

THE STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD
CALIFORNIA DEPARTMENT OF FISH AND GAME
STATE LANDS COMMISSION
MARIN, SONOMA, NAPA, MENDOCINO, AND HUMBOLDT COUNTIES

_____))
In the Matter of: (1) Applications for Water Rights and Related)
Regulatory Approvals and (2) Unauthorized Diversions Affecting)
Steelhead and Coho Salmon Fisheries in Central Coast Streams in)
Marin, Sonoma, Napa, Mendocino, and Humboldt Counties)
_____)

TROUT UNLIMITED AND THE PEREGRINE CHAPTER OF THE NATIONAL
AUDUBON SOCIETY'S PETITION FOR TIMELY AND EFFECTIVE REGULATION
OF NEW WATER DIVERSIONS IN CENTRAL COAST STREAMS

Richard Roos-Collins
Julie Gantenbein
NATURAL HERITAGE INSTITUTE
2140 Shattuck Avenue, 5th floor
Berkeley, CA 94704
(510) 644-2900
(510) 644-4428 (fax)
rrcollins@n-h-i.org

Attorneys for TROUT UNLIMITED
and PEREGRINE AUDUBON SOCIETY

Charlton H. Bonham
California Counsel,
TROUT UNLIMITED
828 San Pablo Avenue, Suite 208
Albany, CA 94706
(510) 528-4164
(510) 528-7880 (fax)
cbonham@tu.org

Attorney for TROUT UNLIMITED

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I.
INTRODUCTION

1. Trout Unlimited and the Peregrine Audubon Society, a chapter of the National Audubon Society representing interior Mendocino County (Conservation Groups), bring this Petition to propose guidelines and procedures which will assure coordinated, timely, and otherwise effective regulation of water diversions in coastal streams from Marin County northwards to the Mattole River, including the Russian River watershed, as well as those streams in Napa County tributary to San Pablo Bay (Geographic Scope). This Petition seeks reform of the water rights *system* – beginning with review of applications for water right permits and ending with compliance – as necessary to protect these steelhead and coho salmon fisheries, riparian habitat, and birds and wildlife dependent on such habitat, in good condition. State laws, including the California Water Code, California Fish and Game Code, and public trust doctrine, require such protection of these public properties.

2. The coho and steelhead fisheries within the Geographic Scope of this Petition are threatened with extinction. NOAA Fisheries, which also listed these fisheries under the federal Endangered Species Act, found that water diversions are a primary cause for that poor condition. The State Water Board does not have written guidelines (namely, policies which guide substantive review of water right permit applications) for the purpose of deciding how much water is divertible for water supply, and how much must remain to protect the coldwater fisheries in good condition. Today, more than 276 water rights applications are pending before the State Water Board for new or modified diversions in Central Coast streams. *See* Ex. 1. Although most have been pending for five years or longer (A.B. 2121, section 1(g)),

the State Water Board has not published or set a schedule for final action. The several State agencies named here do not coordinate their environmental reviews related to such applications. Due partly to resulting uncertainty, delay, and cost, most new diversions since 1990 have been built and are operated today on these streams without permits from the State Water Board or other adequate basis in law.

3. The Mono Lake Cases addressed a similar circumstance where diversions from tributary streams had lowered Mono Lake to the point where public trust values were degraded. "The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible." National Audubon Society v. Superior Court of Alpine County, 33 Cal.3d 419, 446 (1983).

The Central Coast streams will be more challenging to restore than Mono Lake. These suffer from the tragedy of the commons, where a multitude of property owners operating separate storage and diversion facilities have cumulatively caused the decline in the flow of numerous streams. By contrast, there was only one defendant, four points of diversion, and one place of use in the Mono Lake Cases.

4. Accordingly, we bring this Petition before the State Water Board, which is the lead agency regulating water rights; California Department of Fish and Game (DFG) and State Land Commission; and before Sonoma, Mendocino, Napa, Marin, and Humboldt Counties, which are the counties within Petition' s Geographic Scope (collectively, Counties). Each of these State agencies has concurrent jurisdiction to regulate facilities or activities used for water storage or diversion.

5. We bring this Petition for administrative relief. We have chosen not to seek relief in Superior Court. If we had done so, and after we had proved the respective duties of these State agencies to adopt guidelines and procedures adequate to preserve and restore the public trust in these streams, the Court would remand to these agencies for such adoption. Instead, this Petition directly asks the State Water Board and other State agencies to restore effective regulation of water diversions within the Geographic Scope of this Petition.

6. We request reforms within the existing authorities of the State agencies before which this Petition is brought. Among other things, this Petition will assist in the implementation of A.B. 2121, as signed by Governor Schwarzenegger on September 30, 2004. This law requires the State Water Board to adopt instream flow guidelines for the waters within the Geographic Scope by January 1, 2007 for the purpose of water right administration. It also requires the Board to publish its schedule for action on pending water right applications. We request adoption of that and other procedures (relating to compliance, as well as coordination of the several State agencies), as specified in Section VI, to assure effective regulation of water diversions in Central Coast Streams. Such regulation is consistent with the objectives of the California Performance Review, which seeks to improve efficiency, responsiveness and accountability in State Government. *See The California Performance Review Report (Aug.3, 2004).*

II.
INTERESTS OF PETITIONERS

A. Trout Unlimited

7. Petitioner Trout Unlimited (TU) is a national conservation organization with its principal office in Arlington, Virginia, and its California offices in Albany and Santa Rosa. TU is a nonprofit corporation organized under the laws of the State of Michigan. TU has approximately 125,000 members nationwide, and is dedicated to protecting, conserving, and restoring North America's native trout and salmon resources.

8. TU is involved in numerous natural resource conservation and advocacy projects throughout California, including but not limited to state water rights matters and on-going hydropower licensing and relicensing proceedings. TU members and staff use and enjoy salmon and steelhead waters throughout Marin, Napa, Sonoma, Mendocino, and Humboldt counties for recreational, educational, and aesthetic purposes. In California alone, TU has approximately 10,000 members.

9. TU has two grassroots chapters in the Petition's Geographic Scope: North Bay and Redwood. The North Bay Chapter, which meets on a monthly basis, has been actively involved in resolving water disputes in Marin and Sonoma Counties since its formation. It has been instrumental in key salmon and steelhead restoration efforts in the area. For example, the North Bay Chapter has directly contributed to the protection of coho and steelhead fisheries in Lagunitas Creek, most recently entering into a comprehensive settlement with the North Marin Water District to resolve a water rights dispute. The North Bay Chapter has approximately 1,500 members.

10. TU's Redwood Chapter is based in Santa Rosa. Along with the North Bay Chapter, it was instrumental in securing permanent fishway ladders at Healdsburg Dam to improve salmon and steelhead migration up and down the Russian River. In recent years, Redwood Chapter members have been active in gravel mining and water quality issues in the vicinity of Santa Rosa.

11. Both chapters regularly undertake physical restoration projects within the Petition's Geographic Scope. For example, since 2000, our members have conducted yearly restoration projects on Devil's Gulch, a major tributary to Lagunitas Creek. TU is also implementing an extensive non-regulatory program under which almost two million dollars of private and public funds have been invested in restoration projects in the Garcia River, Navarro River, Ten-Mile River, Hollow Tree Creek, Noyo River, Pudding Creek, Elk Creek, and Big River. *See www.tucalifornia.org/nccoho-proj.htm.*

12. The State's water rights system directly affects TU's mission to protect, conserve, and restore the remarkable salmon and steelhead fisheries. Since at least 1991, TU members have monitored the State Water Board's performance in the face of a small flood of permit applications within the Geographic Scope. TU has participated in the review of applications for new and modified water right permits within the Geographic Scope. *See Griffin Declaration (Ex. 2).* TU has filed approximately 82 protests of 112 such applications for tributaries to the Russian River. The protests are based on public trust grounds, and specifically address the risk of cumulative impacts that may prevent restoration of salmon and steelhead fisheries to good condition. *See id.* During this period, TU has also participated in 6 State Water Board workshops and 12 site visits related to protests. Through our consultant

Dr. Bill Trush, we have analyzed the regional risk of cumulative impacts related to new diversions and have submitted flow, monitoring, and other recommendations which, if adopted as guidelines, would permit development of water supply consistent with the restoration of the coho and steelhead fisheries in good condition. *See id.* TU contributed to DFG and NOAA Fisheries' adoption of their "Guidelines for Maintaining Instream Flows to Protect Fisheries Resources Downstream of Water Diversions in Mid-California Coastal Streams" (May 22, 2000, updated June 17, 2002) (2002 Joint Guidelines) (Ex. 3).

B. Peregrine Audubon Society

13. Founded in 1982, the Peregrine Audubon Society (Peregrine) has more than 200 individual and family memberships in inland Mendocino County. It is centrally located within the Geographic Scope of the Petition. Peregrine is a non-profit organization incorporated in California.

14. Peregrine is a chapter of the National Audubon Society (NAS), a nation-wide conservation organization supporting a membership of approximately 550,000 through more than 500 local chapters. NAS has over a 100-year legacy of action, advocacy, and research. It has been instrumental in conservation and protection actions throughout its entire history. NAS was the lead plaintiff in the Mono Lake Cases, which established the first precedent that the public trust doctrine applies to the State's decisions in the allocation of water resources.

15. Peregrine's mission is to actively promote the preservation of birds, wildlife, and their natural habitats. As a result of their concern for declines in such resources, many Peregrine members have contributed to public trust efforts through participation in policy, conservation, and educational activities.

16. Peregrine has been represented on the Russian River Watershed Council since its inception in 1998. The Watershed Council seeks to solve problems through collaboration of citizens, municipalities, and agencies. In the Council, Peregrine has maintained that habitat conservation and restoration are important priorities, and that decisions must be based on sound science. Through its members, Peregrine sits on the Executive Committee and Steering Committee of the Council and functions as Coordinator of the Watershed Information Assessment and Management Workgroup that is developing a Russian River Interactive Information System website.

17. Peregrine members have been actively involved in a 20-year effort to adopt a grading ordinance for Mendocino County. Working collaboratively with agencies and other conservation organizations, Peregrine has petitioned the Mendocino County Planning Commission to adopt standards for grading permits adequate to protect riparian corridors and associated wildlife and fisheries resources.

18. Peregrine has been a strong supporter of education through its school activities. We sponsor "Audubon Adventures" program for local elementary schools. Peregrine's field trips and monthly meetings also strive to educate members and guests about local conservation and policy issues. Peregrine regularly hosts symposiums involving state and federal resource agencies, including DFG, NOAA Fisheries, and Army Corps of Engineers, and other stakeholders.

III.
JURISDICTION OF NAMED PUBLIC AGENCIES

A. State Water Resources Control Board

19. The people own the state's waters. *See* Water Code § 102. Use of that water is of public concern. *See id.* § 104. All waters shall be managed for the greatest public benefit. *See id.* § 105.

20. The State Water Board has exclusive jurisdiction to issue, condition, or rescind post-1914 appropriative water rights. *See* Water Code § 1250 *et seq.* It also regulates other rights, including pre-1914 and riparian, to prevent waste or unreasonable use. *See id.* §§ 100, 275; California Constitution, Article X, section 2.

21. More generally, the State Water Board is responsible to "provide for the orderly and efficient administration of the water resources of the state." Water Code § 174. The State Water Board "shall exercise the adjudicatory and regulatory functions of the state in the field of water resources." *Id.* It shall 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" in California. *Id.* § 275. To perform these functions, the State Water Board may: "(A) Investigate all streams, stream systems, portions of stream systems, lakes, or other bodies of water; (B) Take testimony in regard to the rights to water or the use of water thereon or therein; and (C) Ascertain whether or not water heretofore filed upon or attempted to be appropriated is appropriated under the laws of this state." *Id.*, § 1051. Its function "has steadily evolved from the narrow role of

deciding priorities between competing appropriators to the charge of comprehensive planning and allocations of waters.” National Audubon, 33 Cal.3d at 444.

22. As required by the public trust doctrine, the State protects the trust uses of navigable waters – fishing, navigation, commerce, and environmental quality – to the extent feasible in water rights and other regulatory decisions. *See* National Audubon, 33 Cal. 3d at 437, 441. The State Water Board may reexamine prior diversions to determine whether they should be changed to protect the public trust uses of the affected waters. *See id.* at 446.

23. The State Water Board is a public agency subject to CEQA. *See* Pub. Resources Code § 21063. It is the lead agency in a water rights proceeding, even though other public agencies have concurrent jurisdictions.

24. CEQA’s environmental review requirements apply to any State Water Board discretionary project. *See* Pub. Res. Code § 21080(a). CEQA generally applies to “discretionary projects proposed to be carried out or approved by public agencies....” *Id.* The statutory definition of “project” includes an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies. *See id.* § 21065.

25. The State Water Board may adopt guidelines and procedures to implement applicable laws and rules. *See* Water Code § 275. It may formulate and adopt state policy for water quality control. *See id.* § 13140.

B. California Department of Fish and Game

26. DFG has jurisdiction to regulate taking of fish and wildlife and modifications of their respective habitats. *See* 14 CCR § 783.1.

“The protection and conservation of the fish and wildlife resources of this state are hereby declared to be of utmost public importance. Fish and wildlife are the property of the people and provide a major contribution to the economy of the state as well as providing a significant part of the people’s food supply and therefore their conservation is a proper responsibility of the state.”

Fish and Game Code § 1600. To fulfill this purpose, DFG regulates: (A) any diversion or obstruction of natural flow or other modification of a streambed (*id.*, § 1603); (B) any obstruction of fish passage in specified Districts (*id.*, § 5901); fishways (*id.*, § 5931); release of flow from, through, or around any dam or other artificial obstruction (*id.*, § 5937); and screening of any diversion (*id.*, § 6100). DFG may seek civil damages (*id.*, § 2014) or criminal penalties (*id.*, § 12000 *et seq.*) for any unlawful taking or other form of destruction of fish and wildlife.

27. DFG is a public agency subject to CEQA. *See* Pub. Resources Code § 21063; *see also* CCR § 750 *et seq.* It is a responsible agency in a water rights proceeding. *See id.* § 21069; *see also* 14 CCR §§ 778, 779.5. CEQA applies to any DFG discretionary approval of a streambed alteration agreement, fishway, or screen. *See id.* § 21080(a).

28. Through the Fish and Game Commission, DFG may formulate general guidelines for the administration of its duties. Fish and Game Code § 703.

C. State Lands Commission

29. The State Lands Commission has exclusive jurisdiction to regulate the use and occupancy of ungranted tidelands or "submerged lands" associated with navigable rivers and creeks. Pub. Resources Code §§ 6301, 6331(a), 6216. Specifically, it surveys all such ungranted lands (*id.*, § 6331.5); and requires permits, leases, or other regulatory approvals for dredging or depositing materials, extraction of oil and gas, or other forms of occupancy. *See id.* §§ 6303, 6801. 6501.1. It may seek civil damages or civil penalties for trespass on these lands. *See id.* §§ 6224.1, 6302, 6303.1, 7992.

30. The State Lands Commission is a public agency subject to CEQA. *See* Pub. Resources Code § 21063. It is a responsible or trustee agency in a water rights proceeding. *See id.* § 21069. CEQA applies to any State Lands Commission discretionary approval of a lease, permit, or other use of submerged lands. *See id.* § 21080(a).

31. The State Lands Commission may adopt guidelines and procedures to implement these authorities. *See id.* § 6108; *see, e.g.*, State Lands Commission, Public Trust Policy (Sept. 17, 2001), available at http://www.slc.ca.gov/Policy%20Statements/Policy_Statements_Home.htm.

D. Counties

32. Each County within the Petition' s Geographic Scope has jurisdiction to regulate land use outside of a streambed associated with water diversion, such as the construction of an off-stream storage pond. *See* Government Code § 65300.

33. A County is a subdivision of the State. *See* Government Code §§ 23000-02. As such, it has authority to administer the public trust doctrine, which applies to the State as a whole.

34. The County is a public agency subject to CEQA. *See* Pub. Resources Code § 21063. It is a responsible agency in a water rights proceeding. CEQA applies to any County discretionary approval related to a diversion, including a land use permit. *See id.* § 21080(a).

35. A County may adopt rules, guidelines, or procedures to implement these authorities. *See* Government Code § 23003.

IV. RELEVANT FACTS AND LAWS

36. This section states the facts and laws that are the basis of our claims for relief. It is organized as follows: (A) Geographic Scope; (B) Designated Beneficial Uses of the Central Coast Streams; (C) Threatened Status of Steelhead and Coho Fisheries in Central Coast Streams; (D) Water Right Permits; (E) Registration of Small Domestic Use and Livestock Stockponds; (F) Approvals by DFG; (G) County Permits; (H) Enforcement Proceedings to Correct Unauthorized New Diversions.

37. For the purpose of this Petition, "diversion" means any act or facility to divert flow to storage or to actual use. "New" includes new as well as modified. "Unauthorized" means: without a water right granted by the State Water Board or other adequate basis of water right; or without other regulatory approvals required by the Government Code, Fish and Game Code, and Public Resources Code.

A. Geographic Scope of Petition

38. The geographic scope of the Petition is the Central Coast from the southern boundary of Marin County north to the Mattole River in Humboldt County, including the Russian River watershed. It also includes tributaries to northern San Pablo Bay. It includes Marin, Sonoma, Mendocino, and Napa Counties, and Humboldt County south of the Eel River. This roughly coincides with boundaries of the Evolutionary Significant Units of Central Coast steelhead and coho salmon, as discussed in paragraphs 40-50.

B. Designated Beneficial Uses of the Central Coast Streams

39. Pursuant to the Porter-Cologne Act, Water Code sections 13170-13170.1, 13240-13241, the North Coast and San Francisco Bay Regional Water Quality Control Boards (NCRWQCB and SFRWQCB, respectively) have designated beneficial uses for these waters. See NCRWQCB, Water Quality Control Plan for the North Coast Region (June 28, 2001), p. 2-6.00; and SFRWQCB, Water Quality Control Plan for the San Francisco Bay Region (June 21, 1995) (hereafter, Basin Plans). These designated uses include water supply, preservation of fish and wildlife, and recreation. See *id.* These Basin Plans also include a mandatory policy prohibiting degradation of such beneficial uses or other water quality standards. See Resolution No. 68.16 (Oct. 28, 1968) (Ex. 4); see also NCRWQCB, North Coast Basin Plan, p. 5-1.00.

C. Threatened Status of Steelhead and Coho Fisheries In Central Coast Streams

40. The coho and steelhead fisheries in the Petition's Geographic Scope are threatened with extinction. NOAA Fisheries has made this determination in a series of listings and related decisions under the federal Endangered Species Act.

Southern Oregon/Northern California Coho

41. In 1997 NOAA Fisheries listed the Southern Oregon/Northern California Coast Evolutionary Significant Unit (ESU) of coho salmon (*Oncorhynchus kisutch*) as threatened. *See* 62 Fed. Reg. 24,588 (May 6, 1997). This ESU includes all naturally spawned populations of coho salmon in coastal streams between Cape Blanco, Oregon, and Punta Gorda, California. *See id.* Members of this ESU are known historically to inhabit coastal watersheds in Mendocino Humboldt counties. *See id.* NOAA Fisheries stated that some of the “major activities responsible for the decline of coho salmon in Oregon and California are ... stream channelization, dams, wetland loss, ... water withdrawals and unscreened diversions for irrigation.” *Id.* at 24,592. Specifically, “[d]epletion and storage of natural flows have drastically altered natural hydrological cycles, ... increase[ing] juvenile salmonid mortality[,]” which is attributable to migration impediments, increased water temperatures, and a “loss of useable habitat due to dewatering and blockage.” *Id.* at 24,593.

42. On May 5, 1999, NOAA Fisheries designated critical habitat for this ESU. *See* 64 Fed. Reg. 24,049 (May 5, 1999). Such habitat includes all accessible river reaches between Cape Blanco and Punta Gorda. *See id.* Humboldt and Mendocino Counties include watersheds containing such habitat. *See id.*

Central Coast Coho

43. In 1997, NOAA Fisheries listed the Central California Coast ESU of coho salmon as threatened under the ESA. *See* 62 Fed. Reg. 1,296 (Jan. 9, 1997) (technical amendment to 61 Fed. Reg. 56,138 (Oct. 31, 1996)). This ESU includes all naturally spawned populations of coho salmon from Punta Gorda in northern California south to and including the

San Lorenzo River in central California, as well as populations in tributaries to San Francisco Bay, excluding the Sacramento-San Joaquin River system. *See id.* For Central California Coast coho salmon, NOAA Fisheries found that "... stream channelization, dams, wetland loss, and water withdrawals and unscreened diversions for irrigation have contributed to the decline of ..." the species. *Id.* at 56,141. The sum of these water activities is "drastically altered natural hydrological cycles" which in turn "has increased juvenile salmonid mortality for a variety of reasons" such as increased water temperature, stranding, entrainment, migration delay, and loss of habitat. *Id.* NOAA Fisheries concluded that "[s]ufficient quantities of good quality water are essential for coho survival, growth, reproduction, and migration." *Id.*

44. On May 5, 1999, NOAA Fisheries designated critical habitat for this ESU. *See* 64 Fed. Reg. 24,029 (May 5, 1999). Such habitat includes all accessible river reaches from Punta Gorda in northern California south to the San Lorenzo River in central California, including Mill Valley (Arroyo Corte Madera Del Presidio) and Corte Madera Creeks, tributaries to San Francisco Bay. Marin, Mendocino, and Sonoma counties (and Napa county as a tributary watershed to San Pablo Bay) include watersheds containing habitat for this ESU.

45. In April 2002, DFG recommended that the California Fish and Game Commission list coho salmon from San Francisco north to Punta Gorda as endangered under the California Endangered Species Act (CESA), and coho salmon from Punta Gorda north to the Oregon border, as threatened. *See* DFG, Coho Salmon Recovery Strategy (Nov. 2003), p. ES-1. This geographic division tracks the federal ESUs. In August 2002, the Commission found that listing to be warranted, directed DFG to prepare a recovery strategy for coho, and

deferred final listing decision until such preparation. On February 5, 2004, the Commission approved DFG's recovery strategy, and the fish are now listed under CESA.

Central California Coast Steelhead

46. In 1997, NOAA Fisheries listed the Central California Coast steelhead ESU as threatened under the ESA. *See* 62 Fed. Reg. 43,937 (Aug. 18, 1997). This ESU includes all naturally spawned populations of steelhead (and their progeny) in California streams from the Russian River to Aptos Creek, and the drainages of San Francisco and San Pablo Bays eastward to the Napa River (inclusive), excluding the Sacramento-San Joaquin River Basin. Marin, Mendocino, Napa, and Sonoma counties include watersheds that host this ESU. At the time of listing, NOAA Fisheries found that "[w]ater diversions ... have greatly reduced or eliminated historically accessible habitat." *Id.* at 43,942. Subsequently, NOAA Fisheries has expressed its concern regarding the individual and cumulative effects of the County authorizing new on-stream water storage and diversion facilities, as well as off-stream pond storage, on Central Coast steelhead. *See* letter from James R. Bybee, NOAA Fisheries, to Raymond Hall, Planning and Building Services Department (Building Department), Mendocino County (April 12, 2001) (Ex. 5), p. 2.

47. ESA section 9, 16 U.S.C. § 1538, prohibits take of any species listed as endangered. In July 2000, NOAA Fisheries adopted the Final 4(d) Rule, which extends this prohibition of take to 14 groups of salmon and steelhead listed as threatened. *See* 65 Fed. Reg. 42,422 (July 10, 2000). "Take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. *See* 16 U.S.C. § 1532(19). Habitat modification or degradation is considered take if the modification kills or

injures a protected species. *See* Ex. 5, p. 1. The Final 4(d) Rule describes activities associated with on-stream water impoundments that are likely to cause harm resulting in take, including:

“Constructing or maintaining barriers that eliminate or impede a listed species’ access to habitat or ability to migrate ... Constructing or operating dams or water diversion structures with inadequate fish screens or fish passage facilities in a listed species’ habitat.... Conducting land-use activities in riparian areas and areas susceptible to mass wasting and surface erosion, which may disturb soil and increase sediment delivered to streams....”

See 65 Fed. Reg. 42,472.

48. NOAA Fisheries has not yet adopted a Recovery Plan for these threatened fisheries pursuant to ESA section 4(f), 16 U.S.C. § 1533(f). Plainly, the State Water Board, NOAA Fisheries, and DFG will address water diversions as a limiting factor on such recovery. These agencies will address the cumulative impacts as diversions, both permitted and unpermitted, increase rapidly as a result of significant agricultural and other developments in Sonoma and Mendocino Counties and elsewhere in the Petition’s Geographic Scope. Sonoma is the fastest growing county in the San Francisco Bay Area. Vineyard conversions often result in a net increase in agricultural water diversions. Given the projected increases in irrigation and population, additional water demands are foreseeable. *See* North Coast Basin Plan, p. 2-9.00.

49. Water diversions are a significant cause for the threatened status of the coho and steelhead fisheries within the Geographic Scope. According to NOAA Fisheries, “[m]ultiple diversions can collectively adversely affect listed salmonids by (1) reducing available habitat for these species and related forage species, (2) reducing flows necessary for

upstream and downstream passage of listed salmonids, and (3) interfering with natural stream channel process.” Letter from James R. Bybee, NOAA Fisheries, to Laura Vasquez, SWRCB (Aug. 8, 2000) (Ex. 6), p. 4. Even when diversions or impoundments are located in waterways above historical salmonid habitat, adverse effects reach the downstream fisheries because “[h]e adwater tributaries may be important areas for the production or transport of invertebrate foods that subsequently drift downstream to rearing juveniles.” NOAA Fisheries, “Comments On The California State Water Resources Control Board (SWRCB) Report On Proposed Actions On Pending Water Rights Applications In The Russian River Watershed And NMFS Draft Guidelines For Maintaining Instream Flows To Protect Fisheries In Tributaries Of The Russian River” (Jan. 11, 2000) (Ex. 8), p. 2. Plainly, “[h]eadwater tributaries also contribute flow to downstream reaches that may support salmonids.” *Id.* On-stream reservoirs “have the capacity to completely alter stream hydrographs – reducing stream flows to minimum bypass requirements and eliminating intermediate and high flows necessary for successful spawning, fish migrations, and channel maintenance.” Letter from James R. Bybee, NOAA Fisheries, to Laura Vasquez, SWRCB (Nov. 22, 2000) (Ex. 7), p. 1. DFG has stated, “[t]he issue of water diversions is one of the most problematic facing the 1600 program.” *See* letter from Robert C. Hight, Director DFG, to Marc J. Del Piero, Russian River Flood Control and Water Conservation Improvement District (unknown date) (Ex. 9).

50. Two State reports illustrate that the ESA listings result from inadequate regulation of water rights within the Petition’s Geographic Scope. In 1988, the California Advisory Committee on Salmon and Steelhead Trout, created by law in 1983 to develop a

conservation and restoration strategy for salmon and steelhead fisheries (*see* Fish and Game Code § 6900 *et seq.*) found:

“The effort to maintain adequate streamflow for fish is also seriously hampered by the existing system for considering, granting, and enforcing the conditions placed on diversion permits. These activities are the responsibility of the State Water Resources Control Board (SWRCB). *More than 13,500 [in 1988] permits have been granted, but only 500 (less than 4%) have bypass flow requirements for the protection of fish life.* A recent survey conducted by the SWRCB indicated that more than 35% of the permittees were diverting more water than their rights authorize, indicating poor enforcement. Furthermore, there is the equivalent of only one staff person to handle all of the field inspections.”

California Advisory Committee on Salmon and Steelhead Trout, Restoring the Balance (1988 Annual Report), p. 25 (emphasis in original). Second, in 2003, DFG found that:

“A substantial amount of coho salmon habitat has been lost or degraded as a result of water diversions and groundwater extraction...In some streams the cumulative effect of multiple small legal diversions may be severe. Illegal diversions are also believed to be a problem in some streams within the range of coho salmon...Many of the watersheds where coho salmon are present have been developed and flows have been regulated and significantly reduced compared to natural flows.”

DFG, Coho Salmon Recovery Strategy, pp.3-11, 3-13.

D. Water Right Permits

51. Today, there are at least 276 water right permit applications pending for streams in this Petition’ s Geographic Scope. *See* Ex. 1.¹

52. A person may apply to the State Water Board for a permit to appropriate unappropriated water. *See* Water Code § 1252. Such an application is necessary if the applicant does not have an existing permit or license granted by the State Water Board, a pre-

¹ Of this list, many applications are for “min or diversion,” 3 cubic feet per second (cfs) direct diversion or 200 acre feet storage.

1914 right, or a riparian right adequate to cover the purpose, place, period, and amount of diversion and use.

53. There are five statutory steps in a permit proceeding. First, the owner of the land where the water will be used files an application with the State Water Board on standard form. Second, the State Water Board publishes a notice of application. Third, any interested person may file a protest, which is forwarded to the applicant. A hearing will be held if the protest is unresolved. Fourth, the Division of Water Rights (Division) reviews the application and determines whether to publish a Negative Declaration or order the preparation of an Environmental Impact Report (EIR) under CEQA, Pub. Resources Code §§ 21082.1, 2100. EIRs are rarely prepared for water right applications. Lastly, after such publication and any comment, the Division determines whether to approve an application and, if so, on what conditions; and it issues a final order subject to reconsideration or judicial review. *See id.*

54. This Petition seeks reform of the water rights system as applied to the Central California Coast. This region may be uniquely situated insofar as new diversions primarily occur on tributary streams up to the headwater springs or swales. We state those facts that are the basis for our claims that new diversions are not regulated in the timely, coordinated, or otherwise effective manner necessary to preserve and restore the steelhead and coho fisheries in good condition, and to provide needed protection of riparian habitat essential to those fish species and to many other bird and wildlife species.

Notice of Permit Application

55. The permit application requires a representation that the applicant has contacted other agencies with permitting authority. *See Form APP (March 2001), available at*

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<http://www.waterrights.ca.gov/forms/appform.pdf>. It does not expressly require that the applicant copy the application, when filed, to each affected County, State Lands Commission, NOAA Fisheries, or DFG, regardless of whether the applicant believes that such agency has permitting authority. NOAA Fisheries has protested many such applications on the ground that it did not receive timely notice from a given applicant or directly from the State Water Board, other than publication on the Division's website. See, e.g., letter from Rodney R. McInnis, Regional Administrator, NOAA, to Arthur G. Baggett, Jr., Chair, SWRCB (May 23, 2003) (Ex. 10), p. 2.

Preparation of Environmental Document

56. The State Water Board now requires that an applicant enter into a Memorandum of Understanding for Preparation of Environmental Documents." See Form EIR-MOU (April 2003), available at <http://www.waterrights.ca.gov/forms/MOU%2011-19-03.pdf>. Pursuant to such MOU, the applicant is responsible for engaging a consultant to prepare and implement a work plan, which: (A) identifies necessary environmental studies, (B) determines the permits required to construct and implement the project, (C) provides for consultation with DFG and NOAA Fisheries or other public agency with permitting authority, and (D) results in preparation of the Initial Study under CEQA and any subsequent documents required by the State Water Board.

57. The MOU form does not require that the applicant provide notice to DFG, NOAA Fisheries or a County before execution of the MOU. It does not require that these agencies or protestants to the application have an opportunity to review or comment on the

work plan. It does not establish a procedure for resolution of any dispute related to the draft work plan.

58. More generally, the State Water Board and other public agencies have not entered into a general MOU that describes how they will coordinate in the environmental review of a water right permit applications. In the absence of such an MOU, the State Water Board does not tend to ask or allow DFG or NOAA Fisheries to participate in review or drafting of the CEQA document for a given application. This is inconsistent with Public Resources Code section 21080.3, which requires the lead agency to consult with all responsible agencies and with any other public agency which has jurisdiction by law over natural resources affected by the project which are held in trust for the people of the State of California.

59. In comments on the Federal Energy Regulatory Commission's (FERC) "Notice of Proposed Rulemaking Hydroelectric Licensing Under the Federal Power Act" (68 Fed. Reg. 13987 (Mar. 21, 2003)), the State Attorney General (on behalf of State Water Board, DFG, and other State agencies) complained about FERC's inadequate coordination and collaboration in the preparation of environmental documents that serve as the basis for licensing and related regulatory decisions for hydropower projects. "An important reform FERC could implement to eliminate unnecessary duplication of effort in the licensing process and to integrate review by federal, state and tribal agencies is to provide for the preparation of joint environmental documents." "Comments of the State of California" (April 1, 2003), available at http://ferris.ferc.gov/idmws/file_list.asp?accession_num=20030421-5080 (hereafter, ILP Comments), p. 28. FERC subsequently adopted an Integrated Licensing Process, which although not tested yet contemplates that FERC and other resource agencies

will take appropriate steps to ensure timely preparation of joint environmental documents. 68 Fed. Reg. 51,069 (Aug. 25, 2003). We agree with the State's comments that sought to ensure a better Integrated Licensing Process in hydropower regulation, and we encourage similar coordination and collaboration in the preparation of environmental documents related to water right applications.

Guidelines for Substantive Review of Water Right Permit Applications

60. The State Water Board may approve a permit application on proof that (A) water is available for diversion and (B) the diversion will be put to reasonable and beneficial use. *See* Water Code § 1240. It may establish streamflow and other conditions as it deems necessary to protect fish and wildlife resources. *See id.* § 1257.5. It will consider the Basin Plans applicable to the affected stream and may subject the permit to those conditions necessary to implement the plan. *See id.* § 1258; *see also id.* § 1243.5. A.B. 2121 requires consideration of such plans. *Id.*, § 1259.4(a)(2).

61. In the early 1990s, the State Water Board effectively suspended the processing of permit applications in the Russian River Basin. In 1997, after public comment, the Division published its Staff Report: Russian River Watershed (Aug. 15, 1997) (hereafter, 1997 Staff Report) to "describe actions recommended ... [for] pending water right applications within the Russian River watershed ... to protect fishery resources...." The 1997 Staff Report recommended: (A) an allowable season of diversion from December 15 to March 31, (B) a minimum bypass flow of 60% of the average annual flow; (C) disapproval of on-stream reservoir except where it permits fish passage; (D) a limitation on the maximum rate of diversion, to be determined on a case-by-case basis; (E) installation of fish screens on any new

diversions; and (F) measures to demonstrate compliance, to be determined on a case-by-case basis. See 1997 Staff Report, pp. 36-37.

62. The Division commissioned a peer review of the 1997 Staff Report by Drs. Peter Moyle (UC Davis) and G. Mathais Kondolf (UC Berkeley). See "Fish Bypass Flows for Coastal Watersheds, A Review of Proposed Approaches for the State Water Resources Control Board" (June 12, 2000) (Ex. 11) (hereafter, Joint Guidelines Peer Review). TU submitted extensive comments by Dr. Bill Trush on recommended amendments to the 1997 Staff Report. See Griffin Declaration, Ex. 2, ¶ 18.

63. DFG and NOAA Fisheries thereafter recommended the 2002 Joint Guidelines for diversions from Central Coastal streams subject to the steelhead and coho listings. These guidelines, attached as Exhibit 2, recommend: (A) an allowable season of diversion from December 15 to March 31; (B) subject to limited exceptions, a prohibition on further on-stream reservoirs; (C) a minimum by-pass flow determined on the basis of site-specific data, or absent that, not less than the median unimpaired February median flow at each point of diversion; (D) prevention of cumulative impact, by limiting the cumulative diversion at a point to diversion to 15% of the estimated 20% exceedance flow or 10% of the unimpaired runoff between October 1 and March 31 in a normal water year; (E) adequate facilities for fish passage and screening; and, (F) compliance and monitoring measures satisfactory to the State Water Board, DFG, and NOAA Fisheries, including permission for DFG's access to each point of diversion or use. *Id.* at pp. 5-8. "These joint guidelines represent the first time state and federal fish agencies presented to the board specific fish measures in guideline format that are the *minimum necessary conditions* to preserve stream flow that ensures that anadromous

salmonids will not be adversely impacted by diversions.” A.B. 2121, Section 1(c) (emphasis added).

64. The State Water Board has not formally adopted the 1997 Staff Report or the 2002 Joint Guidelines as the basis for action on pending permit applications. The Board considered the Staff Report at three additional workshops on October 23, 1997, November 27, 2000, and September 5, 2001. It directed further Staff effort. The Division has stated to recent applicants that it will apply the 2002 Joint Guidelines. *See, e.g.*, letter from Harry M. Schueller, Chief, Division Water Rights, SWRCB, to Thomas and Mary Elke (Nov. 8, 2002) (Ex. 12), p. 2.

65. In individual proceedings, the State Water Board, DFG, and NOAA Fisheries have often disputed two fundamental issues in the application of the 2002 Joint Guidelines, discussed in paragraphs 66-67.

66. First, should the cumulative diversion at a proposed point of diversion be calculated to include only authorized diversions (licensed, permitted, pre-1914, and riparian), or should it include all actual diversions, including unauthorized? *See* memo from Robert W. Floerke, DFG Regional Manager, to Edward C. Anton, Chief, Division of Water Rights, SWRCB (April 25, 2003) (Ex. 13), p. 3. Further, how will all authorized diversions be calculated if the holders of such rights do not timely file accurate Statements of Use pursuant to Water Code sections 5100 *et seq.*? The Joint Guidelines expressly state: “... a prerequisite for reasonable flow allocation and habitat protection, is an accounting of existing diversions and enforcement of unpermitted diversions.” 2002 Joint Guidelines, Ex. 3, p. 11. The

Guidelines further conclude, “[i]t is essential ... that an accurate evaluation of all existing diversions be conducted prior to the issuance of any new water rights permits.” *Id.*

67. A second unresolved issue is: what monitoring measures should be included in a permit to assure compliance? Without specifying such measures, the Joint Guidelines recommend that the State Water Board develop a compliance program that, on a watershed scale, includes the following features:

- (A). Installation of stream flow gauging and recording devices at key locations within each stream basin for determining compliance with bypass flow requirements and current level of impairment;
- (B). Separate schedule for routine, random compliance inspections for each watershed, which is based upon the level of impairment and sensitivity of anadromous salmonid habitat;
- (C). Requirement that applicants develop and implement measures that will ensure compliance with bypass terms, and a specific recommendation of “passive” bypass facilities; and
- (D). Procedure for documenting that bypass facilities have been installed and are being maintained.

See Ex. 3, pp. 11-12.

68. A.B. 2121 requires that, by January 1, 2007, the State Water Board shall adopt instream flow guidelines for these coastal streams in accord with water quality standards for the purpose of water rights administration. *See Water Code § 1259.4(a)(1).* Prior to such formal adoption, the Board may consider the 2002 Joint Guidelines. *Id.* § 1259.4(b).

Schedule

69. The State Water Board does not publish a schedule for next steps (other than a protest, as subject to Water Code sections 1302 and 1333), publication of a CEQA document,

or its own final action on an application once filed. Accordingly, even though many of the pending applications for the streams at issue in this Petition were filed more than five years ago, the applicants and protestants do not have any information when next steps will occur. *See Griffin Declaration, Ex. 2, ¶ 25.*

70. Again, we believe that it is helpful to consider the State Water Board's comments in the context of reforming hydropower regulation. It asked FERC to establish and enforce a schedule in its licensing proceedings for hydropower projects. "Lack of accountability for applicants to meet project schedules [under the then-existing rule] is the single greatest reason that project relicensing is delayed." ILP Comments, p. 32.

71. A.B. 2121 requires that the Board shall annually prepare a written chart that shows the status of each pending application within the Geographic Scope of this Petition, any actions taken in the preceding year, proposed actions in the subsequent year, and proposed date for final action. Water Code § 1259.2(a). The Petitioners welcome this greatly needed reform and, as stated in paragraph 6, view this Petition as a vehicle to assist in implementation. However, A.B. 2121 does not answer the next question: what is an appropriate period for processing a water rights application within this Geographic Scope?

E. Registration of Small Domestic Uses and Livestock Stockponds

72. A short-form process applies to small domestic uses (not to exceed 4,500 gallons/day or 10 acre-feet/year) or livestock ponds (same). *See Water Code §§ 1228.9; 1228.1(b), (c).* First, the property owner completes and files a basic application form, including Fish and Game Information Form. The latter requires the applicant to contact the DFG Water Rights Coordinator for the applicable region where the diversion will be located.

DFG may impose conditions on the diversion. Pursuant to Water Code section 1228.3(c), the State Water Board publishes a monthly list of registrations. *See List of Small Domestic Use Registrations for Counties 1990-2004 (Ex. 14), List of Livestock Stockpond Registrations for Counties 1990-2004 (Ex. 15)*. A protest may be filed against a livestock stockpond registration, but not a small domestic use registration.² The State Water Board does not require a licensed engineer to prepare the plan for a small domestic use or livestock stockpond. It does not conduct CEQA review of the registrations. Personal Communication, Jeff Newman, SWRCB (Mar. 2, 2004). Its policy is that such registrations are ministerial actions exempt from CEQA processing under CEQA Guidelines § 15268. *See id.* It does not, as a matter of practice, perform any inspection of the completed diversion facilities to confirm consistency with the information provided in the registration. *See id.*

73. Unlike water permit applications, the State Water Board has approved small domestic use and livestock stockpond registrations expeditiously in the Central Coast streams. The Joint Guidelines Peer Review expressed concern that such registrations may have significant cumulative impacts on small streams. *See Joint Guidelines Peer Review, (Ex. 10), p. 10 n. 4.*

F. Approvals by the Department of Fish and Game

74. DFG has independent authorities to approve and condition any facility or activity that alters stream flow or channel or affects fish passage.

Section 1603 Streambed Alteration Agreement

² "The following is a list of Small Domestic Use Registrations filed with the SWRCB, Division of Water Rights during May of 2003. This list is provided for information purposes. Protest or objections are not allowed for small domestic use registrations (California Code section 1228.3(c))." *Small Domestic Use Registrations Filed in May 2003, available at <http://www.waterrights.ca.gov/application/appnot/DOMESTIC%20June2003.pdf>.*

75. Section 1603 of the Fish and Game Code requires that a property owner notify DFG before commencing any substantial diversion or obstruction of the natural flow of a stream (including river or lake), or any substantial change to the bed, bank, or channel. Upon determining that such modification will have a substantial impact on flow, or the form or function of the stream, the owner and DFG will negotiate an agreement that includes any measures necessary to protect fish and wildlife. *See id.* The diversion or other activity may commence only once the agreement is final.

76. DFG issued nearly 1,800 Streambed Alteration Agreements to property owners in Mendocino County in the past 10 years. *See* "List of Streambed Alteration Agreements issued to Property Owners from January 1993 to April 2003" (Ex. 16). DFG did not review such agreements under CEQA prior to Mendocino Environmental Center v. DFG (No. CV 76761) (Feb. 3, 1999). Thereafter, the number of Section 1603 notices dropped substantially. *See* Ex. 16.

77. We have not located any written guidelines that explain: (A) how DFG determines the level of protection that is "necess ary" under Section 1602; (B) how DFG will coordinate with State Water Board in implementing Title 14 sections 750-781.5 of the California Code of Regulations, in the environmental review for a decision under Section 1602;³ or (C) how any required measure will be monitored to assure compliance.

Section 5901 Prohibition on Impediment to Fish Passage

³ The regulations state "early consultation shall include all responsible agencies," but it does not provide any procedures for accomplishing early consultation. 14 CCR § 758. DFG will circulate the results of the Initial Study to the agencies for their comments and regulations for the proposed Negative Declaration. *See id.* The Fish and Game Code likewise does not provide any specific procedures to assure early and adequate consultation for any projects for which DFG is a lead agency.

78. Section 5901 of the Fish and Game Code provides, "it is unlawful to construct or maintain in any stream in Districts 1, 1½, 2, 2½ ... any device or contrivance which prevents, impedes, or tends to prevent or impede, the passing of fish up and down stream."

79. Districts 1, 1½, 2, and 2½ include the Counties named in this Petition. See Fish and Game Code §§ 11001 - 11007.

80. We have not located any written guidelines that explain: (A) whether DFG considers existing devices or contrivances that impede passage in Central Coast streams to comply with Section 5901; or (B) how DFG will coordinate with State Water Board in the environmental review for a decision under Section 5901. See Fish and Game Code; 14 CCR §§750-781.5.

Section 5930 Inspection of All Dams

81. Section 5930 requires: "The department shall, from time to time, examine all dams in all rivers and streams in this State naturally frequented by fish."

82. Section 5931 requires that, if the Fish and Game Commission finds, "there is not free passage for fish over or around a dam," DFG will "... cause plans to be furnished for a suitable fishway, and order in writing the owner of the dam to provide ... a durable and efficient fishway...."

83. Section 5900(a) defines dam to include "all artificial obstructions."

84. We have not located any written guidelines that explain: (A) DFG's schedule for inspection of dams in the Central Coast streams; (B) whether DFG considers Section 5931 to apply to these streams, in light of the prohibition in Section 5901; or (C) how any fishway requirement will be monitored to assure compliance.

Section 5937 Requirement for Adequate Flow

85. Section 5937 provides:

“The owner of any dam shall allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam. During the minimum flow of water in any river or stream, permission may be granted by the department to the owner of any dam to allow sufficient water to pass through a culvert, waste gate, or over or around the dam, to keep in good condition any fish that may be planted or exist below the dam, when, in the judgment of the department, it is impracticable or detrimental to the owner to pass the water through the fishway.”

86. This statute, and its predecessors dating to 1872 (*see* Fish and Game Code § 5937, “Notes, Historical Derivation”), apply to diversion involving (A) a dam, defined as an artificial obstruction and (B) any claim of right.

87. We have not located any written guidelines that explain: (A) how DFG determines the flow schedule necessary to maintain the good condition of the fishery downstream; (B) how DFG will coordinate with State Water Board in the environmental review for a decision under Section 5937; or (C) how any required measure will be monitored to determine compliance.

Section 6100 Requirement for Screened Diversion

88. Section 6100 provides that, after 1971, no diversion may occur from a water with a steelhead or coho salmon fishery until DFG has: (A) received notice from the diverter; (B) investigated whether the diversion may be deleterious to these fisheries; and if so, (C) determined measures necessary to protect these fisheries. The diversion may commence only once these measures have been incorporated into the plan and construction of such diversion.

89. We have not located any written guidelines that explain: (A) how DFG determines the level of protection necessary to protect the fishery as required by Section 6100; (B) how DFG will coordinate with State Water Board in the environmental review for a decision under Section 61007; or (C) how any required measure will be monitored to determine compliance.

G. County Permits

90. Each of the Counties included in the Petition requires a form of land use permit (such as a grading permit) for land use associated with a diversion outside of the streambed.

91. All of the Counties named in the Petition have adopted Chapter 70 of the Uniform Building Code (UBC), which establishes: (A) rules for excavation, grading, and earthwork construction; (B) administrative procedures for issuance of permits; and (C) procedures for inspections and approval of plans. See UBC, Chapter 70, § 7002 (1991). Most permits issued by the Counties for ponds, dams, and reservoirs are classified as exempt or regular grading.

92. We focus on Mendocino County, which we believe is generally representative of the other Counties so included.

Pond Exemptions

93. Under the UBC, a grading permit is not required when a project is approved by the building official as grading in an "isolated, self-contained area, and determined to pose no danger to private or public property." UBC, Chapter 70 § 7003. Due to the rural nature of much of the Counties named in the Petition, these criteria are over broad. According to the criteria, a pond may be exempt even though more than 5,000 cubic yards of material is moved

in the course of construction. *Id.*; letter from Chris Warrick, Chief Building Inspector, Mendocino County, to Fred and Alberta Zmarzly (Aug. 16, 2000) (Ex. 17) (approving exemption for pond located in drainage and requiring approximately 5,000 cubic yards of material to be moved); letter from Chris Warrick, Chief Building Inspector, Mendocino County, to Marietta Vineyards LLC (Feb. 23, 2000) (Ex. 18) (approving exemption for pond located in drainage and requiring approximately 24,400 cubic yards of material to be moved).

94. The Counties have adopted different guidelines and regulations for reviewing permit applications. In Mendocino, an application for a pond exemption involves the following steps. First, the applicant submits a building permit application form to the County's Planning and Building Services Department (Building Department). Then, upon receiving the application for an exempt pond, the Building Department sends a building inspector to inspect the project. The Building Department does not have any written office policy, regulation, or ordinance according to which inspectors conduct their inspection and prepare their reports. *See* memo from Scott Ward, Building Inspector II, Mendocino County, to Chris Warrick, Chief Building Inspector, Mendocino County (Ex. 19). Next, the Chief Building Inspector renders a decision on the application based on the Building Inspector's report. Finally, if the Chief Building Inspector approves a proposed pond, there is no follow-up inspection to ensure that the proposed plans were followed.

95. By contrast, Marin and Napa counties forward permit applications to their respective planning departments for environmental review. But, like the other counties, they do not require post-construction inspection to ensure compliance with the proposed plans.

Grading Permits

96. An application for a regular grading permit (grading not in excess of 5,000 cubic yards) involves more detailed review. A complete application for a regular grading permit includes "a plan in sufficient clarity to indicate the nature and extent of the work."⁴ UBC § 7006(g). Signature by a licensed engineer is not mandatory. *See id.* § 7014(a), § 7006. The steps that follow track the pond exemption process.

Environmental Review

97. As a matter of policy, Mendocino, Humboldt, and Sonoma Counties hold that issuance of permits for pond exemptions and regular grading are not subject to CEQA because they fall under the statutory exemption for ministerial projects, which "involve little or no personal judgment by the public official as to the wisdom or manner of carrying out the project." CEQA Guidelines §§ 15268, 15369; *see also* letter from Harry M. Schueller, Chief, Division of Water Rights, SWRCB, to Rosalind Peterson (April 6, 2001) (Ex. 20).

98. By contrast, Marin and Napa Counties forward applications for grading permits to their respective planning departments for environmental review. Napa County initiated CEQA review in response to a suit filed by the Napa County Chapter of the Sierra Club.

99. The Counties do not require proof that the applicant has: (A) complied with all other relevant state regulations or submitted the necessary applications; or (B) notified DFG, NOAA Fisheries, or the State Water Board of any intention to store or divert water. *See, e.g.,* Humboldt County, Title III Land Use and Development Division 3, Building Regulations Section 331-12(E).

⁴ We have been unable to locate any standards that describe what constitutes "sufficient clarity."

100. The State Water Board has requested that every County notify property owners that any diversion of water, except under existing rights, prior to obtaining a permit or registration from the Board, is unlawful. *See* letter from Harry M. Schueller, Chief, Division of Water Rights, SWRCB, to Chairmen of the County Boards of Supervisors and Regional Director of NRCS (July 28, 2000) (Ex. 21); *see also* letter from James W. Kassel, SWRCB, to Raymond Hall, Building Department, Mendocino County (Feb. 27, 2002) (Ex. 22). The State Water Board has stated that many pumping facilities, ponds and reservoirs permitted by the Counties had been constructed without proper water rights. *See id.* It further stated that many property owners claimed that the Counties had not informed them of the water rights regulation. *See id.*

H. Enforcement Proceedings to Correct Unauthorized Diversions

101. A large but unknown number of unauthorized diversions occur in the Central Coast streams.

102. Most of the pending permit applications in the Petition's Geographic Scope are probably for unauthorized diversions. *See* Griffin Declaration, Ex. 2, ¶ 30. In the Watershed Investigation Program (WIP) in 1998, the State Water Board determined that approximately 69 percent of the reservoirs identified by the investigation in the Navarro watershed were unpermitted.⁵ *See* State Water Board, Order WR 2000-03 (April 26, 2000) (Ex. 23). It later determined that approximately 77 percent of the reservoirs identified by the investigation in the Maacama watershed were unpermitted. *See* State Water Board, Order WR 2000-06 (June 15, 2000) (Ex. 24). DFG has referenced "profligate unauthorized diversions now occurring in

⁵ Given the fact investigators used GIS maps from 1991, it is likely the investigation did not uncover a number of newer, unauthorized diversions.

Mendocino County,” and we have reason to believe this is the case throughout the Petition scope. Letter from Robert W. Floerke, Regional Manager, DFG, to Edward C. Anton, Chief, Division of Water Rights, SWRCB (May 28, 2003) (Ex. 25), p. 2.

103. In some instances, unauthorized diversions have continued for decades.

“In your letter you ask why protests have been accepted against your project when these reservoirs *have been in existence since the 1960s* and no objections were received during construction. It is my understanding that *these reservoirs have been storing water without a valid basis for right for over 40 years* and that this application was filed in order to legalize the use of water as described in your application” (emphasis added).

Letter from Division of Water Rights, SWRCB, to Ash Creek Vineyards (Oct. 22, 2002); see Ex. 26.

104. We address enforcement to prevent unauthorized diversions as follows: (A) Watershed Investigation Program (paragraphs 105-106), (B) Administrative Civil Liability and related remedies initiated by the State Water Board (paragraphs 107-115), (C) responses to complaints filed by third parties before the State Water Board (paragraphs 116-117), and (D) enforcement proceedings by DFG (paragraphs 118-120), State Lands Commission (paragraph 121), NOAA Fisheries (paragraph 122), and Counties (paragraph 123) under their independent authorities.

Watershed Investigation Program

105. The State Water Board has undertaken WIP since 1998. This compliance program includes the following steps: (A) reviewing satellite photos to locate reservoirs; (B) determining whether an apparent claim of right exists for each such reservoir; (C) notifying

each property owner for which no apparent claim of right exists; and (D) directing the landowner to state a claim of right or file an application.

106. As a matter of practice, the State Water Board selects four watersheds for investigation *throughout the entire State* in any given year. Since 1998, to our knowledge, it has only completed two such investigations within the Geographic Scope: namely, Maacama Creek and Navarro River watersheds. There are many hundreds of streams (including tributaries) that are anadromous fish habitat in the Central Coast ESU. The Petition's Geographic Scope is larger than New Hampshire, New Jersey, Connecticut, Delaware, and Rhode Island. At this pace, the State Water Board will complete the first inspection of all such watersheds within this scope at an unknown date more than a decade hence.

Administrative Civil Liability and Other Compliance Remedies Initiated by State Water Board

107. Under Water Code section 1052, the State Water Board may impose an Administrative Civil Liability (ACL) up to \$500/day of unauthorized diversion. This is a form of civil penalty, subject to judicial review, for trespass on this public property. Pursuant to Water Code section 1055.3, "[i]n determining the amount of civil liability, the board shall take into consideration all relevant circumstances, including, but not limited to, the extent of harm caused by the violation, the length of time over which the violation occurs, and the corrective action, if any, taken by the violator."

108. The State Water Board does not have written penalty standards under Section 1055.3. By contrast, CalEPA has adopted such a policy for RCRA violations, in order to motivate compliance.⁶ See 42 U.S.C. § 6928.

109. As a matter of practice, the State Water Board does not impose ACL for an unauthorized diversion if the property owner, once caught, applies for a water right permit. “[There is a n]eed to encourage owners of unpermitted diversions to file applications to enable identification and rectification of any shortcoming in water rights. Enforcement may penalize such curative conduct, which reduces the amount and accuracy of water use information.” State Water Board, “Analysis of Water Rights Process and Procedures, Water Rights Improvement Project” (Aug. 27, 2002), p. 4.

110. For example, in the course of the Navarro WIP, the State Water Board imposed ACL on only one property owner. That owner stored water diverted from an unnamed stream in an unpermitted reservoir. See Ex. 23, p. 4. The State Water Board found that the unauthorized diversion had continued since at least 1991 despite repeated warnings; the State Water Board imposed an ACL of \$2,000. See *id.*, p. 1. The statutorily permitted ACL for that period of time could have been in excess of \$1.6 million.

111. DFG has objected that this penalty practice motivates unauthorized diversions. “The already profligate unauthorized diversions now occurring in Mendocino County will

⁶ Violations of RCRA are subject to penalties of \$25,000 per day of noncompliance for each violation. See 42 U.S.C. § 6928. The EPA has stated, “[a]n effective hazardous waste enforcement program should impose penalties that remove the economic advantage of noncompliance with regulations and also reflect the gravity and duration of violations.” EPA, *Further Improvements Needed in the Administration of RCRA Civil Penalties*, available at <http://www.epa.gov/oigearth/reports/1997/rpensum.htm>.

continue to flourish unless there is active SWRCB enforcement of the Water Code.” Ex. 25,

p. 2. The Peer Review took a similar position:

“The presence of many unauthorized diversions, some of long standing, creates a dilemma for the SWRCB. On the one hand, effective government depends on the consent of the governed, and taking too strong a position against people who honestly do not realize that they need a permit for their diversions is likely to be counterproductive. On the other hand, taking too weak a position invites non-compliance, and deals with the problem at the expense of the public trust. We are not confident that there is a good resolution to this dilemma, but a vigorous program to identify unauthorized diversions and bring them into the water rights process would be an important step in the right direction. If the problem is ignored it will only get worse.”

Ex. 11, p. 10.

112. As another recent example, the State Water Board issued an ACL complaint against Omnium Estates located in the Russian River watershed in November 2002, alleging violation of Water Code section 1052(a). See “Notice of Public Hearing for Complaint No. 252.5-31” (Mar. 21, 2003). In the course of a compliance inspection in 2001, State Water Board staff observed Omnium’s property was planted in a mature vineyard and that an offstream reservoir constructed on the property was storing water. See *id.*, p. 2. Based on aerial photographs, staff concluded the reservoir had been constructed prior to July 1993. See *id.* Omnium failed to file a permit application, despite repeated warnings from State Water Board staff. See *id.* The State Water Board proposed an ACL liability of \$3,000. This did not even cover the costs of the State Water Board’s investigation. In its comments, DFG stated: “future enforcement efforts should include stronger disincentives to illegal water use in order to ensure that the resource impacts of water projects are eventually mitigated by appropriate and effective permit conditions.” Ex. 25, p. 1. More specifically:

"The \$3,000 imposed results in an amount of approximately \$7.50 per day for each trespass after notification. We question the economic deterrent value of this amount and believe it sends a message to other unauthorized diverters that illegal water use is an acceptable and economic alternative to the more costly and restrictive lawful permitting process ... It also appears that, after paying the ACL and submitting the required water rights application, this diverter is tacitly being allowed to continue diversions without penalty until the completion of the required California Environmental Quality Act (CEQA) review prior to permit issuance. If this is the case, the argument for the ACL acting as a disincentive to unauthorized diversions is further eroded."

Id., p. 2.

113. As a matter of practice, the State Water Board has not required that the property owner who has undertaken an unauthorized diversion include in the corrective permit application any measure to remedy the past adverse impacts on the stream and fish and wildlife resources.

114. The State Water Board may issue a cease-and-desist order against an unauthorized diversion. *See* Water Code § 1831 *et seq.* As a matter of practice, it does not issue such order in that circumstance provided the property owner files a permit application. The unauthorized diversion thus may continue unabated without mitigation until the State Water Board takes final action on such application. To our knowledge, the State Water Board has not scheduled final action on any of the pending applications. *See* Griffin Declaration, Ex. 2, ¶¶ 25, 27, 28.

115. DFG has objected that allowing an unauthorized diversion to continue during review of a permit application will result in unlawful degradation of the environmental baseline used to determine the permit conditions. *See* Ex. 25, p. 2. In other words, since the State Water Board conditions a permit to prevent degradation of beneficial uses which exist at the

time of permit issuance, a permit does not require mitigation for any preexisting degradation caused by the unauthorized diversion. Thus, for a permit application which, as filed in 1994, includes an already constructed dam and diversion, the State Water Board will condition the permit to prevent degradation from 2004 forward and will disregard the degradation caused by the unauthorized diversion between 1994 to 2004.

Complaints Brought by Third Parties before State Water Board

116. Any person may file a complaint before the State Water Board seeking a cease-and-desist order or ACL. See 23 CCR § 820; "Information Pertaining to Investigating Water Right Complaints in California" (Dec. 2003), available at <http://www.waterrights.ca.gov/forms/compBooklet.pdf> (Investigating Complaints). According to this program, a complaint will be dismissed unless it includes prima facie proof that: (A) there are valuable public trust resources in the stream; (B) unauthorized diversion by the defendant adversely affects these resources; and (C) modification or termination of diversions from the stream would benefit public trust resources. See *id.*, at pp. 4-5. The State Water Board will not provide relief on such a complaint unless the complainant provides this proof. *Id.*; see also letter from Edward C. Anton, Chief, Division of Water Rights, SWRCB, to Robert W. Floerke, Regional Manager, DFG, p. 3 (July 7, 2003) (Ex. 27) ("unless we have substantial evidence, which shows that an applicant's diversion causes specific harm, the Division may allow the diversion to continue"); email from Chuck Rich, Chief, Complaints Unit, SWRCB, to Alan Levine (Aug. 8, 2003) (Ex. 28) ("If the necessary evidence is not available, I doubt there is much we can do to establish and enforce minimum flow standards").

117. This burden of proof means that a complaint is generally an ineffective procedure to address an unauthorized diversion, since a complainant cannot gain access without the property owner's consent. See email from Chuck Rich, Chief, Complaints Unit, SWRCB, to Alan Levine, complainant, (Sept. 10, 2003) (Ex. 29) ("unless I were to initiate my own investigation in the meantime to determine where water is being used (which would be difficult due to workload requirements and the fact that I don't know the area and have NO right to trespass on the Stornetta ranch or any other private property"); see also letter from Robert Swain to David LaBrie, SWRCB (April 11, 2002) (Ex. 30), p. 1 ("all three of these ponds are located on private property with no public access, to gather the pictures and information [complainant] says she submitted she or her agents would have needed to enter and trespass").

Enforcement Proceedings by DFG under Fish and Game Code

118. DFG has several independent authorities under Fish and Game Code sections 1601, 5901, 5937, and 6100 to prevent unauthorized diversion of water and degradation of riparian habitat. These statutes provide for: (A) compensation for damages to the fish and wildlife resources, in an amount equal to the detriment to this public property (see, e.g., Fish and Game Code § 2014(b)); (B) civil penalties up to \$25,000 per violation (see *id.*, § 1603.3); and (C) criminal penalties (see *id.*, § 12000).

119. However, relief under these statutes is available only in a judicial case that the Attorney General or District Attorney brings for the relevant County. See, e.g., Fish and Game Code § 1603.3; letter from Tom Pedersen, Regional Patrol Chief, DFG, to Rosalind Peterson (May 2, 2001) (Ex. 31). Prosecution of unauthorized diversions under these statutes

is rare. Such prosecution is not a priority for a typical District Attorney, given the caseload of crimes against persons and other competing priorities. DFG wardens do not have the time, expertise or other resources to develop the evidence necessary for such a *prima facie* case. Staff is limited for the Central Coast streams, and their priority tends to be poaching. See Griffin Declaration, Ex. 2, ¶ 34. DFG does not have a written procedure for enforcement of the Fish and Game Code against unauthorized diversions. DFG wardens are often refused access to property absent a Court order. *Id.*

120. Twenty-six years ago, the Legislature found:

“...the department has in the past not been properly funded. The principal cause has been the fixed nature of the department's revenues in contrast to rising costs resulting from inflation. This lack of funding has prevented proper planning and manpower allocation. The lack of funding has required the department to restrict warden enforcement and to defer essential repairs to fish hatcheries and other facilities. The lack of secure funding for fish and wildlife activities other than sport and commercial fishing and hunting activities has resulted in inadequate nongame fish and wildlife protection programs.”

Fish and Game Code § 710. Time has not changed these findings. We are aware of no cases brought by DFG against unauthorized diversions from Central Coast streams in the past ten years. See Griffin Declaration, Ex. 2, ¶ 34.

Enforcement Proceedings by State Lands Commission under Public Resources Code

121. State Lands Commission has independent authorities to obtain civil damages and injunction against unauthorized use or occupancy of the ungranted submerged lands. See Pub. Resources Code § 6224.1. These authorities may reach diversion or storage facilities. However, we have been unable to determine whether the State Lands Commission has completed the survey required by Public Resources Code section 6370.2 to determine the

locations of such trust lands in the Petition' s area. We are also unaware of any enforcement proceedings brought on behalf of the State Lands Commission against unauthorized diversions from Central Coast streams in the past ten years.

Enforcement Proceedings by NOAA Fisheries under Endangered Species Act

122. NOAA Fisheries has independent authority to prosecute take of listed fish in the Central Coast streams. *See* 16 U.S.C. § 1540, Final 4(d) Rule, 65 Fed. Reg. ¶ 42,422 (July 10, 2000). We are aware of only a handful of cases brought by NOAA Fisheries against unauthorized diversions from these streams in the past ten years. *See* Griffin Declaration, Ex. 2, ¶ 34. No administrative remedy is available, and exclusive venue for an enforcement case lies in U.S. District Court. *See* 16 U.S.C. § 1540(g). NOAA Fisheries only has two or three enforcement staff within the Petition' s Geographic Scope. *See* Griffin Declaration, Ex. 2, ¶ 34. U.S. Department of Justice, which would represent NOAA Fisheries in such enforcement cases, also has its own significant budgetary limitations. Property owners have denied access to NOAA Fisheries staff for the purpose of inspections, absent court order. Finally, any enforcement case must prove with scientific evidence that the diversion was a direct cause of take. In short, State agencies may not rely on federal enforcement cases to prevent or remedy unauthorized diversions in Central Coast streams.

Enforcement Proceedings by Counties

123. The Counties named in the Petition rely upon UBC 70 to regulate grading activities. The Mendocino Grand Jury has stated that the UBC does not address erosion prevention or water quality protection. *See* "19 98-1999 Mendocino County Grand Jury Final Report," available at <http://www.co.mendocino.ca.us/grandjury/Complete%2098->

99%20Final%20Report.pdf, p. 27. Further, “[t]here seems to be little enforcement of UBC 70 which states that a permit is necessary for the movement of more than two cubic yards of soil.” *Id.*

V. CLAIMS FOR RELIEF

124. These claims state the legal basis for our request that the State agencies reform their guidelines and procedures for water rights regulation on the Central Coast streams, as specifically recommended in Section VI. However, before stating the specific claims, we respectfully address possible defenses against such reform, as raised by several agencies in individual proceedings. Such defenses, which maintain the status quo in Central Coast streams, do not comply with the spirit or the letter of applicable laws, and specifically, will not contribute to the recovery of the listed fisheries to good condition as required by State laws and the ESA alike.

125. It is no defense that the exact impacts of unauthorized diversions vary by stream and have not been precisely quantified. The best scientific evidence (including NOAA Fisheries’ listing notices under the ESA) confirms that such diversions are a significant and worsening cause of the threatened condition of these fisheries. The 2002 Joint Guidelines concur. Likewise, unauthorized diversions cause loss of riparian habitat necessary for wildlife. The public trust doctrine and other State laws require effective regulation of water diversions, whether on a navigable river or non-navigable tributaries, to protect fishing, navigation, and other beneficial uses.

126. The Gold Run Ditch case is a useful precedent for the reform of guidelines and procedures that we seek through this Petition. See People of the State of California v. Gold Run Ditch and Mining Company, 66 Cal. 138, 146-47 (1884). There, the California Supreme Court prohibited hydraulic mining that had resulted in discharges of soil and other debris into non-navigable tributaries, eventually impairing navigation in the Sacramento River. The Court confirmed that the public trust prohibits actions, even located on private lands distant from navigable waters, that impair navigation.

“As a navigable river, the Sacramento is a great public highway, in which the people of the State have paramount and controlling rights. These rights consist chiefly of a right of property in the soil, and a right to the use of the water flowing over it, for the purposes of transportation and commercial intercourse. ... To make use of the banks of a river for dumping places, ... is an encroachment upon the soil of the latter, and an unauthorized invasion of the rights of the public to its navigation; and when such acts not only impair the navigation of a river, but at the same time affect the rights of an entire community or neighborhood, or any considerable number of persons, to the free use and enjoyment of their property, they constitute, however long continued, a public nuisance.”

Id. at 146-147.

127. While the miners had acted independently and separately, and while their individual actions may have been “slight” or “scarcely appreciable,” the “common result” was impairment of navigation on the Sacramento River. Accordingly, they were jointly and severally liable for the public nuisance, and subject to a “coordinate remedy....” *Id.* at 149-50.

128. The Court imposed a new regulation of hydraulic mining even though such mining was otherwise consistent with local custom and State law.

"...[A] legitimate private business, founded upon a local custom, may grow into a force to threaten the safety of the people, and destruction to public and private rights; and when it develops into that condition, the custom upon which it is founded becomes unreasonable, because [sic] dangerous to public and private rights, and cannot be invoked to justify the continuance of the business in an unlawful manner.... Accompanying the ownership of every species of property is a corresponding duty to so use it as that it shall not abuse the rights of other recognized owners. Upon that underlying principle, neither State nor Federal legislatures could, by silent acquiescence, or by attempted legislation, ... divest the people of the State of their rights in the navigable waters of the State for the use of a private business, however extensive or long continued."

Id. at 151. These words in 1884 ring as true today.

129. Property owners undertaking unauthorized diversions will bear additional costs to come into compliance. As the California Supreme Court held in the Mono Lake Cases:

"We recognize the substantial concerns voiced by Los Angeles - the city's need for water, its reliance upon the 1940 [SWRCB] decision [granting the water rights], the cost both in terms of money and environmental impact of obtaining water elsewhere. Such concerns must enter into any allocation decision. We hold only that they do not preclude a reconsideration and reallocation which also takes into account the impact of water diversion on the Mono Lake environment."

National Audubon, 33 Cal.3d at 447. Plainly, the State agencies here should adopt guidelines and procedures that protect trust uses while minimizing such compliance costs. In this respect, the Central Coast streams are similar to other areas throughout the State, notably Southern California. Los Angeles and other appropriators have taken many measures on their own budget, such as use of reclaimed water, necessary to reduce their historical levels of diversions and now bear the costs and share the benefits of such balanced management of water resources.

130. The reforms recommended in Section VI will require significant effort by the State Water Board and other public agencies, at a time of extraordinary budgetary limitations.

However, that merely restates the problem. These budgetary limitations are a direct cause for the status quo where permit applications pend for many years and where unauthorized diversions of California's most precious natural resource are the rule rather than the exception. The problems will worsen in the absence of the good government reforms sought here.

131. These budgetary limitations are nothing new, although the severity may be. As discussed in paragraph 120, the Legislature acknowledged in 1978 that DFG's budgets had consistently frustrated adequate enforcement of the Fish and Game Code. It even codified that acknowledgement. As stated in paragraph 50, in 1988 the State Water Board had only one staffer to manage field inspections, and the situation today is not materially better. We are fully prepared - and we hope that the State agencies will agree - to develop innovative guidelines and procedures that will be within the agencies' respective capacities and will assure effective regulation of diversions from in the Central Coast streams. Failure to achieve such reform will cause further harm to the public trust as well as private property owners, who will face continual regulatory uncertainty because the State Water Board has not taken final action for any of the pending permit applications for at least a decade.

132. We organize our claims below by agency. Section V.A states claims that run equally to each agency; Section V.B, State Water Board; Section V.C, DFG; Section V.D, State Lands Commission; and Section V.E, the Counties within the Petition's Geographic Scope.

A. Claims Running to All State Agencies

Claim One. The State Agencies Have Not Protected The Public Trust Uses Of The Central Coast Streams Against Unauthorized Diversions.

133. Waters, submerged lands (up to the high water mark), and fish and wildlife resources are public properties. The public trust doctrine requires protection of the trust uses to the extent feasible. *See National Audubon*, 33 Cal.3d 419, 446-7; *see also Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 436-37, 457 (1892); Water Code § 1201.

134. Unauthorized use of such public properties is trespass.

135. There is a worsening pattern and practice of unauthorized diversions from Central Coast streams.

136. These diversions are a significant cause for the threatened condition of the coho and steelhead fisheries in these streams.

137. The State agencies named in this Petition have abused their discretion by not acting jointly to prevent or correct this pattern and practice of unauthorized diversions from these streams.

Claim Two. The State Agencies Have Not Adopted Adequate Procedures For Coordinated Environmental Review Of Water Right Permit And Related Applications.

138. CEQA requires that each public agency adopt procedures necessary for the "orderly evaluation" of a project preparatory to adoption of feasible mitigation of any significant adverse impacts. CEQA Guidelines § 15022(a). Among other things, such procedures are intended to provide for: (A) deliberate determination which agency will be the lead agency, and what responsibilities will be assumed by the responsible or trustee agencies

(*id.*, § 15051); (B) the timely preparation of a single environmental document that will serve as the basis for all regulatory approvals (*id.*, § 15050(a)); and (C) pro-active consultation between the lead and responsible agencies in the course of preparing that document, beginning before the first application is filed (*id.*, §§ 15022(a)(5), 15060.5).

139. These State agencies have not adopted a MOU or other *standing procedures* for effective cooperation in the preparation of the environmental document related to applications for water right permits and related regulatory approvals under the Fish and Game Code, Public Resources Code, Government Code, and local ordinances.

140. There are at least 276 permit applications pending in the Central Coast streams. The workload will increase in the foreseeable future, particularly if and as applications are filed to correct unauthorized diversions. As discussed above, DFG and NOAA Fisheries have frequently objected that the absence of certain standing procedures for inter-agency coordination, including filing notice from the applicants, interferes with their effective participation in the proceedings before the State Water Board. In turn, the State Water Board has also objected to inadequate notice and other procedures by the Counties in their processing of land use applications. The State agencies have abused their discretion under CEQA by failing to adopt standing procedures to coordinate environmental review of water diversions.

B. Claims Running to State Water Board

Claim Three. State Water Board Does Not Have An Adequate Procedure To Assure Timely Action On Water Right Permit Applications.

141. Under Water Code section 1250, the State Water Board "shall consider and act upon all applications for permits to appropriate water and shall do all things required or proper

related to such applications.” This statute creates an implied duty of timely action of a given permit application.⁷ The State Water Board has not adopted a written procedure under which it sets the schedule to process each permit application.

142. Under CEQA, each lead agency “shall adopt time limits to govern ... implementation...” CEQA Guidelines § 15100. CEQA states specific deadlines for review of an application for completeness and subsequent steps in preparation of the environmental document. *See id.*, §§ 15101-15112. The State Water Board has not adopted such time limits for the purpose of action on each permit application.

143. As a matter of practice, the State Water Board does not publish a schedule that shows status, past actions, future actions, and deadline (or even target date) for decision, for a pending permit application. Since 1990, uncertainty about the schedule for action on permit applications has encouraged the pattern and practice of unauthorized diversions in Central Coast streams.

144. A.B. 2121 requires the State Water Board to henceforth publish a schedule for its action on each permit application within the Petition’s Geographic Scope. While this is much needed progress, it does not moot this claim. We seek both *transparent and expeditious* action. Many applications within the Petition’s Geographic Scope have been pending up to ten years, and most, for five years or longer.

145. The State Water Board abuses its discretion by failing to adopt and implement a schedule for expeditious action on permit applications in Central Coast streams.

⁷ Water Code section 1302 provides for a protest within 60 days of the notice of application, and section 1333 provides for resolution of a protest within 180 days. These are the only steps subject to express time limits.

Claim Four. The State Water Board Does Not Have An Adequate Procedure For Consultation With Responsible Agencies In The Preparation Of The Environmental Document For Its Action On A Permit Application.

146. Claim Two addresses the collective failure to adopt an inter-agency MOU to establish standing procedures for coordination of the several regulatory proceedings that relate to any water diversion. In addition, the State Water Board does not have adequate procedures for the effective participation of DFG, NOAA Fisheries, or other responsible agencies in its own proceedings. Specifically, the standard form of MOU described in paragraph 56 does not require consultation with these responsible agencies regarding the study plan or scoping that the applicant undertakes preparatory to the CEQA document; and it does not provide for resolution of any related disputes. This is an abuse of discretion under CEQA Guidelines §§ 15060.5(b) (pre-filing consultation) and 15006(g) (consultation before as well as during preparation of the EIR).

Claim Five. The State Water Board Improperly Exempts Small Domestic Water Uses And Stockponds From Environmental Review Of Cumulative Impacts.

147. The State Water Board exempts from CEQA review the registration of small domestic uses and stockponds under Water Code section 1228 *et seq.* Its policy is that such registration is ministerial under CEQA Guidelines section 15268.

148. "Ministerial" describes a

"governmental decision involving little or not personal judgment by the public official as to the wisdom or manner of carrying out the project. The public official merely applies the law to the facts as presented but uses no special discretion or judgment in reaching a decision. A ministerial decision involves only the use of fixed standards or objective measurements...."

CEQA Guidelines § 15369.

149. The State Water Board has discretion to require applicants to provide information it deems necessary for the review of a registration form (Water Code § 1228.3(a)(8)), and to establish reasonable general conditions applicable to such registrations, including a requirement for beneficial use (*id.*, § 1228.6). Further, a given registration shall incorporate any specific conditions required by DFG for the protection of fish and wildlife in the affected stream (*id.*, § 1228.6(a)(2)). Such conditions are not statutorily prescribed. *See id.* The Water Code does not prescribe the *manner* of diversion pursuant to a registration. As such, a registration is a discretionary project. *See Leach v. City of San Diego*, 220 Cal.App.3d, 389, 395 (1990); *Mountain Lion Foundation v. Fish and Game Comm'n*, 16 Cal.4th 105, 117 (1997).

150. DFG and NOAA Fisheries have submitted evidence to the State Water Board in individual proceedings that such registrations, in combination with diversions under other claims of right, contribute to the threatened status of the coho and steelhead fisheries and loss of riparian habitat and associated wildlife species. As such, registrations are “cumulatively considerable” on these streams, meaning that the “incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.” CEQA Guidelines § 15064(j).

151. If the State Water Board disagrees with the expert opinion of DFG and NOAA Fisheries about the cumulative impact of such registrations, as described in paragraphs 66-67, the statutory exemption still does not apply. “If there is disagreement among expert opinion

supported by facts over the significance of an effect on the environment, the Lead Agency shall treat the effect as significant..." *Id.*, § 15064(g).

152. The State Water Board abuses its discretion by failing to require CEQA review for small domestic uses and stockponds.

Claim Six. State Water Board Does Not Have Guidelines Adequate To Determine the Existing Diversions From Central Coast Streams.

153. A permit may be granted only for water that the State Water Board determines is available for diversion. *See* Water Code § 1202. This requires a deduction of existing diversions from natural flow in the stream subject to the application.

154. The 1997 Staff Report proposed a method for determining the availability of unappropriated water at a proposed point of diversion in the Russian River Basin. The 2002 Joint Guidelines also proposed a method applicable to Central Coast streams. The State Water Board has not formally adopted either method. The State Water Board has not resolved objections by NOAA Fisheries, DFG, TU and other stakeholders that it does not have a method adequate to estimate: (A) unauthorized diversions upstream of the point of diversion; or (B) storage or diversion under pre-1914, riparian, or other rights, in light of the routine failure to file Statements of Use. Uncertainty regarding the substantive basis for determining the availability of unappropriated water has contributed to the pattern and practice of unauthorized diversions.

155. The State Water Board abuses its discretion by failing to adopt guidelines which will serve as the substantive basis for its decisions whether water is available for diversion under a permit application in the Central Coast streams.

Claim Seven. The State Water Board Does Not Have Guidelines Adequate to Establish Permit Conditions Which Protect And Restore Coho And Steelhead Fisheries In Good Condition.

156. The State Water Board may approve a permit application for unappropriated water, only on conditions that protect fish and wildlife as a beneficial use of water (*see* Water Code § 1243) and prevent impairment of water quality standards (*see id.*, §§ 1243.5, 1258).

157. In the early 1990's, the State Water Board undertook to develop a policy stating permit conditions necessary to protect the coho and steelhead fisheries of the Russian River Basin. It has not formally adopted the 1997 Staff Report. Similarly, it has not formally adopted the 2002 Joint Guidelines, which DFG and NOAA Fisheries recommend in place of that prior report.

158. Existing practices for review of permit applications do not protect the steelhead and coho fisheries in good condition. DFG and NOAA Fisheries have submitted substantial evidence that such existing permits, as well as unauthorized diversions, s have contributed to the listing of these fisheries as threatened under the federal and state Endangered Species Acts.

159. Existing practices for review of permit applications do not assure compliance with water quality standards applicable to the Central Coast streams. These fisheries, including the life stage of propagation, are beneficial uses designated in the applicable Basin Plans. The condition of these fisheries has been degraded since 1968, when the State Water Board adopted its anti-degradation policy applicable to all designated beneficial uses. DFG and NOAA Fisheries have submitted substantial evidence that diversions are a significant cause for such degradation of designated beneficial uses since 1968.

160. The State Water Board has authority to adopt such guidelines under Water Code section 13140 (for the purpose of controlling water quality impacts of diversions) as well as section 275. A.B. 2121 recognizes this authority. See Section 3, adopting Water Code section 1259.4(a)(2).

161. The State Water Board abuses its discretion by failing to adopt guidelines which result in permit conditions which prevent degradation of beneficial uses of the Central Coast streams.

Claim Eight. The State Water Board Does Not Have Guidelines Adequate To Establish Permit Conditions For Mitigation Monitoring And Reporting.

162. CEQA requires that a discretionary approval include monitoring and reporting conditions to assure effective implementation of required mitigation measures. See CEQA Guidelines § 15097(a).

163. The State Water Board has not adopted written guidelines for permit conditions for mitigation monitoring and reporting.

164. As discussed in paragraphs 60-63, the 1997 Staff Report and 2002 Joint Guidelines acknowledge that such conditions are essential to prevent further degradation of the listed fisheries and other beneficial uses of these waters. Both documents anticipate that such conditions will be developed on a case-by-case basis.

165. An agency may adopt guidelines to guide individual monitoring and reporting conditions to address: (A) relative responsibilities of the applicant and the agency, (B) guidelines for determining compliance with mitigation measures, (C) an enforcement procedure

for non-compliance, and (D) reporting of the relative success of mitigation measures as a programmatic basis for improving such future measures. *See* CEQA Guidelines § 15097(e).

166. The State Water Board abuses its discretion by failing to adopt guidelines for monitoring and reporting conditions, given: (A) substantial uncertainty about the cumulative total of actual diversions under existing diversions and (B) substantial evidence that new diversion in excess of the flow or other thresholds specified in the 2002 Joint Guidelines (*see* paragraph 63) will contribute to further degradation of the steelhead and salmon fisheries.

167. Lead and responsible agencies “should coordinate” their respective mitigation and reporting requirements (*id.*, § 15097(a)) where each has authority to approve or mitigate (*see id.*, §§ 15040, 15041). The State Water Board has not adopted guidelines or procedures for such coordination with DFG or other responsible agencies. The State Water Board abuses its discretion by failing to adopt such coordinated guidelines or procedures.

Claim Nine. The State Water Board Does Not Take Adequate Enforcement Actions To Prevent Or Correct Unauthorized Diversions.

168. Water Code section 100, which implements California Constitution Article X, section 2, provides: “... 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...” (emphasis added).

169. Water Code section 1825 provides: “[i]t is the intent of the Legislature that the state should take vigorous action to enforce the terms and conditions of existing permits and licenses to appropriate water and to prevent the unlawful diversion of water.”

170. Diversion in the absence of a permit or valid pre-1914 or riparian basis is unlawful and thus, by operation of law, an unreasonable use of water.

171. There is a worsening pattern and practice of unauthorized diversions from the Central Coast streams within the Geographic Scope of this Petition.

172. Under its Watershed Investigation Program, the State Water Board will complete a once-over investigation of unauthorized diversions from Central Coast streams at an unknown date more than a decade hence.

173. As a matter of practice, once it determines that an unauthorized diversion is occurring, the State Water Board permits that diversion to continue provided the diverter files a permit application. Thus, it permits unauthorized diversion to continue as long as such application is pending, in exchange for payment of the annual fee. Many of the permit applications in Central Coast streams have been pending for ten years or longer.

174. The State Water Board abuses its discretion by failing to take adequate enforcement actions to prevent and correct, in the foreseeable future, the pattern and practice of unauthorized diversions that contribute to the degradation of the coho and steelhead fisheries in the Central Coast streams.

C. Claims Running to Department of Fish and Game

Claim Ten. DFG Does Not Have An Adequate Procedure For Consultation With The State Water Board In The Environmental Review Under Fish And Game Code Sections 1603, 5901, 5930, 5937, And 6100.

175. Each of DFG's decisions under Fish and Game Code sections 1603, 5901, 5930, 5937, and 6100 is discretionary and thus subject to CEQA review.

176. DFG does not have a written procedure for consultation with the State Water Board to assure that the environmental document prepared by the State Water Board provides an adequate basis for its decision whether to approve or condition a diversion under each of these statutes. DFG abuses its discretion by failing to adopt an adequate procedure for such consultation.

Claim Eleven. DFG Does Not Have An Adequate Procedure To Monitor Approvals Under Fish And Game Code Sections 1603 Et Al.

177. The CEQA duty to monitor mitigation measures, as described in Claim Eight, applies to a responsible as well as lead agency.

178. DFG abuses its discretion by failing to adopt written guidelines for monitoring and reporting conditions, given: (A) substantial uncertainty about the cumulative total of actual diversions under existing rights and (B) substantial evidence that new diversion in excess of the flow or other thresholds specified in the 2002 Joint Guidelines will contribute to further degradation of the steelhead and salmon fisheries.

Claim Twelve. DFG Does Not Take Adequate Enforcement Actions Under Fish And Game Code Sections 1603 Et Seq.

179. Fish and Game Code sections 1603 *et seq.* prohibit any diversion that DFG has not conditioned to include a flow schedule, fishway, screen, and other measures necessary to conserve fish and wildlife resources in good condition.

180. Fish and Game Code section 5930 *requires* DFG to periodically investigate all dams in all waters frequented by fish. "Dam" is defined to include any artificial instruction. *Id.*, § 5900(a).

181. Taking of fish and wildlife resulting from unauthorized diversion is a trespass under Fish and Game Code sections 2014, 2080 (take of endangered or threatened species).

182. DFG abuses its discretion by failing to periodically inspect all dams in the Central Coast streams, or otherwise enforce the prohibitions in Sections 1603 *et seq.*, given substantial evidence (including its own) that the pattern and practice of unauthorized diversions contribute to the degradation of the coho and steelhead fisheries.

D. Claim Running to State Lands Commission

Claim Thirteen. State Lands Commission Has Not Complied With Its Mandatory Duty To Complete A Survey Of Ungranted Submerged Lands.

183. Public Resources Code section 6331.5, enacted in 1975, requires the State Lands Commission to survey all ungranted submerged lands in rivers and streams. That survey is the necessary precursor for enforcement of the various statutes that require a permit or lease for any use or occupancy of such lands

184. Although it does not establish an express deadline, Section 6331.5 inherently requires timely action to prevent trespass and degradation of these lands.

185. The State Lands Commission has not complied with its mandatory duty to complete that survey for Central Coast streams.

Claim Fourteen. The State Lands Commission Does Not Take Adequate Enforcement Actions Under Public Resources Code Sections 6301 Et Al.

186. Unauthorized use of ungranted submerged lands is a trespass. Pub. Resources Code § 6224.1.

187. The State Lands Commission abuses its discretion by failing to adopt and implement procedures to prevent trespass on such lands in the Central Coast streams, given

substantial evidence that the pattern and practice of unauthorized diversions contribute to the degradation of the coho and steelhead fisheries.

E. Claims Running to Counties

Claim Fifteen. Humboldt, Mendocino, And Sonoma Counties Improperly Exempt Ponds And Grading Permits From CEQA Review.

188. Humboldt, Mendocino, and Sonoma Counties exempt from environmental review the pond exemptions and grading permits associated with water diversions, on the ground that approval of such a facility is a "ministerial project" pursuant to CEQA Guidelines section 15268.

189. Claim Five states the definition of a "ministerial project." CEQA Guideline section 15369 gives as a relevant example:

"A building permit is ministerial if the ordinance requiring the permits limits the public official to determining whether the zoning allows the structure to be build in the requested location, the structure would meet the strength requirements in the Uniform Building Code, and the applicant has paid his fee."

By contrast, the issuance of building permits may be considered discretionary where the standards guiding decision makers are "relatively general," or where there are no standards and where the question of compliance involves "relatively personal decisions addressed to the sound judgment and enlightenment of the Administrator." *See Friends of Westwood v. City of Los Angeles*, 191 Cal.App.3d 259, 271-72 (1987). Such a permit is discretionary if the County may condition the permit to minimize its environmental impacts. *See Leach v. City of San Diego*, 220 Cal.App.3d 389 (1990).

190. The applicable ordinance permits each County to condition a pond exemption or grading permit. Such authority to condition approval means that a pond exemption or grading permit is a discretionary project subject to CEQA review.

191. Humboldt, Mendocino, and Sonoma Counties do not have a programmatic EIR that determines that pond exemptions and grading permits associated with water diversions will not have significant environmental impacts.

192. Each County abuses its discretion by failing to undertake CEQA review of pond exemptions and grading permits associated with water diversions.

Claim Sixteen. Each County Named in this Petition Does Not Have Adequate Procedures For The Participation Of Other Public Agencies In The Approval Of Pond Exemptions Or Grading Permits.

193. Each County is the lead agency under CEQA for the purpose of pond exemptions or grading permits. None has adopted a procedure necessary for consultation, during a proceeding on such an application, with the State Water Board and responsible agencies have related authorities to approve or condition water diversion to a pond or other facility subject to the County approval. Each County abuses its discretion by failing to coordinate regulatory reviews related to water diversions.

VI.
REQUESTS FOR RELIEF

194. We respectfully request the following process (Section A) and remedies in the form of guidelines and procedures (Section B) in response to this Petition.

A. Coordination of Agencies' Response to Petition, Including Participation of Stakeholders

195. We request that the State agencies named here will coordinate their response to this Petition.

196. The State Water Board will function as lead, given its primary jurisdiction over the public waters of the Central Coast streams. It will publish notice and then hold a public workshop not later than January 15, 2005 to address: (A) the merits of the claims in the Petition; (B) the merits of proposed remedies; and (C) the interest of the named agencies and other stakeholders (including appropriators) to establish requested guidelines and procedures through a collaborative process. In light of the long pendency of the proceeding that resulted in the 1997 Staff Report, Petitioners will support such a process provided the named agencies and participating stakeholders commit to its conclusion not later than June 1, 2006, which is six months prior to A.B. 2121's deadline for the Board's adoption of new guidelines for this purpose.

B. Guidelines and Procedures Recommended to Address Claims

197. We request the following actions, guidelines, and procedures to resolve the claims stated in Section V. These are within the existing authorities of the respective agencies.

All Agencies

198. The State Water Board, DFG, State Lands Commission, and the Counties will adopt an inter-agency MOU for coordination of their respective proceedings to approve or condition water diversion and related facilities and activities. At a minimum, the MOU will include the following procedures.

- (A). The agency which receives an application, or the applicant, will provide actual notice to all other agencies of such filing, concurrent with the filing;
- (B). The agency that receives the application will undertake early and proactive consultation with all other agencies, regarding the potential environmental impacts and appropriate mitigation, monitoring, and reporting measures.
- (C). The lead and responsible agencies will agree to a schedule, scope, and division of responsibilities for preparation of the environmental document that will serve as the basis for their respective decisions.
- (D). The mitigation, monitoring, and reporting measures in the approvals issued by the several agencies will be coordinated as necessary to prevent direct, indirect, or cumulative effects.

199. Using methods agreed-to in the stakeholder process described in paragraph 196, the agencies will undertake systematic investigation of Central Coast streams to identify unauthorized diversions. The investigation will be completed by December 31, 2006, which is prior to A.B. 2121's deadline for adoption of new guidelines, in that manner necessary to determine whether notice required by paragraph 203(C) will be provided to property owners on a given stream within the Geographic Scope.⁸

State Water Board

200. The State Water Board will amend its standard form of MOU with a permit applicant, to be consistent with the inter-agency MOU provided in paragraph 198.

⁸ High-resolution aerial photographs may be suitable as an economical and expeditious method for comprehensive survey of storage and diversion facilities within the Geographic Scope. We understand that a contractor to Mendocino and Sonoma County agencies undertook such a survey of the Russian River Basin in August 2004, and that the photographs have at least a 2-foot resolution, which permits identification of such facilities. We have been informed that the cost of that survey of the 2,000 square-mile watershed was roughly \$80,000, or \$40/square mile. Similar photographs may be available from satellite sources and in archives dating back to the 1940s.

201. It will adopt a general time limit for the processing of permit applications on Central Coast Streams, *not to exceed 3 years*. For each pending or future permit application, it will adopt an expeditious schedule consistent with such time limit.

202. Pursuant to Water Code section 13140, the State Water Board will adopt guidelines for the substantive review of permit applications. It will use the 2002 Joint Guidelines as the starting point and will consider the following amendments and any others agreed to in the collaborative process described in paragraph 196.

- (A). The guidelines will apply to modified as well as new permit applications.
- (B). Each permit will specify management objectives for fish and associated riparian habitats in the reach affected by a diversion. The objectives will be measurable either directly or through an indicator, such as the depth criterion described in paragraph 64, or by indicators of riparian health such as canopy, standards for which have been developed for timber harvest practices or as determined through stream surveys and GIS analysis. The management objective for a given reach will be sufficient to maintain or restore a functional range of naturally occurring spawning and rearing habitat where salmonids can exist. Similarly, management will also be for protection or restoration of functional riparian systems and associated wildlife.
- (C). The design of each storage or diversion facility will, without active intervention (such as an operator's control), limit diversion to the allowed maximum and allow the required bypass flow. A licensed engineer will certify the adequacy of such design.
- (D). Each point of diversion will include continuous monitoring and reporting of diversion, or (if infeasible) an alternative that provides the functional benefit.
- (E). Each point of diversion will include real-time monitoring and reporting of physical conditions necessary to achieve a quantifiable management objective for the affected reach, such as inflow, outflow, water quality conditions, depth or width of wetted channel, or some combination.
- (F). State Water Board or RWQCB staff, alone or with DFG or NOAA Fisheries staff, will have reserved authority to inspect a point of diversion without prior notice. Peace officer status will not be necessary.

- (G). State Water Board will have reserved authority to remedy cumulative impacts on fisheries, riparian habitat, and associated wildlife under applicable law (including ESA), in addition to general reservation to protect public interest. The term will specify the procedures for exercise of this authority, including a duty to periodically assess the cumulative impacts.

203. The State Water Board will take enforcement actions and use enforcement procedures that effectively prevent or correct unauthorized diversions in the Central Coast streams. At a minimum:

- (A). The State Water Board will evaluate the results of the inspection undertaken in paragraph 198 to determine whether a permit or other colorable claim of right appears to exist for the diversion.
- (B). It will provide notice to each property owner without an apparent basis of right of diversion.
- (C). The notice will direct each property owner identified in the survey to prove the adequacy of its claim of right for the diversion, or file a permit application, not later than six months from the receipt of notice. For each stream known or believed to be anadromous fish habitat, the penalty for failing to file a permit application or state a colorable claim of right will be proportional to the delay in filing following the Board's notice, in addition to other factors under applicable law.
- (D). The State Water Board will 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.
- (E). An applicant who has undertaken unauthorized diversion will implement within two years of notice of violation (as a condition of application approval) an agency approved plan to remedy the environmental impacts that resulted from such unauthorized diversion, regardless of the status permit approval. Impacts to be addressed include, but are not limited to, fish passage (adult and juvenile), impairment of natural sediment transport, and diminished or lost riparian habitat.
- (F). An applicant with unauthorized diversion will not continue such diversion pending final decision on the application, unless it demonstrates that no harm

will result, or unless it agrees to interim mitigation implemented during pendency of application.

- (G). The State Water Board will issue a cease-and-desist order against any unauthorized diversion for which the property owner does not file a timely permit application.
- (H). It will set standards for assessing ACL adequate to remove the business advantage of unauthorized diversion. A guideline for such standards could be an assessment for the water appropriated without authorization, valued at a comparable price as that being charged for similar water by the current highest-priced water district in the Central Valley (chosen from the largest 25 districts).
- (I). The State Water Board will assess ACL for unauthorized diversions in a timely manner.

204. The State Water Board will adopt regulations for ensuring small domestic use and livestock stockpond registrations comply with CEQA.

DFG

205. DFG will adopt the 2002 Joint Guidelines (as proposed to amended by paragraph 202) as policy applicable to all decisions under Fish and Game Code sections 1603 *et seq.* in the Central Coast streams.

206. It will take enforcement actions and use enforcement procedures that: (A) establish a schedule for periodic inspection of all dams on Central Coast streams pursuant to Fish and Game Code section 5930; (B) provide for civil damages or other relief for any diversion unauthorized under the Fish and Game Code, sufficient to remove the business advantage of unauthorized diversion; (C) provide an adequate remedy for environmental degradation resulting from unauthorized diversion such that a reasonable level of natural form and function are returned to the stream and associated biological resources, including fish

passage; (D) provide penalties for unlawful take of state-protected fish and wildlife, and (E) refer incidents of illegal take of federally listed species to NOAA Fisheries.

State Lands Commission

207. The State Lands Commission will complete the survey required by Public Resources Code Section 6370, not later than December 31, 2006 for the Central Coast streams.

208. It will take enforcement actions and use enforcement procedures that (A) provide notice to all property owners of any unpermitted use or occupancy of State lands, following the completion of the survey; and (B) provide for civil damages or other relief for any diversion unauthorized under the Public Resources Code, sufficient to remove the business advantage of that unauthorized diversion.

Counties

209. Each County will undertake a proceeding to adopt or amend its ordinance, as appropriate, to provide for CEQA review of any land use permit, including pond exemption or grading permit, for a facility or activity related to a water diversion.

210. All past permits issued by the counties for dams that were classified as "exempted" shall be reviewed for conformity with State and Federal law that was in place at the time that the exemption was granted.

211. A list of dams and ponds that were exempted by the counties, but are found to have not met State or Federal permitting requirements shall be forwarded to the appropriate State and Federal agencies for their review.

VII.
CONCLUSION

Trout Unlimited and National Audubon Society, Peregrine Chapter respectfully request that the State act on this Petition to establish guidelines and procedures necessary to protect and restore the steelhead and salmon fisheries of the Central Coast streams in good condition.

Dated: October 27, 2004

Respectfully submitted,



Richard Roos-Collins
Julie Gantenbein
NATURAL HERITAGE INSTITUTE

Attorneys for TROUT UNLIMITED and NATIONAL
AUDUBON SOCIETY, PEREGRINE CHAPTER

Charlton H. Bonham
California Counsel,
TROUT UNLIMITED

EXHIBIT LIST

- | <u>Number</u> | <u>Title or Subject</u> |
|---------------|--|
| 1. | SWRCB, Water Rights Information Management System, "Water Rights Applications 1990-2004 for Humboldt, Marin, Mendocino, Napa, and Sonoma Counties" |
| 2. | Declaration of Stan Griffin, Northern California President of Trout Unlimited of California (October 27, 2004) |
| 3. | DFG and NOAA Fisheries, "Guidelines for Maintaining Instream Flows to Protect Fisheries Resources Downstream of Water Diversions in Mid-California Coastal Streams, an Update of the May 22, 2000 Guidelines" (June 17, 2002) |
| 4. | SWRCB, Resolution No. 68-16, "State ment of Policy with Respect to Maintaining High Quality of Waters in California" (Oct. 28, 1968) |
| 5. | Letter from James R. Bybee, NOAA Fisheries, to Ray Hall, Mendocino County Planning & Building Services Department (April 12, 2001) |
| 6. | Redacted letter from James R. Bybee, NOAA Fisheries, to Laura Vasquez, Division of Water Rights, SWRCB (Aug. 8, 2000) |
| 7. | Redacted letter from James R. Bybee, NOAA Fisheries, to Laura Vasquez, Division of Water Rights, SWRCB (Nov. 22, 2000) |
| 8. | NOAA Fisheries, "Draft Executive Summary Comments on the State Water Resources Control Board (SWRCB) report on Proposed Actions on Pending Water Rights Applications within the Russian River Watershed and NMFS Draft Recommended Guidelines for Maintaining Instream Flows to Protect Fisheries Resources in Tributaries of the Russian River" (Jan. 11, 2000) |
| 9. | Letter from Robert C. Hight, CDFG, to Mark J. Del Piero, Russian River Flood Control & Water Conservation Improvement District (undated) |
| 10. | Letter from Rodney R. McInnis, Acting Regional Administrator, NOAA Fisheries, to Arthur G. Bagget, Jr., Chair, SWRCB (May 23, 2003) |
| 11. | Peter B. Moyle and G. Mathais Kondolf, "Fish Bypass Flows for Coastal Watersheds, A Review of Proposed Approaches for the State Water Resources Control Board" (June 12, 2000) |

12. Letter from Harry M. Schueller, Chief Deputy Director, SWRCB, to Thomas and Mary Dimmick Elke c/o Drew L. Aspegren, Napa Valley Vineyard Engineering, Inc. (Nov. 8, 2002)
13. Memorandum from Robert W. Floerke, Regional Manager, DFG, to Edward C. Anton, Chief, Division of Water Rights, SWRCB (April 25, 2003)
14. SWRCB, Water Rights Information Management System, Small Domestic Use Registrations 1990-2004 for Humboldt, Marin, Mendocino, Napa, and Sonoma Counties
15. SWRCB, Water Rights Information Management System, Livestock Stock Pond Registrations 1990-2004 for Humboldt, Marin, Mendocino, Napa, and Sonoma Counties
16. DFG, list of Streambed Alteration Agreements 1993-2002 for Mendocino County
17. Letter from Chris Warrick, Chief Building Inspector, Mendocino County, to Fred and Alberta Zmarzly (Aug. 16, 2000)
18. Letter from Chris Warrick, Chief Building Inspector, Mendocino County to Marietta Vineyards LLC (Feb. 23, 2000)
19. Memorandum from Scott Ward, Building Inspector II, to Chris Warrick, Chief Building Inspector, Mendocino County, Re: "Pond Exemption for Larry Smith" (Aug. 31, 1999)
20. Letter from Harry M. Schueller, Chief Deputy Director, SWRCB, to Rosalind Peterson (April 6, 2001)
21. Letter from Harry M. Schueller, Chief Deputy Director, SWRCB, to the Chairmen of the County Boards of Supervisors and Regional Director of National Resources and Conservation Service (NRC) (July 28, 2000)
22. Letter from James W. Kassel, Chief, License and Compliance Section, SWRCB, to Raymond Hall, Director of Planning & Building, Mendocino County Planning and Building Department (Feb. 27, 2002)
23. SWRCB, Order WR 2000-03 "Imposing Administrative Civil Liability in the Matter of Phillip W. Wasson and Geneva Wasson" (April 26, 2000)

24. SWRCB, Order WR 2000-11 "Imposing Administrative Civil Liability in the Matter of William and Jennifer Sloan" (July 20, 2000)
25. Memorandum from Robert W. Floerke, Regional Manager, DFG, to Edward C. Anton, Chief, Division of Water Rights, SWRCB (May 28, 2003)
26. Letter from SWRCB to Mr. And Mrs. Statzer, Ash Creek Vineyards (Oct. 22, 2002)
27. Memorandum from Edward C. Anton, Chief, Division of Water Rights, SWRCB, to Robert W. Floerke, Regional Manager, DFG (July 7, 2003)
28. Email from Charles Rich, Chief, Complaint Unit, SWRCB, to Alan Levine (Aug. 8, 2003)
29. Email from Charles Rich, Chief, Complaint Unit, SWRCB, to Alan Levine (Sept. 10, 2003)
30. Letter from Robert Swain, Winemaker, Parducci Wine Cellars, to David LaBrie, Division of Water Rights, SWRCB (April 11, 2002)
31. Letter from Tom Pedersen, Regional Patrol Chief, Central Coast Region, DFG, to Rosalind Peterson (May 2, 2001)

DECLARATION OF SERVICE

I, Shane Conway, declare that I today served the attached "***TROUT UNLIMITED AND THE PEREGRINE CHAPTER OF THE NATIONAL AUDUBON SOCIETY'S PETITION FOR TIMELY AND EFFECTIVE REGULATION OF WATER DIVERSIONS IN CENTRAL COAST STREAMS,***" to each person below by first-class mail as follows:

Secretary Terry Tamminen
Cal EPA
P.O. Box 2815
Sacramento, CA 95812-2815

Maureen Gorsen
Law Enforcement and Counsel
Cal EPA
P.O. Box 2815
Sacramento, CA 95812-2815

Celeste Cantu
Executive Director
State Water Resources Control Board
P.O. Box 1000
Sacramento, CA 95812-2815

Craig M. Wilson
Chief Counsel
State Water Resources Control Board
P.O. Box 1000
Sacramento, CA 95812-2815

Vicky Whitney
Chief, Division of Water Rights
State Water Resources Control Board
P.O. Box 1000
Sacramento, CA 95812-2815

Jim Kassel
Division of Water Rights
State Water Resources Control Board
P.O. Box 1000
Sacramento, CA 95812-2815

Katherine Mrowka
Division of Water Rights
State Water Resources Control Board
P.O. Box 1000
Sacramento, CA 95812-2815

Secretary Mike Chrisman
Resources Agency
1416 Ninth Street, Suite 1311
Sacramento, CA 95814

Sandra Ikuta
General Counsel
Resources Agency
1416 Ninth Street, Suite 1311
Sacramento, CA 95814

Ryan Broddrick
Executive Officer
Department of Fish and Game
1416 Ninth Street
Sacramento, CA 95814

Michael R. Valentine
General Counsel
Department of Fish and Game
1416 Ninth Street
Sacramento, CA 95814

Rob Floerke
Department of Fish and Game, Region 3
P.O. Box 47
Yountville, CA 94599

Linda Hanson
Department of Fish and Game, Region 3
P.O. Box 47
Yountville, CA 94599

Carl Wilcox
Department of Fish and Game, Region 3
P.O. Box 47
Yountville, CA 94599

Central Coast Water Rights Petition

Paul D. Thayer
Executive Officer
State Lands Commission
100 Howe Ave Suite 100 South
Sacramento, CA 95825-8202

Jack Rump
Chief Counsel
State Lands Commission
100 Howe Ave Suite 100 South
Sacramento, CA 95825-8202

Lt. Governor Cruz M. Bustamante
State Capitol, Room 1114
Sacramento, CA 95814

Steve Westly
California State Controller
P.O. Box 942850
Sacramento, CA 94250-5872

Donna Arduin
Director
California Department of Finance
915 L Street
Sacramento, CA 95814

Patrick Faulkner
Marin County Counsel
3501 Civic Center Dr., Room #303
San Rafael, CA 94903

Farhad Mansourian
Director
Marin County Public Works Department
3501 Civic Center Dr., Room #304
San Rafael, CA 94903

Steven M. Woodside
Sonoma County Counsel
575 Administration Dr., 105A
Santa Rosa, CA 95403

Central Coast Water Rights Petition

Pete Parkinson
Department Head
Sonoma County Permit and Resource Management Department
2550 Ventura Ave.
Santa Rosa, CA 95403

Robert Westmeyer
Napa County Counsel
1195 Third Street, Room 301
Napa, CA 94559-3048

Patrick Lynch
Director
Napa County Conservation, Development, and Planning Department
1195 Third Street, Suite 210
Napa, CA 94559

H. Peter Klein
Mendocino County Counsel
501 Low Gap Road, Room 1030
Ukiah, CA 95482

Raymond Hall
Director
Mendocino County Planning and Building Department
501 Low Gap Road, Room 1440
Ukiah, CA 95482

Tamara Falor
Humboldt County Counsel
825 5th St.
Eureka, CA 95501

Allen Campbell
Director
Humboldt County Public Works Department
1106 2nd Street
Eureka, CA 95501

Steve Hall
Executive Director
Association of California Water Agencies

Central Coast Water Rights Petition

910 K Street, Suite 100
Sacramento, CA 95814-3512

Tony Francois
Director Water Resources, Governmental Affairs Division
California Farm Bureau Federation
1127 11th Street Suite 626
Sacramento, CA 95814

Bob Lohn
Northwest Regional Director
National Marine Fisheries Service
7600 Sand Point Way NE
Seattle, WA 98115 - 0070

Steve Edmondson
Northern California Supervisor
National Marine Fisheries Service
Attn: HCD Division
777 Sonoma Ave Rm 325
Santa Rosa, CA 95404

Bill Hearn
National Marine Fisheries Service
Attn: HCD Division
777 Sonoma Ave Rm 325
Santa Rosa, CA 95404

Stacy Li
National Marine Fisheries Service
Attn: HCD Division
777 Sonoma Ave Rm 325
Santa Rosa, CA 95404