watersheds logged after WW II have extensive road networks that alter watershed hydrology (Jones and Grant, 1996). High road densities act to extend stream networks and intercept ground water flows (Jones and Grant, 1996), resulting in increased peak flows and decreased base flows (Montgomery

and Buffington, 1993). (b) Sediment impairment. Most of the streams within the Policy area are listed for sediment impairment on the SWRCB 303d list and targeted for remediation under the Clean Water Act TMDL program. High sediment yield has caused dozens of regional streams, such as those of the Lower Klamath (Voight and Gale, 1998), to lose surface flow even when there is no diversion. (c) Stream temperature warming. Increased flood peaks and excess sediment transport in North Coast rivers have caused a loss of pool habitat, an increased width to depth ratio, reduced large wood, and overall diminishment of salmon and steelhead habitat. Because the streams have become wider and shallower, they are more subject to warming (Poole and Berman, 2000). (The Policy skips the discussion of cumulative effects due to April-October flow depletion on stream temperatures by concerning itself only with the October-March time period.) The North Coast Regional Water Quality Control Board (NCRWQCB, 2006a) found that flow depletion in the Shasta River was contributing to temperature pollution and NRC (2004) found the same relationship on the Scott River. (*Patrick Higgins, Consulting Fisheries Biologist/Sierra Club Redwood Chapter*)

Response: The SED discusses the cumulative effects of implementing the Policy. Logging and the associated road networks are not an impact of implementing the Policy. Sections 6.2, 6.3 and Appendix D of the Draft SED discuss the potential indirect impacts of the policy on water quality, including a potential increase in stream temperatures, due to an increase in riparian or groundwater withdrawals and a corresponding decrease in stream flows, particularly in the summer. Appendix E of the Draft SED discusses the potential impacts of the removal or modification of onstream dams to comply with the Policy. Section 5.9 of Appendix E discusses short-term impacts of sediment releases following dam removal. In the long-term, however, because the Policy limits the permitting of onstream dams, it would have a beneficial rather than negative impact on the sediment impairment in the Policy area.

The Policy requires a water right applicant to prepare a water availability analysis, to demonstrate that there is sufficient unappropriated water to supply the proposed diversion, and an instream flow analysis, to determine if the proposed diversion would have any impacts to instream beneficial uses. Because the water availability analysis and instream flow analysis both rely on present day hydrologic conditions, they implicitly consider the effects of historical land use practices, including logging, on stream hydrology. The effects of historical land use practices, including logging, on stream hydrology as described by the commenter will often likely translate into these analyses finding less water available for diversion.

Comment 23.6.8: The SED should discuss the cumulative effects to recreational activities due to excessive water diversion and sediment accumulation that cause stagnation that fosters toxic algae. On the South Fork Eel River, which is not in the Policy area, unpermitted water diversion and sediment accumulation has contributed to the formation of toxic blue-green algae. Surface water contact during low flows is now ill-advised. (*Patrick Higgins, Consulting Fisheries Biologist/Sierra Club Redwood Chapter*)

Response: The SED discusses the cumulative effects of implementing the Policy. Appendix E of the Draft SED discusses the potential impacts of the removal or modification of onstream dams to comply with the Policy. Section 5.13 of Appendix E discusses impacts to recreation. Because the Policy limits excessive water diversion and sediment accumulation, it will limit the formation of toxic blue-green algae.

To prevent reduction in summer flows, the Policy does not allow new diversions from Policy area streams during the summer when excessive withdrawals could degrade water quality for recreational beneficial use. The Policy provides for an enforcement program to identify and

prioritize enforcement responses to achieve maximum environmental benefits.

Comment 23.6.9: Anderson Creek in the Navarro River basin might serve as an example. When an early water right was granted for 2 cubic feet per second (cfs), pools were likely frequent with some 6-8 feet deep (CDFG, 1969), and the effect of the withdrawal was likely minimal. The stream has experienced substantial cumulative effects and pools are now infrequent and maximum pool depth is often 4 feet or less; the effects on fish of the historically permitted quantity of water may now be significant. (*Patrick Higgins, Consulting Fisheries Biologist/Sierra Club Redwood Chapter*)

Response: Comment noted.

Comment 23.6.10: The draft SED may fail to disclose or avoid foreseeable environmental consequences. Existing procedures and the proposed Policy application process go to elaborate lengths to prepare daily hydrographs of unimpaired flows, hydrographs impaired by existing diversions of record (including complicated formulas to pro-rate and adjust those records), and hydrographs including the project. Then the Policy proposes elaborate formulae for calculating standard terms. But the estimates of cumulative effect leave out the majority of the water diverted in most coastal basins - water extracted by "non-filer" reservoirs, water extracted by unauthorized direct diversions, water extracted by unauthorized diversions from subterranean streams, water extracted by under basis of riparian or pre-1914 right without a statement of diversion and use, and water extracted from non-jurisdictional groundwater that affects surface flow. To be sure, some Water Code considerations focus on the protection of senior rights, and may not require this data. But that is not the end of the analysis. Other provisions of the Water Code, the public trust doctrine, and CEQA all demand consideration of cumulative effects - the incremental effects of the proposed project viewed together with the effects of past, current, and probable future projects. (See, e.g., Pub. Resources Code section 21083(b); CEQA Guidelines section 15130(a)-(b); *National Audubon Society v. Superior Court of Alpine County* (1983) 33 Cal.3d 419.) This mandate assumes even greater importance for a program-level environmental review such as this. (See Guidelines section 15168(b)(4) (program EIR allows agency to "consider broad policy alternatives and program-wide mitigation measures" at an early stage when the agency has greater flexibility to deal with cumulative impacts).) Assuming the State Water Board believes that the SED and Policy as amended for final adoption adequately consider and avoid cumulative effects without better information about the diversions discussed above, the responses to comment should explain the basis for that belief and describe a mechanism to validate that hypothesis. (*Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society*)

Response: This comment concerns the potential cumulative impacts of surface water diversions under new permits together with existing unauthorized diversions, diversions under claim of riparian or pre-1914 right for which a Statement of Diversion and Use has not been filed, and groundwater pumping. The project analyzed in the draft SED, however, is the adoption of policy for water quality control, not approval of individual water development projects, and adoption of the draft Policy will operate to limit the effects of cumulative surface water diversions on instream flows. In essence, the commenter's concern is that the draft Policy is not sufficiently protective of instream flows because the draft Policy would require water right applicants to prepare an analysis of cumulative diversions that does not include existing diversions that are either unauthorized or unknown. This concern has no bearing on the validity of the draft SED. Before the State Water Board may issue a water right permit, it must find that there is unappropriated water available to supply the applicant. (Wat. Code, section 1375, subd. (d). The Draft Policy contains provisions describing the analysis that

would be used to determine whether there is unappropriated water available to supply the applicant. Water availability is based on first in time, first in right and therefore only needs to consider senior rights and the pending project. For the purposes of water availability, only senior authorized diversions plus the proposed project need to be evaluated. The cumulative consideration of all existing and reasonably foreseeable diversions is a requirement of CEQA, which is a separate evaluation from a water availability analysis. The Draft Policy does not specify the extent to which the State Water Board will take into account unauthorized diversions in evaluation of cumulative impacts pursuant to CEQA, which would be determined on a case by case basis.

Comment 23.6.11: The Substitute Document failed to sufficiently consider the cumulative impacts of the Instream Flow Policy. The Substitute Document dedicates less than a single page to the topic of cumulative impacts. The analysis consists of a conclusory statement that various indirect impacts of the policy were considered. (SED, p. 83.) There is also a conclusory statement that the, "State Water Board considered foreseeable past, current, and probable projects to include two categories of land use and development projects . . . (1) projects requiring water supplies . . . and (2) projects developing water supplies under other bases of right." (SED, pp. 83-84.) These projects, however, are not identified. The Water Board simply concludes that, "The proposed policy, in combination with these land use and water development projects, may have cumulative impacts on the environment. . . ." (SED, p. 84.) This analysis, or lack thereof, is insufficient. (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: Section 6.9 of the draft SED discusses the potential cumulative impacts of the draft Policy. As explained in that section, the draft Policy could result in cumulative impacts associated with increased greenhouse gas emissions. In addition, the draft Policy, in conjunction with other land use and water development projects, could result in cumulative impacts similar to the potential indirect impacts discussed in section 6 of the draft SED. In response to this and other comments concerning the adequacy of the cumulative impacts analysis, more detail concerning the latter category of cumulative impacts is set forth below.

The draft Policy could have potentially significant cumulative impacts to water quality. As disclosed in the draft SED, the draft Policy could have potentially significant impacts to water quality as a result of the following activities that third parties might take in response to the proposed policy: increased groundwater pumping, increased diversions under riparian rights, increased reliance on alternative water sources, modification or removal of onstream dams, and construction of offstream storage facilities. (See Tables 6-3, 6-5, 6-7, 6-9, 6-10, and 6-11 of the Draft SED.) These water quality impacts may include, but are not limited to, short term release of sediment, fluctuations in stream temperature, and discharge of nonvisible pollutants. To the extent that these impacts occur in streams that are already water quality impaired as a result of other land use or water development projects, the draft Policy could contribute to significant cumulative water quality impacts. (Table 19 of Appendix E of the draft SED lists the streams in the policy area that have been listed as impaired under section 303(d) of the Clean Water Act.) Although the draft Policy could have potentially significant cumulative impacts to water quality, it should be noted that the Policy as a whole will serve to improve water quality by protecting instream flows.

The draft Policy also could have potentially significant cumulative impacts to biological resources. As disclosed in the draft SED, increased groundwater pumping and riparian diversions could decrease surface water flows, particularly in the summer, which could harm

riparian vegetation or degrade habitat for sensitive species, including salmonids. (See Tables 6-3 and 6-5 of the draft SED.) To the extent that these impacts occur in streams with flows that already have been impaired as a result of other land use or water development projects, the draft Policy could contribute to significant cumulative impacts to biological resources. As stated above, however, it should be noted that the Policy as a whole will protect biological resources, including salmonids, by protecting instream flows.

Increases in groundwater pumping as a result of the Policy could also contribute to potentially significant cumulative impacts to groundwater resources to the extent that the pumping occurs in overdrafted groundwater basins. Appendix D of the SED estimated the magnitude of impacts associated with use of alternative water supplies. Table 17 in Appendix D provides an estimate of whether the amount of groundwater available to satisfy future water demands is adequate. In Marin and Mendocino counties, Table 17 estimates that the groundwater supply would not likely be adequate if all future demand (planned and unplanned) were to use groundwater instead of surface water. In Sonoma County, the groundwater supply is not likely to be adequate to accommodate planned future usage from large and small water agencies, but may be adequate for accommodating small agencies and individual diverters under specific geologic conditions. The groundwater supply in Humboldt and Napa counties is estimated to be adequate for all planned and unplanned future use.

Comment 23.6.12: The Substitute Document states the analysis of cumulative impacts will be deferred until project-specific CEQA documents are prepared. (SED, p. 84.) Because the actions the regulated community will take in reaction to the policy are highly foreseeable - indeed are identified in the document and its appendices- the deferral of the consideration of the cumulative impacts is therefore unlawful. The Substitute Document also states that ". . . adoption and implementation of the proposed Policy will not result in any direct impacts on the environment. . . ." (Substitute Document, p. 83.) As previously discussed, there are direct impacts that should have been considered in the analysis of direct and cumulative impacts. The analysis of cumulative impacts should have considered the direct and indirect impacts of the policy with the environmental impacts of other past, present, or reasonably foreseeable future projects, such as: urban development projects, habitat restoration projects, streambed alteration agreements, the implementation of TMDLs, existing and future groundwater extraction, existing and future water conservation and water reuse projects, desalinization projects, water right decisions and orders, wastewater discharges, commercial and recreational fishing, and the approximately 300 pending water right applications. The approach taken by the Substitute Document completely undermines the purpose of a programmatic document, which is to evaluate the impacts of the Draft policy. At the project level, the cumulative impacts analysis will be limited to the impacts related to only that specific project. If not considered in the Substitute Document, the cumulative impacts of the Draft Policy will never be considered, as required by CEQA. (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: The potential effects of the Policy are correctly characterized as indirect because they will not occur unless affected persons take certain actions in response to the Policy's requirements, and it is uncertain what actions affected persons will take. The State Water Board is not aware of past, present, or future projects that have, had, or will have widespread region-wide impacts to agricultural resources which the policy would contribute. The comment that the project would have cumulative impacts to agricultural resources is not substantiated.

A discussion of potential cumulative impacts can be found in response to 23.6.11.

Comment 23.6.13: The SED does not contain any real discussion of cumulative impacts. It contains only a two-page section 6.9 on cumulative impacts, most of which is merely a legal recitation of what the law requires. This failure to identify, discuss and analyze cumulative impacts is a fundamental legal deficiency in the document. It is absolutely essential, when issuing a policy that will have the scope and magnitude of environmental effects that the Draft Policy will, to include a thorough discussion of cumulative environmental impacts. This policy, by the State Board's own admission, will directly affect hundreds of water rights applications, petitions and registrations, many of which have been pending for over a decade. For example, the Draft Policy could well force large-scale changes in land use, environmental, social and economic patterns in the affected counties, particularly given its direct adverse impact on the wine grape industry, and none of these changes are addressed in a cumulative impact discussion. (*Paul "Skip" Spaulding, Farella Braun + Martel LLP/Golden Vineyards*)

Response: CEQA does not require review of social and economic impacts. The State Water Board is not aware of past, present, or future projects that have, had, or will have widespread region-wide impacts to agricultural resources which the policy would contribute. The comment that the project would have cumulative impacts to agricultural resources is not substantiated.

A discussion of potential cumulative impacts can be found in response to 23.6.11.

Topic 23.7 CEQA - Mitigation Measures

Comment 23.7.1: Draft Substitute Environmental Document

As part of its consideration of the Policy, the Board has drafted a Substitute Environmental Document (SED) to review and analyze the potential environmental impacts of the Policy under the California Environmental Quality Act (CEQA). The Board claims that it is exempt from CEQA's requirement for preparation of an EIR, negative declaration and initial study because the Policy falls under a list of state certified regulatory programs. Certified regulatory programs, however, remain subject to other core CEQA policies, such as the requirement to identify a project's adverse environmental impacts, to mitigate those impacts by adopting feasible alternatives and mitigation measures, and to justify its action based on specific economic, social, or other condition. (14 Cal Code Regs § 15250, 15252; *Sierra Club v. State Bd. Of Forestry* (1994) 7 Cal.4th 1215.) As a CEQA document, the SED wholly fails in this regard. The SED identifies numerous potentially significant direct, indirect, and cumulative environmental impacts that would result from the adoption of the Policy. Yet, the SED does not contain a single mitigation measure to mitigate these impacts. CEQA requires public agencies to analyze and mitigate, where feasible, all potentially significant direct, indirect, and cumulative impacts caused by the project. (Pub. Res. Code §§ 21002, 21065; 14 Cal Code Regs 15126.2(a), 15126.4(a); *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645.) The SED fails to do this. Thus, the SED is entirely inadequate and must be redrafted to analyze and consider all potentially feasible mitigation measures. (*Barbara Brenner; Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers; Paul "Skip" Spaulding, Farella Braun + Martel LLP/Golden Vineyards*)

Response: Certified regulatory programs, including adoption of the Policy, are exempt from chapter 3 (commencing with section 21100), chapter 4 (commencing with section 21150) and section 21167 of the Public Resources Code. The commenter is correct that other provisions of CEQA, including the policy of avoiding significant, adverse effects on the environment where

feasible, apply to certified regulatory programs.

Mitigation Measures

For purposes of CEQA, the proposed project is adoption of the North Coast Instream Flow Policy. The Policy itself will not approve any particular water diversion projects. Moreover, in general the Policy will operate to protect the environment by ensuring that water rights are administered in a manner designed to maintain instream flows.

The policy requires limitations on diversions which could lead some affected parties to take actions that could in turn result in indirect environmental impacts. An indirect physical change in the environment is a physical change which is not immediately related to adoption of the policy, but which may occur as a result of the policy being adopted.

Examples of such actions that affected parties might take include, but may not be limited to:

- pumping groundwater instead of diverting surface water in order to avoid any limitations applicable to new water right applications that may be contained in the policy;
- directly diverting under their riparian rights instead of seasonally storing water, for which a water right permit is required, which could mean an increase in direct diversions during the spring, summer, and fall (applies to holders of riparian water rights);
- ceasing diverting and allowing previously irrigated land to fallow;
- removing or modifying on-stream storage reservoirs; and
- constructing new off-stream storage facilities.

It is impossible to predict which affected parties will take any of the actions described above, or exactly how many affected parties will take any of those actions. Accordingly, the SED evaluates indirect environmental impacts at a programmatic level. A programmatic level analysis is more general in nature and evaluates the effects on the environment at a broad level. This type of analysis is appropriate when analyzing the potential impacts associated with adopting a program or policy. As explained in chapter 7 of the draft SED, future CEQA reviews conducted by the State Water Board or by another lead agency can be expected to identify any significant project-specific environmental effects and mitigate them to less-than-significant levels. In addition, other regulatory mechanisms can be expected to provide opportunities for minimizing and avoiding significant environmental effects.

In response to comments that the draft SED did not adequately describe mitigation measures, the following paragraphs briefly examine some examples of potentially significant indirect impacts of the Policy and the regulatory requirements and mitigation measures for these impacts that may be incorporated at a project-specific level. These regulatory requirements and mitigation measures are likely to reduce many, but not all, of the potential indirect impacts of the draft Policy to less than significant levels. Some indirect impacts may not be identified or mitigated because it is impossible to predict who will take action in response to the Policy, or what action they will take. In some cases, it may not be feasible to fully mitigate for the indirect impacts of the Policy. For example, it may not be possible to fully mitigate for the loss of wetland habitat as a result of onstream dam removal. In addition, the State Water Board, Regional Water Quality Control Boards, and Department of Fish and Game may not have the resources to fully enforce the regulatory requirements described below. For example, the State Water Board does not have the resources to investigate every possible instance of

increased riparian diversions or groundwater pumping and take regulatory action, if warranted, pursuant to article X, section 2 of the California Constitution or the public trust doctrine.

Modification or removal of onstream dams and construction of offstream storage facilities

In response to the Policy, persons may choose to modify or remove onstream dams or construct offstream storage facilities. These construction activities may result in temporary impacts to air quality, sedimentation, erosion, and non-visible water quality parameters. They may also cause temporary or permanent impacts to habitat for fish and wildlife.

The Basin Plans for the North Coast Regional Water Quality Control Board and the San Francisco Bay Regional Water Quality Control Board contain numeric and narrative water quality objectives designed to protect the beneficial uses of surface waters. If the modification or removal of an onstream dam or the construction of an offstream storage facility would result in the discharge of waste to waters of the State, the discharger must file a report of waste discharge with the appropriate Regional Water Quality Control Board and obtain a waste discharge requirement (WDR). (Wat. Code, § 13260.) The WDR must implement the applicable Basin Plan and protect the beneficial uses of the receiving waters.

Another regulatory tool that may mitigate the water quality impacts of construction activities is the North Coast Regional Water Quality Control Board's Sediment TMDL. The implementation policy of the TMDL states that Regional Water Board staff shall control sediment pollution by using existing permitting and enforcement tools, including individual NPDES permits and coverage under the general construction stormwater permit. The goals of the TMDL Implementation Policy are to control sediment waste discharges to impaired water bodies so that the TMDLs are met, sediment water quality objectives are attained, and beneficial uses are no longer adversely affected by sediment.

As indicated in the TMDL implementation policy, certain construction activities may be covered under the General Permit for Discharges of Storm Water Associated with Construction Activity adopted by the State Water Board. Covered activities may include grading and excavation of reservoir facilities and pump and piping replacement. Under the general permit, construction Best Management Practices (BMPs) such as silt fencing, straw wattles, and other erosion BMPs can be used to contain stormwater runoff and reduce erosion potential. Pursuant to the State Water Board's General Construction Permit, for any construction involving disturbance of 1 acre or more, a Stormwater Pollution and Prevention Plan (SWPPP) would need to be prepared.

Potential mitigation for water quality impacts due to modification or removal of onstream dams or construction of off-stream storage facilities may also involve Water Quality Certifications from the Regional Water Quality Control Boards. Water quality certification requirements would apply to anyone proposing to conduct a dredge or fill project that requires a federal permit and may result in a discharge to waters of the United States, including wetlands, year round and seasonal streams, lakes and other surface waters. A Clean Water Act (CWA) Section 401 Water Quality Certification is a finding from the Regional Water Quality Control Board that the proposed project will comply with CWA Sections 301, 302, 303, 306 and 307, the applicable Basin Plan, and other appropriate provisions of State law.

Projects having a substantial adverse effect on federally protected wetlands as defined by Section 404 of the CWA (including, but not limited to, marsh, vernal pool, coastal, etc.) either

individually or in combination with the known or probable impacts of other activities through direct removal, filling, hydrological interruption, or other means may need to obtain a permit from the United States Army Corps of Engineers (USACE). If the project will require disturbance of a wetland and the USACE determines that the wetland is not subject to regulation under Section 404 of the CWA, Section 401 water quality certification is not required. However, the Regional Water Board may require WDRs if fill material is placed into waters of the state. If all wetlands cannot be avoided as part of the project, the applicant will be required to file an application for WDRs with the Regional Water Board.

The California Department of Fish and Game (DFG) is responsible for conserving, protecting, and managing California's fish, wildlife, and native plant resources. Fish and Game Code section 1602 requires DFG to be notified regarding any proposed activity that may substantially modify a river, stream, or lake. Persons proposing to modify or remove onstream dams or construct off-stream storage facilities should notify the DFG if the activity will:

- substantially divert or obstruct the natural flow of any river, stream or lake;
- substantially change or use any material from the bed, channel, or bank of, any river, stream, or lake; or
- deposit or dispose of debris, waste, or other material containing crumbled, flaked, or ground pavement where it may pass into any river, stream, or lake.

If DFG determines that the activity may substantially adversely affect fish and wildlife resources, a Lake or Streambed Alteration Agreement would be prepared. Conditions that DFG may require include, but are not limited to, avoidance or minimization of vegetation removal, use of standard erosion control measures, limitations on the use of heavy equipment, limitations on work periods to avoid impacts on fisheries and wildlife resources, minimum bypass flow requirements, and requirements to restore degraded sites or compensate for permanent habitat losses. In addition, rendering a dam incapable of storing water by leaving the structure in place while allowing water to pass through, may be a less costly alternative, and may reduce impacts to fish and wildlife habitat to less than significant levels. The Agreement would include reasonable conditions necessary to protect those resources and must comply with the California Environmental Quality Act (CEQA).

Potentially significant air quality impacts associated with modification or removal of onstream or construction of offstream storage facilities are limited to those resulting from short-term construction activities. Construction-related emissions could include exhaust from construction equipment and fugitive dust from land clearing, earthmoving, movement of vehicles, and wind erosion of exposed soil during reservoir construction or removal. The San Francisco Bay Area Quality Management District has developed mitigation measures to reduce construction-related emissions.

In addition to the regulatory requirements described above, the seasonal storage of surface water in most new offstream storage facilities will require a water right permit from the State Water Board. Unless an exemption applies, the State Water Board's review of water right applications is subject to CEQA. In addition, in acting on water right applications, the State Water Board must take into consideration the public interest and the applicable Basin Plan. (Wat. Code, §§ 1253, 1255, 1257, 1258.) Accordingly, the State Water Board will have the opportunity to identify and mitigate the impacts of constructing offstream storage reservoirs as part of the State Water Board's review of individual water right applications. Similarly, the State Water Board will have the opportunity to ensure that applicants comply with any other applicable regulatory requirements.

Inclusion of some or all of the following permit terms, substantially as follows, in permits issued under this Policy, may reduce potential short-term water quality impacts from storage facility construction activities to less-than-significant levels:

- *To prevent degradation of the quality of water during and after construction of the project, Permittee shall file a report of waste discharge pursuant to Water Code section 13260 prior to commencement of construction and shall comply with all waste discharge requirements imposed by the California Regional Water Quality Control Board, San Francisco Bay Region/North Coast Region, or by the State Water Resources Control Board.*
- *Prior to the diversion of water and construction of the offstream reservoir, Permittee shall obtain coverage from the North Coast Regional Water Quality Control Board/San Francisco Bay Regional Water Quality Control Board under the General Permit for Discharges of Storm Water Associated with Construction Activity prior to conducting any construction activities that disturb more than one acre of soil.*
- *Permittee shall prevent any debris, soil, silt cement that has not set, oil, or other such foreign substance from entering into or being placed where it may be washed by rainfall runoff into the waters of the State.*

Inclusion of the following permit terms, substantially as follows, in permits issued under this Policy, may reduce potential short-term impacts to wetlands from storage facility construction activities to less-than-significant levels:

- *Prior to the start of construction, or diversion or use of water under this permit, Permittee shall obtain the appropriate permit from the United States Army Corps of Engineers and file a copy with Division of Water Rights. If a permit from the United States Army Corps of Engineers is not necessary for this permitted project, the Permittee shall provide the Division of Water Rights with a letter from the United States Army Corps of Engineers affirming that a permit is not needed.*
- *If the project requires a permit from United States Army Corps of Engineers, Permittee shall obtain Clean Water Act section 401 Water Quality Certification from the State Water Resources Control Board prior to the start of construction, or diversion or use of water under this permit.*

Inclusion of the following permit term, substantially as follows, in permits issued under this Policy, would reduce potential impacts to fish and wildlife from reservoir construction activities to a less-than-significant level:

- *No work shall commence and no water shall be diverted, stored or used under this permit until a copy of a stream or lake alteration agreement between the State Department of Fish and Game and the permittee is filed with the Division of Water Rights. Compliance with the terms and conditions of the agreement is the responsibility of the permittee. If a stream or lake agreement is not necessary for this permitted project, the permittee shall provide the Division of Water Rights a copy of a waiver signed by the State Department of Fish and Game.*

Inclusion of the following permit term, substantially as follows, in permits issued under this Policy, would reduce potential short-term air quality impacts from storage facility construction activities to a less-than-significant level:

- *Prior to the start of construction, Permittee shall submit a detailed Emission Control and Mitigation Plan to the Deputy Director for Water Rights. Permittee shall also submit a copy of the plan to the San Francisco Bay Area Air Quality Management District. The Emission Control and Mitigation Plan shall be consistent with the San Francisco Bay Area Air Quality Management District's Air Quality Guidelines and include a monitoring and reporting component to ensure that mitigation measures identified in the Emission Control and Mitigation Plan are implemented. Permittee shall provide evidence to verify implementation of measures identified in the Emission Control and Mitigation Plan within 30 days of completion of construction work to the Deputy Director for Water Rights. Permittee shall also provide a copy of the evidence to the San Francisco Bay Area Air Quality Management District upon request. Evidence may consist of, but is not limited to, photographs and construction records.*

Increased riparian diversion and groundwater use

Surface water may be diverted and used under a riparian water right. Unless the right has been lost through severance, any owner of a parcel immediately adjacent to a water course has the right to divert water at any time to be used directly and beneficially on the land that borders and is contiguous with the stream. The water that is diverted cannot be seasonally stored. Riparian rights do not require approval from the State Water Board and are not subject to the Policy restrictions on diversions. Similarly, the use of percolating groundwater does not require State Water Board approval, and is not subject to the Policy's restrictions.

As a result of the policy, there could be an increase in riparian diversion of surface water or pumping of percolating groundwater if water users choose to utilize riparian basis of right or percolating groundwater in addition to or in lieu of utilizing an appropriative water right subject to the Policy's limitations. Increased riparian diversion and pumping of interconnected groundwater could reduce stream flows in the spring and summer, which are critical periods for fish habitat.

The California Constitution, article X, section 2, and Water Code section 100 prohibit the waste, unreasonable use, unreasonable method of use, and unreasonable method of diversion of water. The constitutional doctrine of reasonable use applies to all water users, regardless of basis of water right, serving as a limitation on every water right and every method of diversion. (*Peabody v. Vallejo* (1935) 2 Cal.2d 351, 367, 372 [40 P.2d 486].) Water Code section 275 directs the State Water Board to take all appropriate proceedings or actions to prevent waste or violations of the reasonable use standard. Thus, the State Water Board has jurisdiction to regulate water use in accordance with article X, section 2 of the Constitution. (See *Imperial Irrigation District v. State Water Resources Control Board* (1986) 186 Cal.App.3d 1160 [231 Cal.Rptr. 283] [holding that jurisdiction extends to pre-1914 rights].)

The California Constitution also declares that the general welfare requires that the State's water resources be put to beneficial use to the fullest extent to which they are capable. (Cal. Const., art. X, § 2.) Therefore, in determining the reasonableness of a particular use of water or method of diversion, other competing water demands and beneficial uses of water must be considered. A particular water use or method of diversion may be determined to be unreasonable based on its impact on fish, wildlife, or other instream beneficial uses.

(*Environmental Defense Fund, Inc. v. East Bay Municipal Utility District* (1980) 26 Cal.3d 183 [161 Cal.Rptr. 466].) What constitutes a reasonable water use depends on the entire circumstances presented and varies as current conditions change. (*Id.* at p. 194.)

The State Water Board also has an affirmative duty to take the public trust into account in the planning and allocation of water resources. The purpose of the public trust doctrine is to protect navigation, fishing, recreation, environmental values, and fish and wildlife habitat. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 434-435 [189 Cal.Rptr. 346].) Under the public trust doctrine, the State retains supervisory control over the navigable waters of the state and the lands underlying those waters. (*Id.* at p. 445.) In applying the public trust doctrine, the State Water Board has the power to reconsider past water allocations even if the Board considered public trust impacts in its original water allocation decision. Thus, the State Water Board may exercise its authority under the doctrines of reasonable use and the public trust to address reduced instream flows in the policy area and adverse affects fish, wildlife, or other instream beneficial uses due to riparian diversions or the pumping of percolating groundwater.

The five counties in the Policy area also may mitigate the potential impacts of increased groundwater pumping by regulating groundwater use pursuant to their police powers. Local regulation of groundwater pumping exists in Napa and Mendocino Counties. Napa County's Ordinance 1162, Napa County Code Chapter 13.15, regulates the extraction and use of groundwater in the county and requires the issuance of a groundwater permit before development may occur. The groundwater permit cannot be issued if evidence exists showing that the proposed agricultural, commercial or residential development will increase the existing water use or take more than its fair share of groundwater if there is no pre-existing use. In Mendocino County, Chapter 20.744 of Division III of Title 20 of the Mendocino County Zoning Code contains requirements for the evaluation of the adequacy of groundwater resources for new developments in the Town of Mendocino. It allows local government to mandate the amount of naturally occurring groundwater that can be withdrawn from the Town of Mendocino's aquifer on a sustained basis to help prevent depletion of the Town's groundwater by not exceeding the aquifer's perennial or safe yield, which is the amount of water that can be pumped regularly and permanently without dangerous depletion of the storage reserve. Current groundwater management policies for the Town of Mendocino are to collect and analyze current groundwater and rainfall data to assist the Board of Directors with their groundwater management decision-making responsibilities, to increase the use of reclaimed water to reduce groundwater extraction, and to promote water conservation measures.

Sonoma County has implemented a non-regulatory Sonoma Valley Groundwater Management Plan. The Plan, implemented by Sonoma County Water Agency in 2007, identifies a range of water management actions to sustain resources for future generations. The goal of the Plan is to locally manage, protect, and enhance groundwater resources for all beneficial uses, in a sustainable, environmentally sound, economical, and equitable manner. The Plan contains basin management objectives; groundwater availability forecasts developed through modeling; actions to attain groundwater sustainability, including increased use of recycled water to offset groundwater pumping, increased conservation, groundwater monitoring, integration of water management planning on a regional scale, and stakeholder involvement; and plan implementation through a collaborative process.

Groundwater management plans, and codes or ordinances regulating groundwater use were not found for Humboldt or Marin Counties.

In addition to the regulatory authorities discussed above, under certain circumstances the State Water Board will have the opportunity to identify and mitigate for the potential impacts of increased riparian diversions as part of the State Water Board's review of individual water right applications. To the extent that a diverter might increase riparian diversions in connection with a storage project that requires a water right permit, and the increase in riparian diversions would not occur in the absence of the storage project, the State Water Board can mitigate the impacts of the increased riparian diversions through the imposition of a permit term.

Inclusion of the following permit term, substantially as follows, in permits issued under this Policy, may reduce potential stream flow reductions due to riparian diversion during spring and summer:

For all projects where the SWRCB has determined that riparian water has been used on the proposed place of use:

- *Permittee shall not use more water under the basis of riparian right on the place of use authorized by this permit than permittee would have used absent the appropriation authorized by this permit. Based on the information in the Division's files, approximately XX acre-feet per year of riparian water has been used on the place of use. Therefore, consistent with this term, permittee may not divert any additional riparian water for use on the place of use authorized by this permit under basis of riparian right. With the Chief of the Division's approval, this information may be updated, and permittee may use water under basis of riparian on the authorized place of use, provided that permittee submits reliable evidence to the Chief of the Division quantifying the amount of water that permittee likely would have used under the basis of riparian right absent the appropriation authorized by this permit. The Chief of the Division is hereby authorized to approve or reject any proposal by permittee to use water under the basis of riparian right on the place of use authorized by this permit.*

For all projects where the SWRCB has determined that riparian water has not been used on the proposed place of use

- *Permittee shall not use more water under the basis of riparian right on the place of use authorized by this permit than permittee would have used absent the appropriation authorized by this permit. Based on the information in the Division's files, riparian water has not been used on the place of use. Therefore, consistent with this term, permittee may not divert any additional riparian water for use on the place of use authorized by this permit under basis of riparian right. With the Chief of the Division's approval, this information may be updated, and permittee may use water under basis of riparian on the authorized place of use, provided that permittee submits reliable evidence to the Chief of the Division quantifying the amount of water that permittee likely would have used under the basis of riparian right absent the appropriation authorized by this permit. The Chief of the Division is hereby authorized to approve or reject any proposal by permittee to use water under the basis of riparian right on the place of use authorized by this permit.*

In addition, if additional riparian diversion facilities are constructed, the construction activity should be undertaken in a manner that does not adversely affect fish and wildlife resources, per Fish and Game Code section 1602, described above. If DFG determines that the construction activity may substantially adversely affect fish and wildlife resources, a Lake or Streambed Alteration Agreement would be prepared. The Agreement would include

reasonable conditions necessary to protect those resources and must comply with the California Environmental Quality Act (CEQA).

Changes in land use

In response to the policy, persons may change land use patterns. For instance, lands being used for agriculture might be converted for other uses, such as subdivisions, or fallowing. Land use changes would go through a local planning process, with mitigation measures developed at a local level.

Mitigation measures for cumulative impacts

Potential mitigation measures for cumulative impacts are anticipated to be the same as those described above.

Comment 23.7.2: The Draft Policy has potentially significant impacts the Substitute Document either failed to adequately consider, or did not consider at all. Accordingly, it failed to consider feasible mitigation measures and project alternatives to minimize the Draft Policy's potentially significant impacts. Adoption of the Substitute Document as currently written would violate CEQA's substantive mandate that public agencies refrain from approving projects with significant environmental effects if there are feasible alternatives or mitigation measures that can substantially lessen or avoid these effects. (*Mountain Lion Foundation v. Fish and Game Commission*, supra, 16 Cal. 4th at p. 134.) (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: The potential indirect environmental impacts of the Draft Policy were assessed in chapter 6 of the draft SED (pp. 48-84), and in Appendices D and E. The commenter does not specify what impacts the draft SED allegedly either did not consider or did not consider adequately. Accordingly, staff cannot respond to this comment.

Comment 23.7.3: The Substitute Document failed to adequately consider mitigation measures that could reduce or avoid significant impacts. The Substitute Document failed to identify a single mitigation measure even though, by its own admission, the policy will result in significant indirect and cumulative impacts. (SED, pp. 86-87.) The Substitute Document must fully describe feasible mitigation measures which could minimize significant adverse impacts. (Cal. Code of Regs., tit. 14, section 15126.4(a)(1).) "Mitigation measures must be fully enforceable through permit conditions, agreements, or other legally-binding instruments. In the case of the adoption of a plan, policy, regulation, or other public project, mitigation measures can be incorporated into the plan, policy, regulation, or project design." (Cal. Code of Regs., tit. 14, section 15126.4(a)(2).) As it has done throughout the entire environment document, the Substitute Document once again improperly deferred any meaningful analysis until, ". . . future CEQA reviews. . ." (SED, p. 87.) This approach limits mitigation to "project-specific environmental effects," and does not provide any mitigation for the significant affects of the Policy. (Id.) Once again, the approach taken by the Substitute Document completely undermines the purpose of a programmatic document, which is to consider and mitigate the impacts of the entire project or policy. (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers; Catherine Kuhlman, State of California Regional Water Quality Control Board, North Coast Region*)

Response: See response to 23.7.1.

Comment 23.7.4: The technical analysis and Policy does not substantively consider the following: (1) the water quality objectives and the requirements of the Basin Plan(s); (2) 303(d) listings, developed TMDLs, and adopted TMDLs; and (3) the presence of and need for protection of refugial streams. These omissions are significant and require a revision of the technical analysis, proposed Policy, and/or the development of mitigations to prevent potentially significant impacts. *(Catherine Kuhlman, State of California Regional Water Quality Control Board, North Coast Region)*

Response: The SED (Section 6) adequately considers the potential indirect environmental impacts of the Policy on water quality. Appendix E of the SED provides a detailed discussion of the potential indirect environmental impacts of dam modification or removal on water quality (section 5.9). Table 17 in Appendix E of the SED lists the 303(d) water bodies impaired by sediment and Table 19 lists the 303(d) water bodies impaired by other pollutants in the Policy area. As pointed out in the SED (pp. ii - iii), the environmental assessment was conducted at a programmatic level, which is more general than a project-specific analysis. Individual water right applications and petitions subject to the Policy may be further evaluated under CEQA at a project-level by the State Water Board or, depending on the proposed project, by another lead agency such as the Regional Water Quality Control Boards. Future environmental reviews can be expected to identify project-specific environmental effects; the lead agency must identify any project-specific environmental effects and either mitigate them to a less-than significant level or adopt a statement of overriding considerations. The SED (p. 14) further acknowledges that streams affected by the Policy are subject to water quality regulation by the Regional Water Quality Control Boards which have adopted Water Quality Control Plans for water bodies within the Policy area.

Because the Policy applies to all streams in the Policy area, it is protective of refugial streams.

Comment 23.7.5: Both the State Attorney General and the courts have emphasized, in the last few years, that CEQA environmental documents (and this would certainly include SEDs) should identify, discuss and analyze the potential individual and cumulative impacts associated with climate change. Although the SED includes (on page 84) a brief recognition that such an analysis is necessary, it then fails to provide any such serious discussion or to propose any mitigation measures to mitigate such expected impacts. In short, the SED is incomplete and legally deficient for its failure to analyze and mitigate for such anticipated impacts. *(Paul "Skip" Spaulding, Farella Braun + Martel LLP/Golden Vineyards)*

Response: See response to 23.7.1.

Comment 23.7.6: It is absolutely essential that mitigation measures be addressed at this programmatic level as the necessary mitigation measures cannot be effectively adopted at the individual permit level. For example, if adoption of the Draft Policy is going to cause significant increases in groundwater withdrawals or is going to cause changes in fundamental land use patterns involving conversion of farmlands to other developments, these reasonably foreseeable changes must be anticipated, addressed and mitigated for at the policy level through policy modification. Later agency action on a particular permit cannot address these broad policy impacts. It is also clear that existing portions of the Draft Policy - such as the supposed variances and exemptions - do not constitute mitigation measures because they are illusory and unavailable to applicants as described above. *(Paul "Skip" Spaulding, Farella Braun + Martel LLP/Golden Vineyards)*

Response: See response to 23.7.1.

Comment 23.7.7: The SED's failure to identify, discuss and incorporate any mitigation measures to address the potentially significant environmental impacts of the Draft Policy is a serious legal deficiency. Among other things, it has prevented the State Board from directly considering and mitigating the full range of potentially significant adverse impacts, which would have allowed it to reach a more balanced policy that meets the requirements of AB 2121 and CEQA. *(Paul "Skip" Spaulding, Farella Braun + Martel LLP/Golden Vineyards)*

Response: See response to 23.7.1.

Topic 23.8 CEQA - Impacts of Removal of Onstream Dams

Comment 23.8.1: My wife and I live within the City of Sonoma. Every winter we are faced with the very real threat of flooding. Two years ago, our property was underwater, our home experienced significant flood damage. The recovery was financially difficult. As a general contractor, I am often called upon to assess and/or repair other properties that have incurred flood damage due to winter runoff. Our good friends live on a property in Sonoma that has a small pond. They have informed us that the proposed policy will force them, and other pond owners in our community, to bypass or remove their ponds at exorbitant expense. Although these small ponds store an insignificant fraction of our winter rains, they in fact mitigate and delay downstream flows. This gives our community a better chance to weather large winter storms. *(Paul Baumbach; Patrick Garvey, Flora Springs Wine Company; Barry Hoffner; Adrian and Mary Martinez; Ofer Zur)*

Response: Appendix E of the Draft SED estimates the potential indirect environmental impacts of modification or removal of existing unauthorized dams. Section 5.9.4 discusses the impacts of dam removal on detention of storm flows and flooding.

Comment 23.8.2: CDFG, State Water Board, NOAA/NMFS, and State Legislature have been unaware of the estimated 1771 unauthorized dams/reservoirs in the Policy area. *(Jay Halcomb, Diane Beck, and Daniel Myers, Sierra Club Redwood Chapter)*

Response: Appendix E of the Draft SED estimates there to be 1,771 existing unauthorized dams in the Policy area using a geographic information system (GIS) analysis based on available data. The GIS analysis used for this estimate included a number of assumptions that are listed in Section 4.2. These assumptions tend to overestimate the amount and impact of unauthorized reservoirs and provide the upper limit of potential indirect environmental impacts of modification or removal of existing unauthorized dams for the purposes of CEQA.

Comment 23.8.3: Many farmers who either will have so much water diverted from their reservoirs due to the policy, or who will have to pull out their ponds, have an abundance of wildlife which will die in the process. Your policy will end up killing far more turtles, fish, and bird life than you save. *(Barry Hoffner)*

Response: Section 6.5.2 of the Draft SED assesses the impact of the removal of unauthorized dams on special status species. Appendix C of the Draft SED lists the special-status animals occurring in riparian, freshwater marsh and vegetated lacustrine habitat in the Policy Area. Appendix E of the Draft SED discusses the potential loss of biological resources that could result from loss of wetlands, open water and riparian habitat.

Comment 23.8.4: We believe the draft SED understates the adverse consequences of onstream dams and overstates the consequences of removing them. In particular, there are likely to be adverse geomorphic consequences caused by onstream dams that cannot be mitigated with gravel augmentation and minimum flows. (See North Coast Regional Water Quality Control Board's August 25, 2006 comments on the Notice of Preparation.) If the draft provisions remain in place, this approach should be evaluated in the five year review. (*Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society*)

Response: As noted by the commenter, the Draft SED discusses the consequences of the removal of onstream dams and provides an assessment of the upper limit of the potential indirect environmental impacts of modification or removal of existing unauthorized dams for the purposes of CEQA. The adverse consequences of onstream dams are discussed in the Scientific Basis (R2, 2007) in Section 8 (Protectiveness of On-Stream Dam/Reservoir Restrictions) and in Section 9 (Importance of Fish Passage and Screening Measures).

North Coast Regional Water Quality Control Board's August 25, 2006 comments on the Notice of Preparation identify the following potential impacts of onstream dams:

- geomorphic and habitat effects of interruption of coarse sediment supply downstream
- channel changes caused by abrupt failure
- increased fine sediment deposition downstream
- hydrograph changes downstream that lead to dewatering, reduced instream flows that in turn affect habitat and riparian zone
- increased population of non-native fauna in ponds, specifically bullfrogs
- poor water quality downstream

All of these potential impacts except effects of abrupt failure are discussed in the Scientific Basis Report. It is because of these potential impacts that the Draft Policy does not allow new onstream dams on Class I streams and only allows new onstream dams on Class II and Class III streams if they are built and operated in a manner to ensure that there is no interruption of sediment transport, that a protective minimum bypass flow and peak flow variability are maintained, and to prevent potential establishment of non-native species. No new onstream dams would be permitted unless it can be demonstrated with data that the adverse effects identified will not occur or will be effectively mitigated. Abrupt failure would be prevented by dam safety regulations administered by DWR Division of Safety of Dams or by the local grading permit regulatory agency.

The recommendation that the permitting requirements for onstream dams be evaluated in the five year review of the adopted policy is noted.

Comment 23.8.5: The Draft Policy greatly overestimates the amount and impact of unauthorized reservoirs. Wagner & Bonsignore's review of its own and Water Board files demonstrates that storage under pending applications as been overstated by at least 40% and storage by "non-filers" has been overstated by at least 33% and potentially as much as 1800% (a factor of 17.5). These pervasive errors provide an unsound foundation on which to base policy relating to water storage in the North Coast streams. (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: Appendix E of the Draft SED is not intended to assess the impact of unauthorized

reservoirs. Its purpose is to estimate the potential beneficial storage volume and surface area of unauthorized reservoirs and to provide an upper limit of potential indirect environmental impacts of modification or removal of existing unauthorized dams over the entire Policy Area. The in-depth study of several specific watersheds within the Policy area by the commenter supports the use of the results presented in Appendix E of the Draft SED as an upper limit of potential indirect environmental impacts of modification or removal of existing unauthorized dams.

The Policy is not based on the Draft SED. The Policy is based on the Scientific Basis (R2, 2007) and focuses on measures to protect native fish populations, with a particular focus on anadromous salmonids and their habitat.

Comment 23.8.6: Unpermitted reservoirs have no significant cumulative effect on instream resources. The great majority are wet-season diversions in small watersheds above the limit of anadromy. The amount of water stored in these reservoirs is a small fraction of total wet-season streamflow. The Draft Policy's aggregation of these reservoirs' storage to demonstrate their cumulative effects in the Policy area as a whole, rather than by watershed, is meaningless. (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: An unpermitted reservoir would be subject to enforcement action if the diversion were determined to be occurring without a basis of right, and if the owner had not submitted an application for water right to the State Water Board. While an individual reservoir by itself may have a minor effect, the cumulative effects of many such reservoirs can be major. The Draft Policy contains provisions for evaluating whether individual diversions result in no significant cumulative effect on instream resources, including wet-season diversions above the limit of anadromy. The estimate of cumulative effects in a watershed would be performed by the water right applicant as part of the water availability analysis required by the Policy.

The aggregation of reservoir storage volume in Appendix E of the Draft SED is not intended to demonstrate their cumulative effects but rather to summarize the potential beneficial storage volume and surface area of unauthorized reservoirs and to provide an upper limit of potential indirect environmental impacts of modification or removal of existing unauthorized dams over the entire Policy Area for the purposes of CEQA.

Comment 23.8.7: Based on review of the information presented in the Unauthorized Dam Analysis, and review of supporting electronic data transmitted to Wagner & Bonsignore Engineers by the State Water Board staff on April 10, 2008, the computed impoundment volume associated with existing unauthorized onstream storage reservoirs within the Policy area has been greatly overstated. This overestimation results in an erroneous representation of watershed impairment by "pending applicants" and "non-filers" within the Policy area. In addition to overstating the indirect effects of dam removal/modification, the erroneous values of unauthorized onstream storage may result in misperceptions as to the extent of potential impacts these existing facilities have had on sensitive instream resources. To the extent that misperceptions of existing unauthorized onstream storage influenced the development and scope of the Draft Policy, it is fair to question whether the entire the Policy is based on a false premise, and whether the implementation of the Policy will have any beneficial effect on instream resources whatsoever. Review of the Unauthorized Dam Analysis showed the following errors that contributed to the overestimation: (1) errors in quantifying the pending unauthorized storage volume, (2) errors in identifying and quantifying non-filers" in six

watersheds, (3) inclusion of non-filers upstream of permitted and licensed municipal water supply reservoirs that meet the exemption provided in section 4.4.2 of the draft policy, (4) use of inaccurate methods to estimate the storage volume of non-filer reservoirs, and (5) lack of comparison of the non-filer analysis against previous State Water Board illegal reservoir investigations. (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: Appendix E of the Draft SED provides an upper limit of potential indirect environmental impacts of modification or removal of existing unauthorized dams for the purposes of CEQA. These estimates are based on conservative assumptions, as clearly stated in the Draft SED. Results of the commenter's analysis supports the use of these estimates as an upper limit of potential indirect environmental impacts of modification or removal of existing unauthorized dams.

The conservative estimates of the Draft SED did not influence the development and scope of the Draft Policy. The Policy is not based on the Draft SED. The Policy is based on the Scientific Basis (R2, 2007) and focuses on measures to protect native fish populations, with a particular focus on anadromous salmonids and their habitat.

Comment 23.8.8: The unauthorized storage volumes presented in Tables 7, 10 and 11 of the Unauthorized Dam Analysis are grossly overstated and imply that there are significant cumulative impacts associated with unauthorized reservoirs. There has not been a showing that existing unauthorized storage reservoirs have had significant cumulative effect because: (1) The great majority of pending unauthorized diversions and non-filer diversions are for wet-season diversions to storage, and do not have a direct impact on fishery resources that have been diminished by lack of dry season flows and diversion of dry season flows in the late spring, summer and early fall; (2) Tables 7, 10, and 11 aggregate unauthorized diversion for the Policy area as a whole and by political boundaries, i.e. on a county by county basis. Cumulative impacts should instead be evaluated on a watershed basis. A project tributary to the Napa River is not cumulatively impacting the Navarro River. Simply reporting the volume by county, or aggregating the number into 1,253 projects and 48,515 acre feet, is meaningless in the context of cumulative impacts. The question is simple: cumulative of what? (3) In order to actually determine if the winter diversions are in fact a significant impact on fishery resources, and cumulatively so, the Substitute Environmental Document should identify where projects are located by stream, and evaluate the effects on a watershed basis. (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: The purpose of the Draft SED is not to determine if the winter diversions are in fact a significant impact on fishery resources. Its purpose is to assess the environmental impacts of adopting and implementing the Policy. The unauthorized storage volumes presented in Tables 7, 10 and 11 of Appendix E of the Draft SED are not intended to assess the cumulative impact of unauthorized reservoirs but rather to estimate the potential beneficial storage volume and surface area of unauthorized reservoirs and to provide an upper limit of potential indirect environmental impacts of modification or removal of existing unauthorized dams over the entire Policy Area. As noted by the commenter, these numbers are conservative estimates and are therefore appropriate for use in providing the upper limit of

potential indirect environmental impacts of modification or removal of existing unauthorized dams.

The Draft Policy contains provisions for evaluating whether individual diversions result in no significant cumulative effect on instream resources, including wet-season diversions above the limit of anadromy. The estimate of cumulative effects in a watershed would be performed by the water right applicant as part of the water availability analysis required by the Policy.

Comment 23.8.9: The SED fails to analyze the environmental impacts of dam removal, including the release of sediment. The release of sediment would have negative environmental impacts as many of the potentially impacted streams are already on the section 303(d) list of impaired water bodies for sediment. The fishery would undoubtedly be significantly impacted, as these streams are listed for sediment because of the negative impact that sediment loading has on the same listed species the policy is suppose to protect. The Substitute Document should have considered the impact to aquatic species caused by sediment related changes in water temperature, dissolved oxygen, dissolved nutrients, dissolved organic carbon, total suspended solids, biological oxygen demand, and pH. The Substitute Document should also have analyzed the potential contaminants that may be contained in the sediment trapped behind that existing dam structures that would be released into the environment if the dams were removed. While acknowledging that hazardous contaminants will be released into the environment, the Substitute Document contains no analysis of the likely contaminants and the impacts associated with the release of those contaminants into the environment. (See e.g., Substitute Document, Appendix E, p. v.) (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: Appendix E of the Draft SED assesses the impact of the modification or removal of unauthorized dams on hydrology and water quality in Section 5.9. Section 5.9.1 discusses the short-term release of sediment and Section 5.9.3 discusses the impacts to water quality.

The Substitute Document contains no analysis of the likely contaminants and the impacts associated with the release of those contaminants into the environment because it assesses environmental impacts at a programmatic level for the entire Policy area. Water quality impacts associated with a specific project would be highly site-specific and would vary greatly from project to project.

Comment 23.8.10: One of the foreseeable responses to the Draft Policy is that existing dams will be removed, but the environmental impacts of the permanent loss of habitat are not discussed in the Substitute Document. The Substitute Document simply list species (See, SED, Appendices B and C) without analyzing the environmental impacts to those species resulting from the predicted loss of habitat after dam removal. The County of Napa raised the same concern in their scoping letter dated August 25, 2006, stating: ". . . diversion and/or dam removal will affect aquatic species that have become dependent upon these habitats. . . . We understand that the policy is intended to improve habitat for some sensitive species (namely fish), however other species (i.e., red legged frog) may be harmed as a result of policy actions. Your analysis should fully disclose these inevitable trade-offs of one species' survival for that of another and justify the policy actions and mitigation suggested." (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: Section 6.5.2 of the Draft SED assesses the impact of the removal of unauthorized dams on special status species. Section 5.5 of Appendix E of the Draft SED discusses the potential loss of biological resources that could result from loss of wetlands, open water and riparian habitat. The Substitute Document contains no analysis of the impacts to special status species associated with specific diversion projects because it assesses environmental impacts at a programmatic level for the entire Policy area. Impacts associated with a specific project would be highly site-specific and would vary greatly from project to project

Comment 23.8.11: The SED failed to consider the flood protection benefits of existing structures. The existing dams, whether permitted or not, provide some level of flood protection. The flood protection benefits provided by these structures should have been evaluated. *(Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers)*

Response: Appendix E of the Draft SED estimates the potential indirect environmental impacts of modification or removal of existing unauthorized dams. Section 5.9.4 of Appendix E discusses the impacts of dam removal on detention of storm flows and flooding. This provides an estimate of the upper limit of the flood protection benefits provide by existing unauthorized dams.

Comment 23.8.12: The Substitute Document's analysis of the impacts of the removal of existing dams is flawed because the analysis in Appendix E uses the CDF stream classification system, and not the system actually used in the policy. The Substitute Document therefore failed to consider the potentially significant impacts of the on-stream dam prohibitions in its proposed policy. *(Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers)*

Response:

For the estimate of the potential indirect environmental impacts of modification or removal of existing unauthorized dams provided in Appendix E of the Draft SED, it was assumed that the actions that would results in the highest potential impact would be taken at all the estimated existing dams, regardless of stream classification.

Comment 23.8.13: 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. *(Rudolph Light)*

Response: Appendix D of the SED discusses the potential indirect environmental impacts of the Draft Policy if water right applicants choose to satisfy their water needs through alternative water supplies. It identifies alternative water supply sources or other bases of right (alternative water supplies) that could be used to satisfy diversion demand and evaluates the adequacy of these alternative water supplies to meet the future diversion demand. It also estimates the potential indirect environmental impacts related to development of the alternative water supplies to meet the future diversion demand, describes any potential inadequacies of alternative water supplies, and estimates the potential indirect environmental impacts that result if the future diversion demand cannot be met.

Comment 23.8.14: The SED acknowledges that other beneficial uses of water (municipal, industrial, or agricultural) might be curtailed (page 65) by the removal of onstream ponds. 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. *(Rudolph Light)*

Response: Appendix C of the Draft SED lists the special-status animals occurring in riparian, freshwater marsh and vegetated lacustrine habitat in the Policy Area. Section 5.5 of Appendix E of the Draft SED discusses the potential loss of biological resources that could result from loss of wetlands, open water and riparian habitat. Table 6-9 on page 65 of the SED includes a discussion of biological resources.

Comment 23.8.15: 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-feet capacity face the same problem, and staff didn't discuss it in the SED. *(Rudolph Light)*

Response: Under the Draft Policy, onstream reservoirs with pending applications may remain onstream if specific conditions are met. These conditions are described in section 4.4 of the Draft Policy. The Draft Policy also allows owners to apply for case-by-case exceptions to any policy provision.

Comment 23.8.16: On page 6 of the Powerpoint presentation at the February 6, 2008 Staff Workshop, it is stated that "The cumulative effects of water diversions on instream flows needed for the protection of fish and their habitat shall be considered and minimized." It is also stated that "Accumulation of sediment in the river would cause spawning gravels and pools used by salmon and steelhead to become choked with fine sediment." However, in commenting on the restoration of the Steelhead on the Trinity River, Alan Lufkin notes, "A federally financed sediment catchment dam has been approved to reverse some of the damage." Stock and irrigation ponds capturing runoff allow fine sediments to settle out within the pond, thus aiding the maintenance of good spawning conditions. The draft policy seems to ignore, rather than consider, this beneficial aspect. *(Alec Rorabaugh)*

Response: Water appropriations must be for some useful or beneficial purpose. Sediment catchment dams would not be considered eligible for water appropriation because sediment catchment is not considered a beneficial use of water as defined by sections 659 through 672

of the California Code of Regulations.

The beneficial aspects of onstream dams were considered when assessing the potential negative environmental impacts of their removal. Appendix E of the Draft SED assesses the potential indirect environmental impacts of modification or removal of existing unauthorized onstream dams. Section 5.9 discusses the impacts of dam removal on hydrology and water quality: Section 5.9.1 discusses the short-term release of sediment; and Section 5.9.3 discusses the impacts to water quality. This provides an estimate of the upper limit of the beneficial aspect of unauthorized ponds on water quality, including sedimentation.

Comment 23.8.17: If the cost of compliance is too great, will some of these ponds be removed? Many times, Cal-Fire helicopters use these convenient reservoirs as a quick source of water to fight fires. Has the draft policy considered the loss of this resource on fire suppression? (*Alec Forabaugh*)

Response: If the cost required to bring an unauthorized onstream pond into compliance is prohibitively expensive, owners may choose to use alternative methods of diversion or alternative water supplies. Appendix E of the Draft SED estimates the potential indirect environmental impacts of modification or removal of existing unauthorized dams. Section 5.12 (Public Services) in Appendix E discusses the impacts of dam removal on fire suppression.

Comment 23.8.18: The Policy's supporting documents discuss removal of onstream dams. Does this refer only to unpermitted ones? (*Roland Sanford, Mendocino County Water Agency; Jim Wattenburger, Mendocino County Board of Supervisors*)

Response: Appendix E of the Draft SED estimates the potential indirect environmental impacts of modification or removal of existing unauthorized dams (i.e. unpermitted and already constructed).

24.0 Socioeconomic Impacts

Comment 24.0.1: My fear is that a policy will be implemented that is so restrictive in its limits and so complex in its implementation that for small municipal diverters, it essentially becomes impractical to divert at all. (*Charles Acker*)

Response: Comment noted. Staff is considering revisions to the Draft Policy provisions describing analysis requirements for diversions in small watersheds based on technical comments that have been received.

Comment 24.0.2: I have been a licensed water treatment operator for nearly 30 years and have managed two small public water districts on the north coast, both relying on local streams for their water supplies. The proposed instream flow policy may affect the ability of local water purveyors to supply adequate drinking water to the people served. (*Charles Acker*)

Response: Appendix D of the Draft SED examines alternative sources of water supply potentially available to affected parties whose access to surface water is limited by the Policy. The report finds that many sources of supply may not be adequate to meet future demands, including the demands of agriculture. The SED finds that the lack of future water supply could have a potentially significant impact on agricultural resources and land use.

Comment 24.0.3: Water in California must be used to full potential to benefit habitat as well

as agriculture. (*Pat Geib Alexander, Geib Ranch Vineyards; Corrin Amaral; Myles Anderson; Vincent Bartolomei, Bartolomei Brothers Vineyard; Peter Bradford, Bradford Ranch; Carrie Brown; Jeffery Carlton, Dutton Ranch Corporation; Thomas Carpenter; Brian Churm, Potter Valley Growers, Inc.; Ned Coe, Bill Coe & Sons; Annette Cooley, Cooley Logging; Casey Cooley; Christopher Dohring; Alfred Edelbacher; Brian Fedora; Nicholas Ferrari; Sara and Gary Giannandrea, Three G's Hay and Grain; Donald Gordon, Gordon Family Ranch; Dominic Grossi, Marin County Farm Bureau; Katherine Harnden, Harnden Ranches; Joseph Hurlbut; Leo Hurley, Wrath Cellars and Vineyard; James Mooney; Jack Olsen, San Mateo County Farm Bureau; Frost Pauli; Loren Poncia; George Rau; Jay Russ, J. Russ Company; Gary Sack, California Farm Bureau; Janet Sclar, Amity Heritage Roses; William Smith; Al Wagner, Clos Du Val Wine Company; Gary Wilsey, Wilsey Vineyard, LLC; Silvie Wilson; Windy Wilson*)

Response: See response to 24.0.63.

Comment 24.0.4: I urge the State Water Board to adopt an alternative policy that based on sound scientific facts, provides the appropriate balance between economic development and protecting natural habitat and wildlife species, while using water to its full potential. (*Pat Geib Alexander, Geib Ranch Vineyards; Corrin Amaral; Myles Anderson; Anne Arns; Peter Bradford, Bradford Ranch; Carrie Brown; Jeffery Carlton, Dutton Ranch Corporation; Thomas Carpenter; Brian Churm, Potter Valley Growers, Inc.; Ned Coe, Bill Coe & Sons; Annette Cooley, Cooley Logging; Casey Cooley; Greg and Karen Crouse; Christopher Dohring; Alfred Edelbacher; Sandy Elles, Napa County Farm Bureau; Brian Fedora; Nicholas Ferrari; Tom Gamble, Gamble Ranch; Sara and Gary Giannandrea, Three G's Hay and Grain; Donald Gordon, Gordon Family Ranch; Keith Gorzell; Dominic Grossi, Marin County Farm Bureau; Ted Hall, Long Meadow Ranch; Katherine Harnden, Harnden Ranches; Lee Hudson, Hudson Vineyards; Joseph Hurlbut; Leo Hurley, Wrath Cellars and Vineyard; Wayne Lamb; Dennis Meisner; James Mooney; Robert Mueller, McKenzie-Mueller Vineyards and Winery; Peter Nissen, Napa County Farm Bureau; Jack Olsen, San Mateo County Farm Bureau; Butch Parton; Frost Pauli; Loren Poncia; George Rau; Barbara Reed; Steve Reese, Denner Ranches Inc.; Annette Rhodes, Rhodes Vineyards; Richard Rhodes, Rhodes Vineyards; Barry and Phyllis Rogers; Jay Russ, J. Russ Company; Erin Russell; Gary Sack, California Farm Bureau; Tito Sasaki, Sasaki Vineyards; Janet Sclar, Amity Heritage Roses; R. Simcoe, Mast Ranch Vineyard, FLP; William Smith; Al Wagner, Clos Du Val Wine Company; Gary Wilsey, Wilsey Vineyard, LLC; Silvie Wilson; Terrence Wilson, Rancho Chimiles; Windy Wilson; Kristi Wrigley*)

Response: See response to 24.0.66.

Comment 24.0.5: The proposed Policy will directly affect the farming interests of my family/business. (*Vincent Bartolomei, Bartolomei Brothers Vineyard; Edward T. Bennett; Jon-Mark Chappellet; Jack L. Cox, Cox Vineyards; Greg and Karen Crouse; Jonathan Frey, Frey Vineyards; Frank and Phyllis Hooper; Lee Hudson, Hudson Vineyards; Robert Hunter Jr.; Kenneth L. Kahn, Blue Rock; Chris London; Douglas Lumgair, Windsor Oaks Vineyards & Winery; JJ McCarthy, Cain Vineyard & Winery; Harry Merlo, Lago di Merlo Vineyards and Winery; Dwight Monson; Wendel Nicolaus, Middleridge Vineyard; Steve Pride, Pride Mountain Vineyards; Annette Rhodes, Rhodes Vineyards; Richard Rhodes, Rhodes Vineyards; Michael Vellutini, TriValley Vineyard Management; Edward Wallo, Yorkville Vineyards; Brian and Helen White; James Young, Robert Young Family Limited Partnership*)

Response: Comment noted.

Comment 24.0.6: With projections of continued, high sustained population growth in

California, and the diminished availability of water in many streams, it is critical that our society come to terms with the consequences of human population growth on aquatic ecosystems that contribute importantly to our quality of life. A dramatic increased demand for water as the result of high human population growth and agricultural expansion has significantly depleted stream flows in many rivers and creeks in the policy area. Pressures to augment water supply often directly conflict with efforts to conserve and protect salmon, steelhead, and other sensitive natural resources. Unrelenting population growth will necessitate that we as a society develop technologies and infrastructure (desalination; reclamation of treated wastewaters; offstream storage of winter flow) to address water demands so that we do not inadvertently destroy our remaining, limited natural aquatic resources. Fisheries and aquatic ecosystems can only benefit from efforts to offset deleterious spring, summer, and fall water diversion practices with projects providing alternative sources of water. NMFS finds the proposed policy acceptable for the purpose of balancing competing, beneficial uses of fresh water resources in the project area, with the exception of the provision for an expanded season of water diversion to October 1, and other comments provided in their letter. *(Dick Butler, US National Marine Fisheries Service)*

Response: Comment noted.

Comment 24.0.7: The Water Board needs to ensure that this policy does not cause more detrimental harm to any one user group than another. The current Policy as proposed is based on theory, with no guarantee for the fish. While the Delta pumping operation is an example of what not to do to the fish, let's not make this Policy an example of what not to do agriculture. *(Larry Cadd)*

Response: The Scientific Basis Report (R2, 2008) evaluated effects of changed hydrology on passage and spawning habitat availability using data collected in validation sites, in addition to more general considerations of the benefits of protecting instream flows. The Draft Policy ensures that habitat conditions will not deteriorate beyond conditions already imposed by existing permitted diversions. Effectiveness of the Policy would ultimately need to be determined through monitoring.

Staff note that anadromous fish populations are influenced by many other factors besides flow. Thus, there is no certainty that numbers of salmon and steelhead will increase upon implementation of the Draft Policy. However, the opportunity for populations to increase will most certainly be less without the Draft Policy.

Comment 24.0.8: A balanced approach was not taken in the design of this policy. Water use must be divided among all beneficial uses and not to the benefit of one segment or interest group. The Policy does not provide a balance to the competing needs for water as it fails to weigh the many benefits derived from the agricultural, domestic and industrial uses. Water management policies by the state and federal government are the cause of most of the environmental concerns we face today. The Klamath River (federal) the current Delta pumping debacle are failed government policies, permitted and allowed to take place. I am aware of many small dams built over the years because licenses weren't processed and the owner just gave up and built it. The Water Board needs to ensure that this policy does not cause more detrimental harm to any one user group than another. The current Policy as proposed is based on theory, with no guarantee for the fish. While the Delta pumping operation is an example of what not to do to the fish, let's not make this Policy an example of what not to do agriculture. *(Sam Aanestad, Senator 4th District and Bob Dutton, Senator 31st District; Drew Aspegren, Napa Valley Vineyard Engineering, Inc.; Vincent Bartolomei, Bartolomei Brothers Vineyard;*

Edward T. Bennett; Larry Cadd; Jon-Mark Chappellet; Jack L. Cox, Cox Vineyards; Greg and Karen Crouse; Mark D. Edwards, North Coast Resource Management; Jonathan Frey, Frey Vineyards; Nick Frey, Sonoma County Winegrape Commission; Frank and Phyllis Hooper; Lee Hudson, Hudson Vineyards; Kenneth L. Kahn, Blue Rock; Tom Klein, Rodney Strong Vineyards; Chris London; Douglas Lumgair, Windsor Oaks Vineyards & Winery; JJ McCarthy, Cain Vineyard & Winery; Dwight Monson; Wendel Nicolaus, Middleridge Vineyard; Steve Pride, Pride Mountain Vineyards; Annette Rhodes, Rhodes Vineyards; Richard Rhodes, Rhodes Vineyards; Alex Ryan, Duckhorn Wine Company; Michael Vellutini, TriValley Vineyard Management; Edward Wallo, Yorkville Vineyards; Brian and Helen White; James Young, Robert Young Family Limited Partnership)

Response: The water cost analysis described in the SED (section 6.8), in conjunction with the comparisons of protectiveness provided for in the Task 3 Report (Tables 5-2, 6-2, 7-2, 8-1), can be used to assess how the Policy balances competing uses of instream flow. In the water cost analysis, the alternative Policy criteria are compared in general terms of how relatively restrictive they are with respect to limiting diversion and how protective they are of fish habitat. The SED concludes that Policy criteria are protective, yet are among the least restrictive of the alternatives considered in terms of limiting diversion.

In addition, a sensitivity study (Stetson and R2, 2009) was performed based on feedback in peer reviewer and public comments to provide more comparisons of the relative benefits and impacts to fisheries and irrigation associated with different diversion restrictions. The study compared the potential water diversion volume for 9 different MBF alternatives and 5 MCD alternatives and calculated the number of days of spawning and passage opportunities for 5 of the MBF alternatives with an MCD of 5% of the 1.5 year peak flow (the Draft Policy regional criteria). A diversion season of December 15 to March 31 was used for the sensitivity study instead of the October 1 to March 31 proposed in the Draft Policy. The study concluded that an MBF criterion based on a 0.7 ft steelhead minimum spawning depth criterion in the validation sites would be similarly protective as one based on a 0.8 ft criterion and would provide a slightly higher potential diversion volume.

The Scientific Basis Report (R2, 2008) evaluated effects of changed hydrology on passage and spawning habitat availability using data collected in validation sites, in addition to more general considerations of the benefits of protecting instream flows. The Draft Policy ensures that habitat conditions will not deteriorate beyond conditions already imposed by existing permitted diversions. Effectiveness of the Policy would ultimately need to be determined through monitoring.

Staff note that anadromous fish populations are influenced by many other factors besides flow. Thus, there is no certainty that numbers of salmon and steelhead will increase upon implementation of the Draft Policy. However, the opportunity for populations to increase will most certainly be less without the Draft Policy.

Comment 24.0.9: The State economy is a mess, can we really afford to just bypass all of the dams without regard to economics any more than we can afford to take all of the water away from the fish as in the case of Delta pumping? This Policy draft appears to have had too much input from environmental groups during development and not enough input from other stakeholders. The Water Board must take the responsibility to balance those inputs and provide a policy that is clear, concise, economical, provides the intended results, and the means for verification of those results. The current draft is long on enforcement, and short on ensuring that the policy even works. The Draft Policy should be rejected and replaced with

one that balances economic interests and environmental protection with equal input from all parties. *(Larry Cadd)*

Response: See response to 24.0.66.

Comment 24.0.10: An analysis on our project under the stringent bypass and diversion requirements of the Policy indicates that there would be a devastating effects on our water yield and the ability to continue our family's vineyard operation. Small family farmers like me, who live on our land, have the most incentive to be good stewards of the land. We have farmed organically for six years and biodynamically for three years. *(Vincent A. Ciolino, Montemaggiore)*

Response: Comment noted. Staff is not able to provide a detailed response because the commenter did not provide the details of the analysis that was performed.

Comment 24.0.11: The Policy will cause distress sale of my neighbor's property which contains a pond because the costs for documentation, installing a bypass, and monitoring equipment will be higher than their mortgage. *(Robert Cohen)*

Response: See response to 24.0.68.

Comment 24.0.12: Do the right thing and allow our friends and neighbors to keep their homes and small ponds. As proposed, the policy is unbalanced and immoral. The State Water Board should implement a balanced Policy considering citizens and fish alike. *(Robert Cohen)*

Response: See response to 24.0.63.

Comment 24.0.13: You will blindside our community by implementing this unbalanced, bureaucratic policy. You have neglected social and economic factors, as well as the critical question of efficacy. You have not shown that these policies will work, yet you put at risk whole communities and industries. *(John Curry and Janice Crow)*

Response: See response to 24.0.66.

Comment 24.0.14: An analysis on our project under the stringent bypass and diversion requirements of the Policy indicates that there would be a devastating effects on our water yield and the ability to continue our family's vineyard operation. *(Tom Eakin, Peter Michael Winery)*

Response: See response to 24.0.10.

Comment 24.0.15: Napa growers are committed to sustainable agriculture and utilize best management practices to sustain habitat for fish and wildlife. The Instream Flow Guidelines should be crafted to sustain both fish and farms. *(Sandy Elles, Napa County Farm Bureau)*

Response: See response to 24.0.63.

Comment 24.0.16: I am deeply concerned about the proposed AB2121 policy and the devastating impact this policy would have on my family property and the business we operate from there. *(Karen Fontanella, Fontanella Family Winery)*

Response: See response to 24.0.68.

Comment 24.0.17: The Policy does not provide a balance to the competing needs for water as it fails to weigh the many benefits derived from the agricultural, domestic and industrial uses of water such as ours and the impact on the ecosystems already in existence in our pond. This proposed policy ... fails to balance the rights and economic interests of the citizens of the state of California as well as the environmental protections of other existing species that rely on the existence of ponds such as ours. The draft policy should be rejected and replaced with one that balances economic interests and environmental protection. *(Drew Aspegren, Napa Valley Vineyard Engineering, Inc.; Vincent Bartolomei, Bartolomei Brothers Vineyard; Edward T. Bennett; Jon-Mark Chappellet; Vincent A. Ciolino, Montemaggiore; Jack L. Cox, Cox Vineyards; Greg and Karen Crouse; Tom Eakin, Peter Michael Winery; Karen Fontanella, Fontanella Family Winery; Jonathan Frey, Frey Vineyards; Frank and Phyllis Hooper; Robert Hunter Jr.; Kenneth L. Kahn, Blue Rock; Sam Keen; Chris London; Douglas Lumgair, Windsor Oaks Vineyards & Winery; Adrian and Mary Martinez; JJ McCarthy, Cain Vineyard & Winery; Harry Merlo, Lago di Merlo Vineyards and Winery; Dwight Monson; Wendel Nicolaus, Middleridge Vineyard; Steve Pride, Pride Mountain Vineyards; Annette Rhodes, Rhodes Vineyards; Richard Rhodes, Rhodes Vineyards; Alex Ryan, Duckhorn Wine Company; Michael Vellutini, TriValley Vineyard Management; Edward Wallo, Yorkville Vineyards; Brian and Helen White; James Young, Robert Young Family Limited Partnership; Ofer Zur)*

Response: See response to 24.0.66.

Comment 24.0.18: The policy provides no analyses of economic impacts. The staff report indicated the policy allows flexibility for landowners seeking water rights. This flexibility comes at significant cost and with no assurance that a water right will be obtained. Landowners cannot afford costly studies that may not result in any water to support their agricultural production. Finally the costs to landowners to comply with the Draft Policy are unbearable, thereby threatening agriculture. *(Nick Frey, Sonoma County Winegrape Commission)*

Response: The commenter provided a document titled “Economic Impact of Wine and Vineyards in Sonoma County”, dated March 7, 2005, written by MKF Research. The report states that the full economic impact of the wine and vineyard sector in Sonoma County totals \$7.6 billion, and that wine industry and the activities supporting it affect nearly half of the economic activity in the county, either directly or indirectly. It also states wineries and vineyards and the services and products they consume or generate are responsible for nearly 28,000 full time equivalent jobs in the county – more than 15% of the county’s total employment and a payroll of more than \$1 billion.

State Water Board staff reviewed a report titled, “The Value of Recreational Fishing in California – Direct Financial Impacts”, prepared by Dr. Carolyn Alkire of Environmental Economics and Policy Consulting in January 2008, and released by California Trout states: “The most recent national survey shows that anglers spend over \$2 billion a year in California on recreational fishing trips and related equipment. A review of the limited studies of fishing in regions within the State published over the last ten years indicate that spending in northern and central California communities ranges from \$2 million to \$421 million annually. Economic impact multipliers are applied to some of these estimates and show there are substantial total impacts in fishing destination communities. Furthermore, restoration of fish habitat that could result in increased fish populations and recreational fishing is estimated to provide an increase of \$600,000 per year for every additional 2,000 fish caught.”

Additionally, staff reviewed a report titled, "The Economic Impacts of Marine Recreational Fishing in the North Central Coast of California and the Potential Effects of Area Closures," was prepared by Southwick Associates in April 2008 for the American Sportfishing Association. This study looked at the potential economic losses to the counties of Sonoma, Marin, San Francisco, and San Mateo that could result from sportfishing closures. The report states: "The economic impacts from all recreational fishing trips (and each trip) in North Central California's ocean waters are substantial (estuaries and bays excluded):

Retail sales = \$104.4 million (\$405 per fishing trip)
Salaries, wages and business earnings = \$59.6 million (\$231 per trip)
Jobs = 1,611 (.0062 per trip)
State and local tax revenues = \$13.0 million (\$50 per trip)
Total ripple effect/total economic activity = \$184.7 million (\$716 per trip)"

Water Code section 13141 requires, to the extent that the Policy includes agricultural water quality control measures, the State Water Board to estimate the total cost of such measures and potential sources of funding prior to implementation. Staff prepared a Direct Cost Analysis report that evaluates the direct costs of reasonably foreseeable methods of compliance, such as the costs of preparing permit applications, including required studies and analyses, and implementing fish and habitat protection measures as expressly required by the Policy. This report does not and is not required to include an economic impact analysis on potential indirect effects that may arise from the Policy, such as the economic impact resulting from development of alternative water supplies.

Comment 24.0.19: The Policy will have far reaching economic impacts on the regional economy, largely foreclosing future developments of vineyards and agriculture in addition to indirect impacts to tourism and support industries. (*Patrick Garvey, Flora Springs Wine Company*)

Response: See response to 24.0.68.

Comment 24.0.20: I will be directly and severely impacted by the policy. This policy will be potentially devastating to my family's vineyards and winery. As more wells are drilled for farms and domestic use, ground water is becoming a scarce commodity. We are now more than ever relying solely on our surface water ponds for irrigation and frost control. The lack of availability of water alone could put our family out of business and our loyal employees out of work. (*Patrick Garvey, Flora Springs Wine Company*)

Response: See response to 24.0.10.

Comment 24.0.21: The Small Domestic Use Registration provisions of the draft policy may result in diversion facilities becoming prohibitively expensive, increasing water storage tank costs from \$25,000 to \$50,000. Such additional storage also would require additional real estate, which often is not available. Storing water for an eight month period also creates much greater difficulties in maintaining water quality. These practical and economic challenges threaten Mattole Flow Program funding sources and the willingness of water users and landowners to participate in the Program. (*Eric Goldsmith, Sanctuary Forest*)

Response: Staff is considering revisions to the small domestic use provisions of the Draft Policy to allow exceptions to season of diversion requirements.

Comment 24.0.22: The wine industry is economically strong and able to comply with the law. *(Jay Halcomb, Diane Beck, and Daniel Myers, Sierra Club Redwood Chapter)*

Response: Comment noted.

Comment 24.0.23: The costs to bring an illegal dam into conformance with the policy is not a penalty, but only the cost of doing business. *(Jay Halcomb, Diane Beck, and Daniel Myers, Sierra Club Redwood Chapter)*

Response: Comment noted.

Comment 24.0.24: I care deeply about some of the environmental issues facing California, particularly the problem of water. However, when a group of people come up with a policy of "one size fits all" without taking into account some of the specific situations of individual farmers, nor the small impact these farmers have on the issue of water, it clearly demonstrates "bureaucracy run amok" in our great State. *(Barry Hoffner)*

Response: See section D.5 in Appendix D of the Task 3 report for a discussion of how the Draft Policy does not and cannot constitute a one-size-fits all approach. The Draft Policy does not attempt to predict instream flow needs for each stream, and instead relies on a protective regional criterion to establish a suitable threshold flow below which uncertainty on site-specific instream flow needs can be addressed by site specific study. The site specific study element of the draft Policy is provided as a means to determine instream flow needs on a site specific basis.

Comment 24.0.25: One often hears of the bureaucracy of doing business in California and the nightmare many small business owners face. The Draft Policy is a very perfect example. I hope you are able to think through this policy clearly and help stop it from being implemented. *(Barry Hoffner)*

Response: Comment noted.

Comment 24.0.26: In Sonoma Valley, the increased demand on scarce groundwater supplies which could occur if surface runoff storage is curtailed would be a serious problem both for farmers and for rural residents not hooked up to municipal water. There needs to be a better balance between improving fish habitat and the needs of farmers and other users. *(Robert Hunter Jr.)*

Response: Section 5.2 of the Draft SED Appendix D points out that the use of groundwater in the Policy area is limited by hydrogeologic factors, including aquifer materials of low permeability, as also pointed out by the commenter. The adequacy of groundwater to serve as an alternative supply is further evaluated in Section 5.2 of Draft SED Appendix D, where it finds that groundwater is not likely adequate to meet the foreseeable upper range of possible future demand (estimated at approximately 7,930 ac-ft/year), but may be adequate to meet the foreseeable lower range of possible future demand (estimated at approximately 230 ac-ft/year). The adequacy of groundwater to meet the possible future demand for a specific project will depend on local hydrogeological conditions determined through site-specific study.

The water cost analysis described in the SED (section 6.8), in conjunction with the comparisons of protectiveness provided for in the Task 3 Report (Tables 5-2, 6-2, 7-2, 8-1), can be used to assess how the Policy balances competing uses of instream flow. In the water

cost analysis, the alternative Policy criteria are compared in general terms of how relatively restrictive they are with respect to limiting diversion and how protective they are of fish habitat. The SED concludes that Policy criteria are protective, yet are among the least restrictive of the alternatives considered in terms of limiting diversion.

In addition, a sensitivity study (Stetson and R2, 2009) was performed based on feedback in peer reviewer and public comments to provide more comparisons of the relative benefits and impacts to fisheries and irrigation associated with different diversion restrictions. The study compared the potential water diversion volume for 9 different MBF alternatives and 5 MCD alternatives and calculated the number of days of spawning and passage opportunities for 5 of the MBF alternatives with an MCD of 5% of the 1.5 year peak flow (the Draft Policy regional criteria). A diversion season of December 15 to March 31 was used for the sensitivity study instead of the October 1 to March 31 proposed in the Draft Policy. The study concluded that an MBF criterion based on a 0.7 ft steelhead minimum spawning depth criterion in the validation sites would be similarly protective as one based on a 0.8 ft criterion and would provide a slightly higher potential diversion volume.

Comment 24.0.27: The minimum bypass requirements and the maximum cumulative diversion rate restrictions will dramatically reduce project yield. This reduced yield, combined with costs of compliance such as moving dams offstream or constructing elaborate bypasses to effectively move them offstream, will cause many irrigation projects to become non-economic. (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: At the February 2008 staff workshop, estimated yields for four examples were presented. The estimated yield results are as follows with the DFG-NMFS estimated project yield listed first and the Policy's estimated project yield using the regional criteria listed second: 1) 9.8 ac-ft/9.6 ac-ft 2) 30 ac-ft/18 ac-ft 3) 8.6 ac-ft/1.2 ac-ft 4) 18 ac-ft/18 ac-ft.

As can be seen based on the estimated yield results, the amount of water available for diversion varies due to the site specifics of the project. Two of the four examples from the February 2008 workshop showed that the estimated yield under the Draft Policy would be equal to, or almost equal, to the yield using the DFG-NMFS Draft Guidelines. The Draft Policy allows water right applicants the option of performing a site-specific study to more accurately determine the fishery resource instream flow needs for a particular location. A site specific study may result in a lower bypass flow rate which may increase the estimated project yield.

Water Code section 13141 requires, to the extent that the Policy includes agricultural water quality control measures, the State Water Board to estimate the total cost of such measures and potential sources of funding prior to implementation. Staff prepared a Direct Cost Analysis report that evaluates the direct costs of reasonably foreseeable methods of compliance, such as the costs of preparing permit applications, including required studies and analyses, and implementing fish and habitat protection measures as expressly required by the Policy. This report does not and is not required to include an economic impact analysis on potential indirect effects that may arise from the Policy, such as the economic impact resulting from development of alternative water supplies.

Comment 24.0.28: The Scientific Basis did not evaluate changes in hydrology important to anadromous salmonids associated with any specific project. Further, the Scientific Basis did not perform any type of trade-off analysis that compared the benefits and impacts to fisheries

and irrigation associated with different diversion restrictions. The presentation in Appendix I did not adequately discuss the extent a diversion to storage affects hydrology important for salmonid viability. Nor did the Scientific Basis discuss the impact to fisheries compared to the impact to irrigation in order to avoid that impact to fisheries. This is frequently called a trade-off analysis. Any diversion is going to change the hydrograph from natural conditions. The question becomes: is there a significant effect on salmonids? Because of uncertainty in the sciences involved and because there are competing societal values at stake, the measure of significance for fishery protection requires simultaneous consideration of diversions foregone attributable to the Draft Policy. (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: There are numerous case studies that demonstrate the benefits of restoring and managing instream flows. Studies on Putah Creek have shown this (e.g., Marchetti and Moyle 2001. Effects of flow regime on fish assemblages in a regulated California stream, *Ecological Applications* 11(2): 530-539). For a much greater range of case studies, see: Locke, A., and nine others. 2008. Integrated approaches to riverine resource stewardship: Case studies, science, law, people, and policy. Instream flow Council, Cheyenne WY.

The Scientific Basis Report (R2, 2008) evaluated effects of changed hydrology on passage and spawning habitat availability using data collected in validation sites, in addition to more general considerations of the benefits of protecting instream flows. Using real data from previous studies supplemented by field data from validation sites in the Policy area, the Scientific Basis Report establishes regional flow criteria that are expressly protective of fish habitat. The water cost analysis described in the SED (section 6.8), in conjunction with the comparisons of protectiveness provided in the Scientific Basis Report (Tables 5-2, 6-2, 7-2, 8-1), can be used as a type of "trade-off" analysis where the alternative Policy criteria are compared in general terms of how relatively restrictive they are with respect to limiting diversion and how protective they are of fish habitat. The SED concludes that Policy criteria are protective, yet are among the least restrictive of the protective alternatives analyzed in terms of limiting diversion.

In addition, a sensitivity study (Stetson and R2, 2009) was performed based on feedback in peer reviewer and public comments to provide more comparisons of the relative benefits and impacts to fisheries and irrigation associated with different diversion restrictions. The study compared the potential water diversion volume for 9 different MBF alternatives and 5 MCD alternatives and calculated the number of days of spawning and passage opportunities for 5 of the MBF alternatives with an MCD of 5% of the 1.5 year peak flow (the Draft Policy regional criteria). A diversion season of December 15 to March 31 was used for the sensitivity study instead of the October 1 to March 31 proposed in the Draft Policy. The study concluded that an MBF criterion based on a 0.7 ft steelhead minimum spawning depth criterion in the validation sites would be similarly protective as one based on a 0.8 ft criterion and would provide a slightly higher potential diversion volume.

The regional criteria are conservatively protective because of the uncertainty of the sciences involved. The Draft Policy allows water right applicants to use of results of a site-specific study instead of the conservatively protective regional criteria to more accurately assess the fishery resource instream flow needs at a particular location (Policy, Section 4.1.8).

Comment 24.0.29: The Scientific Basis failed to evaluate impacts to irrigation project yields. Not only would the Draft Policy impose significant costs for constructing bypasses or moving

reservoirs, the Draft Policy would also cause significant reduction in water yield to most irrigation projects. Wagner & Bonsignore Engineers evaluated 21 projects to estimate their average annual water yield under three different diversion scenarios. In the first scenario, the project diversions were constrained by a bypass requirement equal to the February median flow (FMF). In the second scenario, the project diversions were constrained by an FMF bypass and a seasonal volumetric limit equal to 10 percent of the seasonal unimpaired flow. This scenario corresponds to the 2002 DFG-NMFS Draft Guidelines. The third scenario corresponded to the Draft Policy regional criteria (aka design elements) for minimum bypass flow (MBF3) and maximum cumulative diversion rate (MCD2). The large difference in yield between the FMF bypass and the MBF3 bypass can be observed in Table 8-2 of Wagner and Bonsignore's comment letter. This has a particularly strong effect on diversions in smaller drainage areas. *(Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers)*

Response: The SED (section 6, Tables 6-3 through 6-11) adequately assesses, at a programmatic level, the potential indirect environmental impacts of the Policy on agricultural resources. The SED identifies potentially significant impacts, including reduction in available water supplies for agriculture that could result in changes in cropping patterns or conversion of farmlands to less water-consumptive or non-agricultural use.

Comment 24.0.30: The Draft Policy did not evaluate the economic impact associated with the potential loss of almost 4,000 acres of irrigable land. As acknowledged in the Executive Summary of the Direct Cost Analysis Report, an economic analysis is not included in the Direct Cost Analysis. We understand based on subsequent communications with State Water Board staff that an economic analysis of the Draft Policy was not "mandated" by the legislation authorizing the development of an instream flow policy. However, the absence of a mandate in AB2121, as codified in California Water Code Section 1259.4, does not relieve the State Water Board of its duty to conduct a thorough and comprehensive analysis, including an economic analysis. Absent an economic analysis, a complete picture of the cost and relative benefits associated with the Policy, i.e. the intrinsic value of the Policy, cannot be ascertained with any degree of certainty, and hence the State Water Board Members will not be equipped to render an informed decision as to the merits of the Draft Policy. *(Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers)*

Response: Comment noted. Water Code section 13141 requires, to the extent that the Policy includes agricultural water quality control measures, the State Water Board to estimate the total cost of such measures and potential sources of funding prior to implementation. Staff prepared a Direct Cost Analysis report that evaluates the direct costs of reasonably foreseeable methods of compliance, such as the costs of preparing permit applications, including required studies and analyses, and implementing fish and habitat protection measures as expressly required by the Policy. This report does not and is not required to include an economic impact analysis on potential indirect effects that may arise from the Policy, such as the economic impact resulting from development of alternative water supplies.

Comment 24.0.31: The loss in project yield coupled with large costs for compliance with the Draft Policy will significantly affect the viability of most projects subject to the Draft Policy, and will render many of them infeasible. Section 10.7.2 of Wagner and Bonsignore's comment letter provides examples of the costs for compliance and estimated yield for two projects under the Draft Policy. Table 8-2 of Wagner and Bonsignore's comment letter presents yield

analyses for 21 pending projects in the Policy area. The reduction in yield among the 21 projects ranges from 2 percent to 98 percent, and averages 62 percent on a project-by-project basis. The reduction in yield will greatly impact project viability, and together with expenditures required for compliance with the Draft Policy, will likely render most projects infeasible. The impacts of these occurrences on the regulated community and on the public interest are not disclosed in the Direct Cost Analysis or in any other Policy-related document. Such disclosure should be provided for public review and comment prior to the adoption of the Policy. (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: The SED acknowledges that the Policy may restrict water availability. The SED (section 6, Tables 6-3 through 6-11) adequately assesses, at a programmatic level, the potential indirect environmental impacts of the Policy on agricultural resources. The SED (section 6, Tables 6-3 through 6-11) identifies and adequately assesses, at a programmatic level, potentially significant impacts, including reduction in available water supplies for agriculture that could result in changes in cropping patterns or conversion of farmlands to less water-consumptive or non-agricultural use.

Comment 24.0.32: Clarification is required regarding the extent of the SWRCB's authorities, specifically with regard to the balancing of its requirement to protect existing beneficial uses and its authority to oversee species recovery and restoration actions. The Scientific Basis (pg. 1-6) states that: (1) "Lifting Policy limitations above structural barriers would not be protective of the anadromous salmonid resource if the possibility exists that historically accessible habitat will be re-opened by correction of passage barriers. This has proven to be an effective, high return method for restoring anadromous salmonid populations elsewhere (e.g., Roni et al. 2002)." (2) "...current trends in fisheries management within the Policy area are to identify and correct passage barriers caused by human actions...Once barrier problems are corrected, it is likely that efforts will be undertaken to subsequently improve habitat conditions above the former barrier location (e.g., DFG 1996; Flosi et al. 1998; DFG 2002; Roni et al. 2002; DFG 2004)." (3) "Policy should also apply above existing barriers to stream reaches potentially supporting anadromous salmonids, or that influence flow and habitat in such downstream reaches, in anticipation of restored runs in the future." From these statements, it is not clear what the intent of the Policy is, and whether the full extent of beneficial uses identified in the California Water Code have been taken into consideration. Specifically, clarification should be provided as to the SWRCB's authority for protecting existing beneficial uses, which include not only the preservation and enhancement of fish and wildlife, but also domestic and agricultural supplies, among others. It is suggested that further clarification be provided to address how the Policy balances and/or prioritizes the level of protection assigned to multiple beneficial uses (e.g., fisheries and agricultural supply), as well as the extent to which the SWRCB has authority to oversee and mandate habitat restoration and species recovery efforts throughout the Policy area, particularly in areas located upstream of the point of anadromy. (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: Water Code section 1259.4 requires the State Water Board to adopt principles and guidelines for maintaining instream flows within the Policy area. These principles and guidelines must be adopted as part of state policy for water quality control pursuant to chapter 3, article 3 (commencing with section 13140) of the Porter-Cologne Water Quality Control Act (Wat. Code, § 13000 et seq.). The Porter-Cologne Act provides the Board with broad authority

to adopt a policy that establishes guidelines for the regulation of any activity, including water diversions, that may affect water quality. Under the Porter-Cologne Act, water quality is defined as the "chemical, physical, biological, bacteriological, radiological, or other properties and characteristics of water which affect its use." (Wat. Code, § 13050, subd. (g).) Under this definition, water quantity is a component of water quality because the quantity of water in a stream is a property or characteristic of the water that affects its use. Accordingly, protection of water quality requires the maintenance of instream flows to the extent necessary to protect the beneficial uses of the stream, including the instream beneficial uses.

Comment 24.0.33: The Draft Policy fails to consider the public need for and benefits of water. This failure is contrary to law. The fundamental principle underlying all of California's water law and administration is set forth in the California Constitution: "[B]ecause of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare" (Cal. Const. Article X, Sec. 2) While it is undisputed that the protection and maintenance of the state's fisheries is a beneficial use of water, that fact does not end the necessary inquiry. The "maximum beneficial use" mandate is tempered by the requirement that all uses be reasonable. Even instream uses must adhere to the standard of reasonableness (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 443), and the Water Board, in administering the state's water resources, must ensure that all uses are reasonable. Reasonableness of use "cannot be determined without considering the effect of such use on all needs of those in the stream system" and "statewide considerations of transcendent importance." (*In Re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d 339, 354; *Joslin v. Marin Municipal Water District* (1967) 67 Cal.2d 132, 140.) This Constitutional mandate to balance the needs of all competing uses is carried forward by the statutes governing the Water Board. Section 1257 of the Water Code is especially pertinent: "In acting upon applications to appropriate water, the board shall consider the relative benefit to be derived from (1) all beneficial uses of the water concerned including, but not limited to, use for domestic, irrigation, municipal, industrial, preservation and enhancement of fish and wildlife, recreational, mining and power purposes, and any uses specified to be protected in any relevant water quality control plan . . ." The board may subject such appropriations to such terms and conditions as in its judgment will best develop, conserve, and utilize in the public interest, the water sought to be appropriated. (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: See response to 24.0.35.

Comment 24.0.34: The requirement that all water right applications must be weighed against competing needs, including instream needs, is confirmed in a 1980 opinion of the California Attorney General, which found proposed Water Board regulations establishing instream flows in the absence of such balancing to be contrary to state law. The Attorney General opined that the Water Board, "may not by the adoption of any rule of policy or procedure so circumscribe or curtail the exercise of its discretion under the statute as to prevent the free and untrammelled exercise thereof in every case, for an attempt to do so would be for it to arrogate to itself a legislative function." (63 Cal. Ops. Atty. Gen. 95 (1980)). In sum, the Attorney General concluded that the Water Board may not: "(1) determine, without regard to any application for appropriation of water for beneficial offstream uses, the required flow for beneficial instream

uses, (2) establish, in advance of a hearing on any such application, the required flow for beneficial instream uses by rule, and (3) create, without considering the relative benefits of all beneficial uses, a presumption as to the validity of the rule." Like the proposed regulations in 1980, the Draft Policy would establish instream flow requirements without consideration of the relative merits of the competing water uses, and would give such uses automatic priority over off-stream uses, regardless of the purpose for such diversions. The instream flow requirements would be established in advance of any hearing on an application. Such a result is contrary to law; it is inconsistent with the California Constitution and the statutes that delegate authority to the Water Board. (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: There are a number of problems with the commenter's reliance on the opinion of the Attorney General cited by the commenter. First, opinions of the Attorney General are not controlling as to the meaning of a constitutional provision or statute. (*County of Fresno v. Clovis Unified School Dist.* (1988) 204 Cal.App.3d 417, 427.) Second, the opinion cited is inconsistent with the holdings in several cases, including *United States v. Storer Broadcasting Company* (1956) 351 U.S. 192, 202-205 [upholding Federal Communications Commission's authority to regulate broadcasting stations through rulemaking notwithstanding statutory requirement that Commission hold a hearing before denying license applications for broadcasting stations] and *California Trout, Inc. v. State Water Resources Control Board* (1989) 207 Cal.App.3d 585, 622-625 [upholding validity of statute imposing instream flow requirements on dam owners, and rejecting argument that instream flow requirements can only be imposed on a case-by-case basis]. Third, the opinion of the Attorney General did not address the State Water Board's authority to regulate water rights pursuant to the Porter-Cologne Water Quality Control Act (Wat. Code, § 13000 et seq.). Moreover, Water Code section 1259.4 expressly requires the State Water Board to adopt a policy for maintaining instream flows for purposes of water right administration as part of state policy for water quality control pursuant to provisions of the Porter-Cologne Act. (See also *United States of America v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82, 124 [confirming the State Water Board's broad authority to provide for the regulation of water rights in a water quality control plan or policy].)

Comment 24.0.35: In addition to being contrary to law, the Draft Policy's failure to consider competing water uses is not the result intended by the Legislature when it enacted AB 2121. AB 2121, codified as Water Code Section 1259.4, directs the Water Board to develop "principles and guidelines," not to mandate bypass flows automatically applicable to all existing and future appropriations and petitions, nor to wall off high flood flows so that they cannot be beneficially used. The Draft Policy is therefore contrary to the Constitutional mandate, statutes and court decisions requiring the Water Board to consider the relative merits of all uses of water in every case. Moreover, in developing the principles and guidelines, the Water Board was instructed by the Legislature to develop them "as part of state policy for water quality control adopted pursuant to Article 3 (commencing with Section 13140) [of the Water Code]." The sections of the Water Code to which the Water Board was directed are the Porter-Cologne Act. Consistent with all other provisions of law cited above, the State Legislature established the State's Policy in carrying out the Porter-Cologne Act is: "to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." (Water Code section 13000) (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: Staff disagree with the assertion that the draft Policy fails to consider competing water uses. The State Water Board's goal is to develop a Policy that provides an adequate level of protection for fishery resources, while minimizing the water supply impacts of the Policy on agriculture and other beneficial uses. For example, the draft SED concluded that the Maximum Protectiveness Alternative was infeasible because a policy that favored the protection of fishery resources above all other beneficial uses did not meet the project goal of minimizing water supply impacts resulting from the Policy.

In addition, staff disagree with the argument that the draft Policy is contrary to the Constitutional mandate, statutes and court decisions requiring the State Water Board to consider the relative merits of all uses of water in every case. The Porter-Cologne Act provides the Board with broad authority to adopt a policy that establishes guidelines for the regulation of any activity, including water diversions, that may affect water quality. Under the Porter-Cologne Act, water quality is defined as the "chemical, physical, biological, bacteriological, radiological, or other properties and characteristics of water which affect its use." (Wat. Code, § 13050, subd. (g).) Under this definition, water quantity is a component of water quality because the quantity of water in a stream is a property or characteristic of the water that affects its use. Accordingly, a water quality control policy may establish guidelines for the administration of water rights to the extent necessary to maintain instream flows and protect the beneficial uses of the stream, including the instream beneficial uses. (See also *California Trout, Inc. v. State Water Resources Control Board* (1989) 207 Cal.App.3d 585, 622-625 [upholding validity of statute imposing instream flow requirements on dam owners, and rejecting argument that instream flow requirements can only be imposed on a case-by-case basis].)

Comment 24.0.36: Water Code section 13141 expressly requires the Water Board to consider factors including "past, present, and probable future beneficial uses of water," "economic considerations" and "the need for developing housing within the region." None of these factors were considered in the Draft Policy. The Draft Policy asks only whether its principles are protective of fish, not even whether they are necessary to protect fish. By way of contrast, in Decision 1610, the Water Board properly followed California law in developing specific streamflow measures to "preserve the fishery and recreation in the [Russian River] and in Lake Mendocino to the greatest extent possible while serving the needs of the agricultural, municipal, domestic, and industrial uses which are dependent on the water." (State Water Board Decision 1610, Section 13.2, cited in Draft Policy at 10.) The balancing of competing uses demonstrated in Decision 1610 and every other Board Decision is the sort of balancing process required by California law and is the balancing that an instream flows policy must also embody. (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: This appears to be a reference to Water Code section 13241, which applies to the development of water quality objectives, not the development of policy for water quality control. Moreover, contrary to the commenter's assertion, the State Water Board did consider competing beneficial uses in developing the draft Policy. The State Water Board's goal is to develop a Policy that provides an adequate level of protection for fishery resources, while minimizing the water supply impacts of the Policy on agriculture and other beneficial uses. For example, the draft SED concluded that the Maximum Protectiveness Alternative was infeasible because a policy that favored the protection of fishery resources above all other beneficial uses did not meet the project goal of minimizing water supply impacts resulting from the Policy.

Comment 24.0.37: Government Code Section 11346.3(a) requires that state agencies, when proposing a regulation, ". . . assess the potential for adverse economic impact on California business enterprises. . . ." More specifically, section 11346.5 requires that the results of the assessment be included in the notice of the proposed action. These provisions are consistent with the California Water Code requirement that economic considerations to be taken into account in establishing water quality objectives under the Porter-Cologne Water Quality Act. (Water Code section 13241(d) and (e).) However, the Draft Policy neither identifies nor discusses economic implications, beyond flatly asserting that any such impacts will be the result of individuals' actions responding to the Policy, not the result of the Draft Policy itself. What the State Water Board staff has proposed is a policy that includes no assessment of the total number of diversions that can meet the proposed standards, no assessment of the environmental consequences of noncompliance, and no assessment of the environmental improvement (or detriment) that would occur from implementation of the standards. Commenters are not aware of a regulation of comparable scope and economic impact that was ever so vague. (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: The adoption of state policy for water quality control, such as the proposed Policy, is exempt from most of the requirements set forth in the Administrative Procedure Act, including sections 11346.3 and 11346.5. (Gov. Code, § 11353.) In addition, Water Code section 13241 does not apply to the adoption of a water quality control policy. The State Water Board has prepared a report which estimates the direct costs of complying with the Policy and identifies potential sources of financing, consistent with the requirements of Water Code section 13141 and Public Resources Code section 21159.

Comment 24.0.38: The public trust doctrine calls for a balancing of the competing considerations. We understand that such balancing may not be permissible for endangered species, but it is required in other cases. In all situations it is important to ensure effective and efficient use of a limited and precious resource such as water. (*Bill Kocher, City of Santa Cruz Water Department*)

Response: Consistent with the public trust doctrine, the State Water Board has balanced competing considerations in developing the draft Policy. The State Water Board's goal is to develop a Policy that provides an adequate level of protection for fishery resources, while minimizing the water supply impacts of the Policy on agriculture and other beneficial uses. For example, the draft SED concluded that the Maximum Protectiveness Alternative was infeasible because a policy that favored the protection of fishery resources above all other beneficial uses did not meet the project goal of minimizing water supply impacts resulting from the Policy.

Comment 24.0.39: If the Water Board cannot work with landowners to encourage both fish and farming, you'll lose both. This policy, if adopted, will guarantee environmental degradation and economic disaster. I urge the Water Board to reject this Policy and work with landowners and others to develop a good policy for these streams and rivers, based on the needs of agriculture as well as anadromous fish. I'd like to see a reasonable policy soon, and working together, we have every expectation of success. (*Rudolph Light*)

Response: See response to 24.0.66.

Comment 24.0.40: 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. *(Rudolph Light)*

Response: See response to 24.0.66.

Comment 24.0.41: 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. *(Rudolph Light)*

Response: The commenter stated in other comments that the Draft Policy complicates the application procedure, is contrary to AB2121 and to the intent of the Trout Unlimited Peregrine Audubon Petition of October 27, 2004 to improve the application procedure, will not reduce the backlog of applications, requires entirely new classes of regulations and restrictions, substitutes unknown procedures that are untested in Northern California for determination of water availability and instream flow criteria, will make the whole process more complicated, and is unfair to those with pending applications who have seen no progress in the application process. These concerns were responded to in the Policy Approach - General topic. Staff is unable to provide a detailed response to the comment listed here because the commenter did not provide information supporting this comment.

Comment 24.0.42: The Policy is punitively restrictive on small watersheds and on small streams, and it largely targets small onstream dams and small watersheds. Because the Policy exempts Lake Sonoma, Dry Creek, and the mainstem Russian River, it appears that it is to be implemented almost solely on the backs of farmers and ranchers and small landowners. *(Rudolph Light)*

Response: The comment regarding the restrictiveness of the Draft Policy on small watersheds and streams is noted. Staff is reevaluating the flow related criteria for small watersheds in the Draft Policy based on consideration of the comments and suggestions that have been received.

Regarding the exemption of Lake Sonoma, Dry Creek, and the mainstem Russian River, these reaches are exempted from the Policy regionally protective instream flow criteria because the State Water Board has previously established minimum instream flows in State Water Board Decisions. Staff is considering revisions to the Draft Policy to clarify.

Comment 24.0.43: The Commenter owns a winery and is a partner in a 58 ac vineyard supplied with water from a well, and is concerned that the Draft Policy may prevent future expansion of the winery. I support the idea that industry and government should find a way to solve the problem of declining salmonid populations; but at the same time I believe the draft policy goes too far in decreasing our ability to access surface water for vineyard development. *(Steven MacRostie, MacRostie Winery and Vineyards)*

Response: See response to 24.0.63.

Comment 24.0.44: Adoption of the highest protections of flows will provide an economic benefit to the public from less pollution, increased fisheries health, less pestilence and disease. *(Chris Malan, Earth Defense for the Environment Now, Living Rivers Council)*

Response: Comment noted.

Comment 24.0.45: The Draft Instream Flows Policy takes a one-sided approach that takes

fish over farms and agriculture and the local economy. Water in California must be used to full potential to benefit habitat as well as agriculture. *(Robert Mueller, McKenzie-Mueller Vineyards and Winery)*

Response: See response to 24.0.66.

Comment 24.0.46: While the abbreviated comment period did not allow ample time for full and complete analysis of the impacts of this Policy from both short- and long-term perspectives, we were able to analyze the near-term impacts resulting from the Policy's proposed stringent bypass flow and diversion requirements on two of our vineyard properties. We have determined that these requirements would result in a reduction in water yield from 106 ac-ft to 4 ac-ft on one ranch, and from 48 ac-ft to 1 ac-ft on another. This yield reduction of nearly 100% for each of our vineyards in Sonoma County effectively eliminates our ability to produce our award-winning wines in this region. Early analysis suggests this same devastating effect on our vineyards in Mendocino County. Equally important, it is not clear that the fishery resources of the Policy area would benefit significantly from the drastic and costly compliance measures proposed in the Policy. *(Tim Nall, Brown-Forman Corporation)*

Response: Staff disagrees that the review and comment period was abbreviated. Interested persons had from December 28, 2007, when the Draft Policy and supporting documentation were released, until May 1, 2008, to review the Draft Policy and prepare comments, a total of 125 days. In addition, the State Water Board held a technical workshop on February 6, 2008, to explain the technical basis for the Policy, describe how it could be applied to water right projects, and answer questions. Staff is not able to provide a detailed response to the commenter's conclusions regarding the water yield for the commenter's projects under the Draft Policy because the commenter did not provide the details of the analysis that was performed.

Comment 24.0.47: The proposed policy does not provide a balance of the economic and environmental uses of the water in this region as it commits nearly all available flow to instream uses. We respectfully request that the State Water Board reject this policy and engage a consortium of affected parties, scientific experts, and State Water Board representatives to create a more balanced policy, one protective of all our interests. *(Tim Nall, Brown-Forman Corporation)*

Response: See response to 24.0.66.

Comment 24.0.48: Napa County Farm Bureau respectfully urges the State Water Board to reject the draft AB 2121 Policy, as it does not achieve the intended goals of the state legislation. The policy utilizes a flawed approach to improve fisheries habitat and certainly will not remedy the backlog of pending water rights applications. Napa County Farm Bureau is a non-profit agricultural organization representing farmers and ranchers throughout Napa County. With over 1,000 members, we work to promote and protect agriculture. The proposed policy will negatively impact many agricultural businesses in Napa County and does not fairly balance the competing needs for water as is mandated by the fundamental principles underlying California water law and administration. *(Peter Nissen, Napa County Farm Bureau)*

Response: See response to 24.0.63.

Comment 24.0.49: We sincerely seek the Water Board's support in crafting a better policy and set of principals that provides water for both farms and fish. Napa County growers produce

world renowned agricultural products and do so as committed stewards of the land. We ardently support and are engaged in the Fish Friendly Farming program and are willing to work with the California Land Stewardship Institute and our local watershed experts at NRCS and RCD in a pilot project. Again, we urge the Water Board to reject the current policy and work toward a policy that fairly balances the water needs of all beneficial uses. *(Peter Nissen, Napa County Farm Bureau)*

Response: See response to 24.0.63.

Comment 24.0.50: The Commenter has a small pond authorized by a Small Domestic Use Registration in 1999 and is concerned that the existing registration would be subject to the Policy. The potential financial costs, provided by the State Water Board, to comply with the proposed new policy could potentially drive the commenter's family off their property. *(John Painter and Jean Gadiot)*

Response: See response to 24.0.68.

Comment 24.0.51: The resultant plan goes way overboard in protecting fish. There needs to be a greater balance between fish and other water uses. Where is the cost-benefit analysis analyzing a balance of uses? *(Peggy Phelan)*

Response: The Scientific Basis Report (R2, 2008) evaluated effects of changed hydrology on passage and spawning habitat availability using data collected in validation sites, in addition to more general considerations of the benefits of protecting instream flows. Using real data from previous studies supplemented by field data from validation sites in the Policy area, the Scientific Basis Report establishes regional flow criteria that are expressly protective of fish habitat. Although the SED does not contain a monetary cost-benefit analysis, it does provide a "water cost analysis." The water cost analysis described in the SED (section 6.8), in conjunction with the comparisons of protectiveness provided in the Scientific Basis Report (Tables 5-2, 6-2, 7-2, 8-1), can be used as a type of "cost-benefit" analysis where the alternative Policy criteria are compared in general terms of how relatively restrictive they are with respect to limiting diversion and how protective they are of fish habitat. The SED concludes that Policy criteria are protective, yet are among the least restrictive of the protective alternatives analyzed in terms of limiting diversion.

In addition, a sensitivity study (Stetson and R2, 2009) was performed based on feedback in peer reviewer and public comments to provide more comparisons of the relative benefits and impacts to fisheries and irrigation associated with different diversion restrictions. The study compared the potential water diversion volume for 9 different MBF alternatives and 5 MCD alternatives and calculated the number of days of spawning and passage opportunities for 5 of the MBF alternatives with an MCD of 5% of the 1.5 year peak flow (the Draft Policy regional criteria). A diversion season of December 15 to March 31 was used for the sensitivity study instead of the October 1 to March 31 proposed in the Draft Policy. The study concluded that an MBF criterion based on a 0.7 ft steelhead minimum spawning depth criterion in the validation sites would be similarly protective as one based on a 0.8 ft criterion and would provide a slightly higher potential diversion volume.

To be regionally protective, the regional criteria are designed to limit water diversions so that adequate flows are available for spawning and passage at sites with the most restrictive instream flow needs. At some sites, therefore, more than adequate flows will be provided by regionally protective criteria. Only site specific study can determine where on the

protectiveness spectrum a given site lies, as described in section D.5 of Appendix D of the Scientific Basis Report (R2, 2008). The Draft Policy allows water right applicants to use of results of a site-specific study instead of the conservatively protective regional criteria to more accurately assess the fishery resource instream flow needs at a particular location (Policy, Section 4.1.8).

Comment 24.0.52: The Draft Policy will impact the north coast grape growing industry especially hard. In reviewing the financial projections cited in the policy, it is clear that few vineyard operations can afford to modify their reservoirs in order to achieve mitigated compliance. *(Peggy Phelan)*

Response: See response to 24.0.68.

Comment 24.0.53: The Draft Policy will impact the multitude of small users most harshly as compared to the biggest municipal water diverters because it impacts the newest water user the most. *(Peggy Phelan)*

Response: Pending water right applicants need to show water availability by evaluating the extent of water demand from senior diverters. The comment implies that new and pending applicants do not include large municipal water diverters. Table 16 of Appendix D of the SED reports there are several large municipal water agencies with pending applications totaling over 65,000 acre-feet per year that are subject to the Policy requirements. This accounts for over 69% of the total future water demand in the policy area.

Comment 24.0.54: My dream property had a cattle watering trench, dug in the 1950s, that always contains water due to the high water table in Kenwood. The water element supports beautiful flora and fauna. I have been apprised of AB2121 and of the SWRCB's attempt to comply. I see potentially disastrous consequences for me and my family. It is an extreme financial burden to prove the pond is not riparian. *(Heidi Porch)*

Response: See response to 24.0.68.

Comment 24.0.55: I implore the State Water Board to consider the negative impact of this proposed new Policy on smaller family-owned properties and farms. Surely it is not the intent of the SWRCB to drive people off their land. *(Heidi Porch)*

Response: See response to 24.0.69.

Comment 24.0.56: We understand the rationale for making the policy conservative, given the risk to the fisheries resource and uncertainty involved with such a varied geographic region. However, we feel that the policy does not adequately address the key socio-economic side of the issue - namely that much of the landscape in our watershed is used for agriculture, and imposing stricter regulations upon these existing stakeholders will not necessarily achieve the intended goals. We have found that our [NCRCD] results and observations vary significantly from the prescriptions of the Policy, suggesting that a more adaptive approach may yield more meaningful results - both socially and ecologically. *(Clinton Pridmore, Napa County Resource Conservation District)*

Response: The commenter expresses concern regarding the socioeconomic impacts of the Draft Policy on existing agricultural users of water. Existing water right permittees and licensees would not be affected by the Draft Policy unless the permittee or licensee makes

changes to the project. Other existing authorized water diverters would not be affected by the Draft Policy.

The NCRCD study focused on spring and summer flows, which have been suggested as the most significant flow-related limiting factor for the Napa River watershed by several recent studies (Stillwater Sciences Limiting Factors Analysis 2002, Stillwater Sciences Steelhead Growth Analysis 2007, RWQCB Sediment TMDL 2005). The Draft Policy protects spring and summer flows by precluding new diversions outside of the October 1 through March 31 diversion season. New water diversions will not be permitted at other times of the year unless a site-specific study shows through collection and analysis of site specific data that the diversion would have no impact on the fishery resource. As indicated elsewhere in this response document, staff is reevaluating the diversion season and considering using a period of December 15 through March 31. The Draft Policy thus ensures that summer habitat conditions will not deteriorate beyond conditions already imposed by existing permitted diversions.

Effects analyzed under CEQA must be related to a physical change in the environment. Economic and social effects, in and of themselves, are not considered environmental effects under CEQA.

Comment 24.0.57: The Napa County Resource Conservation District (NCRCD) appreciates the challenges associated with developing a policy in a manner that fits into an integrated watershed management framework, where there are numerous tradeoffs among multiple beneficial uses and within each beneficial use category. It would be desirable to have these tradeoffs identified and considered in an explicit and upfront manner, to prevent any unintended consequences. (*Clinton Pridmore, Napa County Resource Conservation District*)

Response: The Scientific Basis Report (R2, 2008) evaluated effects of changed hydrology on passage and spawning habitat availability using data collected in validation sites, in addition to more general considerations of the benefits of protecting instream flows. Using real data from previous studies supplemented by field data from validation sites in the Policy area, the Scientific Basis Report establishes regional flow criteria that are expressly protective of fish habitat. The water cost analysis described in the SED (section 6.8), in conjunction with the comparisons of protectiveness provided in the Scientific Basis Report (Tables 5-2, 6-2, 7-2, 8-1), can be used as a type of "trade-off" analysis where the alternative Policy criteria are compared in general terms of how relatively restrictive they are with respect to limiting diversion and how protective they are of fish habitat. The SED concludes that Policy criteria are protective, yet are among the least restrictive of the protective alternatives analyzed in terms of limiting diversion.

In addition, a sensitivity study (Stetson and R2, 2009) was performed based on feedback in peer reviewer and public comments to provide more comparisons of the relative benefits and impacts to fisheries and irrigation associated with different diversion restrictions. The study compared the potential water diversion volume for 9 different MBF alternatives and 5 MCD alternatives and calculated the number of days of spawning and passage opportunities for 5 of the MBF alternatives with an MCD of 5% of the 1.5 year peak flow (the Draft Policy regional criteria). A diversion season of December 15 to March 31 was used for the sensitivity study instead of the October 1 to March 31 proposed in the Draft Policy. The study concluded that an MBF criterion based on a 0.7 ft steelhead minimum spawning depth criterion in the validation sites would be similarly protective as one based on a 0.8 ft criterion and would provide a slightly higher potential diversion volume.

Comment 24.0.58: Water in California must be used to full potential to benefit habitat as well as agriculture. I have been farming wine grapes in Redwood Valley for the past 17 years. It is most essential for my business to be able to store water in order to frost protect in early spring as well as drip irrigate during the summer. Without water I will not only lose the ability to farm and produce food, but my property which is my asset as well. The Policy as draft could cause an economic disaster in Mendocino as the production of grapes is the most import income producing industry. (*Annette Rhodes, Rhodes Vineyards; Richard Rhodes, Rhodes Vineyards*)

Response: See response to 24.0.63.

Comment 24.0.59: The Draft Policy indicates that the cost to implement the proposed bypass criteria would be a minimum of \$100,000 for a small project, and from \$473,000 to over \$3,000,000 for larger projects. Therefore, the overall costs to landowners might exceed \$2 billion based on the number of dams identified in the draft Policy. Before such costs are even contemplated, it would seem necessary that the State Water Board verify that the proposed measures would not only benefit the intended resources but also not cause deleterious effects on other aspects of the environment. We believe the governmental policy should be fair to competing interests and balance the competing needs of the environmental and the agricultural and industrial community who share the resources. (*Barry and Phyllis Rogers*)

Response: The commenter raises concerns that the State Water Board verify that the Policy would not only benefit the intended resources, but also not cause deleterious effects on other aspects of the environment, be fair to competing interests, and balance competing instream flow needs and the needs of other water users.

The Policy aims to maintain instream flows for the protection of native fish populations, with a particular focus on anadromous salmonids and their habitat. The benefits to this target resource, in terms of protectiveness, are documented in the Scientific Basis Report. The Draft Policy ensures that habitat conditions will not deteriorate beyond conditions already imposed by existing permitted diversions. Effectiveness of the Policy would ultimately need to be determined through monitoring. Staff note that anadromous fish populations are influenced by many other factors besides flow. Thus, there is no certainty that numbers of salmon and steelhead will increase upon implementation of the Draft Policy. However, the opportunity for populations to increase will most certainly be less without the Draft Policy.

The SED identifies potential actions that affected parties may take in response to the Policy and assesses the resultant environmental impacts. The SED points out that future project-level CEQA reviews conducted by the State Water Board or by other lead agencies can be expected to identify any significant project-specific environmental effects and mitigate them to less-than-significant levels.

The water cost analysis described in the SED (section 6.8), in conjunction with the comparisons of protectiveness provided for in the Task 3 Report (Tables 5-2, 6-2, 7-2, 8-1), can be used to assess how the Policy balances competing uses of instream flow. In the water cost analysis, the alternative Policy criteria are compared in general terms of how relatively restrictive they are with respect to limiting diversion and how protective they are of fish habitat. The SED concludes that Policy criteria are protective, yet are among the least restrictive of the alternatives considered in terms of limiting diversion.

In addition, a sensitivity study (Stetson and R2, 2009) was performed based on feedback in

peer reviewer and public comments to provide more comparisons of the relative benefits and impacts to fisheries and irrigation associated with different diversion restrictions. The study compared the potential water diversion volume for 9 different MBF alternatives and 5 MCD alternatives and calculated the number of days of spawning and passage opportunities for 5 of the MBF alternatives with an MCD of 5% of the 1.5 year peak flow (the Draft Policy regional criteria). A diversion season of December 15 to March 31 was used for the sensitivity study instead of the October 1 to March 31 proposed in the Draft Policy. The study concluded that an MBF criterion based on a 0.7 ft steelhead minimum spawning depth criterion in the validation sites would be similarly protective as one based on a 0.8 ft criterion and would provide a slightly higher potential diversion volume.

Comment 24.0.60: With global competition pressuring California agricultural producers to contain costs, adding layers of regulations with no cost benefit analysis, and with no way to measure the results, seems to be counterproductive in the extreme. Given the State's budget crisis, this is no time to impose a complicated regulatory scheme of questionable value that will be costly for the State to administer and even costlier for agricultural producers to comply with. In addition to the direct cost of compliance, there will likely be reduced agricultural production because of reduced water availability due to the bypass requirements, and also because some/many ponds may be removed if compliance costs are prohibitive. For that land forced out of production because of prohibitive expense, subdivision would likely be an attractive choice. Limiting productivity and forcing higher expenses guarantee reduced tax revenues and job growth from the agricultural sector at a time when the State's need for increased revenue is at its greatest. (*Alec Rorabaugh*)

Response: See response to 24.0.69.

Comment 24.0.61: Preserving these fish is in the public interest. Restricting what a private property owner can do with his property, argued Supreme Court Justice (1863-1897) Stephen Field, amounts to a "regulatory taking" and requires compensation. By limiting how a person may use his property, as when an owner wants to plant crops, but is prevented from capturing water to irrigate them, the state is preventing the owner from full use and development of his property. In *Property and Freedom*, Harvard professor Richard Pipes points out that recent Supreme Court cases, (in 1992 and 1994) have affirmed that compensation is required "...when government regulations prevent the owner from preserving or improving the property." It is apparent that complying with the proposed regulations will require a substantial investment of both time and money, or a restriction on the property's productive capacity. Probably both. (*James Mooney; Alec Rorabaugh; Michael Vellutini, TriValley Vineyard Management*)

Response: The draft Policy would not place direct restrictions on the use of real property. Instead, the draft Policy would restrict the use of water, which is a public resource, owned by the people of the State. (Wat. Code, §§ 102, 1001.) Individuals may acquire the right to use water, which is a property right, but water rights are not unrestricted. Among other things, a water right holder does not have a vested right to divert water in a manner inconsistent with the reasonable use and public trust doctrines. (*Joslin v. Marin Municipal Water Dist.* (1967) 67 Cal.2d 132, 144-145; *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 440.)

It also merits note that the draft Policy would apply to future appropriators and existing permittees and licensees who seek to make changes to their water rights, and therefore the draft Policy would not affect the ability of any existing water right holders to continue to exercise their rights as they have in the past.

Comment 24.0.62: Water that falls as rain on the mountains and valleys of Mendocino County are most fairly reserved for human and fish entities within Mendocino County. It is unfair to suggest that entities within this county cannot lawfully partake of these waters while other users downstream and in other parts of the State are allowed to divert the water so necessary to the health of humans and the economy in this State. In a way, the Policy establishes the North Coast area as environmental mitigation for the rest of the State, which remains essentially free to divert water as before. *(Linda Ruffing, City of Fort Bragg)*

Response: The policy area includes streams and tributaries discharging to water diversions from all streams and tributaries discharging to the Pacific Ocean from the mouth of the Mattole River south to San Francisco, and all streams and tributaries discharging to northern San Pablo Bay. Southern California water demand does not currently affect this water supply.

Comment 24.0.63: Agriculture in California must be protected against surging population growth and urban sprawl. Government regulations are creating an impossible situation for farmers in California. We must act to sustain both agricultural water needs, as well as to protect our wildlife. Water in California must be used to full potential to benefit habitat as well as agriculture. *(Erin Russell)*

Response: The water cost analysis described in the SED (section 6.8), in conjunction with the comparisons of protectiveness provided for in the Task 3 Report (Tables 5-2, 6-2, 7-2, 8-1), can be used to assess how the Policy balances competing uses of instream flow. In the water cost analysis, the alternative Policy criteria are compared in general terms of how relatively restrictive they are with respect to limiting diversion and how protective they are of fish habitat. The SED concludes that Policy criteria are protective, yet are among the least restrictive of the alternatives considered in terms of limiting diversion.

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Comment 24.0.64: The proposed policy does have severe implications for vineyard owners and farmers throughout the North Bay. *(Alex Ryan, Duckhorn Wine Company)*

Response: See response to 24.0.66.

Comment 24.0.65: We believe the AB 2121 Policy, as presently drafted, will not meet the stated objective of protecting endangered salmonid fisheries without unnecessarily restrict water development, and in turn economic development, in Mendocino County. *(Roland Sanford, Mendocino County Water Agency)*

Response: See response to 24.0.66.

Comment 24.0.66: While we appreciate the fact that the Substitute Environmental Document discusses some of the direct costs associated AB 2121 Policy implementation, we are very concerned that the indirect economic costs, which we believe may be substantially greater than the estimated direct costs, are not quantified. Consequently, it is difficult to accurately compare or balance the potential benefits of AB 2121 Policy implementation and more specifically, the "conservative" instream flow requirements (conservative in the sense that they may at times be more than adequate to protect salmonid fishery resources), against the economic, social and land use impacts that will be incurred as a result of AB 2121 Policy implementation. *(Roland Sanford, Mendocino County Water Agency)*

Response: Comment noted. Water Code section 13141 requires, to the extent that the Policy includes agricultural water quality control measures, the State Water Board to estimate the total cost of such measures and potential sources of funding prior to implementation. Staff prepared a Direct Cost Analysis report that evaluates the direct costs of reasonably foreseeable methods of compliance, such as the costs of preparing permit applications, including required studies and analyses, and implementing fish and habitat protection measures as expressly required by the Policy. This report does not and is not required to include an economic impact analysis on potential indirect effects that may arise from the Policy, such as the economic impact resulting from development of alternative water supplies.

The water cost analysis described in the SED (section 6.8), in conjunction with the comparisons of protectiveness provided for in the Task 3 Report (Tables 5-2, 6-2, 7-2, 8-1), can be used to assess how the Policy balances competing uses of instream flow. In the water cost analysis, the alternative Policy criteria are compared in general terms of how relatively restrictive they are with respect to limiting diversion and how protective they are of fish habitat. The SED concludes that Policy criteria are protective, yet are among the least restrictive of the alternatives considered in terms of limiting diversion.

In addition, a sensitivity study (Stetson and R2, 2009) was performed based on feedback in peer reviewer and public comments to provide more comparisons of the relative benefits and impacts to fisheries and irrigation associated with different diversion restrictions. The study compared the potential water diversion volume for 9 different MBF alternatives and 5 MCD alternatives and calculated the number of days of spawning and passage opportunities for 5 of the MBF alternatives with an MCD of 5% of the 1.5 year peak flow (the Draft Policy regional criteria). A diversion season of December 15 to March 31 was used for the sensitivity study instead of the October 1 to March 31 proposed in the Draft Policy. The study concluded that an MBF criterion based on a 0.7 ft steelhead minimum spawning depth criterion in the validation sites would be similarly protective as one based on a 0.8 ft criterion and would provide a slightly higher potential diversion volume.

Comment 24.0.67: This Policy is 43 pages with appendices totaling 49 more pages, several technical memorandums and other documents totaling 700 more pages. It has a single focus - anadromous salmonids. It was developed solely based on the requirements of anadromous fish. SWRCB has the job to fairly consider ALL beneficial uses of water, including agriculture, wildlife and urban users. This Policy undercuts that mandate. *(Roland Sanford, Mendocino County Water Agency; Jim Wattenburger, Mendocino County Board of Supervisors)*

Response: The legislative digest for AB 2121 directed the State Water Board to develop principles and guidelines to ensure that new water right permits include appropriate fish measures that are protective of anadromous salmonid and related aquatic resources. The

Draft Policy accomplishes this goal.

Comment 24.0.68: The Policy potentially will be economically devastating to vineyards that depend on water supply for irrigation. If we are unable to irrigate, our yields will decrease substantially, raising our costs per acre, and ultimately squeezing our margins between what consumers can pay and what the cost of the wine is. This in turn translates to lost jobs in the field and the winery. (*Jan Shrem, Clos Pegase*)

Response: Comment noted. Water Code section 13141 requires, to the extent that the Policy includes agricultural water quality control measures, the State Water Board to estimate the total cost of such measures and potential sources of funding prior to implementation. Staff prepared a Direct Cost Analysis report that evaluates the direct costs of reasonably foreseeable methods of compliance, such as the costs of preparing permit applications, including required studies and analyses, and implementing fish and habitat protection measures as expressly required by the Policy. This report does not and is not required to include an economic impact analysis on potential indirect effects that may arise from the Policy, such as the economic impact resulting from development of alternative water supplies.

Comment 24.0.69: Under the proposed Policy, water will be in short supply, with essentially no new water rights being approved and no alternative sources of water being available. Existing farmland may be put out of production and there will be little water even for existing homes that rely on existing water rights for small domestic uses. (*Jan Shrem, Clos Pegase*)

Response: Appendix E of the SED discusses the potential indirect impacts on municipal, industrial and agricultural water use and related indirect impacts on other environmental resources. Section 5 of Appendix E identifies alternative water supply sources or other bases of right (alternative water supplies) that could be used to satisfy the future diversion demand and evaluates the adequacy of these alternative water supplies to meet the future diversion demand. Section 6 of Appendix E estimates the potential indirect environmental impacts related to development of the alternative water supplies to meet the future diversion demand, describes any potential inadequacies of alternative water supplies, and estimates the potential indirect environmental impacts that result if the future diversion demand cannot be met.

Comment 24.0.70: Protection of habitat is important, but so is the ability of the farmer to efficiently produce food for the tables of the world. Do not cripple the farmer by instituting policies which will do more harm than good overall. I urge you to consider all possible consequences to habitat, food supply and economics before you make any decisions. (*R. Simcoe, Mast Ranch Vineyard, FLP*)

Response: The effects of the Draft Policy's regional criteria on habitat are described in the Scientific Basis Report and Appendices. Section 6.8 of the SED contains a water cost analysis which evaluated forty-eight possible combinations of policy criteria for their effect on the amount of water that could be diverted. The Direct Cost Analysis report summarizes estimates of the costs of complying with the Draft Policy.

Comment 24.0.71: Golden Vineyards are certified as Fish Friendly Farms. Golden Vineyards has chosen to farm in an organic and sustainable manner that reflects enlightened stewardship of water and other environmental resources. Nonetheless, many of the unreasonable, costly and experimental limitations contained in the Draft Policy will likely make it extremely difficult for Golden Vineyards to continue receiving adequate water supplies and the Draft Policy's unreasonable, anticipated costs of compliance may threaten Golden Vineyards' ability to

continue farming in this manner or in any productive manner over the long term. (*Paul "Skip" Spaulding, Farella Braun + Martel LLP/Golden Vineyards*)

Response: Comment noted. Although this commenter is concerned that the Draft Policy contains unreasonable, costly and experimental limitations, there is insufficient information to provide a detailed response. Regardless of whether the State Water Board adopts a policy, water right applicants would need to demonstrate water availability. Currently, they have the option of demonstrating this by showing the project complies with the NMFS-DFG Draft Guidelines. Most, if not all, of the hydrologic analysis recommended by the NMFS-DFG Draft Guidelines would be utilized as part of the analysis requirements for the proposed policy. The NMFS-DFG Draft Guidelines allow for site specific study, so does the proposed Policy. Although the Draft Guidelines did not delineate the biological studies required, staff does not anticipate the costs for site specific biological studies under the Draft Policy to be substantially different than under the NMFS-DFG Draft Guidelines. The Draft Policy requires preparation of mitigation plans, which are not required under the NMFS-DFG Draft Guidelines. Requirements for gravel and wood augmentation will be determined based on the applicant-developed mitigation plan. The level of mitigation required would be based on site-specific conditions described in the mitigation plans.

Comment 24.0.72: The State Water Board misinterpreted and misapplied the legislative mandate in AB 2121. The State Board has failed to propose a balanced instream flow policy that evaluates and addresses protection of all beneficial uses, including agricultural supply. Rather, as the Draft Policy candidly admits, the policy adopts maximum protectiveness criteria for salmon and steelhead, with no serious attempt within the policy to balance its adverse impacts on other beneficial uses such as agricultural supply. Rather than heeding the Legislature's mandate that the new policy itself incorporate these balanced principles, the Draft Policy appears to be based on the concept that the only purpose to be served by the Draft Policy is protection of salmon and steelhead. However, AB 2121 does not authorize the State Board to issue a policy that protects these species without incorporating an appropriate balancing of all applicable water quality principles, guidelines and objectives. (*Eileen G. Crane, Champcal Estates; Eileen G. Crane, Domaine Carneros; Patrick Garvey, Flora Springs Wine Company; Jan Shrem, Clos Pegase; Paul "Skip" Spaulding, Farella Braun + Martel LLP/Golden Vineyards*)

Response: The Draft Policy does not adopt maximum protectiveness criteria for salmon and steelhead. The Draft Policy's minimum bypass flow criteria was developed to be protective of anadromous salmonid habitat in as many streams as possible based on measures of channel size expressed in terms of drainage area and mean annual flow. Analysis of this criteria (which is described in detail in Appendix E of the Scientific Basis Report) suggested that while a more restrictive minimum bypass flow could be imposable on diversions, doing so would likely not provide significant additional, quantifiable benefits to the three anadromous salmonid species. The Draft Policy allows for site specific studies to determine instream flow needs on a site specific basis.

The water cost analysis described in the SED (section 6.8), in conjunction with the comparisons of protectiveness provided for in the Task 3 Report (Tables 5-2, 6-2, 7-2, 8-1), can be used to assess how the Policy balances competing uses of instream flow. In the water cost analysis, the alternative Policy criteria are compared in general terms of how relatively restrictive they are with respect to limiting diversion and how protective they are of fish habitat. The SED concludes that Policy criteria are protective, yet are among the least restrictive of the alternatives considered in terms of limiting diversion.

In addition, a sensitivity study (Stetson and R2, 2009) was performed based on feedback in peer reviewer and public comments to provide more comparisons of the relative benefits and impacts to fisheries and irrigation associated with different diversion restrictions. The study compared the potential water diversion volume for 9 different MBF alternatives and 5 MCD alternatives and calculated the number of days of spawning and passage opportunities for 5 of the MBF alternatives with an MCD of 5% of the 1.5 year peak flow (the Draft Policy regional criteria). A diversion season of December 15 to March 31 was used for the sensitivity study instead of the October 1 to March 31 proposed in the Draft Policy. The study concluded that an MBF criterion based on a 0.7 ft steelhead minimum spawning depth criterion in the validation sites would be similarly protective as one based on a 0.8 ft criterion and would provide a slightly higher potential diversion volume.

Comment 24.0.73: The Policy will have a disproportionate impact on small vineyard owners and wineries who entered the business in the last 20 years as opposed to large water suppliers, municipalities and larger institutional diverters whose water rights applications were resolved years ago and are less likely to have onstream dams and other facilities that are affected by the Draft Policy. *(Paul "Skip" Spaulding, Farella Braun + Martel LLP/Golden Vineyards)*

Response: See response to 24.0.53.

Comment 24.0.74: Given the major uncertainties and huge financial costs associated with these new proposed onstream reservoir provisions, the State Board needs to keep in mind its duty, under both existing law and AB 2121, to preserve and enhance all beneficial uses of these waters, including agricultural supply. If it were to adopt this set of onerous provisions relating to onstream dams, it could well, for many agricultural diverters, be removing this potential beneficial use entirely. This is one key area where greater balance among all beneficial uses is essential. *(Paul "Skip" Spaulding, Farella Braun + Martel LLP/Golden Vineyards)*

Response: Comment noted. Although this commenter is concerned that the onstream dam provisions are onerous, there is insufficient information to provide a detailed response. The costs to construct bypass structures for existing unauthorized reservoirs to bring them into compliance with policy requirements would make some projects infeasible. As described in the Direct Cost Analysis Report, there are many variables that could affect construction costs, which is why it provided a range of estimated costs to comply with the policy. Construction costs for passive bypass systems could range from \$25,000 to \$175,000 (Direct Cost Report, Table 3-6) depending on site specific conditions. The Draft Policy proposes that applicants develop mitigation plans for gravel and wood augmentation. Requirements for gravel and wood augmentation will be determined based on the applicant-developed mitigation plan. The level of mitigation required would be based on site-specific conditions described in the mitigation plans.

Comment 24.0.75: One document accompanying the Draft Policy attempts to ballpark the costs of compliance under the new policy. Direct Cost Analysis For The Proposed Policy For Maintaining Instream Flow In Northern California Streams (December 2007). Among other things, it estimates that application costs will exceed \$73,000 if various studies are needed, that mitigation plans will cost almost \$10,000 to prepare, \$99,000 to implement and \$6000 per year to maintain. However, the expected "big ticket" items relate to the onstream dam provisions, which are estimated to cost between \$100,000 and \$3 million per reservoir to

implement. These astronomical costs are beyond the ability of most farmers to afford and could likely force many wine grape growers out of business. When considering the Draft Policy, the State Board must take the magnitude of these financial costs, and the extreme adverse impacts on the agricultural supply beneficial use, into account. Because the current financial costs and beneficial use impacts of the Draft Policy are unacceptable, the State Board should reject the Draft Policy. *(Paul "Skip" Spaulding, Farella Braun + Martel LLP/Golden Vineyards)*

Response: See response to 24.0.66.

Comment 24.0.76: I believe that this bill threatens jobs and livelihoods. *(Michael Vellutini, TriValley Vineyard Management)*

Response: Comment noted.

Comment 24.0.77: Napa County is concerned about the impacts of the Policy on the community. The policy attempts to balance the use and protection of our ecosystem/watershed services, maintenance of habitat for endangered species and the provision of freshwater for domestic, agricultural, industrial and commercial uses. However, the County strongly feels that significant revisions to the draft policy are necessary if we are to achieve the balance which is vital to our community and the region. *(Brad Wagenknecht, Napa County Board of Supervisors)*

Response: Comment noted. Staff is considering all comments received and is planning revisions to the Draft Policy based on this review.

Comment 24.0.78: Water is getting more expensive all over the world and cannot be replaced. Using it stupidly is irrecoverable. Many edible fish populations have been exhausted in recent years. We can't afford to waste what we have because we can't buy replacements from the countries that are getting richer as we get poorer. *(Nina Wouk)*

Response: Comment noted. The State Water Board has adopted a Water Recycling Policy which was developed to increase the use of recycled water. The State Water Board plans to develop additional policies to encourage the use of stormwater, encourage water conservation, encourage the conjunctive use of surface and groundwater, and improve the use of local water supplies.

Comment 24.0.79: Water in California must be used to full potential to benefit habitat as well as agriculture. Farmers have a choice where and when they can farm; fish have no choice where they live. Water is their absolutely necessary for their survival and they have no choice where they live. Do not succumb to the "Economic" diatribe of this administration. Farmers can go elsewhere; fish can not. *(Kristi Wrigley)*

Response: Comment noted.

25.0 Water Right Administration

Comment 25.0.1: I am a landowner in Mendocino County and the proposed Policy will directly impact me. I filed Application #30615 in 1997 to appropriate 45 ac-ft of water for storage offstream storage in 1997 for existing reservoir (circa early 70's). I cancelled 2 change petitions because they were too complicated and prevent things from moving forward. *(Vincent*

Bartolomei, Bartolomei Brothers Vineyard)

Response: Comment noted.

Comment 25.0.2: State Water Board should concentrate on fixing the water right process. Applicants deserve clear and effective guidance on how to obtain a water right permit. *(Drew Aspegren, Napa Valley Vineyard Engineering, Inc.; Vincent Bartolomei, Bartolomei Brothers Vineyard; Edward T. Bennett; Larry Cadd; Jon-Mark Chappellet; Jack L. Cox, Cox Vineyards; Greg and Karen Crouse; Dino Dina, Ciamrossa Vineyards; Karen Fontanella, Fontanella Family Winery; Jonathan Frey, Frey Vineyards; Frank and Phyllis Hooper; Lee Hudson, Hudson Vineyards; Kenneth L. Kahn, Blue Rock; Tom Klein, Rodney Strong Vineyards; Chris London; Douglas Lumgair, Windsor Oaks Vineyards & Winery; JJ McCarthy, Cain Vineyard & Winery; Harry Merlo, Lago di Merlo Vineyards and Winery; Dwight Monson; Wendel Nicolaus, Middleridge Vineyard; Steve Pride, Pride Mountain Vineyards; Annette Rhodes, Rhodes Vineyards; Richard Rhodes, Rhodes Vineyards; Michael Vellutini, TriValley Vineyard Management; Edward Wallo, Yorkville Vineyards; Brian and Helen White; James Young, Robert Young Family Limited Partnership)*

Response: Comment noted.

Comment 25.0.3: We have been trying to obtain Water Rights on our existing pond, as required by the State, for 15 years. The first 7 years we were able to file all the required paperwork by ourselves to the point where we had our final inspection by Julie Humberstone and Laura J. Vasquez. At that time, we were verbally told that everything was acceptable and complete and that we should expect to be granted our water rights within the next couple of months. Approximately 1 year later, we were told that the State Water Board is no longer issuing water rights and that if we wanted to continue pursuing water rights we had to hire an Engineering and an Environmental firm familiar with water rights. These firms will be directed by the State at our expense. We obliged because water rights are very important to us. Since this time, we have incurred approximately \$38,000.00 for consultants, engineers, foresters and other specialists. Several months ago, we were again told that we had satisfied all requirements and studies. It was concluded that our pond had no negative impact on the Navarro River Watershed and fisheries. Now again, for the third time, the State is trying to change the requirements by adopting a new costly time consuming policy for the attainment of water rights. This pond is vital to us for agriculture purposes and fire safety. We are under financial burden due to this prolonged process. During our years of trying to obtain water rights, all costs have significantly risen to be able to plant, maintain and use our land. As we have not finished planting not knowing whether we have water rights or not. *(Robert Battinich and Tom Spinardi, Aladdin Depot)*

Response: Comment noted.

Comment 25.0.4: If the policy is approved, and if a permit applicant adheres to the letter and spirit of all of the new regulations, will the Division dismiss the protests and petitions that have held up the permitting process for nearly fifteen years? *(Tim Buckner)*

Response: Statutory requirements for dismissing protests are described in Water Code sections 1330 through 1335.

Comment 25.0.5: Who defines what is reasonable in these changing and precarious times must not be left up to the illegal diverters or suspected permit violators. It must be clear in the

language that the resource agencies will be expected to err on the side of caution with respect to protection of the species at risk. To the extent that funding and lack of enforcement exists, the policy cannot meet its mandated requirement and will not satisfy the requirements of the law. *(Kimberly Burr)*

Response: Comment noted.

Comment 25.0.6: The policy will be effective only if it is applied consistently, there is adequate staff to implement and enforce the policy (especially the maintenance of the limited season of diversion and minimum bypass flows), and projects are monitored for their effectiveness in protecting fisheries resources. *(Dick Butler, US National Marine Fisheries Service)*

Response: Comment noted.

Comment 25.0.7: The State Water Resources Control Board should reject the Policy and replace it with a one that also addresses the obvious problems in the application processing system. *(Vincent A. Ciolino, Montemaggiore)*

Response: Comment noted.

Comment 25.0.8: The Policy does not specify the terms and conditions to be added to water right permits, licenses, and registrations. Would not the policy be easier and more likely to be enforced if such terms and conditions were added to licenses, permits, and registrations? *(Alan Levine, Coastal Action Group)*

Response: Permit terms will be developed to address implementation of policy provisions.

Comment 25.0.9: In advance of new enforcement efforts, priority should be considered towards providing pending applicants and petitioners assistance for completing their requests for appropriation or appropriation changes. *(Darren Cordova, MBK Engineers)*

Response: Division staff will provide assistance with processing water right applications to extent that staffing resources are available.

Comment 25.0.10: For the reasons above we do not support the Draft Policy. We do support AB 2121 and the Joint Guidelines and would encourage the Water Board to reject the Draft Policy until it addresses the issues above. Until it does, continue operations under Water Code section 1259.4 using the Joint Guidelines. We urge that you listen to and act upon the comments of the agencies and those who support the protection of public trust interests and the rule of law. *(Jay Halcomb, Diane Beck, and Daniel Myers, Sierra Club Redwood Chapter)*

Response: This is a comment from the Sierra Club, Redwood Chapter, which does not support the Draft Policy because they claim it is silent on enforcement; allows illegal diverters to form watershed groups to avoid individual compliance for bypass flows; ignores design consultants roles in designing illegal dams; extends the season of diversion start date to October 1; and documents 1771 illegal dams but makes no recommendations for increased staffing to bring the dams into compliance. Staff notes that Section 11 of the Draft Policy contains enforcement provisions, and revisions to the policy are being considered for revising the start of the diversion season to December 15. The State Water Board has not concluded that all of the water impoundments identified in the SED are illegal diversions that require a

water right permit from the State Water Board. The State Water Board will contact the owners of these facilities and inform them that they must either file a Statement of Water Diversion and Use or identify why the provisions of Water Code section 5100, et seq do not apply to the impoundment. Those who fail to file within the time allowed will be assessed a monetary penalty consistent with the provision of amendments to Water Code section 5107 that become effective in February 2010. The State Water Board will review the information contained in Statements of Water Diversion and Use that are filed as a result of this notification to identify which of the impoundments and diversions are likely to be illegal and to identify the potential impacts of the impoundment. This information will be used to determine enforcement priorities within the policy area.

Comment 25.0.11: Conduct full inventory of all water extraction on the ground in cooperation with USGS, including riparian rights, pre-1914 and illegal diversions within one year. *(Patrick Higgins, Consulting Fisheries Biologist/Sierra Club Redwood Chapter)*

Response: The State Water Board may consider this in the future, but currently there are no resources to conduct a full inventory of all water extractions.

Comment 25.0.12: Work cooperatively with CDFG using Fish and Game Code Section 5937 and get flows back. Don't reign in the wardens. *(Patrick Higgins, Consulting Fisheries Biologist/Sierra Club Redwood Chapter)*

Response: Comment noted.

Comment 25.0.13: The Department of Water Resources should re-establish the Watermaster Service so that it is done by a government agency not a private party due to public trust protection needs and provide more effective service. *(Patrick Higgins, Consulting Fisheries Biologist/Sierra Club Redwood Chapter)*

Response: Staff suggests that the commenter submit this comment to the Department of Water Resources. Comment noted.

Comment 25.0.14: Instead of adaptive management, the SWRCB WRD has been exhibiting what NRC (2004) terms deferred action: "In the deferred-action approach, management methods are not changed until ecosystems are fully understood (Walters and Hillborn, 1978; Walters and Holling, 1990; Wilhere, 2002). This approach is cautious but has two notable drawbacks: deferral of management changes may magnify losses, and knowledge acquired by deferred action may reveal little about the response of ecosystems to changes in management. Stakeholder groups or agencies that are opposed to changes in management often are strong proponents of deferred action." *(Patrick Higgins, Consulting Fisheries Biologist/Sierra Club Redwood Chapter)*

Response: Comment noted.

Comment 25.0.15: In light of over-diversion, critical shortages of water for fish, inexorably rising demand for water, and the rampant lawlessness of both surface and ground water diversion, it is clear that we have a regional crisis. The data and the case studies above show that there is a complete dereliction of duty by the WRD and a similar lapse in management of ground water by DWR. In fact, much more profound reform is likely necessary, although there will be considerable opposition from agricultural interests and intransigent bureaucracies involved. What is really necessary is: (1) Change California Water Law to make riparian

diversions require a permit; (2) Have Legislature request Attorney General investigation into lack of enforcement of SWRCB codes (1052, 1055, 1243, and 1375), including illegal extraction of ground water that is connected to surface water (i.e. Big Springs, Shasta River); (3) Consolidate surface water and ground water management and Watermaster Service under one State agency that has public trust as its over-riding objective, such as CDFG or Cal EPA; and (4) Integrate planning with TMDL (Regional Boards), ESA/CESA (CDFG, NMFS), watershed restoration efforts (NRCS/NGO's), and NFMA and Northwest Forest Plan (U.S. Forest Service/Bureau of Land Management) implementation to pool resources and all agencies and processes targeting Pacific salmon recovery. *(Patrick Higgins, Consulting Fisheries Biologist/Sierra Club Redwood Chapter)*

Response: Comment noted.

Comment 25.0.16: Given the institutional incapacity of both the SWRCB WRD and DWR, it is hard to recommend either as a future lead agency under which water management would be carried out, and it is time to consider shifting authority. Regardless of how bureaucratic responsibility might be reallocated, the new management perspective must hold public trust protection as a priority and allow water extraction only when it does not harm fisheries and water quality. Also under any scenario the USGS is needed immediately to lead data collection and analysis. *(Patrick Higgins, Consulting Fisheries Biologist/Sierra Club Redwood Chapter)*

Response: The Draft Policy was based on a Scientific Report (Scientific Basis and Development of Alternatives Protecting Anadromous Salmonids, Task 3 Report, August 6, 2007, with revisions dated March 14, 2008) which provided recommendations for conditions under which diversion could occur without affecting habitat conditions for fishery resources. The Draft Policy incorporates the recommendations of the Scientific Report.

Comment 25.0.17: Because of the bureaucracy at the State Water Board, there is simply no one to dialogue with. *(Barry Hoffner)*

Response: The Notice of Availability for the Draft Policy included contact information of the staff that were working on the development of the policy. In addition, the State Water Board held three workshops that provided the public opportunities to comment and to ask questions of staff and the State Water Board members.

Comment 25.0.18: Advance the SWRCB's objective to reengineer and improve the water right process to produce scientifically and technically sound decisions, and to promote transparency and accountability. (See 1/25/08 draft Strategic Plan, p. 25; TU/PAS & WB/ESH Joint Principles, pp. 4-5.) *(Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society)*

Response: Comment noted.

Comment 25.0.19: The State Water Board should state whether and on what basis the Policy, as amended, will lead to water rights administration sufficient for maintaining instream flows as mandated by the statute. The State Water Board should develop a work plan to test, validate, and if necessary re-evaluate this conclusion as part of the Policy Effectiveness Monitoring and Review program. *(Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society)*

Response: The Draft Policy was based on a Scientific Report which provided recommendations for conditions under which diversion could occur without affecting habitat conditions for fishery resources. The Draft Policy incorporates the recommendations of the Scientific Report.

Comment 25.0.20: Incorporate into the Policy the recommendations set forth in the Joint Principles (described in johnson-kiel-roos-collins-wagner), which would improve protest resolution, focus environmental reviews, and improve efficiency. (Joint Principles, pp. 4-5.) (Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society)

Response: Comment noted.

Comment 25.0.21: Evaluate the potential for the State Water Board in collaboration with a university or other partner to create a common GIS interface to prepare the standard calculations required for water right applicants and stakeholders working on collaborative processes. (Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society)

Response: Comment noted.

Comment 25.0.22: The State Water Board should consider standard reference designs for the construction of bypass structures, monitoring and reporting systems, fish passage measures, and fish screens. (Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society)

Response: Comment noted.

Comment 25.0.23: The State Water Board should publish a schedule for implementing the Policy concurrent with final adoption. The schedule should include, among other things, estimated times for carrying out the following tasks: (1) Processing currently pending applications; (2) Identifying unauthorized diversions, including direct diversions and diversions from a subterranean stream flowing through known and definite channels; (3) Delivering notice to identified "non-filer" diversions to either file an application or demonstrate an adequate basis of right, and processing those applications; (4) Initiating and completing CDOs and ACLs, if any; (5) Collecting adequate information about riparian and groundwater diversions to inform water availability and stream flow studies necessary to administer the permitting program. In addition, the State Water Board should publish an estimate of the staff and budget resources required to implement AB 2121 according to this schedule and to carry out SWRCB's other statutory duties. The State Water Board should also evaluate the potential to work with stakeholders and outside institutions to prepare an independent audit report on staff and budget requirements necessary to carry out the law. (Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society)

Response: The commenter provides many recommendations that the State Water Board has already begun to implement. Several of these tasks will require the augmentation of the Division's staff resources. As staff becomes available the State Water Board will evaluate how to deploy these resources to improve the development of information and improve the water rights process.

Comment 25.0.24: Prepare a Memorandum of Understanding with responsible agencies defining standing procedures for processing water rights and related permits. (See TU/PAS Petition paragraph 146.) *(Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society)*

Response: The Division has developed an informal process with the Department of Fish and Game to provide early notice of water rights process and coordination of the development of the regulation of water rights that incorporates compliance with various requirements of the Fish and Game Code. The State Water Board continues to coordinate with various state and federal agencies to improve the procedures for processing water rights.

Comment 25.0.25: The Policy should advance the SWRCB's objective to reengineer and improve the water right process to produce scientifically and technically sound decisions, and to promote transparency and accountability. (See 1/25/08 draft Strategic Plan, p. 25.) TU/PAS and WB/ESH recommend the following procedural changes to the current water right process: (1) The applicant and SWRCB staff should be required to mutually develop a work plan at the start of process; (2) The applicant and SWRCB staff should be required to agree upfront to the scope of the environmental impact and water availability studies, and the analytic methodologies for those studies; (3) The applicant and SWRCB staff should have an early scoping meeting with protestants and responsible agencies to better inform them of the project. Providing more detailed project information earlier in the process may reduce the number of protests or reduce the scope of the issues in the protests; (4) The water availability, CEQA and public trust analyses should consider relevant watershed-scale issues wherever possible; (5) Pending applicants within a watershed should coordinate the water availability, CEQA and public trust analyses where feasible; (6) Generally, the process must be more transparent for both applicants and protestants; (7) The SWRCB should reevaluate the requirement that private applicants enter into a Memorandum of Understanding (MOU) with the SWRCB for the preparation of CEQA and other environmental analyses by a consultant, which has added significant delay to the water right process; (8) The SWRCB should establish a process to obtain decisions with an opportunity for appeal on key issues before final action on the applications and petitions is taken. *(Brian Johnson, Trout Unlimited; Peter Kiel, Ellison, Schneider & Harris LLP; Richard Roos-Collins, Peregrine Chapter of the National Audubon Society; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers)*

Response: Some of these suggested changes to water right procedures have been common practice as part of the Memorandum of Understanding process for the development of the CEQA compliance/Public Trust and water availability analysis.

Comment 25.0.26: TU/PAS and WB/ESH support additional funding and staffing for the Division of Water Rights. We agree that budget constraints have contributed to the non-functioning water rights system and are likely to do so in the future absent additional resources. We recommend that SWRCB set forth a schedule for carrying out the policy and publish an assessment of the resources required to carry out its statutory obligations, including the policy. *(Brian Johnson, Trout Unlimited; Peter Kiel, Ellison, Schneider & Harris LLP; Richard Roos-Collins, Peregrine Chapter of the National Audubon Society; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers)*

Response: Comment noted.

Comment 25.0.27: Water rights reengineering should consist of (1) development of initial

work plan (including all parties) after public notice; (2) written guidance on environmental studies: applicants may prepare draft CEQA/public trust document, and may meet/confer with parties on studies; guidance on appropriate study approaches, baseline, thresholds of significance; (3) mechanism to review staff decisions at key points of the permit process (consider designating one board member or rotation of members); (4) application-related documents (workplan, water availability analysis, studies) readily available to parties and public to improve transparency; (5) MOU with DFG, Regional Boards on permit coordination (e.g., section 1600) (*Brian Johnson, Trout Unlimited; Peter Kiel, Ellison, Schneider & Harris LLP; Richard Roos-Collins, Peregrine Chapter of the National Audubon Society; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: These suggested changes to the water right procedures have been common practice for the Division of Water Rights. (1)(2) Current Division practice is to require the applicant to enter into a Memorandum of Understanding (MOU) for the preparation of the CEQA/Public Trust documentation and water availability analysis. The process includes meeting with the applicants, usually their agents, the various Federal, State and Local governmental agencies to determine the baseline for the environmental review process and develop a work plan for conducting the supporting documentation and studies. This usually includes site visits by Division staff and the various representatives of governmental agencies the environmental consultants and the applicant and their agent. This process is designed to develop the CEQA documents and the supporting studies and documents. It includes the development of the appropriate studies and evaluations to address the compliance with CEQA. (3) The State Water Board annually adopts a Resolution re-delegating various authorities to the Deputy Director of the Division of Water Rights. The Resolution is posted on the Division of Water Rights web page. The Re-Delegation Resolution provides direction and requirements for the Deputy Director to review staff decisions at key points. (4) The files and records are readily available to the public upon request. Draft CEQA/ Public Trust documents and the water availability analysis are posted on the Division of Water Rights web page for review and comment (www.waterrights.ca.gov.) The Division provides electronic notification of public notices. The procedure for requesting electronic notification is posted on the Division's web page. (5) The Division provides separate notification to the Department of Fish and Game (Headquarters Sacramento and the Regional Offices) and the Regional Water Quality Control Board.

Comment 25.0.28: We have six water right applications and one petition on file seeking appropriation of water from streams within the Russian River watershed. Three of the applications were filed 10 years ago; and three have been pending since 2002. The delays in processing of our pending applications for our proposed vineyard project have cost my family over \$1.5 million in increased development costs. (*Tom Klein, Rodney Strong Vineyards*)

Response: Comment noted.

Comment 25.0.29: Prior to Policy implementation and to the extent feasible with available information, GIS datasets could be used to conduct an analysis that produces a standardized demarcation of those Policy area streams or upstream reaches that would be either exempt from, or subject to the Policy. Additionally, GIS-based analyses, including application of the Policy exemption criterion to Policy area streams, could be used to determine which ephemeral and intermittent upper watershed reaches meet the exemption criterion. Delineation of those upstream reaches where gradients exceed 12% would provide a more accurate representation of those reaches that would and would not be affected by the Policy. As a tool to assist applicants interpretation and compliance with the implementation requirements that will be

established by the Final Policy, the results of such a GIS-based analysis should be included as part of the Scientific Basis that will be used to support the Final Policy to be approved by the SWRCB. Further, establishment of the upper extent of anadromy by the SWRCB, to the extent feasible using the Policy criterion and available GIS applications, would: (1) avoid the duplication of effort by multiple applicants if they choose to independently submit information to the SWRCB that indicates a stream reach meets this criterion and a different location of anadromy is more appropriate; and (2) eliminate the potential for dispute if there are inconsistencies among individual applicant submittals to the SWRCB. *(Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers)*

Response: Comment noted. At the present time, the State Water Board does not have the funding or staffing for developing a GIS-based analysis model to implement the policy.

Comment 25.0.30: Delays on the part of the Division and protestants, particularly Trout Unlimited, exemplify what the water right application process has become. Twenty-one years ago in 1987 when I was 43 years old, I applied for a water right to build a pond at the upper end of Redwood Valley near the West Fork of the Russian River. The Division of Water Rights engineer inspected our project in 1993, six years after construction, and that was when we first realized there was an error and that we would need an additional supplemental water right which we duly applied for in 1994. Trout Unlimited protested this supplemental application. Trout Unlimited refused to visit the site or to explain what the objection really was. After hearing nothing from the Division for seven years regarding my application, in March 2005, I received a notice from the Division of Water Rights about new requirements for a pending application. I was required to hire a qualified engineer to do a WAA/CFII, and to hire an environmental consultant to write CEQA or other environmental documents. From my viewpoint the rules are always changing. Now we're in the 15th year since my supplemental application was filed and there's neither permit nor protest resolution in sight. With the Policy in place, the wait could easily be 14 more. More realistically, most people will quit trying due to the unjustifiable expense and unworkable restrictions. The resulting consequences of that will be unfortunate and many. *(Rudolph Light)*

Response: Comment noted.

Comment 25.0.31: It is important that the public recognize Trout Unlimited's historical and current role here. Trout Unlimited held up the Division from processing applications for years. Trout Unlimited was the driving force behind AB 2121. Trout Unlimited and Peregrine Audubon Society filed the Petition to change the entire water rights permitting system. The Division has embraced Trout Unlimited's goals although the Division may have originally buckled under the threat of a lawsuit. *(Rudolph Light)*

Response: Comment noted.

Comment 25.0.32: A major selling point of AB 2121 and of the Trout Unlimited Petition was said to be to reduce the backlog of water right applications, to speed up the process for pending applications and streamline the process for new ones. Adopting the Policy will guarantee more delays, require more staff time, and greater expense for all involved so the selling point of speeding up and simplifying the process is a false one. *(Rudolph Light)*

Response: Comment noted.

Comment 25.0.33: The draft Policy requires new classes of regulations and restrictions and new provisions that complicate process and will delay rather than expedite the application process. *(Rudolph Light)*

Response: Section 4.0 of the Draft Policy indicates that if an applicant has submitted a water availability analysis and analysis of cumulative flow-related impacts prior to January 1, 2008, and the proposed project is consistent with the recommendations contained in the DFG-NMFS Draft Guidelines, then the State Water Board will consider processing the water availability aspects of the application using the DFG-NMFS Guidelines. Staff notes that most, if not all, of the hydrologic analysis recommended by the NMFS-DFG Draft Guidelines would be utilized as part of the proposed policy's analysis requirements. The NMFS-DFG Draft Guidelines allow for site specific study, so does the proposed Policy. Although the Draft Guidelines did not delineate the biological studies required, staff does not anticipate the costs for site specific biological studies described in the Draft Policy to be substantially different than those that would be performed under the NMFS-DFG Draft Guidelines.

Comment 25.0.34: 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 publicly. *(Rudolph Light)*

Response: Water Code section 1330 et. seq describe the procedures involving water right applicants and protestants that would be followed in resolving outstanding protests.

Comment 25.0.35: The commenter provided a detailed account of the changes in the water right application process since 1997 and how TU and their consultants, McBain and Trush, exerted increased influence on water right application processing. The commenter also stated that the Division and the entire SWRCB should explain to the applicants, the public and perhaps to the Legislature what really happened. Was the Division forced into non-action by TU/NHI or did the Division never intend from the outset to process the applications as staff repeatedly say they would? The commenter states that they deserve an honest explanation to account for what happened. *(Rudolph Light)*

Response: Comment noted.

Comment 25.0.36: The Commenter suggested three things to add to the policy regarding protest procedures: (1) 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. (2) There cannot be any new grounds for protests. (3) 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. *(Rudolph Light)*

Response: Water Code section 1330 et. seq provides the State Water Board with procedures for processing protests.

Comment 25.0.37: The Policy should deal directly with the issue of protests. 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: (1) 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; (2) 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; (3) 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; (4) 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; (5) 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; (6) 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. (7) 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. *(Rudolph Light)*

Response: Water Code section 1330 et seq. provides the State Water Board with procedures for processing protests.

Comment 25.0.38: The Commenter provided a detailed account of the chronology leading up to the passage of AB 2121 and the content of the Trout Unlimited Petition. The Commenter provided an account of specific statements in the Petition that he disputes. *(Rudolph Light)*

Response: Comment noted.

Comment 25.0.39: 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. *(Rudolph Light)*

Response: Water Code section 1330 et seq. provides the State Water Board with procedures for processing protests.

Comment 25.0.40: I am in the process of filing for water rights but have found the existing process cumbersome and difficult to manage. *(Douglas Lumgair, Windsor Oaks Vineyards & Winery)*

Response: Comment noted. It is anticipated that an adopted policy will provide a clear process with clear expectations.

Comment 25.0.41: The State Water Resources Control Board should urge local lead agencies reviewing discretionary projects in water scarce areas to update policies for new use permits for greater protection of cumulative water resource impacts. As this Plan is being formulated, Sonoma County's Permit and Resource Management Department is reviewing applications for commercial wineries, tourism destination, and vineyard expansions that will require pumping of ground water near tributaries that have already demonstrated reduced flow and periodic fish kills. *(NA, Maacama Watershed Alliance)*

Response: Comment noted.

Comment 25.0.42: Water right Applicants and Petitioners should allow for access/observation along stream for resource assessment. *(NA, Maacama Watershed Alliance)*

Response: Comment noted.

Comment 25.0.43: Fundamental problems in the water rights system must be fixed in order to have an effective instream flow policy. The Draft Policy does not acknowledge that the water right administrative system has caused the massive application and petition backlog in the North Coast. *(Steven MacRostie, MacRostie Winery and Vineyards)*

Response: Comment noted.

Comment 25.0.44: The Policy will not streamline the permitting process and reduce the application backlog. It will have the opposite effect. It will make application processing more costly and time-consuming, and the outcome less certain. *(Vincent A. Ciolino, Montemaggiore; Dino Dina, Ciamrossa Vineyards; Tom Eakin, Peter Michael Winery; Donald Gordon, Gordon)*

Family Ranch; Mike Morris, North Bay Agriculture Alliance; Barry and Phyllis Rogers)

Response: See response to 25.0.33.

Comment 25.0.45: Dismiss any protests that do not meet the stipulated conditions on the protest form. *(Mike Morris, North Bay Agriculture Alliance)*

Response: Protests are not accepted that do not conform to the basic requirements outlined on the Division of Water Rights' "Protest form". The requirements for accepting, dismissing, and providing answers to protests are specified in the California Code of Regulations Title 23 section 745 et. seq.

Comment 25.0.46: The Policy should clarify how protestants to an appropriation will be accommodated in the process of proving water availability and stream flow impact. This mechanism has been important for the National Park Service to ensure protection of the resources we manage for the public trust. *(Don Neubacher, US National Park Service, Point Reyes National Seashore)*

Response: Comment noted. The water availability analysis is described in the policy. It is used to satisfy the Water Code requirement that the State Water Board make a finding that there is unappropriated water available for the proposed project (Water Code section 1375).

Comment 25.0.47: All decisions on new dams and diversion permits, plus other proposed activities, must be considered provisional until monitoring data shows no negative impact to the recovery parameters. *(Jane Nielson, Sonoma County Water Coalition)*

Response: Water Code section 13143 requires periodic review of adopted policies. During the periodic review, monitoring data may be reviewed to assess whether the policy would need revising.

Comment 25.0.48: We also support a system of public notification, perhaps through local organizations and councils, when new projects affecting the health of our watersheds are proposed and when judgments are issued. Along with the permit application should be data including general watershed characteristics, hydrology, stream health indicators (as listed previously) and a map and list of all other diversions in the watershed. *(Robert Pennington, Community Clean Water Institute)*

Response: The State Water Board already is required to publish public notices of applicants' intent to appropriate water. Protests and comments may be submitted. The State Water Board also provides public notice of CEQA and/or public trust findings regarding the environmental impact of the proposed project.

Comment 25.0.49: AB2121, on the face of it, appears to be a worthwhile attempt to address a number of the fundamental shortcomings attributable to the SWRCB's lack luster performance to carry out its legal mandates and trust responsibilities to protect the public's water and fisheries resources. However, as previously stated in Porgans and Associate's communications to the SWRCB and staff, there are real questions as to the need for such a policy, because the SWRCB already has the authority and the so-called "regulatory tools" to provide for the maintenance of instream flows and to ensure compliance and protection of trust resources. Based solely on the SWRCB's own performance activities, there is a real question as to whether the SWRCB has either the will or the commitment to carry out its existing

policies, and/or mandates let alone another policy. (*Patrick Porgans, Patrick Porgans and Associates, Inc./Pacific Coast Federation of Fishermen's Association*)

Response: Comment noted.

Comment 25.0.50: While we support and appreciate all viable efforts to protect the waters and fisheries of the State, we have legitimate concerns, based on the SWRCB's adoption of similar water protection polices, that were geared toward defusing public indignation, while doing election-year grandstanding, at the expense of the taxpayers and to the demise of the trust resources: i.e., the Bay-Delta Water Rights proceedings, the deplorable conditions of the San Joaquin River Valley and the collapse of the salmon are all indicative of how the SWRCBs conduct the public's business. We are hopeful that TU's efforts and press releases will amount to something; however, our time would be better spent getting existing laws and/or policies enforced or implemented, because if anyone truly believes that the SWRCB will step up to the plate, they simply need to go back and review the SWRCB's "enforcement-track record" which, to say the least, is shamefully deplorable. Note: Porgans and Associates Is preparing several "White Papers" which, among other issues, will discuss the SWRCB's "performance." (*Patrick Porgans, Patrick Porgans and Associates, Inc./Pacific Coast Federation of Fishermen's Association*)

Response: Comment noted.

Comment 25.0.51: I filed an application in 2002 to appropriate water for storage in an on-stream reservoir (the "stream" is dry and not spring fed". We have followed the rules of the Water Board and are at the point where we have paid an engineering firm to perform environmental studies at the reservoir site. (*Steve Pride, Pride Mountain Vineyards*)

Response: Comment noted.

Comment 25.0.52: To significantly enhance the fish population and greatly reduce the impact on the agricultural sector, process water right permits within a reasonable time. (*Alec Rorabaugh*)

Response: The time it takes to obtain a permit depends on the effects the project could have on other water rights; the effects the project could have on the environment, including aquatic species, particularly endangered species; whether anyone protests against issuing a water right permit; whether there are other applicants competing for the same water supply; and State Water Board staffing resources. The State Water Board has in excess of 500 pending water right applications. If all the necessary information is provided, it may take three to four years to obtain a permit. If others protest the project or if the project has the capacity to harm threatened or endangered species, it could take longer to get a permit. When adopted, the policy has the potential to streamline the analysis to evaluate whether proposed projects may cause harm to threatened or endangered species.

Comment 25.0.53: When citizens are subjected to a regulatory scheme as poorly crafted as this proposed policy, perhaps the most insidious result is the undermining of the Rule of Law. Unlike most other nations, the foundation of America's greatness is the respect our citizens have for the law. People abide by our laws not because of fear, but because they see them as fair and just. The proposed regulations are being promulgated with a lack of scientific justification, no yardstick for success and no apparent consideration of the costs to society and those who will bear the brunt of the regulations. (*Alec Rorabaugh*)

Response: The technical peer reviewers have indicated the scientific basis is sound. The DFG and NMFS have not questioned the scientific basis behind the recommendations of the Draft Policy. A large number of technical comments submitted by the public have been responded to in this document. Staff will consider reevaluating aspects of the Draft Policy after consideration of all comments that have been received. The Draft Policy contains a provision allowing the State Water Board to implement a monitoring program to study the effectiveness of the adopted policy. CEQA does not require a review of social and economic impacts.

Comment 25.0.54: As I've talked to people about this policy, many are incredulous when I explain that a permit from the state is required in order to capture and store rainwater. I'm sure many ranchers and rural property owners are, even now, not aware that their small duck pond is in violation of state law. For each pond, the state requires a permit and collects an annual fee of \$100 for stock ponds and a higher, graduated fee for larger irrigation ponds. With the recent well-publicized concerns about state water shortages, it seems illogical to dissuade property owners from capturing and conserving water. Many of these farm ponds have existed for decades and have their own flourishing diverse ecosystem. No doubt many of these ponds would require major work to comply with the and require the expenditure of thousands of dollars. Also, probably many of these ponds have never had permits to store water, and thus have never paid the \$100/year minimum tax. *(Alec Rorabaugh)*

Response: The water rights annual fees and application fees are specified in California Code of Regulations sections 1061 et. seq. The commenter mentioned stock ponds specifically and suggested these ponds are subject to annual fees of \$100.00. The Livestock Stockpond Registration program pursuant to the 2009 California Code of Regulations section 1068 requires an initial application fee for a Livestock Stockpond registration of \$250.00 and a renewal fee of \$100.00 every five years. There is no annual fee associated with a livestock stockpond registration.

Comment 25.0.55: If adopted, the policy will impose severe and costly compliance measures and punishes applicants who have had applications pending with the SWRCB for years. *(Alex Ryan, Duckhorn Wine Company)*

Response: The Draft Policy contains enforcement provisions that are already adopted in California law. The Draft policy contains provisions addressing existing pending applications. Section 4.0 of the Draft Policy indicates that if an applicant has submitted a water availability analysis and analysis of cumulative flow-related impacts prior to January 1, 2008, and the proposed project is consistent with the recommendations contained in the DFG-NMFS Draft Guidelines, then the State Water Board will consider processing the water availability aspects of the application using the DFG-NMFS Guidelines. Staff notes that most, if not all, of the hydrologic analysis recommended by the NMFS-DFG Draft Guidelines would be utilized as part of the proposed policy's analysis requirements. The NMFS-DFG Draft Guidelines allow for site specific study, so does the proposed Policy. Although the Draft Guidelines did not delineate the biological studies required, staff does not anticipate the costs for site specific biological studies described in the Draft Policy to be substantially different than those that would be performed under the NMFS-DFG Draft Guidelines.

Comment 25.0.56: The [Water Supply Report and Instream Flow Analysis] used to be done by the Water Board's engineering and environmental staff. Now the applicant is required to do all research and number crunching, or more accurately, the applicant is now required to PAY for consultants and engineers to do it. The SWRCB should develop a short list of approved

and acceptable firms from which the applicant must choose. *(Roland Sanford, Mendocino County Water Agency; Jim Wattenburger, Mendocino County Board of Supervisors)*

Response: The State Water Board maintains lists of engineering and environmental consulting firms that have worked on water right issues. The State Water Board is unable to provide recommendations.

Comment 25.0.57: How is this Policy less complicated than prior procedures, in other words, will this Policy streamline the application process? Please compare the procedure people had to follow before with what they'll have to do with this Policy. *(Roland Sanford, Mendocino County Water Agency; Jim Wattenburger, Mendocino County Board of Supervisors)*

Response: See response to 25.0.33.

Comment 25.0.58: How long will it take an application to go through the multi-step process put forth in this Policy? One year? Ten years? Will the SWRCB be held to any deadlines the way an applicant is? What can applicants count on the Division of Water Rights to do? *(Roland Sanford, Mendocino County Water Agency; Jim Wattenburger, Mendocino County Board of Supervisors)*

Response: See response to 25.0.52.

Comment 25.0.59: If municipal or rural water district wants to expand or get more water, will it be able to under this new Policy with its restrictions? *(Roland Sanford, Mendocino County Water Agency; Jim Wattenburger, Mendocino County Board of Supervisors)*

Response: Since the commenter does not provide specific examples, staff cannot provide a detailed response. In general, regardless of whether the policy is adopted, the applicant would need to consider the impacts the proposed diversion could have on the environment, including aquatic species, particularly endangered species; respond to protests against issuing a water right permit for the diversion; and to evaluate whether there are other applicants competing for the same water supply. The Draft Policy's methodology for assessing water availability requires the consideration of site-specific conditions. These include: (1) the drainage area at the point of diversion; (2) the unimpaired flow at the point of diversion; (3) the proximity of fish relative to the point of diversion; and (4) the existing level of impairment resulting from senior diversions in the watershed.

Comment 25.0.60: In the past, the Division would accept a protest against a project without the protest being specific to the project. Will the Policy change the protest procedure to one that is fair and equitable to both the protestant and the applicant? *(Roland Sanford, Mendocino County Water Agency; Jim Wattenburger, Mendocino County Board of Supervisors)*

Response: Protests are not accepted that do not conform to the basic requirements outlined on the Division of Water Rights' "Protest form". The requirements for accepting, dismissing, and providing answers to protests are specified in the California Code of Regulations Title 23 section 745 et. seq.

Comment 25.0.61: The State Water Board needs a formal auditing division to evaluate monitoring and report data as it comes in. To start, such division needs to create a standardized format for reporting and monitoring that makes these processes usable and accessible by water rights holder, auditor, and the public. Second, timely filing of monitoring

and reporting data should be a condition of every water right and should be the first cut of auditing. Third, the auditors need to develop a review process and then actually review the data that is reported. *(Chris Shutes, California Sportfishing Protection Alliance)*

Response: In 2010, the State Water Board will begin requiring that all annual progress reports of permittees and licensees be submitted electronically. The annual reporting of Statements of Diversion and Use will also be required to be submitted electronically. These reports will be posted and made available for public review on the Division of Water Rights' electronic water right information system posted on the Division's web page. Recent amendments to the Water Code provide for penalties for failure to report the diversion and use of water. Water Code section 5101 requires unpermitted water diverters to file a Statement of Water Diversion and Use unless certain exceptions apply. The Division intends to contact the owners of unpermitted impoundments and inform them that they must file a Statement of Water Diversion and Use or explain why the provisions of Water Code section 5100 et seq. do not apply to the impoundment. Those who fail to file within the time allowed will be assessed a monetary penalty consistent with amendments to Water Code section 5107 which become effective in February 2010. The State Water Board will review the information contained in submitted Statements of Water Diversion and Use to identify which of the impoundments and diversions are likely to be illegal and to identify the potential impacts of the impoundment. This information will be used to determine enforcement priorities within the policy area.

Comment 25.0.62: The State Water Board needs a team dedicated to processing applications and petitions in the policy area. Parties that are presently out of compliance need to have a sense that their applications will not be drowned in process. By the same token, conservation and fisheries interests equally need certainty that applications under the Policy do not simply become parked in a legal limbo which allows another decade of inaction. to bring parties into compliance including a web master to post all information related to water right applications *(Chris Shutes, California Sportfishing Protection Alliance)*

Response: The Division of Water Rights has dedicated staff assigned to process water right applications and petitions in the Policy area. The Division posts on its web site the progress of all water right applications that are in the Policy's five county geographic area. The Division also provides the public with on-line access to some water right information at the following link: <http://ciwqs.waterboards.ca.gov/ewrims/ewrims/EWMMenuPublic.jsp>

Comment 25.0.63: Another staff group, coordinated with auditing and processing teams, needs to be established to carry out investigation and enforcement. The central issue is ending unauthorized diversions and reservoirs. You've identified 1771 of them. Anyone who does not come forward with an application for a water right and a plan to come into compliance within one year of Policy adoption needs to be shut down. The Draft Policy places such an explicit one year limitation on applications for onstream reservoirs on Class I streams that were constructed before July 19, 2006. *(Chris Shutes, California Sportfishing Protection Alliance)*

Response: As a result of the passage of Senate Bill X7 8 in November 2009 and other bills upon which it was contingent, the State Water Board will be increasing its water rights enforcement staff by 25 positions. The State Water Board intends to use these positions to pursue enforcement of some of the water right violations that it has identified during prior enforcement sweeps in the AB 2121 area and to conduct new enforcement sweeps. In addition, the State Water Board has been working and will continue to work with other agencies to pursue joint enforcement where appropriate. Also, the State Water Board is investigating the use or remote sensing technology to assist in its enforcement efforts. Water

Code section 5101 requires unpermitted water diverters to file a Statement of Water Diversion and Use unless certain exceptions apply. The Division intends to contact the owners of unpermitted impoundments and inform them that they must file a Statement of Water Diversion and Use or explain why the provisions of Water Code section 5100 et seq. do not apply to the impoundment. Those who fail to file within the time allowed will be assessed a monetary penalty consistent with amendments to Water Code section 5107 which become effective in February 2010. The State Water Board will review the information contained in submitted Statements of Water Diversion and Use to identify which of the impoundments and diversions are likely to be illegal and to identify the potential impacts of the impoundment. This information will be used to determine enforcement priorities within the policy area.

Comment 25.0.64: The entire water rights process should be daylighted on the Internet, and the Policy area is an excellent starting point. Applications and petitions within the context of the Policy should be put on the Web, as should all documents supporting and otherwise relating to these applications and petitions. The public should be able to track an application, especially for a previously unauthorized diversion, from start to finish. Further, complaints, follow ups, and enforcement notices and actions should be posted on the Web. (*Chris Shutes, California Sportfishing Protection Alliance*)

Response: In 2010, the State Water Board will begin requiring that all annual progress reports of permittees and licensees be submitted electronically. The annual reporting of Statements of Diversion and Use will also be required to be submitted electronically. These reports will be posted and made available for public review on the Division of Water Rights' electronic water right information system posted on the Division's web page. Recent amendments to the Water Code provide for penalties for failure to report the diversion and use of water.

Comment 25.0.65: Golden Vineyards owns two vineyard properties within the Draft Policy area: (1) Fairbairn Ranch, located on Eastside Road in Hopland, California; and (2) Heart Arrow Ranch, located north of Ukiah. Applications for appropriative rights to divert and store water were submitted 16 years ago for Fairbairn Ranch (by a prior owner) and seven years ago for Heart Arrow Ranch. The applications have undergone the public notice and comment process. After long delays, the State Board finally agreed to enter into Memoranda of Understanding with Golden Vineyards for California Environmental Quality Act ("CEQA") review for the applications, but the CEQA review has not yet begun for either Ranch since the State Board staff has failed to provide appropriate points of diversion and other information necessary for a water availability analysis. (*Paul "Skip" Spaulding, Farella Braun + Martel LLP/Golden Vineyards*)

Response: The Division of Water Rights has dedicated staff assigned to process water right applications and petitions in the Policy area. The Division posts on its web site the progress of all water right applications that are in the Policy's five county geographic area. The Division also provides the public with on-line access to some water right information at the following link: <http://ciwqs.waterboards.ca.gov/ewrims/ewrims/EWMenuPublic.jsp>

Comment 25.0.66: During the interim, while the Draft Policy is reassessed, the State Water Board should expeditiously process its backlog of water rights applications using current practices. Any new instream flow policy adopted can then be applied to applications filed after that date. Indeed, in AB 2121, the Legislature specifically authorized the State Board to use the DFG/NMFS Guidelines prior to adoption of a new policy. Water Code section 1259.4(b). (*Paul "Skip" Spaulding, Farella Braun + Martel LLP/Golden Vineyards*)

Response: Comment noted.

Comment 25.0.67: The Proposed Policy also fails because it does not fulfill one of its core legislative mandates, which was to improve the fundamentally broken water rights process. The Proposed Policy does nothing to improve the system, nor does it even acknowledge that the system is broken. There is, and has long been, an unreasonable backlog in the processing of water rights applications in the North Coast. Implementation of the Proposed Policy will do nothing to remedy this broken system and, in fact, will only add additional expense and delay. The Proposed Policy would impose rigid, one-size-fits-all diversion restrictions on applicants and petitioners without giving any consideration to the separate, and often significantly different, water issues arising in different watersheds. The implementation of such a rigid policy would force the majority of applicants and petitioners to seek a variance from the Proposed Policy's one-size-fits-all limitations. While the Proposed Policy purports to provide for such a variance mechanism, the criteria for obtaining such a variance are ill-defined. Processing so many variance requests will only worsen the already unseasonable delays in the processing of pending applications and will likely lead to years of unnecessary litigation. The fundamental problems in the water right system must be fixed in order to have an effective instream flows policy that results in measurable environmental benefits. (*Leonard Stein, Jackson Family Investments, LLC*)

Response: The Draft Policy's regional criteria provide the applicant an avenue for quicker processing of pending applications while still being protective of fishery resources. They provide the applicant the opportunity to show that operation of their project will not cause impacts to instream resources without the need for conducting expensive site specific fishery studies. Staff is considering revising the Draft Policy's regional criteria to better address diversions in different watersheds. Staff is also considering revisions that provide more detail to the site specific study provisions of the policy to minimize delays in processing pending applications.

Comment 25.0.68: This policy is only going to lead to less stable water rights and more regulation. (*Michael Vellutini, TriValley Vineyard Management*)

Response: Water Code section 1259.4 requires the State Water Board to adopt principles and guidelines for maintaining instream flows for the purposes of water right administration. It also allows the State Water Board to consider the DFG-NMFS 2002 Draft Guidelines in the interim.

Comment 25.0.69: I believe that this bill increases government red tape. (*Michael Vellutini, TriValley Vineyard Management*)

Response: Comment noted.

Comment 25.0.70: The relationship between the SWRCB and other agencies such as Fish and Game and the resolution as to which has final say also needs to be addressed. Compliance with the requirements of one organization seems currently to be contradicted by the requirements of another. (*Edward Wallo, Yorkville Vineyards*)

Response: The State Water Board continues to confer with federal, state, and local governmental agencies with the objective to develop a process that addresses all of the various agencies' requirements.

Comment 25.0.71: Commenters stated that they have cooperated with State Water Board staff in the processing of their water right applications and petitions but have been pending for a number of years. (*Vincent Bartolomei, Bartolomei Brothers Vineyard; Edward T. Bennett; Jack L. Cox, Cox Vineyards; Greg and Karen Crouse; Jonathan Frey, Frey Vineyards; Kenneth L. Kahn, Blue Rock; JJ McCarthy, Cain Vineyard & Winery; Harry Merlo, Lago di Merlo Vineyards and Winery; Dwight Monson; Wendel Nicolaus, Middleridge Vineyard; Annette Rhodes, Rhodes Vineyards; Richard Rhodes, Rhodes Vineyards; Edward Wallo, Yorkville Vineyards; Brian and Helen White; James Young, Robert Young Family Limited Partnership*)

Response: Comment noted.

26.0 Existing Water Rights

Comment 26.0.1: How does the Policy deal with an existing permit with an established minimum bypass flow that conflicts with Policy. Why have these not been enforced in the past? (*Alan Levine, Coastal Action Group*)

Response: Permitted and licensed diversions that are in compliance with their permits and licenses will not be affected by the policy. However, the State Water Board may impose instream flow requirements on existing water rights pursuant to the Board's authority to protect public trust resources and prevent the unreasonable use of water. The State Water Board's exercise of these authorities will involve a hearing if warranted.

As a result of the passage of Senate Bill X7 8 in November 2009 and other bills upon which it was contingent, the State Water Board will be increasing its water rights enforcement staff by 25 positions. The State Water Board intends to use these positions to pursue enforcement of some of the water right violations that it has identified during prior enforcement sweeps in the AB 2121 area and to conduct new enforcement sweeps. In addition, the State Water Board has been working and will continue to work with other agencies to pursue joint enforcement where appropriate. Lastly, the State Water Board is investigating the use of remote sensing technology to assist in its enforcement efforts.

Comment 26.0.2: In Draft Policy Section 2.2, it states "the primary objective of this policy is to ensure that the administration of water rights occurs in a manner that maintains instream flows needed for the protection of fishery resources". This statement is inconsistent with other policy statements that existing water rights and licenses are not to be affected by the flow policy. It is not clear how the policy can be effective without dealing with all diversions (and stream blocking impoundments) - licensed and unlicensed, authorized and unauthorized. Assessment and mitigation accomplished on a watershed basis must consider all water use and related habitat alteration. (*Alan Levine, Coastal Action Group*)

Response: Permitted and licensed diversions that are in compliance with their permits and licenses will not be affected by the policy. However, the State Water Board may impose instream flow requirements on existing water rights pursuant to the Board's authority to protect public trust resources and prevent the unreasonable use of water. The State Water Board's exercise of these authorities will involve a hearing if warranted.

Comment 26.0.3: We live on Mark West Creek and have a small permitted reservoir (Permit #5422) on an adjacent intermittent watercourse. The permit dates from approximately 50 to 60 years ago. Does the proposed policy have any effect on my dam and reservoir? (*Jim*)

Doerksen)

Response: The proposed policy does not affect existing permitted diversions, provided that permittees are in compliance with permit conditions, have no plans to modify their projects in a manner that could result in reduced stream flow, and have no plans to move or add onstream storage.

Comment 26.0.4: The policy is currently written so that it will apply only to new applications for diversions and petitions that would decrease flow in a stream reach. The policy should not be modified to be retroactively applied to existing water rights. *(Paul Helliker, Marin Municipal Water District)*

Response: Comment noted. Permittees and licensees who are in compliance with their permits and licenses will not be affected by the policy.

Comment 26.0.5: Many existing facilities are contributing to an overall cumulative impact on the pattern and range of flows necessary to support beneficial uses in the Policy area, including salmonids. Given the extent and magnitude of existing diversions, the temperature and sediment impairments of many policy area streams, and the precarious position of salmonid populations in the Policy area, Regional Board staff suggests revisiting existing water right permits to ensure they are not contributing to violations of the Basin Plan or Policy. At a minimum, Regional Board staff recommends that the Division include in the Policy a monitoring element designed to track compliance with existing water rights and efficacy of the protections provided in the Policy. *(Catherine Kuhlman, State of California Regional Water Quality Control Board, North Coast Region)*

Response: Existing water right holders, including permittees and licensees who are in compliance with their permits and licenses, will not be affected by the policy. However, the State Water Board may impose instream flow requirements on existing water rights pursuant to the Board's authority to protect public trust resources and prevent the unreasonable use of water. Existing permittees and licensees will continue to monitor in accordance with their existing permit and license terms.

Comment 26.0.6: The Draft Policy suggests opening up existing licenses to make them conform to the new guidelines of the Policy. If the existing licenses are opened up to modifications to require the MBF and MCD as the Policy envisions, the ponds will never collect enough water to fill. Modification of terms may well include forcing a person to tear down the dam of an already licensed pond. This provision allowing for retroactive modifications such as demolishing a dam or adding MBF and MCD requirements should be deleted. *(Rudolph Light)*

Response: Permittees and licensees who are in compliance with their permits and licenses will not be affected by the policy. However, the State Water Board may impose instream flow requirements on existing water rights pursuant to the Board's authority to protect public trust resources and prevent the unreasonable use of water. The MBF and MCD are conservative criteria designed to apply to new appropriations or changes to existing permits or licenses. Whether the MBF and MCD should be applied to existing water rights will require a case-by-case determination. With respect to new projects, the examples presented by staff at the technical workshop on February 6, 2008 indicated that two out of the four projects would receive all, or almost all, of their requested water volume. However, due to concerns raised by commenters regarding applying the regional criteria to small watersheds, staff is reevaluating the flow related criteria for small drainage areas.

Comment 26.0.7: Section 11.1.1 states [quote], "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. Additionally, the State Water Board may impose terms and conditions to implement this policy through a public trust proceeding, an enforcement proceeding or as a result of a complaint investigation." [end of quote] This sounds like it will allow an environmental organization to file a complaint on an already licensed diversion and as a result the Division can impose the new conditions of the Policy on that license. So therefore, does the Division intend to modify conditions of already licensed onstream ponds or diversions to pit ponds to make them retroactively compliant with the Policy even when the licensee has not filed a change petition? If so, would these new conditions require demolition of an existing permitted dam, and therefore require construction of new offstream storage? Also, if demolition were not required for a pond, would a modification require a licensee to construct bypass facilities to meet the new MBF or MCD requirements on existing permitted ponds? (*Rudolph Light*)

Response: Permitted and licensed diversions that are in compliance with their permits and licenses will not be affected by the policy. However, the State Water Board may impose instream flow requirements on existing water rights pursuant to the Board's authority to protect public trust resources and prevent the unreasonable use of water. The regionally protective instream flow criteria contained in the Policy, including the limitations to onstream dams, are conservative criteria designed to apply to new appropriations or changes to existing permits or licenses. Whether the regionally protective instream flow criteria should be applied to existing water rights will require a case-by-case determination. The State Water Board's exercise of these authorities will involve a hearing if warranted.

Comment 26.0.8: I strongly support that existing homes prior to 2008 with established water rights for reasonable domestic use be given priority for water use over new commercial endeavors. This means reasonable use and does not include excess usage for non-essential uses, such as swimming pools and large planted areas, or large lawns. (*Harris Nussbaum*)

Response: Water rights are based on a priority system that is used to determine who can continue taking water when there is not enough water to supply all needs. Higher priority appropriative water rights are first in time. The State Water Board has continuing authority to protect public trust uses and to prevent the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in the state, regardless of basis of right. The State Water Board's exercise of these authorities requires notice and a hearing if warranted.

Comment 26.0.9: In discussions with SWRCB staff, staff has stated that water diversions presently permitted or licensed are not subject to this proposed Policy. The City of Fort Bragg believes that exempting existing licenses and permits from the Policy is the correct approach. However, SWRCB staff has also indicated that while the Policy might not apply directly to existing permits and licenses, the SWRCB has the discretion to apply the Policy on a case-by-case basis to such existing permits and licenses. This creates confusion and uncertainty regarding the scope of the Policy's application. An example of the present confusion regarding the application of the Policy to existing diversions is indicated with the licensing process. Presently, Sections 3.3 and 6.0 of the Policy strongly indicate that the licensing process is not included as being an action covered under the Policy. However, in conversations with SWRCB staff about the Policy, staff has indicated that in fact the Policy might apply to the licensing process for existing permits and that the Policy's application would be determined upon a case-by-case discretionary basis. Obviously, such an ad hoc application of the Policy will cause an

unreasonable amount of uncertainty and confusion among present water users. Substantial monetary investments are being made in reliance on existing permits and licenses. Additionally, critical planning and building decisions have been made, and are being made, based in reliance on these existing permits and licenses. Therefore, it is vital that the Policy make it clear that existing permits and licenses are exempt from the Policy's application and that ad hoc discretionary application of the Policy will be expressly prohibited. (*Linda Ruffing, City of Fort Bragg*)

Response: Section 11.1.1 of the Draft Policy indicates existing permittees and licensees who are in compliance with their permit and license terms would not be affected by the policy. Section 6.0 of the Draft Policy indicates petitioners who have no plans to modify their projects in a manner that could result in reduced stream flow, and have no plans to move or add onstream storage would not be affected by the provisions of the policy.

Comment 26.0.10: The Policy does not cover riparian water rights, which do not require a Permit and, consequently, will likely confound any allocation planning. (*NA, Sierra Club Redwood Chapter*)

Response: Section 4.1 of the Draft Policy describes the Water Availability Analysis that determines whether there is unappropriated water available for appropriation. Section 4.1.2 states that the Water Supply Report portion of the Water Availability Analysis shall consider the demand by senior water right holders, including riparian claims and pre-1914 appropriative rights. Appendix section A.5.0 makes a similar statement for the Instream Flow Analysis part of the Water Availability Analysis.

Comment 26.0.11: The policy appears focused on water right applications submitted after January 1, 2008 and prior/pending applications that the Water Board determines are not consistent with the NMFS-DFG 2002 Draft Guidelines. There is concern as to the policy's effect on existing diversion facilities, particularly as it relates to their ongoing operation, maintenance and periodic relicensing/permitting. The effectiveness of the policy will depend upon how water diverters respond to the relatively restrictive regulations. The Water Board should not underestimate the diverter's economic interests and the ability of a diverter to respond to the proposed regulations in a manner that will lessen the effectiveness of a policy. (*Brad Wagenknecht, Napa County Board of Supervisors*)

Response: Permittees and licensees who are in compliance with their permits and licenses will not be affected by the policy.

Comment 26.0.12: Pre-1914 riparian rights and groundwater use should be monitored and addressed. (*Gordon Bennett, Sierra Club Marin Group; Jay Halcomb et al, Sierra Club Redwood Chapter; Patrick Higgins, Consulting Fisheries Biologist/Sierra Club Redwood Chapter; Thomas Weseloh, California Trout Keeper of the Streams*)

Response: Comment noted. The State Water Board does not have permitting authority over pre-1914 appropriative rights, riparian use or groundwater pumping from aquifers not delineated as subterranean streams. The State Water Board may, however, impose instream flow requirements on all water rights pursuant to the Board's authority to protect public trust resources and prevent the unreasonable use of water. The regionally protective instream flow criteria contained in the Policy are conservative criteria designed to apply to new appropriations or changes to existing permits or licenses. Whether the regionally protective instream flow criteria should be applied to pre-1914, riparian, or groundwater rights will require

a case-by-case determination, subject to notice and hearing requirements.

Comment 26.0.13: We find the Proposed Policy to be unclear with respect to whether the Irish Beach Water District will become subject to the policy or not. The water diversion history of the Irish Beach Water District dates back to 1964. As a subdivision, individual parcels have been sold for more than forty years, but to date we have not reached buildout and have not exhausted our potential water diversion. Our existing and future residences require year round water, and our permits have echoed that situation in that the diversion permits authorized year round diversion. We understand that our situation may become subject to the proposed policy as we seek renewal of our water rights. We have invested significant human and financial resources to secure our water rights during this time, and those rights are now at risk of revocation. We feel it is unfair to subject our water district to this new Instream Flow Policy given our history with permitted water rights. *(Stephen Whitaker, Irish Beach Water District)*

Response: It is difficult to respond to this comment without more information about the water right in question.

Comment 26.0.14: The Draft Instream Flow Policy is a massive document written in complex language that has thwarted its comprehension on even the most basic levels. If existing permits and licenses are not directly subject to this policy, please make that clear at the beginning of the document in order to allay concerns of those communities that have grown around their water supply. If existing permits or licenses are subject to this policy, it would be more clear if the policy specifically addressed New Applications, Renewal of Existing, Permits and Licenses. *(Stephen Whitaker, Irish Beach Water District)*

Response: Comment noted.

27.0 Funding

Comment 27.0.1: While the draft policy seems grounded with a detailed technical framework, it seems unrealistic to assume that the State Water Board will be able to carry out the monitoring, evaluation, and adaptive management necessary to ensure that program goals are met and regulatory compliance is achieved. As you refine this policy further, the State Water Board should identify staffing and funding needs to ensure programs implemented under AB2121 lead to positive and measurable results for both natural resources and our agricultural commission. *(Ashley Boren, Sustainable Conservation; Ellen Drell, The Willits Environmental Center; Patrick Porgans, Patrick Porgans and Associates, Inc./Pacific Coast Federation of Fishermen's Association; Thomas Weseloh, California Trout Keeper of the Streams)*

Response: As a result of the passage of Senate Bill X7 8 in November 2009 and other bills upon which it was contingent, the State Water Board will be increasing its water rights enforcement staff by 25 positions. The State Water Board intends to use these positions to pursue enforcement of some of the water right violations that it has identified during prior enforcement sweeps in the AB 2121 area and to conduct new enforcement sweeps. In addition, the State Water Board has been working and will continue to work with other agencies to pursue joint enforcement where appropriate. Also, the State Water Board is investigating the use of remote sensing technology to assist in its enforcement efforts. Water Code section 5101 requires unpermitted water diverters to file a Statement of Water Diversion and Use unless certain exceptions apply. The Division intends to contact the owners of unpermitted impoundments and inform them that they must file a Statement of Water Diversion and Use or explain why the provisions of Water Code section 5100 et seq. do not apply to the

impoundment. Those who fail to file within the time allowed will be assessed a monetary penalty consistent with amendments to Water Code section 5107 which become effective in February 2010. The State Water Board will review the information contained in submitted Statements of Water Diversion and Use to identify which of the impoundments and diversions are likely to be illegal and to identify the potential impacts of the impoundment. This information will be used to determine enforcement priorities within the policy area.

Comment 27.0.2: The basic mechanism for funding the implementation of the policy, because it is currently available, must be collection of fines, penalties, and settlements. Not only will these enforcement efforts generate appropriate and much needed funding, they will have the immediate positive effect of alerting the public of the determination of the resource agencies to carry out their important work while making the job of agency staff easier and more meaningful. *(Kimberly Burr)*

Response: Like water right fees, administrative civil liability collected by the Board for water right violations is deposited in the Water Rights Fund. (Wat. Code, § 1551, subd. (b).) The collection of administrative civil liability serves to reduce the amount of revenue the Board must collect through water right fees, but it does not increase the total amount of revenue available to the Division of Water Rights to fund all of its programs. The State Water Board's budget is established by the annual Budget Act, and the Board cannot simply collect more revenue, by raising fees or imposing enforcement penalties.

Comment 27.0.3: The City supports self-monitoring and reporting consistent with that described in Section 11.1 of the Draft Policy, and requests SWRCB fully fund a program to enforce compliance with water rights granted under the Policy consistent with Section 11. *(Susan Gorin, City of Santa Rosa)*

Response: See response to 27.0.1.

Comment 27.0.4: The Draft Policy is silent on the need for additional personnel for the Water Board's staffs. If staffing is not to be addressed, this entire Draft Policy is pointless. Current staffing cannot deal with the existing backlog of 276 applications from 2004. Inadequate staffing is the cause of the failure to be aware of the 1771 unpermitted dams. So how will the SWRCB be able to process the applications that come in from those 1771 diverters with problem attitudes and problem dams? We believe the correct response is to take AB2121 at face value and let the legislature know that you have the will to fix the problem and what is needed in financial resources to get the job done. This Draft's position stated above that there will be "limited resources" undermines the entire program and continues an ingrained pattern of curtailing the enforcement of environmental regulation by limiting staff resources. We see this pattern throughout other state and federal agencies. The SWRCB needs more than just additional staff, it also needs new leadership that places the public interest above personal and corporate financial interests of water users and strictly adheres to the rule of law. *(Jay Halcomb, Diane Beck, and Daniel Myers, Sierra Club Redwood Chapter)*

Response: See response to 27.0.1.

Comment 27.0.5: Without adequate funding and staffing, any Policy - no matter how well developed - is likely to fail. The State Water Board should assess and publish an account of the proposed schedule for implementing the first five years of this Policy and the resources required for that task. We believe that water users as well as conservation objectives would benefit from this information. *(Brian Johnson, Trout Unlimited and Richard Roos-Collins,*

Peregrine Chapter of the National Audubon Society)

Response: See response to 27.0.1.

Comment 27.0.6: The Policy must contain specific timelines and mechanisms for enforcement and it must make recommendations that address the source and amount of resources required for enforcement. Without adequate funding proper implementation of any policy guidelines will not occur. In some cases, separating the cost of enforcement from actual policy is justified, however it is not feasible in this case, as without adequate funding no enforcement will occur, rendering the policy moot. *(David Katz and Huey Johnson, Resource Renewal Institute)*

Response: See response to 27.0.1.

Comment 27.0.7: To further emphasize the deficiencies of the enforcement problem, we note that the Draft Policy makes no mention of how the State Board will obtain the staffing required to implement any new policy. According to current Water Board staff, the primary reason the Water Board has not been able to properly carry out the orderly processing of water diversion applications is the lack of adequate staffing. Without addressing the staffing question, the successful implementation of any new policy is doomed from the beginning. *(David Katz and Huey Johnson, Resource Renewal Institute)*

Response: Comment noted.

Comment 27.0.8: It is understood that the state's ability to monitor and enforce the policy is limited by funding. We believe that funding for the monitoring program can be achieved through increased fines for violations, and potentially increased fees for permits. *(Robert Pennington, Community Clean Water Institute)*

Response: See response to 27.0.2.

Comment 27.0.9: Administration for the policy must be based on a reliable funding stream that is separate from that of the State Water Board in general and from the State's General Fund. Policy implementation cannot succeed if those who administer it are required to scabble for dollars on an annual basis. We proposed in our May, 2007 comments that funding be legislatively mandated, as a corollary of AB 2121, and that legislative oversight be made part of the funding package. We still believe this is the best choice. Alternatively, part of the costs of administrating the policy could be borne by the applicants who seek to legalize previously unauthorized diversions. However, we have concern that, leaving aside for a moment culpability for previous violations of the Water Code, as a practical matter the costs of coming into compliance will already be formidable for many parties, and the reliability of a funding stream based solely on user fees will likely fall short. *(Chris Shutes, California Sportfishing Protection Alliance)*

Response: The revenue collected through water right fees are deposited in the Water Rights Fund, and must conform to the revenue levels in the annual Budget Act. (Wat. Code, § 1525, subd. (d)(3).) Accordingly, the revenue levels set in the Budget Act would need to be increased in order to fund additional staffing without reducing the amount of money available to fund existing programs.

Comment 27.0.10: The Draft Policy proposes no funding source for Policy administration, and

no governance structure separate, apparently, from the already underfunded and understaffed Water Rights Division of the State Board. In our May 7, 2007 written comments to the Board on water rights enforcement, and our oral comments presented at the Board workshop on June 17, 2007, we addressed the need for good process above all: adequate and secure funding; cataloguing of existing diversions; timely application processing and permitting; monitoring and reporting; auditing, investigation and enforcement. Administration for the policy must be based on a reliable funding stream that is separate from that of the State Board in general and from the State's General Fund. Policy implementation cannot succeed if those who administer it are required to scabble for dollars on an annual basis. We proposed in our May 2007 comments that funding be legislatively mandated, as a corollary of AB 2121, and that legislative oversight be made part of the funding package. We still believe this is the best choice. Alternatively, part of the costs of administrating the policy could be borne by the applicants who seek to legalize previously unauthorized diversions. However, we have concern that, leaving aside for a moment culpability for previous violations of the Water Code, as a practical matter the costs of coming into compliance will already be formidable for many parties, and the reliability of a funding stream based solely on user fees will likely fall short. (*Chris Shutes, California Sportfishing Protection Alliance*)

Response: The revenue collected through water right fees are deposited in the Water Rights Fund, and must conform to the revenue levels in the annual Budget Act. (Wat. Code, § 1525, subd. (d)(3).) Accordingly, the revenue levels set in the Budget Act would need to be increased in order to fund additional staffing without reducing the amount of money available to fund existing programs.

Comment 27.0.11: An Effectiveness Monitoring Program is outlined in great detail in the Task 3 Report. We support it, provided that watershed and fisheries groups are included in any Monitoring Oversight Committee that may be established; and provided that the timeline is shortened so that review takes place every five years. However, in the frequently asked questions section of the IFP web page, we are informed that, "unfortunately, the State Water Board currently does not have the funding to implement this monitoring program." In addition, there are various other monitoring and reporting requirements that should follow from the Policy that are not provided for, and in some cases, not even described. (*Chris Shutes, California Sportfishing Protection Alliance*)

Response: The State Water Board will consider including watershed and fisheries groups in Monitoring Oversight Committees which may become part of any Effectiveness Monitoring Program that may be implemented. Unfortunately, due to uncertainties in State funding as a result of the State budget crisis, the State Water Board cannot guarantee that future funding will be available for the Effectiveness Monitoring Program.

Staff notes the commenter's assertion that "there are various other monitoring and reporting requirements that should follow from the Policy that are not provided for, and in some cases, not even described". The policy describes the monitoring and reporting requirements for bypass flows. Permit terms for monitoring and reporting other parameters are already being implemented in water right permits.

Comment 27.0.12: USGS streamflow gauges and rainfall gauges in the geographic area subject to this policy are crucial instruments with which to monitor streamflow conditions. However, the number of streamflow monitoring stations seems to diminish year to year. How are we to keep pace with the realities of diminishing streamflows if the instruments that measure streamflow continue to be slashed due to funding problems? Please use your

political will and financial resources to fund continuation of these essential gauges. (*Stephen Whitaker, Irish Beach Water District*)

Response: The State Water Board does not have the resources to fund continuation of USGS gauges. However, staff understands that new gauges on the Russian River and the North Fork of the Gualala River have been recently activated. In addition, the State Water Board has installed temporary flow monitoring sites in cooperation with NMFS and DFG.

28.0 Fully Appropriated Streams

Comment 28.0.1: The season of diversion restrictions in the Draft Policy have the effect of making unavailable for appropriation all streamflow in the five-county North Coast area for over eight months of every year. This consequence is effectively a declaration by the Water Board that every stream in the affected area is fully appropriated, but achieves this result without the procedural due process mandated by the Legislature. Water Code section 1205 provides the requirements for such a declaration: "A declaration that a stream system is fully appropriated shall contain a finding that the supply of water in the stream system is being fully applied to beneficial uses." The Draft Policy contains no such finding, nor could it, because the finding can only be made "after notice and a hearing." (Water Code section 1205.) Further, the notice specified for the required hearing is both personal and broad: "the notice shall be mailed to all persons known to the board who own land that appears to be riparian to the stream system, who divert water from the stream system, or who have made written request to the board for special notice of hearing pursuant to this article." (Water Code section 1207.) The underlying principle illustrated by these statutes is the Legislature's recognition that water users and land owners who may desire to divert water to use from a stream have a vital interest in the availability of water - an interest that must be protected by due process. Because of that interest, an action to remove water resources from potential future use can be taken by the Water Board only after determining, after hearing, that all the water in the stream is being put to reasonable beneficial use. Streams cannot be afforded "fully appropriated" status by mere fiat, as the Draft Policy attempts to do. (*Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: Contrary to this comment, the season of diversion restriction in the draft Policy does not amount to a declaration, pursuant to Water Code sections 1205 through 1207, that water is unavailable for appropriation outside of the season. The season of diversion restriction, which limits new diversions to the October 1 through March 31 season, is one of five regionally protective instream flow criteria designed to ensure that water right applications, registrations, and petitions will not adversely affect fishery resources. The season of diversion restriction is based on the assumption that diversions outside the season may adversely affect fishery resources, but the restriction does not amount to a determination that water is unavailable for appropriation outside the season in every case, and the draft Policy does not contain an absolute prohibition against diversions outside the season. Instead, the draft Policy would allow an applicant to appropriate water outside of the season if the applicant can demonstrate, based on a site specific study, that water is available for appropriation, taking into consideration the instream flows needed to protect fish and their habitat. Similarly, the draft Policy allows for a watershed approach for determining water availability and the environmental impacts of multiple diversions, as an alternative to using the regionally protective criteria set forth in the Policy.

Comment 28.0.2: DFG recommends that any watershed where diversions currently equal or

exceed the policy's maximum cumulative diversion criteria be designated a Fully Appropriated Stream (FAS) and that no additional diversions be permitted. (*Donald Koch, State of California Department of Fish and Game*)

Response: Water Code sections 1205 through 1207 set forth the procedures for declaring a stream to be fully appropriated. A fully appropriated stream declaration must be based on a determination in a decision on a water right application that no water remains available for appropriation. (Wat. Code, § 1205, subd. (b).) Accordingly, the Policy cannot declare streams within a watershed to be fully appropriated if it is determined that diversions in a watershed exceed the maximum cumulative diversion criteria. Any declaration that a stream within the Policy area is fully appropriated would have to be based on a determination in a future decision on a water right application that no water remains available for appropriation from the stream. In addition, the fact that diversions from streams within a given watershed exceed the maximum cumulative diversion criteria does not necessarily mean that water is unavailable for appropriation from the streams. The State Water Board might conclude, based on site specific studies, that water is available for appropriation, notwithstanding the fact that diversions exceed the maximum cumulative diversion criteria.

Comment 28.0.3: DFG recommends that Policy Section 4.1.2 (Water Supply Report) specifically state that if the Water Supply Report finds that there is insufficient unappropriated water available to supply a new project, the subject stream will be included on the State Water Board's Fully Appropriated Stream (FAS) list. (*Donald Koch, State of California Department of Fish and Game*)

Response: Water Code sections 1205 through 1207 set forth the procedures for declaring a stream to be fully appropriated. A fully appropriated stream declaration must be based on a determination in a decision on a water right application that no water remains available for appropriation. (Wat. Code, § 1205, subd. (b).) A declaration that a stream is fully appropriated cannot be based on a finding in a water supply report.

Comment 28.0.4: DFG recommends that Policy Section A.5.0 (Instream Flow Analysis) include language stating that streams with insufficient water to allow permitting new projects as a result of implementation of the regional criteria in the Instream Flow Analysis should be placed on the Fully Appropriated Stream (FAS) list. (*Donald Koch, State of California Department of Fish and Game*)

Response: Staff will consider revising Appendix 1 of the Draft Policy to indicate that streams could be considered for placement on the Fully Appropriated Stream list if the State Water Board determines in a decision on an application that no water remains available for appropriation.

Comment 28.0.5: The Middle Russian River Hydrologic Area should be declared by the State as fully appropriated unless it can be demonstrated that additional surface diversions can occur without affecting habitat and wildlife, instream flows, recharge of existing wells, and existing users. (*NA, Maacama Watershed Alliance*)

Response: Water Code sections 1205 through 1207 set forth the procedures for declaring a stream to be fully appropriated. A fully appropriated stream declaration must be based on a determination in a decision on a water right application that no water remains available for appropriation. (Wat. Code, § 1205, subd. (b).) Any declaration that all or a part of the Russian River is fully appropriated would have to be based on a determination in a future decision on a

water right application that no water remains available for appropriation from the river.

Comment 28.0.6: The Policy should include a plan for adding streams to the "Declaration of Fully Appropriated Streams" for all streams that are already over allocated. *(Thomas Weseloh, California Trout Keeper of the Streams)*

Response: See response to 28.0.4.

29.0 Incentives and Conservation

Comment 29.0.1: Under current standard permit terms, permittees may be required to implement a water conservation plan. (23 CCR Section 780) However, the conservation plan is not mandatory and often is not required. It is imperative that the Policy mandate conservation measures. Restrictions on bypass flows and diversion amounts are appropriate, but those alone will not maintain adequate stream flow levels. Demand-side restrictions are crucial, particularly during seasons when flows are insufficient to provide adequate water supplies while maintaining anadromous fish habitat. *(Joshua Basofin, Defenders of Wildlife; Don McEnhill, Russian Riverkeeper; and Linda Sheehan, California Coastkeeper Alliance)*

Response: Comment noted. The State Water Board has adopted a Water Recycling Policy which was developed to increase the use of recycled water. The State Water Board plans to develop additional policies to encourage the use of stormwater, encourage water conservation, encourage the conjunctive use of surface and groundwater, and improve the use of local water supplies.

Comment 29.0.2: In implementing conservation measures, attention should be paid to the net impact of the measures on flows overall. During the summer of 2007, as flows on the Russian River dipped to extremely low levels, the SWRCB issued Order WR 2007-0022. This order required Sonoma County Water Agency ("SCWA") to implement conservation measures to reduce diversion amounts 15 percent from July to October. Despite this stringent mandate, actual reductions in pumping did not occur. The SCWA and its contractors claimed to have achieved a 21% reduction in pumping from the Russian River. However, the demand reduction was actually less than half of that due to groundwater pumping in lieu of direct diversions. The net effect of that action was the dewatering of many smaller tributaries along the Russian River, including Foss Creek. *(Joshua Basofin, Defenders of Wildlife; Don McEnhill, Russian Riverkeeper; and Linda Sheehan, California Coastkeeper Alliance)*

Response: Comment noted.

Comment 29.0.3: Water users in the municipal, industrial and agricultural sectors can realize tremendous and cost-effective net reductions in water use by implementing new technologies such as high-efficiency drip irrigation. Additionally, modest changes to landscaping can help save significant net amounts of water. Conservation plans are integral to the maintenance of instream flows and should be included and mandated in the Policy. *(Joshua Basofin, Defenders of Wildlife; Don McEnhill, Russian Riverkeeper; and Linda Sheehan, California Coastkeeper Alliance)*

Response: The State Water Board includes standard terms in water right permits that are consistent with Title 23 of the California Code of Regulations, section 780, which states the permittee may be required to implement a water conservation plan. In addition, the State Water Board has adopted a Water Recycling Policy which may increase the use of recycled

water. The State Water Board plans to develop additional policies to encourage the use of stormwater, encourage water conservation, encourage the conjunctive use of surface and groundwater, and improve the use of local water supplies

Comment 29.0.4: The Policy does not envision that a conservation-minded entity might simply request a shift in the diversion season, and not an increased allocation of water. A shift in the diversion season from summer to winter could benefit both farmers and fish if peak winter flows are captured and stored in off-stream ponds for use as irrigation water during the hot summer months. Farmers would benefit from knowing how much irrigation water they have available before the start of the growing season, and fish would benefit from decreases in summer diversions and corresponding increases in stream flow. As you refine the policy further, please draw a distinction between at least two sets of water right applicants - those requesting a diversion that would represent a net increase in diversions on a basin-wide scale, and those requesting a shift in season of diversion, but whose diversions represent a neutral, or even reduced, level of withdrawal from a basin-wide perspective. The latter scenario could actually represent a net benefit, and this should be acknowledged and rewarded with regulatory and economic incentives. e.g., expedited permitting by regulatory agencies, and transfers of water rights amongst water users in a given basin. (*Ashley Boren, Sustainable Conservation*)

Response: Comment noted. Staff is considering developing policy provisions describing incentives for projects that benefit fish and wildlife.

Comment 29.0.5: The State Water Board needs to develop water conservation policies and help implement the practices necessary to put effective conservation measures in place. (*Richard Dawson; Chris Malan, Earth Defense for the Environment Now, Living Rivers Council*)

Response: See response to 29.0.3.

Comment 29.0.6: Suggests tax incentives to encourage reservoirs that would increase underground flow and provide fire fighting ponds. (*Michael Dunn*)

Response: Comment noted.

Comment 29.0.7: Provide incentives for water conservation so that water policy is a reward rather than a punishment (*Ellen Faulkner, Acorn Growers Association*)

Response: See response to 29.0.3.

Comment 29.0.8: Each water district must be responsible for local reclamation and be made to import desalination water. (*Mitch Fleitz*)

Response: Comment noted.

Comment 29.0.9: Allow the scales of justice to favor the natural resource and allow growers to be the spark for more creative water solutions in the San Joaquin Delta and cities to the south. (*Kevin Floyd*)

Response: The San Joaquin Delta is not within the area affected by the North Coast Instream Flow Policy.

Comment 29.0.10: Need creative solutions to water usage in the San Joaquin valley, i.e. desalination. *(Kevin Floyd)*

Response: See response to 29.0.9.

Comment 29.0.11: The same people that you are trying to regulate are your best bets for proper maintenance of said habitat. It is their interest to keep things balanced. ... Work with these farmers instead of against them. *(Sara and Gary Giannandrea, Three G's Hay and Grain)*

Response: Comment noted.

Comment 29.0.12: Those seeking appropriate rights to benefit wildlife should at least be given priority consideration of their applications. *(Eric Goldsmith, Sanctuary Forest)*

Response: See response to 29.0.4.

Comment 29.0.13: We in Agriculture are working hard at conserving water without impacting our food supply. We must maintain accessible water and preserve our rights to use that water. *(Donald Gordon, Gordon Family Ranch)*

Response: Comment noted.

Comment 29.0.14: The City requests that the Draft Policy be modified to include the opportunity for applicants for rights under the Policy to enhance fish habitat by contributing to the enhancement of diversions under existing rights and to contribute to other instream enhancement projects. *(Susan Gorin, City of Santa Rosa)*

Response: See response to 29.0.4.

Comment 29.0.15: The City requests that the Draft Policy be modified so that projects with a net benefit to instream flows and small projects above limits of anadromy are processed in an expedited manner. The City also requests that the State Board develop a methodology to determine if a project provides a net benefit. *(Susan Gorin, City of Santa Rosa)*

Response: See response to 29.0.4.

Comment 29.0.16: Engineers and scientists who study irrigation tell us that efficiency can be improved from 10% to 70%, but the draft policy does not create an incentive for irrigators to make needed changes and improve efficiency. *(Jay Halcomb et al, Sierra Club Redwood Chapter)*

Response: See response to 29.0.3.

Comment 29.0.17: Most households already use extensive conservation techniques. Rain catchment is the most eco friendly and cleanest water but requires an expensive system to collect and store water. Many will resort to pirating the water, and it is nearly impossible to catch the offenders. Many will rely on water deliveries. During the driest of months, water trucks are the most reliable way to ensure a water supply. These trucks work overtime sucking water from the Mattole and Eel watersheds. A 3,000 gallons a truck load is sometimes transported over 30 miles to its destination. This policy should encourage on site storage and

rain catchment as the best and most efficient approach to solving the water shortage. *(Mark Hilovsky and Rod Silva)*

Response: See response to 29.0.3.

Comment 29.0.18: The Policy should provide incentives for stewardship actions, including specifically incentives to switch from dry season diversions to properly conditioned storage of rainy season water. *(Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society)*

Response: See response to 29.0.4.

Comment 29.0.19: Create a new Section 2.4 called "Summer Stream Flow Enhancement" in the Policy for measures promoting proactive stewardship activities, including summer stream flow enhancement projects. State that it is the policy of the State Water Board to promote proactive stewardship activities by existing water users to improve stream flows for the conservation of salmon, steelhead and other natural resources. *(Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society)*

Response: See response to 29.0.4.

Comment 29.0.20: Create a new Section 4.1.9 in the Policy called "Variances Justified by the Inclusion of Stewardship Actions". Suggested wording is as follows: "It is the policy of the State Water Board to encourage water right holders to remove obsolete dams and other fish barriers, to impose bypass flow requirements or seasons of diversion on existing water rights, and to engage in other conservation actions. The following stream flow-related actions, when added as mitigation to a project subject to this policy may justify a variance from the regionally protective criteria in Section 2.3 of the Policy: (1) addition of a season of diversion to an existing senior water right; (2) addition of a bypass flow requirement to an existing senior water right; (3) addition of a maximum rate of diversion limitation to an existing senior water right; (4) removal of an artificial barrier to the migration of anadromous fish; (5) removal of an onstream reservoir; or (6) relocation of a point of diversion to reduce impacts to aquatic resources. A variance justified by reliance on these activities may be granted if the Chief of the Division of Water Rights finds after consultation with and concurrence by the Executive Officer of the Regional Board and Chief of the Water Branch, Department of Fish and Game that the project, including these actions, provides a net benefit to instream flows and serves the public interest. In making the net benefit finding, the Chief of the Division of Water Rights is also encouraged to consult with the National Marine Fisheries Service and other resource agencies that may have participated in the development of the project. The Chief may rely on written statements of support of or opposition to the project by those agencies and on other evidence in the record." *(Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society)*

Response: See response to 29.0.4.

Comment 29.0.21: The State Water Board should evaluate the potential to establish a monetary mitigation fund that would support barrier removal, construction of Summer Flow Enhancement Projects, and other stream flow related actions, and include the potential for applicants to pay into such a fund as an alternative to undertaking policy-specified stewardship actions to support variances from the regionally protective criteria. *(Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society)*

Response: Comment noted. It would be difficult to ensure that the impacts of a particular project are adequately mitigated by offsite mitigation projects paid for by a mitigation fund.

Comment 29.0.22: Trout Unlimited is also pursuing stewardship partnerships directly with agricultural water users. On March 19, 2008, we launched "Water & Wine," a cooperative program that works with grape growers and wine makers in Northern California Wine Country to enhance instream flows and salmon habitat through (a) coordination of water management and diversions, (b) physical projects (e.g., switching from summer diversions to off-stream storage and use of rainy season water), and (c) habitat restoration projects. More than a dozen water users have indicated their interest in participating in the program. (See Exhibits 4, 5.) We have been working actively with these water users, the Sonoma County Salmonid Coalition, resource agencies, the University of California, and other stakeholders to develop Watershed Approach pilots within Sonoma County based on several criteria: the feasibility of salmonid restoration, the degree of stream and estuary habitat impairment by diminishing flows, and the extent of landowner interest in collaboration. The committee is assembling existing data on streams to select and begin analysis for pilot projects and expects to choose specific streams for pilot projects in the near future. Just last week, the State Coastal Conservancy authorized up to \$600,000 for Trout Unlimited to pursue what we call the Coastal Streamflow Stewardship Project to implement 5-8 "watershed approach" pilot projects in coastal areas including but not limited to the Policy area. Both the SWRCB and DFG supported that grant proposal and have been working with TU and our partners to identify pilot streams. *(Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society)*

Response: Comment noted.

Comment 29.0.23: If the State Water Board amends the Policy to accept policy-specified stewardship actions to support variances from the regionally protective criteria, the State Water Board should make conforming amendments to other sections of the Draft Policy and Appendices. For example, Section A.5.13 would be amended as follows: ". . . There are numerous ways in which the applicant could modify the project. Examples of project modifications include: reductions in the amount of water collected to storage, reductions in the rate of direct diversion, placing a cap on the maximum rate of diversion, or raising the minimum bypass flow. The applicant may also be able to make modifications to other, senior water rights in order to ensure that the new project, in combination with senior diversions, complies with the regional criteria, or to justify a variance by removing a barrier to fish migration or implementing other activities (see Section 4.1.9). . . ." *(Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society)*

Response: See response to 29.0.4.

Comment 29.0.24: TU/PAS and WB/ESH share the concern that the Draft Policy and current water right system do not encourage water users to proactively manage natural resources. The watershed-based policy should encourage stewardship of natural resources. In addition to providing guidelines and principles for processing new water right applications, it should encourage beneficial stewardship activities for existing diversions. *(Brian Johnson, Trout Unlimited; Peter Kiel, Ellison, Schneider & Harris LLP; Richard Roos-Collins, Peregrine Chapter of the National Audubon Society; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers)*

Response: See response to 29.0.4.

Comment 29.0.25: The SWRCB should grant priority processing for projects that enhance streamflows by reducing existing diversions during the dry season and benefit summer rearing habitat. Priority processing should also be given to summer flow enhancement projects pursued in combination with requests for new water rights where new water rights are needed to change the timing or magnitude of existing diversions and the project as a whole is likely to provide a net benefit to instream flows. The SWRCB should approve these projects where the project as a whole provides a net benefit to instream flows. *(Brian Johnson, Trout Unlimited; Peter Kiel, Ellison, Schneider & Harris LLP; Richard Roos-Collins, Peregrine Chapter of the National Audubon Society; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers)*

Response: See response to 29.0.4.

Comment 29.0.26: The policy should also encourage actions such as removal of obsolete dams and other fish barriers, and to improve management of other senior diversions. One option would be to obtain the agreement of an existing senior water right holder to meet a bypass flow requirement or limit maximum rate of diversion. Another option would be removal of an artificial barrier to migration, or to arrange for removal of an onstream reservoir or for the relocation of a point of diversion to reduce impacts to aquatic resources. *(Brian Johnson, Trout Unlimited; Peter Kiel, Ellison, Schneider & Harris LLP; Richard Roos-Collins, Peregrine Chapter of the National Audubon Society; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers)*

Response: See response to 29.0.4.

Comment 29.0.27: Water Right applicants should receive credit for including other ideas that enhance flows for fish. (e.g. modification of barriers to fish, modifying usage of other water rights). *(Brian Johnson, Trout Unlimited; Peter Kiel, Ellison, Schneider & Harris LLP; Richard Roos-Collins, Peregrine Chapter of the National Audubon Society; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers)*

Response: See response to 29.0.4.

Comment 29.0.28: Incentives for stewardship could include recommendations to encourage beneficial changes to existing diversions as well as recommendations for processing new permits. *(Brian Johnson, Trout Unlimited; Peter Kiel, Ellison, Schneider & Harris LLP; Richard Roos-Collins, Peregrine Chapter of the National Audubon Society; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers)*

Response: See response to 29.0.4.

Comment 29.0.29: Incentives for stewardship could promote shift of time and manner of diversion if a net benefit to fish is a result (e.g., off-stream ponds as an alternative to direct diversion). *(Brian Johnson, Trout Unlimited; Peter Kiel, Ellison, Schneider & Harris LLP; Richard Roos-Collins, Peregrine Chapter of the National Audubon Society; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers)*

Response: See response to 29.0.4.

Comment 29.0.30: Incentives could provide water right applicants credit for including other flow enhancement (removal barriers, changes to existing water rights) with new project (*Brian Johnson, Trout Unlimited; Peter Kiel, Ellison, Schneider & Harris LLP; Richard Roos-Collins, Peregrine Chapter of the National Audubon Society; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers*)

Response: See response to 29.0.4.

Comment 29.0.31: DFG encourages the State Water Board to provide adequate incentives and flexibility to allow movement of proposed onstream dams to alternative offstream locations. This will avoid the need to provide mitigation for the impacts of onstream dams into perpetuity. (*Donald Koch, State of California Department of Fish and Game*)

Response: See response to 29.0.4.

Comment 29.0.32: The State Water Board should take this opportunity to demonstrate its leadership in climate change, groundwater recharge, water recycling, and water conservation by redrafting the Policy to encourage reductions in water use and encouraging increases in water recycling, stormwater capture, and groundwater recharge. (*Catherine Kuhlman, State of California Regional Water Quality Control Board, North Coast Region*)

Response: See response to 29.0.3.

Comment 29.0.33: The Commenter described a major riparian restoration project on the West Fork of the Russian River. He states the project was successful in terms of restoring habitat and fish populations. DFG staff participated in the design and permitting of this project, and was helpful in many ways. The Commenter says the Water Board, DFG, and NMFS must find ways to work with landowners to achieve successes similar to this one. (*Rudolph Light*)

Response: Comment noted.

Comment 29.0.34: 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. (*Rudolph Light*)

Response: Comment noted.

Comment 29.0.35: Educational public outreach on the benefits of resource protection should be expanded to encourage more public involvement and support, and require a more diverse participation from all stakeholders in the watershed. (*NA, Maacama Watershed Alliance*)

Response: Comment noted.

Comment 29.0.36: Not discussed in your proposal are "offstream" composting toilets as part of a policy solution. The flush toilet is ultimately the root cause of much diversion of groundwater and introduction of pollutants. Urban flush toilets are associated with miles and miles of sewer pipes to offsite treatment plants. These pipes are traditionally placed below ground. Pipes leak. Why not positive incentives devised by the Water Resources Control Board to install waterless toilets? (*Ann Maurice, Ad Hoc Committee for Clean Water*)

Response: See response to 29.0.3.

Comment 29.0.37: Our land use practices involve massive water diversion engineering schemes to satisfy our need for water. Urban dwellers are notorious for not knowing where their water comes from or where it goes after they use it. As far as most people know, water comes "from a faucet" and goes "down the drain". Rural folk and farmers are more aware of a critical need for water, but what positive incentives are there to decrease diversions, ponds, and limit the amount of water used for agriculture? What incentives can you come up with regarding choice of crops or size of herd? An essential part of your policy proposal should be incentives for the public to grow drought tolerant landscaping, Mediterranean crops, plant rock gardens and remove lawns. There are myriad municipal programs that can be used as models for State policy, for example, the innovative "Cash for Grass" incentive for lawn-removal in Novato, recently duplicated in Santa Rosa and Valley of the Moon in Sonoma County. Also, the DMV instituted an incentive to purchase hybrid vehicles by allowing single driver hybrids access to the diamond lane with purchase of a "sticker" for pollution reducing vehicles. Can you come up with similar innovative incentive policies aimed at maintaining instream flows, rather than the usual punishment by fine for non-compliance? *(Ann Maurice, Ad Hoc Committee for Clean Water)*

Response: Comment noted.

Comment 29.0.38: An essential part of your policy must be to motivate and inspire collaboration. What incentives do you offer? More water quantity and quality discussions, seminars, workshops need to be promoted. *(Ann Maurice, Ad Hoc Committee for Clean Water)*

Response: Comment noted.

Comment 29.0.39: Restore the streams and we restore an overwhelmingly abundant food supply. *(Ann Maurice, Ad Hoc Committee for Clean Water)*

Response: Comment noted.

Comment 29.0.40: We draw your attention to a successful effort to get cooperation from streamside agricultural operations to address the problem of the cumulative effects of withdrawals and season of withdrawals. The Pine Gulch Creek Farms and the National Park Service working with the county and environmental groups have forged an agreement in which Pine Gulch Farms voluntarily agreed to forego their summer riparian water rights in exchange for a certain amount of water diversion of water into holding ponds. We urge the Water Board to develop innovative incentive programs for streamside property owners to help achieve constant minimum flows throughout the year. Having enough water in the streams when it is needed for the fish is one goal of the policy. Withdrawing water at night, when water flow is great, at a slow rate, has stopped intermittent dewatering of an Eskew Creek property owner. We recommend to the Water Board the development of education and alternative tools for land owners and very importantly, local planning and permitting agencies. *(Roger Roberts, Marin Conservation League)*

Response: Comment noted.

Comment 29.0.41: Fifty years ago, the state had a particularly effective, but very low-tech program of Steelhead enhancement. Teenagers were enlisted to rescue fry trapped in drying creeks, and move them to the river or to headwaters where water for survival was assured.

One who participated, Mr. Kieffer from Ukiah, recalls rescuing fifty thousand fry in a single summer. These were wild trout; not hatchery fish. The cost was probably minimum wage for a few people, for a month or two. Can today's hatcheries boast of such success? Resurrecting this program, perhaps with the addition of local rearing ponds, could well be the most effective means of enhancing Steelhead production in the area. *(Alec Rorabaugh)*

Response: Comment noted.

Comment 29.0.42: Typically, the failure to implement land stewardship programs is not through a lack of interest, but rather a lack of money. Based on our experience with Proposition 50 and other grant programs, we believe that significant progress toward the protection and enhancement of fisheries resources could be achieved through the implementation of a meaningful financial assistance program. Accordingly, we recommend that the State Water Resources Control Board develop and implement financial assistance programs to assist landowners and other entities with the development of off-stream storage. *(Roland Sanford, Mendocino County Water Agency)*

Response: During the most recent State Water Board frost workshop, winegrape growers discussed an Agricultural Water Enhancement Program, which is administered by the U.S. Department of Agriculture. This program provides financial and technical assistance to farmers and ranchers to improve water conditions on their agricultural lands. The winegrape growers received a disbursement of grant money through this program for purposes of constructing offstream storage reservoirs in the Russian River watershed.

Comment 29.0.43: A truly effective instream flows policy should also, at a minimum... provide positive incentives for resource stewardship by, for example, encouraging winter off-stream storage projects to reduce water diversions during the dry season, by expediting processing of such applications and by exempting from the bypass and mitigation requirements of the policy modifications to any time of diversion restrictions in existing licenses and permits where such a modifications would result in a shift in diversion from drier to wetter periods of the season. *(Leonard Stein, Jackson Family Investments, LLC)*

Response: See response to 29.0.4.

Comment 29.0.44: Policy should provide incentives for landowners to go above and beyond to improve stream flows during the critical dry season. *(TU Form Letter)*

Response: See response to 29.0.4.

Comment 29.0.45: I suggest expanding the program. This effort should be part of a larger, integrated campaign to restore our river systems. Use your leverage to get whatever is needed to help restore the salmon population. For instance if a pond owner is willing to restore some riparian forest in place of removing the pond, barter with him to see what's equal for the fishes good. If that means the pond owner needs to put money into a fund for purchasing restorable riparian property elsewhere on the river, then set up such a fund. *(Chuck Williams)*

Response: Comment noted.

Comment 29.0.46: Strong incentives should be provided in the adopted policy to promote changes to existing diversions that would enhance conditions for fish and aquatic wildlife species. One means of accomplishing this would be through a streamlined process for

petitions that enhance flow and/or habitat conditions. Regional Water Board staff are aware of several landowners in the Napa River watershed who would be willing to modify existing water uses and rights in ways that would substantially enhance conditions for fish and wildlife. Typically however, the cost and/or uncertainty associated with the petition and/or permit processes has precluded landowners from initiating these actions. *(Bruce Wolfe, State of California Regional Water Quality Control Board, San Francisco Bay Region)*

Response: See response to 29.0.4.

30.0 Groundwater

Comment 30.0.1: While groundwater may be a solution, it may have, in the long run, as much of an impact to stream flow as direct diversion. *(Charles Acker)*

Response: Comment noted. The SED points out that the Policy could give rise to increases in groundwater extraction as affected parties take actions in response to the Policy requirements. Section 6.2 of SED, in particular Table 6-3, describes the possible environmental impacts resulting from increased groundwater extraction, including reduction in stream flow. Certain actions that affected parties take to increase groundwater extraction would be subject to CEQA review at the "project-level" and the lead agency would be required to adopt mitigation measures to reduce significant project impacts, including cumulative impacts such as reduction in stream flow, to a level of less than significant.

Comment 30.0.2: Ground and surface water are connected to each other and as a result, pumping ground water can adversely affect river flows. Therefore, the SWRCB should conduct studies of subterranean streams to determine the areas where groundwater extraction may affect surface flows. The SWRCB should publish these analyses and related maps for use by groundwater users, permittees, decision makers and the public. *(Joshua Basofin, Defenders of Wildlife; Don McEnhill, Russian Riverkeeper; and Linda Sheehan, California Coastkeeper Alliance)*

Response: The State Water Board has completed mapping of subterranean streams and areas where groundwater pumping could potentially cause streamflow depletion in the Policy area. This mapping information is available from the State Water Board in a compilation of technical memoranda and maps entitled "Delineated Subterranean Streams and Potential Streamflow Depletion Areas," dated November 14, 2008 by Stetson Engineers Inc. Some areas currently mapped as Potential Streamflow Depletion Areas in the compilation could be reclassified as subterranean streams if adequate new information and site specific studies become available in the future.

Comment 30.0.3: A shortcoming of the Draft Policy is that there is insufficient consideration of groundwater extractions, despite known linkage to diminished surface flow and carrying for Pacific salmon species regionally. *(Patrick Higgins, Consulting Fisheries Biologist/Sierra Club Redwood Chapter)*

Response: The Policy applies to water diversions from all streams and tributaries in the Policy area that are subject to the State Water Board's water right permitting authority, including extractions from subterranean streams. Extractions from percolating groundwater are not subject to the State Water Board's water right permitting authority. However, the SED points out that the Policy could give rise to increases in groundwater extraction as affected parties take actions in response to the Policy requirements. Section 6.2 of SED, in particular

Table 6-3, describes the possible environmental impacts resulting from increased groundwater extraction, including reduction in stream flow. Certain actions that affected parties take to increase groundwater extraction would be subject to CEQA review at the "project-level" and the lead agency would be required to adopt mitigation measures to reduce significant project impacts, including cumulative impacts such as reduction in stream flow, to a level of less than significant.

Comment 30.0.4: The Department of Water Resources needs to work with USGS on collection of ground water data and more actively manage the resource and data needs to be made public. (*Patrick Higgins, Consulting Fisheries Biologist/Sierra Club Redwood Chapter*)

Response: The program may develop data through monitoring of stream hydrology and coordinate with and utilize and incorporate data from other ongoing monitoring programs carried out by other agencies, including the Department of Water Resources and the USGS. These agencies, however, are not directly responsible for active management of groundwater resources in the Policy area.

Comment 30.0.5: The State Water Board should complete and publish maps delineating the boundaries of subterranean streams flowing through known and definite channels within the policy area. Work with diverters within those boundaries to bring them into the water right system. Publish a schedule for doing so. (*Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society*)

Response: The State Water Board has completed mapping of subterranean streams and areas where groundwater pumping could potentially cause streamflow depletion in the Policy area. This mapping information is available from the State Water Board in a compilation of technical memoranda and maps entitled "Delineated Subterranean Streams and Potential Streamflow Depletion Areas," dated November 14, 2008 by Stetson Engineers Inc. Some areas currently mapped as Potential Streamflow Depletion Areas in the compilation could be reclassified as subterranean streams if adequate new information and site specific studies become available in the future. To the extent that someone files a complaint regarding a diversion from a subterranean stream, it could result in a finding by the State Water Board.

Comment 30.0.6: Water right applications must take into consideration the impacts that the diversion will have on riparian aquifer groundwater and groundwater. Riparian groundwater has gaining and losing reaches. Water diversions impact riparian aquifer groundwater thereby causing increased losing reaches or dry creek beds. The Policy fails to adequately determine the status of groundwater/riparian water. (*Chris Malan, Earth Defense for the Environment Now, Living Rivers Council*)

Response: The Policy requires applicants to prepare a water availability analysis which quantifies the amount of unappropriated water remaining instream after senior rights are accounted for and evaluates the effects of the proposed project, in combination with existing diverters, on instream flows needed to protect the fishery resource. These effects must be assessed at a minimum of two Points of Interest (POIs) as determined by the State Water Board in consultation with the Department of Fish and Game. In determining the POIs, the State Water Board will consider specific geology and site conditions present within the watershed and other pertinent information to ensure that the effects on fishery resources are adequately assessed. By maintaining instream (surface) flows needed to protect the fishery resource, the Policy also will also help maintain riparian groundwater (subsurface) supplies.

The State Water Board has completed mapping of subterranean streams and areas where groundwater pumping could potentially cause streamflow depletion in the Policy area. This mapping information is available from the State Water Board in a compilation of technical memoranda and maps entitled "Delineated Subterranean Streams and Potential Streamflow Depletion Areas," dated November 14, 2008 by Stetson Engineers Inc. Some areas currently mapped as Potential Streamflow Depletion Areas in the compilation could be reclassified as subterranean streams if adequate new information and site specific studies become available in the future.

Comment 30.0.7: To determine which activities impact streamflows for the fish, the relations between groundwater and surface water for any watershed must rely on scientific studies and not solely on legal doctrines. (*Jane Nielson, Sonoma County Water Coalition*)

Response: The Policy applies to pending and new water diversions within the Policy area that are subject to the State Water Board's water right permitting authority, including extractions from subterranean streams. Extractions from percolating groundwater are not subject to the State Water Board's water right permitting authority. The SED points out that the Policy could give rise to increases in groundwater extraction as affected parties take actions in response to the Policy requirements. Section 6.2 of SED, in particular Table 6-3, describes the possible environmental impacts resulting from increased groundwater extraction, including reduction in stream flow. Certain actions that affected parties take to increase groundwater extraction would be subject to CEQA review at the "project-level" and the lead agency would be required to adopt mitigation measures to reduce significant project impacts, including cumulative impacts such as reduction in stream flow, to a level of less than significant. It will be the responsibility of the lead agency to ensure that the any techniques used in the CEQA review to evaluate the connection between the proposed extraction project and streamflow is scientifically sound and is in accordance with standard engineering practice. Furthermore, the State Water Board may exercise its authority under the doctrines of reasonable use and the public trust to address diversions of surface water or groundwater that reduce instream flows in the Policy Area and thus adversely affect fish, wildlife, or other instream beneficial uses. The State Water Board has completed mapping of subterranean streams and areas where groundwater pumping could potentially cause streamflow depletion in the Policy area. The mapped areas were determined using existing geologic and scientific information. This mapping information is available from the State Water Board in a compilation of technical memoranda and maps entitled "Delineated Subterranean Streams and Potential Streamflow Depletion Areas," dated November 14, 2008 by Stetson Engineers Inc. Some areas currently mapped as Potential Streamflow Depletion Areas in the compilation could be reclassified as subterranean streams if adequate new information and site specific studies become available in the future.

Comment 30.0.8: Groundwater recharge is the reason most of our rivers and streams continue to flow throughout the dry summer once the winter rains have subsided. It is foreseeable that by decreasing the availability of future surface water diversions, increased groundwater "diversions" will result. However, groundwater is not always subject to the same degree of regulation as surface water. It is therefore recommended that the SWRCB should consider developing standardized techniques and procedures for new groundwater wells that test the connection between groundwater and surface water because over drafting groundwater's could potentially result in reduced instream flows during the summer. (*Linda Ruffing, City of Fort Bragg; Stephen Whitaker, Irish Beach Water District*)

Response: The State Water Board has completed mapping of subterranean streams and

areas where groundwater pumping could potentially cause streamflow depletion in the Policy area. This mapping information is available from the State Water Board in a compilation of technical memoranda and maps entitled "Delineated Subterranean Streams and Potential Streamflow Depletion Areas," dated November 14, 2008 by Stetson Engineers Inc. It includes descriptions of methodology to assess the rate of depletion of surface water due to groundwater pumping. Some areas currently mapped as Potential Streamflow Depletion Areas in the compilation could be reclassified as subterranean streams if adequate new information and site specific studies become available in the future. As indicated in the SED (p. 13), the State Water Board may exercise its authority under the doctrines of reasonable use and the public trust to address diversions of surface water or groundwater that reduce instream flows in the Policy Area and thus adversely affect fish, wildlife, or other instream beneficial uses. The State Water Board may utilize the mapped subterranean streams and Potential Streamflow Depletion Areas in these efforts.

Comment 30.0.9: The ability for groundwater to serve as an alternative water supply in Mendocino County is grossly overstated. The Substitute Environmental Document correctly notes that implementation of the AB 2121 policy may redirect water users to alternative sources, but is largely silent with respect to the actual availability of alternative water sources. For example, groundwater is identified in the Substitute Environmental Document as a potential source of water in lieu of surface water diversions. However, comparatively little is said about the availability of groundwater in Mendocino County. As noted in various publications of the Department of Water Resources and the United States Geological Survey, the consolidated rocks of the Franciscan Complex, which dominate the geology of Mendocino County, generally yield little or no water. Mendocino County's groundwater resources are for the most part limited to the greater Ukiah Valley and a few other comparatively small and widely dispersed valleys in the region. However, even here there is a serious question as to the true availability of the groundwater supply, not because of geology but because of the State Water Resources Control Board's assertion that all of the "groundwater" in these valleys is in fact "underflow". (*Roland Sanford, Mendocino County Water Agency*)

Response: Section 5.2 of the Draft SED Appendix D points out that the use of groundwater in the Policy area is limited by hydrogeologic factors, including aquifer materials of low permeability, as also pointed out by the commenter. The adequacy of groundwater to serve as an alternative supply is further evaluated in Section 5.2 of Draft SED Appendix D, where it finds that groundwater is not likely adequate to meet the foreseeable upper range of possible future demand (estimated at approximately 7,930 ac-ft/year), but may be adequate to meet the foreseeable lower range of possible future demand (estimated at approximately 230 ac-ft/year). The adequacy of groundwater to meet the possible future demand for a specific project will depend on local hydrogeological conditions determined through site-specific study. Contrary to the commenter's claim, except in its Gualala River Decision, at present, the State Water Board has not issued any other Decisions on subterranean streams in the valleys of Mendocino County that would limit the availability of groundwater.

Comment 30.0.10: How will the proposed AB 2121 Policy apply to diversions of "underflow"? The State Water Resources Control Board reportedly asserts that essentially all of the "groundwater" in the Ukiah Valley, and most if not all of the other valleys in Mendocino County, is "underflow" and therefore subject to the State Water Resources Control Board's permitting authority. While we vigorously disagree with this interpretation - that essentially all of the water underlying the Ukiah Valley floor is underflow - we do acknowledge that there are instances where "underflow" occurs and is or could be divested for out-of-stream beneficial uses. How does the policy address underflow? (*Roland Sanford, Mendocino County Water Agency*)

Response: The Policy applies to water diversions from all streams and tributaries in the Policy area that are subject to the State Water Board's water right permitting authority, including extractions from subterranean streams or, as (presumably) referred to by the commenter as "underflow." Contrary to the commenter's claim, except in its Gualala River Decision, at present, the State Water Board has not issued any other Decision on subterranean streams in the valleys of Mendocino County that would limit the availability of groundwater.

Comment 30.0.11: The SWRCB ignores groundwater withdrawal in the Policy despite the fact that increased appropriative water rights permit difficulty or cost is likely to increase well use and that groundwater use is recognized as contributing to surface water depletion and loss of fisheries productivity in the region. *(NA, Sierra Club Redwood Chapter)*

Response: The State Water Board did not ignore groundwater withdrawals when it developed the Draft Policy. The SED points out that the Policy could give rise to increases in groundwater extraction as affected parties take actions in response to the Policy requirements. Section 6.2 of SED, in particular Table 6-3, describes the possible environmental impacts resulting from increased groundwater extraction, including reduction in stream flow and associated degradation of fish habitat. Certain actions that affected parties take to increase groundwater extraction would be subject to future CEQA review at the "project-level" and the lead agency would be required to adopt mitigation measures to reduce significant project impacts, including cumulative impacts such as reduction in streamflow, to a level of less than significant.

Comment 30.0.12: If the objectives of the policy are to be met, the policy must recognize the interactions between surface and groundwater. This interaction is particularly important in alluvium dominated watersheds such as the Napa River. Depending on the timing and duration of seasonal rains, surface flows in the upper watershed of the Napa River often percolate into streambed gravels/soils, leaving dry mid-slope channels, before re-surfacing again in downstream reaches. During the proposed seasonal diversion period, it is not uncommon for tributaries to the Napa River to exhibit discontinuous surface flows within the mid-reaches of the channel network. Downstream benefits to fishery resources at these times are in the form of groundwater interflow and not surface flow. The policy will not be successful with a one-size-fits-all stream flow bypass requirement. Until the Policy addresses specific geology and site conditions present within the wide variety of watersheds located within the policy area, the assumed benefits to the fisheries resources will not be obtainable. *(Brad Wagenknecht, Napa County Board of Supervisors)*

Response: The Policy (section 4.1.2) requires applicants to prepare a Water Supply Report analysis which quantifies the amount of unappropriated water remaining instream after senior rights are accounted for and evaluates the effects of the proposed project, in combination with existing diverters, on instream flows needed to protect the fishery resource. As part of the Water Supply Report, the Policy requires applicants to prepare an Instream Flow Analysis consisting of a daily flow study performed at all points of interest. Water right applicants may perform a daily flow study (A.5.11) as part of the Instream Flow Analysis that compares unimpaired and impaired conditions to assess impacts of the proposed project. In the situation described, the selection of the location of points of interest and the calculation of unimpaired and impaired flow should take into consideration the interaction between surface and groundwater to accurately assess the impact of the proposed project.

See section D.5 in Appendix D of the Task 3 report for a discussion of how the Draft Policy does not and cannot constitute a one-size-fits all approach. The Draft Policy does not attempt to predict instream flow needs for each stream, and instead relies on a protective regional criterion to establish a suitable threshold flow below which uncertainty on site-specific instream flow needs can be addressed by site specific study. The site specific study element of the draft Policy is provided as a means to determine instream flow needs on a site specific basis and may be particularly necessary in alluvium dominated watersheds which have highly site-specific hydrologic behavior.

31.0 Miscellaneous

Comment 31.0.1: Commenter concurs with points raised by Sierra Club Redwood Chapter. (*Gordon Bennett, Sierra Club Marin Group*)

Response: Comment noted.

Comment 31.0.2: The commenter has no comments regarding the notice and is pleased with current regulations and restrictions (*Barbara Bowne*)

Response: Comment noted.

Comment 31.0.3: The Sonoma County Regional Parks Department plans to restore the natural historical Tolay Lake on Tolay Creek, which was drained in the 1800s when the natural dam was removed to enable farming in the lakebed. The County has a pending application for storage of Tolay Creek and has filed a petition to conform with the lake restoration plan. While the County supports the Draft Policy's general goal of protecting native fish populations, some aspects of the Draft Policy could hinder the Tolay Lake project, even though the project has significant environmental benefits. These aspects include the Draft Policy's assumption that the regional criteria should be the starting point for any development of instream flow requirements; and the Draft Policy's provisions that give DFG a "blank check" to impose any fish passage requirements that it wants to, even if such requirements are not reasonable or appropriate. (*Mary Burns, Sonoma County Regional Parks*)

Response: The Policy regional criteria are not intended as a starting point for any development of instream flow requirements, but rather are intended for use when no site-specific data are available. If a site-specific study was performed to more accurately assess the fishery resource instream flow needs at a particular location, then results of the study would be used for any development of instream flow requirements.

The Policy does not give DFG a blank check to impose fish passage requirements. Fish and Game Code sections 5931 and 5933 provide DFG with the authority to determine whether the construction of fish passage facilities are necessary for the preservation and protection of fish. Under this existing regulatory authority, DFG reviews and makes recommendations for fish passage facilities on a site-specific basis.

Comment 31.0.4: In the absence of perfect funding allotments, public agencies must rely on observations made by the concerned public. When habitat modification is observed, when reproduction or stranding, unusual health affects including mortality are suspected or observed, exhaustive study shall not be required. Prophylactic measures must be instituted. Credible observations and reports must be treated as valuable contributions to the effort to prevent extinction and must be processed and acted upon in a timely manner. (*Kimberly Burr*)

Response: Comment noted.

Comment 31.0.5: The Coastal Action Group supports the comments on the draft policy provided by Patrick Higgins, March 2008, and incorporates these comments by reference. *(Alan Levine, Coastal Action Group)*

Response: Comment noted.

Comment 31.0.6: The policy only speaks to "new" diversions. Please define "new" diversion. What if historically permitted diversions (possibly with additional "new" diversions) are limiting flows, and habitat, to the point where fish survival is not supported by flows? How should the policy be applied? What if there are permitted or unpermitted water transfers out of the basin where flows are not supporting beneficial uses? *(Alan Levine, Coastal Action Group)*

Response: Policy section 4.1.7 and Appendix A, starting at A.5.0, describe how pending water rights shall consider the effect of the proposed project on instream flows that considers the additive effect of senior diversions. Permitted and licensed diversions that are in compliance with their permits and licenses will not be affected by the policy. However, the State Water Board may impose terms and conditions consistent with the policy through a public trust proceeding, an enforcement proceeding or complaint investigation. The State Water Board's exercise of these authorities may involve an opportunity for hearing.

Comment 31.0.7: Commenter is a fish biologist who supports providing sufficient instream flows to protect fish. *(Joshua Fuller)*

Response: Comment noted.

Comment 31.0.8: We strongly urge the Board to reject the Draft Policy and revise it to include issues outlined in this letter, and comments by fisheries scientist Patrick Higgins done on behalf of the Redwood Chapter of the Sierra Club. Most importantly, public trust doctrine and values need to be the foundation for in-stream flows in Northern California coastal streams. *(Jay Halcomb et al, Sierra Club Redwood Chapter)*

Response: Comment noted.

Comment 31.0.9: When TU and PAS filed the Petition in 2004, we noted that coho salmon and steelhead fisheries were threatened with extinction. The cumulative effects of legal and illegal water withdrawals and unscreened diversions were considered a major cause of the species' decline, as NOAA Fisheries highlighted in the federal ESA listings for Coho salmon and steelhead, and as the California Department of Fish and Game indicated in its Coho Salmon Recovery Strategy. (See e.g., 62 Fed.Reg. 24,588, 24, 592 (May 6, 1997); 61 Fed. Reg. 56,138, 56,141 (Oct. 31, 1996); Petition at pp. 13-18 and citations therein.) In the Recovery Strategy, DFG found that, "A substantial amount of coho salmon habitat has been lost or degraded as a result of water diversions and groundwater extraction . . ." (DFG, Coho Salmon Recovery Strategy, pp. 3-11, 3-13.) The situation has not improved. Rather, the status of salmon and steelhead has only declined since 2004, as demonstrated by the coast-wide collapse of the salmon fishery and ban on commercial and recreational fishing off the California and Oregon coasts this year. While the causes of the collapse are complex, the message it sends is clear: the future of California fisheries depends on our ability to address the threats to salmonid survival and to improve habitat and stream flows conditions throughout

their historic range. *(Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society)*

Response: Comment noted.

Comment 31.0.10: This attachment is a press release for "Water & Wine" program by Wine Industry Leaders and Trout Unlimited. The goal of the program is to develop a 'Watershed Approach' for real resource management that will ultimately augment other restoration efforts in the Russian River Basin. Participating landowners will work with TU, the Sonoma County Winegrape Commission, and the Sonoma County Salmon Coalition to investigate opportunities for a "watershed approach" to improving water supply reliability and stream flows, and process water rights by streams or sub-basins. *(Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society)*

Response: Comment noted.

Comment 31.0.11: This attachment is a "Water & Wine" booklet produced by Wine Industry Leaders and Trout Unlimited. The booklet highlights vineyards that have contributed to stream restoration efforts and improve fish habitat. In the Collaborative Solutions to Tough Problems section, the booklet says "In 2004, Governor Schwarzenegger signed "A.B. 2121" which directs the State Board to adopt a policy for maintaining stream flows in North Coast streams. Two thirds of the pending water right applications in the entire state are within the geographic scope of the statute, which runs from San Francisco Bay to the Mattole River in Humboldt County. The policy will affect about 5,900 stream miles in 3.1 million watershed acres - an area the size of Connecticut, Delaware, New Hampshire, New Jersey, and Rhode Island. Trout Unlimited has been working with representatives from the wine industry and other stakeholders to propose common sense solutions to these problems. Water and Wine grew out of TU's discussions with representatives for the wine industry, and it will move beyond the confines of the traditional water right system. By working collaboratively with water users, we can achieve a new water future for California." *(Brian Johnson, Trout Unlimited and Richard Roos-Collins, Peregrine Chapter of the National Audubon Society)*

Response: Comment noted.

Comment 31.0.12: This attachment provides the 5 request for informations submitted by the commenter to the State Water Board. *(Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers)*

Response: The specific comments regarding the requests for information are responded to in the public participation section of this document.

Comment 31.0.13: This attachment provides the scoping comments submitted by Wagner & Bonsignore, Hanson, and Ellison, Scheider & Harris. These comments state the NOP was insufficient given the scope of the policy and provide recommendations regarding improvements to the existing water right system, a proposed alternative to the existing water rights appropriation process referred to as the "North Coast Permit Process" and a Watershed Management Approach. *(Janet Goldsmith and Becky Sheehan, Kronick, Moskovitz, Tiedeman & Girard, P.C.; Peter Kiel, Ellison, Schneider & Harris LLP; and Robert Wagner, Wagner & Bonsignore Consulting Civil Engineers)*

Response: In their scoping comments, Wagner & Bonsignore, James C. Hanson, and Ellison, Schneider & Harris argued that the NOP was inadequate because it did not clearly spell out how the State Water Board proposed to adopt the policy and implement it pursuant to the Board's water right authority. CEQA did not require, however, that the NOP include a detailed description of every procedural step that would be taken in order to adopt the policy, or a detailed description of how the policy would be implemented. Instead, CEQA required only that the NOP provide sufficient information concerning the project description and the potential environmental effects of the project to enable trustee and responsible agencies and interested persons to make a meaningful response. (Cal. Code Regs., tit. 14, § 15082, subd. (a)(1).) The NOP satisfied this requirement by describing the proposed Policy in general terms and identifying the potential environmental effects of the policy. The firms did not show that the Board failed to identify any potential environmental effects of the proposed policy, or that the project description was so vague that they were unable to provide a meaningful response.

Comment 31.0.14: RWQCB1 staff are available to provide State Water Board with its comprehensive water quality database for use in its Policy analysis. (*Catherine Kuhlman, State of California Regional Water Quality Control Board, North Coast Region*)

Response: State Water Board staff contacted RWQCB1 and RWQCB2 staff regarding data they had available. RWQCB2 staff provided contacts at other agencies that had performed biological surveys in the policy area. Staff received partial datasets from these sources; however, funding and schedule limitations prevented a complete analysis of additional field sites.

Comment 31.0.15: This attachment provides the documents referenced in lightr1.pdf regarding participation of TU/NHI in development of AB2121. (*Rudolph Light*)

Response: Comment noted.

Comment 31.0.16: The AB 2121 Policy is short sighted and domestic water user friendly and promotes deprecation and degradation of aquatic ecosystems. (*Chris Malan, Earth Defense for the Environment Now, Living Rivers Council*)

Response: Comment noted.

Comment 31.0.17: Draft Policy, Page 1, section 1.0 Introduction - DFG 2004 and NMFS 1996 citations are missing in Appendix 3, References (*Elliott Matchett*)

Response: Comment noted.

Comment 31.0.18: Draft Policy, Page 3 and 4, section 2.3.2 Minimum Bypass Flow - Point of Diversion, Mean Annual Unimpaired Flow, and Watershed Drainage Area (bolded but not defined) should be defined in Appendix 2, Glossary of Terms. (*Elliott Matchett*)

Response: Comment noted.

Comment 31.0.19:

'Relocate subscript 2 from "watershed drainage area" to POD on page 3 of the Draft Policy (*Elliott Matchett*)

Response: Comment noted.

Comment 31.0.20: Napa County Farm Bureau agrees with the comments in the letter submitted on our behalf by Wagner & Bonsignore (Engineering Firm), Kronick, Moskovitz, Tiedemann & Girard (Law Firm), Ellison, Schneider & Harris (Law Firm) and HDR/Surface Water Resources (Fisheries Biologist). *(Peter Nissen, Napa County Farm Bureau)*

Response: Comment noted.

Comment 31.0.21: Established water rights and natural habitat are being threatened by large use of water for vineyards and other commercial uses *(Harris Nussbaum)*

Response: Comment noted.

Comment 31.0.22: I support a limit on the use of water for vineyards and other commercial purposes *(Harris Nussbaum)*

Response: Comment noted.

Comment 31.0.23: Please find attached a letter with attachments written to the Board by R.H. Light and include that letter in my comments. Though i feel differently about some of the issues raised in the RH Light letter, presently these objections will suffice. *(Richard and Annette Rhodes, Rhodes Vineyards)*

Response: Comment noted. Mr. Light's specific comments are responded to in various sections of this document.

Comment 31.0.24: Farm Bureau specifically acknowledges and incorporates by this reference the comments submitted by the law firms of Kronick, Moskovitz, Tiedemann & Girard, P.C. and Ellison, Schneider & Harris, LLC, and the hydrologic engineering firm of Wagner & Bonsignore on behalf of Farm Bureau and other entities and persons (hereinafter "Coalition Comments"). Since the Coalition Comments comprehensively address Farm Bureau's technical, biological and legal ' concerns regarding the Draft Policy, this letter will not attempt to reiterate those points. However, please recognize that Farm Bureau is very concerned that the issues raised by the Coalition Comments are appropriately addressed. *(Jack Rice, California Farm Bureau)*

Response: Comment noted.

Comment 31.0.25: We support the concept of developing a policy that sustains the freshwater ecosystem and at the same time allocates and preserves stream flows fairly and uniformly to people and their communities. The massive document that forms the Policy speaks to the level of effort and dedication that your staff has made in order to define such a policy. The size of the Policy however also indicates its complexity, which unfortunately makes it difficult for water users to understand and comply with, and which may also lead to the Policy being applied unevenly and unfairly. *(Linda Ruffing, City of Fort Bragg)*

Response: Comment noted.

Comment 31.0.26: Many feel the Draft Policy is a test - the real goal by those who pushed this Policy into being is to rewrite California's Water Code and to reopen all licensed water

rights. *(Roland Sanford, Mendocino County Water Agency; Jim Wattenburger, Mendocino County Board of Supervisors)*

Response: Comment noted.

Comment 31.0.27: The Sierra Club "Water Rights Reform Action Alert" that provides an alert regarding the Policy was submitted as an exhibit to halcom_b comment letter. *(NA, Sierra Club Redwood Chapter)*

Response: Comment noted.

Comment 31.0.28: My husband and I live in a riparian corridor and are very much aware of the health of the creek that runs through our property. We have seen steelhead in the winter and early spring but the stream is too low in summer to sustain them. *(Amber Sumrall)*

Response: Comment noted.

Comment 31.0.29: The policy should be easily understood, able to be implemented, and fully enforceable. *(Thomas Weseloh, California Trout Keeper of the Streams)*

Response: Comment noted.