

MEMORANDUM LEGAL AND POLICY ISSUES

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

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

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

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

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(Cal. Const. Article X, Sec. 2, emphasis added.)

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

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

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

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