SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

LIVING RIVERS COUNCIL, Petitioner and Plaintiff, vs. STATE WATER RESOURCES CONTROL BOARD, Respondent and Defendant.	RG10-543923 ORDER AND PROPOSED STATEMENT OF DECISION.

The petition of Petitioner Living Rivers Council for a writ of mandate and for motions to augment the record came on regularly for hearing on May 4 and May 25, 2012, in Department 31 of this Court, Judge Evelio Grillo presiding.

This is the court's proposed statement of decision. CRC 3.1590(f). In accordance with CRC 3.1590(g) the parties have fifteen (15) days within which to file any comments or objections. If comments or objections are filed, the Court will determine whether, and if so when, a hearing will be scheduled on the comments or objections.

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PROPOSED STATEMENT OF DECISION

The petition of Living Rivers Council for a writ of mandate is GRANTED IN PART.

OVERVIEW.

The Legislature passed AB 2121, which required the State Water Resources Control Board ("the "Board") to "adopt principles and guidelines for maintaining instream flows in coastal streams [in Northern California] as part of state policy for water quality control … for the purposes of water right administration." (Water Code 1259.4(a)(1). Following several years of study, the Board noticed and distributed a draft Policy and SED in December 2007, then submitted corrections in January 2008 and March 2008. The draft policy was subject to review, and then in February 2010 the Board issued a public notice that it would consider adopting the Policy. The Board received comments and then provided responses. The Board approved the "Policy for Maintaining Instream Flows in Northern California Coastal Streams" (the "Policy") on May 4, 2010. (AR 155-303).

The Board's adoption of a policy for water quality control was certified as exempt from CEQA. (AR 3, para 8). The adoption of the Policy required the Board to prepare a Substitute Environmental Declaration ("SED"). The Policy states that the SED consists of the draft SED dated December 2007 (AR 3394-3499) and the responses to that document (AR2139-2758). (AR 3, para 8) Cal. Pub. Res. Code §§ 21080.5(a), (b), and (d)(3) and 21159(a); *San Joaquin River Exchange Contractors Water Authority v. State Water Resources Control Board* (2010) 183 Cal.App.4th 1110, 1125-1126. The Policy also states that the CEQA documentation includes the SED plus a scientific basis report

(AR420-852), a sensitivity study (AR3515-3588), and responses to public comments on those documents. (AR 3, para 8)

The Board's focus in the Policy is to establish a regulatory framework for managing the flow in the coastal streams by managing the amount and timing of water diversion as well as managing impediments to stream flow like dams. The Policy establishes a framework designed to maintain instream flows for the protection of fishery resources by prescribing protective measures on a watershed basis regarding (1) the season of diversion, (2) minimum bypass flow, (3) and maximum cumulative diversion. (AR 166.) The Policy also addresses the construction of dams and off stream water storage. (AR 166.)

NATURE OF THE POLICY

The Board adopted the Policy under a certified regulatory program that is exempt from CEQA and subject to its own environmental review requirements. Pub. Res Code 21080.5(d); 14 CCR §§ 15250-15252. A SED has been described as an "abbreviated" environmental impact report." *Environmental Protection Information Center, Inc. v. Johnson* (1985) 170 Cal.App.3d 604, 610. However, "[w]hen conducting its environmental review and preparing its documentation, a certified regulatory program is subject to the broad policy goals and substantive standards of CEQA." *City of Arcadia v. State Water Resources Control Bd.* (2006) 135 Cal.App.4th 1392, 1422. Therefore, the court evaluates the SED for compliance with the substantive provisions of CEQA.

The Policy is broad programmatic document similar to a "Program" document under 14 CCR § 15168 rather than a "Project" document under 14 CCR § 15161. The

Policy is prepared under Public Resources Code 21159 and under 21159(d) the Board is not required to conduct a project-level analysis. The Policy can, therefore, focus on only the general plan or program, leaving project-level details to subsequent EIR's when specific projects are being considered. (14 CCR § 15152(b).) At the inception of the Policy, the Board stated, "Other agencies may have authority to carry out or approve activities that will be subject to the policy, but the project in this case is the policy itself, not the activities that may be subject to the policy." (AR 12830, Checklist.) The Board can use the SED "to adequately identify "significant effects of the planning approval at hand" while deferring the less feasible development of detailed, site-specific information to future environmental documents. (14 CCR § 15152 (c).) See also *In re Bay-Delta Programmatic Environmental Impact Report* (2008) 43 Cal.4th 1143, 1169-1174.

The Policy directly concerns water quality within the Board's permitting authority even though, as discussed below, for CEQA purposes the Board must consider how the Policy affects groundwater that is within the Board's jurisdiction but outside its permitting authority. *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 124.

The Policy recognizes that third parties might change their actions in response to the Policy and that those changes might have potentially significant indirect environmental impacts. (AR 3, para 10.) The Policy directs the implementing agencies to incorporate feasible mitigation measures to limit the environmental impact of any Projects they undertake, and finds that to the extent that mitigation measures do not fully mitigate indirect impacts that the benefits of the Policy outweigh any unavoidable adverse impacts. (AR 4, para 12.)

COMPLIANCE WITH AB 2121.

Living Rivers asserts that the Board did not comply with the legislature's direction in AB 2121 when the Board developed the Policy. Living Rivers argues that the Policy does not comply with AB 2121 because the Policy (1) fails to consider principles and guidelines for regulating groundwater extraction and (2) permits use of a flawed methodology for estimating the minimum bypass flow (MBF) and the maximum cumulative diversion (MCD) in a stream.

The court reviews the Board's compliance with AB 2121 to determine whether the Policy "(1) is within the scope of the authority conferred and (2) is reasonably necessary to effectuate the purpose of the statute." *Yamaha Corp. of America v. State Board of Equalization* (1998) 19 Cal.4th 1, 10-11. Regarding the scope of the statute, the court does not defer to the Board's view regarding the legislature's direction. *Yamaha*, 19 Cal.4th at 11 fn 4; *Environmental Protection Information Center v. Department of Forestry and Fire Protection* (1996) 43 Cal.App.4th 1011, 1022 ("The applicable standard of review is, therefore, “respectful nondeference.”"). Having determined the scope of the statute, the court's inquiry regarding the wisdom of the Board's decisions is confined to whether the Policy is "arbitrary, capricious or [without] reasonable or rational basis." *Yamaha*, 19 Cal.4th at 10-11; *Neighbors in Support of Appropriate Land Use v. County of Tuolumne* (2007) 157 Cal.App.4th 997, 1004.

In AB 2121 the legislature directed the Board to "adopt principles and guidelines for maintaining instream flows in coastal streams [in Northern California] as part of state policy for water quality control … for the purposes of water right administration." The

Board's policy statements reflect that it and Living Rivers share the same understanding of the legislature's goals. The Board's resolution adopting the Policy states that the Policy is focused on "measures to protect native fish populations" (AR 11) and the Policy itself states that "the primary objective of this policy is to ensure that the administration of water rights occurs in a manner that maintains stream inflows needed for the protection of fishery resources" (AR 166).

The Board correctly determined that the legislature wanted the Policy to concern the protection of native fish populations through the Board's water right permitting and licensing system and was not to focus on how the Board might regulate groundwater extraction. Water Code 1259.4 is within Water Code Division 2, Part 2, which sets out the water right permitting and licensing system administered by the Water Board. (Water Code 1200 et seq.) This system applies only to surface channel and to groundwater known as subterranean streams flowing in known and definite channels. "[S]ubsurface water that is not part of a subterranean stream flowing through a known and definite channel is referred to in the case law as “percolating groundwater,” which falls outside the Board's jurisdiction." (*North Gualala Water Co. v. State Water Resources Control Bd.* (2006) 139 Cal.App.4th 1577, 1582 fn 4. See also Water Code 1200.) Given that the Board cannot regulate the use of percolating groundwater, the court cannot reasonably read Water Code 1259.4 as directing the Board to "adopt principles and guidelines for [the use of both surface channel and groundwater] to maintaining instream flows … for the purposes of water right administration."

The Policy reflects an understanding of the limits of the legislature's direction. The Policy states, "Except as provided below, this policy applies to applications to

appropriate water from surface water streams or from subterranean streams flowing through known and definite channels." (AR 24, 178.) The Board was, however, required under CEQA and Pub. Res Code 21080.5(d)(2)(A) to consider how its Policy on the use of surface channel water might encourage the increased use of groundwater, which in turn might have an impact on the environment.

Second, the Policy reflects a reasoned approach to managing instream flows in coastal streams in Northern California with the goal of rehabilitating and protecting fish habitat. The Board's decision to permit stream measurement by proxy or by approximation might not always lead to accurate information or estimate, but it had a rational basis and is not arbitrary or capricious. Furthermore, the Board specifically acknowledged the measurement problems associated with the use of reference streams, noting that the adopted methodology "is a standard method appearing in textbooks for estimating flows in ungauged streams, and would be used by the State Water Board regardless of whether the policy is adopted." (AR 2899-2900.)

COMPLIANCE WITH CEQA - GENERALLY

The court evaluates the SED under the same standards as an EIR and applies the usual standard of review is under CEQA - the court reviews the Board's compliance with CEQA's procedures de novo and the Board's factual findings for substantial evidence. *Vineyard Area Citizens for Responsible Growth, Inc. v. City* (2007) 40 Cal.4th 412, 1277. The failure to provide information required by CEQA in an EIR is a failure to proceed in a manner required by law and is reviewed de novo. "The failure to comply with CEQA's procedural or information disclosure requirements is a prejudicial abuse of discretion if

the decision makers or the public is deprived of information necessary to make a meaningful assessment of the environmental impacts." (*Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455, 468.)

COMPLIANCE WITH CEQA - DISCLOSURE

Legal standard and background facts. The Board was required to provide adequate disclosures in the draft SED that was available for public review. Pub. Res. Code 21080.5(d)(3)(B) states, "(d) To qualify for certification …, a regulatory program … shall meet all of the following criteria: … (3) The plan or other written documentation required by the regulatory program does both of the following: … (B) Is available for a reasonable time for review and comment by other public agencies and the general public." This is also consistent with 23 CCR 3777(a), which states, "The Draft SED must be circulated prior to board action approving or adopting a project … ."[1]

"The EIR process … informs the public of the basis for environmentally significant decisions by public officials and thereby promotes accountability and informed self-government." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1998) 47 Cal.3d 376, 392; *Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455, 466-467.) "An EIR must include detail sufficient to enable those who did not participate in its preparation to understand and to consider

[1] The draft SED was first circulated in 2007 and the current version of 23 CCR 3777 did not become effective until February 11, 2011. The Board's statement of reasons for the amendment of 23 CCR 3777, however, state that the amendments were "largely a rewrite," were "intended to clarify," and were "necessary to comply with and implement" the statute. This suggests that the amendment was not a substantive change and that the regulations in effect in 2007 also required circulation of the draft SED before board approval of a project.

meaningfully the issues raised by the proposed project." (*Laurel Heights, supra,* 47 Cal.3d 376, 405; *Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 882-883.)

Particularly relevant to the issues in this case, an EIR or SED is a document for public consumption and must be written in plain English so lay readers can ascertain the scope of the project, the alternatives considered, the impediments to the alternatives and to any proposed mitigation, and the basis for the agency's proposed decision. (14 CCR 15021(a), 15140, and 15147; *Sunnyvale West Neighborhood Assn. v. City of Sunnyvale City* (2010) 190 Cal.App.4th 1351, 1389 and 1391; *Neighbors of Cavitt Ranch v. County of Placer* (2003) 106 Cal.App.4th 1092, 1103 fn 2; *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1987) 193 Cal.App.3d 1544, 1548-49.) The information in an EIR "must be presented in a manner calculated to adequately inform the public and decision makers, who may not be previously familiar with the details of the project. Information scattered here and there in EIR appendices, or a report buried in an appendix, is not a substitute for a good faith reasoned analysis." (*Environmental Protection Information Center v. California Dept. of Forestry and Fire Protection* (2008) 44 Cal.4th 459, 493.)

"[T]echnical perfection is not required; the courts have looked not for an exhaustive analysis but for adequacy, completeness and a good faith effort at full disclosure.." (*Pfeiffer v. City of Sunnyvale City Council* (2011) 200 Cal.App.4th 1552, 1561. See also 14 CCR 15151; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712.) The lead agency is not required to disclose in full every study or report in the administrative record, but it is required to adequately inform the

public of the arguably feasible mitigation measures it considered and the impediments to those mitigation measures. (*Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 88; *Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1501-1506.)

On issues of disclosure, "when a plaintiff asserts error based on the omission of information, independent review will apply if the information in question is required by CEQA and necessary to informed discussion. In contrast, if the asserted error concerns the amount or type of information that is not required by CEQA and necessary for an informed discussion, then the substantial evidence standard applies." (*Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, 101-102.)

Consistent with CEQA's disclosure requirements, the draft SED was required to include a description of the proposed activity with alternatives to the activity, and mitigation measures to minimize any significant adverse effect on the environment. (Pub. Res. Code 21080.5(d)(3)(A).) The Board circulated a draft SED dated December 2007 (AR 3394-3499), various persons submitted comments, and the Board provided responses to those comments in January 2010 (AR 2139-2433 and AR 2434-2697). The Board then circulated draft revisions to the Policy and the SED in February 2010 (AR 3589-3818). The “Information Sheet” specifically noted that most of the public comments had concerned cumulative impacts and mitigation measures. (AR 3728.) Following the circulation of the documents in February 2010, the Board adopted the Policy. For purposes of analyzing the disclosure claims, the Court reviews the information that the Board had circulated to the public through February 2010.

The SED disclosed that the Policy might lead to increased groundwater pumping and the anticipated potential impacts.[2] (AR 1882-1887.) Where a SED identifies a potential impact, it must then either (1) identify measures that will mitigate or avoid the significant effects on the environment or (2) identify specific economic, legal, social, technological, or other considerations that make mitigation measures or alternatives infeasible. (Pub Res Code 21081.)

Groundwater - Disclosure and Consideration of the Groundwater Delineations and Related Regulatory Concept. Under California's legal framework regarding water use the Board's permitting authority is limited to surface channel and subterranean streams but does not include percolating groundwater. Therefore, it is important for regulatory and enforcement purposes to delineate where one type of water stops and the other starts. "California is the only western state that still treats surface water and groundwater under separate and distinct legal regimes. … The persistence of these alternative regimes inevitably leads to thorny issues of classification and boundary-setting. … [C]lassification disputes in this field quickly take on an Alice–in–Wonderland quality because the legal categories (e.g., " 'subterranean streams flowing through known and definite channels,' " "percolating water") are drawn from antiquated case law and bear little or no relationship to hydrological realities." (*North Gualala Water*, 139 Cal.App.4th at 1590-91.) (See also Living Rivers 2nd RJN, Exh A. (Board Report on California law regarding groundwater.).)

[2] Living Rivers acknowledges that the SED correctly anticipates that third party actions might cause significant environmental impacts. (Guidelines 15064 (defining "significant"))(Guidelines 15358 (defining "effects" and "impacts").)

Living Rivers asserts that the Board failed to consider and disclose two mitigation measures developed by the Board's staff: (1) "Groundwater Delineations," which was a methodology to identify subterranean streams where groundwater use could deplete stream flows (AR 11758-11774) and related maps (AR 11780-11884) and (2) a regulatory concept that persons who use groundwater in the delineated areas must report that pumping to the Board so the Board can then determine if a permit is required (AR 12160). Living Rivers asserts that the Board could have, and should have, considered these means to more aggressively exercise its permitting authority over surface channel water and subterranean streams. (5/25/12 TR at 18, 20, 26-28, 55-56, 58.) The Board asserts that it was not feasible to extend the Board's reporting and permitting authority and that the Board therefore had no obligation to discuss these mitigation options. (5/25/12 TR at 20, 44, 46-48, 58.)

If the Board considered a mitigation measure and determined that it was facially infeasible, then the Board would not be required to analyze the measure in any detail. (*Cherry Valley Pass Acres and Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316, 350.) Similarly, if the Board determined that a mitigation measure could not be legally imposed, then the Board would not be required to analyze the measure in any depth. Instead, the SED could "simply reference that fact and briefly explain the reasons underlying the lead agency's determination." (14 CCR § 15126.4(a)(5).)[3]

[3] If Living Rivers or some other commenter had proposed the mitigation measures in a specific, concrete suggestion, then the Board would have been required to respond. "[A]n adequate EIR must respond to specific suggestions for mitigating a significant environmental impact unless the suggested mitigation is facially infeasible. While the response need not be exhaustive, it should evince good faith and a reasoned analysis." (*Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 360.)

The Board did not disclose the "Groundwater Delineations" or the related regulatory concept in the draft SED that was circulated to the public, but did disclose in the final SED that the mapping information was available. (AR 2586.) The disclosure in the final SED was made after the public comment period and therefore is not a timely disclosure. (Pub. Res. Code 21080.5(d)(3)(B); 23 CCR 3777(a).) Because omissions are at issue, the court applies the independent review standard when determining if the information was necessary to an informed discussion. (*Madera,* 199 Cal.App.4th at 101-102.)

The court finds that adopting the "Groundwater Delineations" and related maps as mitigation measures in the Policy was not facially infeasible and there is a fair argument that they could be legally adopted.[4] The "Groundwater Delineations" and related maps were a feasible mitigation measure because there is a fair argument that their adoption would have made the Board's monitoring of the anticipated increase in groundwater use more effective and efficient. (AR 7834-7835.)

It would have been practically feasible to disclose the "Groundwater Delineations" and related maps because the Board's staff and its consultant, Stetson Engineers, had prepared the materials before the legislative deadline of January 1, 2008.[5] In August 2005, agencies pointed out the relevance of subterranean streams (AR 12872, 12915); in November 2006, Board's staff discussed subterranean stream delineation and depletion (AR 11939); and in February 2007 Stetson Engineers prepared a substantial study on the location of subterranean streams and methods for measuring whether

[4] The court reads the "facially infeasible" standard and the "cannot be legally imposed" standard as equivalent to an "absence of fair argument" standard.
[5] The Board was required to prepare and propose the Policy before January 1, 2008. (Water Code 1259.4.)

groundwater wells were depleting the subterranean streams (AR 11758-11780). Given that a significant portion of the work was completed, there is a fair argument that this mitigation measure was not a project unto itself that would be at least as complex, ambitious, and costly as the Project itself. (Compare *Concerned Citizens of South Central L.A. v. Los Angeles* (1994) 24 Cal.App.4th 826, 842-843.) The SED discloses that hydrology is a developing science and that future developments may determine what water is subject to what regulatory scheme. (AR 2434-2697, Responses to Comments 24.4.26, 30.0.2, 30.0.5, 30.0.6, 30.0.7, 30.0.8.) The developing nature of any "Groundwater Delineations" might be a good reason not to adopt them as a mitigation measure, but it does not render them "facially infeasible."

There is a fair argument that adopting the "Groundwater Delineations" and related maps to assist the Board in its enforcement of the Policy would be a lawful mitigation measure. If properly proposed and adopted, then the delineations and maps would arguably be quasi-legislative in nature and therefore subject to some deference as the Board enforced the Policy through permits and enforcement actions. (*North Gualala Water Co. v. State Water Resources Control Bd.* (2006) 139 Cal.App.4th 1577, 1607.) [6]

The court finds under the independent review standard that the Board should have disclosed its work on the "Groundwater Delineations" and related maps because their use as an enforcement tool was a feasible mitigation measure. The Board should have either

[6] The court does not defer to the Board in determining whether a mitigation measure "cannot be legally imposed," as the court reviews the merit of the legal issue de novo. (*City of Marina v. Board of Trustees of the California State* (2006) 39 Cal.4th 341, 355-356.)

adopted the measure or stated that the measure was not feasible for specific economic, legal, social, technological, or other considerations.[7] (14 CCR § 15091(c).)

The court finds that adopting the regulatory concept that persons who use groundwater in the delineated areas must report that pumping to the Board was facially infeasible because there is no fair argument that it could be legally imposed. (AR 12160) The Board's permitting authority is limited to surface channel water and subterranean streams (Water Code 1200) and the Water Code suggests that the Board has no authority to enact regulations to require routine reports of groundwater use.[8] The legislature enacted a focused statute that directs that persons in Riverside, San Bernardino, Los Angeles, and Ventura Counties who extract more than 25 acre feet of groundwater each year must report information to the Board. (Water Code 4999 et seq.) This focused statute implies that the Board lacks the authority to require landowners to file permit requests for groundwater in other counties and under other circumstances. (*Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1118 ("[W]hen the Legislature has carefully employed a term in one place and has excluded it in another, it should not be implied where excluded.").) The legislature also enacted statutes relating to groundwater management suggesting that groundwater is to be managed by local agencies. (Water Code 10750 et seq.) The only authority suggesting that the Board could require reports of groundwater use is that the Board's investigatory authority over streams, stream systems, portions of stream systems, lakes, or other bodies of water is not

[7] On the substantive issue of whether the Board decided to adopt a mitigation measure, the court would review to the Board's decision under the substantial evidence standard.
[8] The Board can require reports of groundwater use regarding a specific location following a specific enforcement action under the doctrine of waste. Living Rivers argued that the Board could require reports of groundwater use whenever any landowner used groundwater within a specified distance from any delineated stream.

expressly limited to surface channel water and subterranean streams. (Water Code 1051.) The arguable inference by omission that the Board can require the reporting of groundwater use is weak compared to the substantially stronger inferences in Water Code 4999 et seq. and Water Code 10750 et seq. that the Board lacks that regulatory authority.

The court finds under the independent review standard that the Board had no obligation to disclose the concept that it could require persons who use groundwater to report that pumping to the Board, as the concept appears to be lack even arguable merit. (*Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 244 ("An EIR need not identify and discuss mitigation measures that are infeasible); *Cherry Valley Pass Acres and Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316, 347-348.).)

At the hearing, the Board's counsel stated, "We prefer to take on battles we can win based on the law." (5/25/12 TR at 58.) The law does not require the Board to assert untenable legal positions or otherwise take on losing battles. What the law requires is that where the Board identifies a potential mitigation measure that can be supported by a fair legal argument, that the Board must disclose the mitigation measure and either adopt it or explain why it decided to avoid the battle. (*Laurel Heights Improvement Assn. v. Regents* (1988) 47 Cal.3d 376, 404-405.)

Groundwater - Disclosure of the Effectiveness of the Existing Mitigation Measures. The SED suggests that local regulations will mitigate or avoid the impact of increased groundwater use and implies that these are feasible mitigation measures. (Pub Res Code 21081(a)(1).) In fact, however, the Board has limited ability under California water law to effectively monitor and regulate the use of groundwater and under the

existing regulations in four of the five affected counties there likely will be little to no CEQA review of the anticipated increase in groundwater use.

The SED did not clearly present to the public the reality that under California law (1) the Board does not monitor the use of groundwater, (2) any permitting of groundwater use is at the county level, (3) Marin and Humboldt counties have no plans, codes, or ordinances for regulating groundwater use (AR 2610), (4) Sonoma County has a non-regulatory, collaborative, plan (Living Rivers 2nd RJN, Exh 3), (5) Mendocino County regulates groundwater use only in the Town of Mendocino and only for new uses or new developments (Living Rivers 2nd RJN, Exh 2), (6) Napa County regulates groundwater "to the maximum extent possible" (Living Rivers 2nd RJN, Exh 4 (Napa Reg 15.15.010)), and (6) as a result there will likely be little to no CEQA review of the anticipated increase in groundwater use in four of the five affected counties. (5/25/12 TR at 54-55.)

The draft SED does disclose significant portions of the regulatory framework. The Responses to Public Comments explain that the Board has jurisdiction over all the water in California but under Water Code 1200 et seq. the Board only has permitting authority over surface channel water and groundwater known as subterranean streams flowing in known and definite channels. (AR 2609-2611) Consistent with the Board's permitting authority, the Draft revisions dated February 2010 states "this policy applies to applications to appropriate water from surface water streams and from subterranean streams flowing through known and definite channels." (AR 3606.) The Draft revision dated February 2010 has a section titled "Enforcement" that differentiates between "8.3. Continuing Authority to Amend Permits and Licenses," and "8.4. Prohibition Against Waste and Unreasonable Use of Water." (AR 3616-3617.) The Board's responses to

public comments about groundwater issues states repeatedly words to the effect that "Extractions from percolating groundwater are not subject to the State Water Board's water right permitting authority." (AR 2434-2697, Responses to Comments 23.3.4, 23.4.1, 24.4.3, 24.4.26, 23.6.5, 30.0.3, 30.0.7.) These disclosures informed the public that the Board has no permitting authority regarding groundwater use.

The SED also disclosed that the Board's enforcement authority regarding groundwater was limited to enforcement actions to prevent waste and that the limited enforcement authority could have a significant practical environmental effect. The Response to Public Comments explained:

> In some cases, it may not be feasible to fully mitigate for the indirect impacts of the Policy. … [T]he State Water Board, Regional Water Quality Control Boards, and Department of Fish and Game may not have the resources to fully enforce the regulatory requirements described below. For example, the State Water Board does not have the resources to investigate every possible instance of increased riparian diversions or groundwater pumping and take regulatory action, if warranted, pursuant to article X, section 2, of the California Constitution or the public trust doctrine.

(AR 2605-2606.) The Board's Draft revision dated February 2010, has both an Appendix F regarding "Compliance Assurance," which explains in some detail how the Board intends to enforce the Policy (AR 3681-3683) and an Appendix G regarding "Prioritization of Enforcement" (AR 3684-3686). Together, these disclosures informed

the public that the Board's discretionary enforcement efforts to regulate groundwater use will be limited by its available resources.

The SED also disclosed summaries of the existing mechanisms for regulating groundwater use in Marin, Humboldt, Sonoma, Napa, and Mendocino Counties. (AR 2610.) The SED did not, however, effectively disclose that there would be no CEQA review of any groundwater use in Marin, Humboldt, or Sonoma counties, that there would be CEQA review of groundwater use in Mendocino county only in the town of Mendocino, and that there would be consistent CEQA review only in Napa county. The Board's Supplemental Brief confirms by inference that Napa is the only affected county that will have effective CEQA review of groundwater use. (Board Brief filed May 23, 2012, at 1:28 and 2:9.)

The SED then confused and complicated the information provided by suggesting that the five counties have effective regulation and that there would be CEQA review of groundwater use. Examples include:

1. "The five counties in the Policy area … *may* mitigate the potential impacts of increased groundwater pumping by regulating groundwater use pursuant to their police powers." (Response to Comment 23.7.1, AR 2610.) (Emphasis added.)
2. "*Certain* actions that affected parties take to increase groundwater extraction *might* be subject to CEQA review at the 'project level' and the lead agency would be required to adopt mitigation measures to reduce significant project impacts." (Response to Comment 23.4.16, AR 2583; See also responses to Comments 23.4.26, AR 2586; 23.4.39, AR 2591; 23.4.43, AR 2593; 23.6.4,

AR 2599; 30.0.1, AR 2687; 30.0.7, AR 2689; 30.0.11, AR 2691.) (Emphasis added.)

3. "To the extent that the land use and water development projects are not regulated by the State Water Board, they are within the purview of local governments and those entities *can and should* avoid or mitigate their significant environmental impacts. … Individual projects *will* be subject to the appropriate level of environmental review at the time they are proposed, and mitigation would be identified to avoid or reduce the adverse effects of potentially significant effects, prior to any project-level action. (March 14, 2008 Draft SED, AR 1916) (Emphasis added.)

4. "Future CEQA reviews conducted by the State Water Board or by another lead agency *can be expected* to identify any significant project-specific environmental effects and mitigate them to less-than-significant levels. (March 14, 2008 Draft SED, AR 1919) (Emphasis added.)

To the lay reader, these statements imply, if not aggressively suggest, that the anticipated increases in groundwater use will be subject to CEQA review. The Board's use of qualifiers such as "may," "might," and "can" obscure the reality that there will likely be no meaningful environmental review of increased groundwater use in Marin, Humboldt, Sonoma, or Mendocino counties. For example, the draft SED states "In some cases, it may not be feasible to fully mitigate for the indirect impacts of the Policy" (AR 2605), but the reality appears to be that "For most streams in the Policy Area, the regulatory policies of Marin, Humboldt, Sonoma, and Mendocino counties are not likely

to effectively mitigate for the increased groundwater use that is an expected indirect impact of the Policy."

The court finds that the Board did not provide the type of information required by CEQA and necessary for an informed discussion and therefore applies the substantial evidence standard. (*Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, 101-102.) The court has evaluated the disclosures consistent with the law that a SED or EIR is intended for public consumption and must, therefore, convey all the required information to the public in a manner designed to make the issues understandable to the public. (14 CCR 15121, 15140, 15147.) A CEQA disclosure is not adequate if only a PhD biologist can understand the implications of the disclosed facts or if only a lawyer can understand the implications of the distinction between the Board's jurisdiction and its permitting authority. (14 CCR 15140 and 15147; *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1987) 193 Cal.App.3d 1544, 1548-49 (an EIR must be "readily understandable … by interested non-professional laypersons").)

There is no substantial evidence that the SED adequately informed the public that under current law in Marin, Humboldt, Sonoma, and Mendocino counties there will be little to no monitoring of the expected increase in groundwater use. The SED's disclosure that the Board can initiate enforcement actions to limit groundwater use is accurate in isolation, but misleading without an explanation that it is a lesser level of regulation than a permitting process. The SED requires the reader to gather information from scattered places and then critically parse sentences to discern that there will be little effective monitoring of increased groundwater use.

The SED does not accurately present information to enable the public to understand and to consider meaningfully the limited legal options facing the Board to mitigate the expected increase in groundwater use. As a result, with regards to the discussion regarding groundwater the SED does not effectively meet CEQA's minimum disclosure requirements for promoting the accountability of public agencies and public's informed self-government.

The Board's failure to clearly disclose what appear to be the limited mitigation measures available to address increased groundwater use creates a presumption of prejudice. (*Sunnyvale West Neighborhood Assn. v. City of Sunnyvale City* (2010) 190 Cal.App.4th 1351, 1388; *Neighbors of Cavitt Ranch v. County of Placer* (2003) 106 Cal.App.4th 1092, 1100-1101.) The Board has not overcome the presumption of prejudice. Therefore, the court orders that the matter be remanded for adequate public disclosure and a new comment period.

Dam removal and construction of off stream storage. The draft SED adequately disclosed that the Policy might lead to dam removal and construction of off stream storage, potential impacts (AR 1894-1904), and that the Board and other agencies will need to implement mitigation efforts based on the specific impacts of each project (AR 1880, 1919). The draft SED's disclosures and discussion were appropriate for a program level document. The draft SED is not deficient just because the Board provided additional information regarding mitigation options that might be appropriate for future projects in its response to comments. (AR 2606-2609.)

Full Disclosure to the Board. The Board’s staff did not disclose to the Board that a consultant (Stetson) had developed a regulatory concept for controlling groundwater

pumping. (AR 12160.) The regulatory concept would have requested owners to file permit requests whenever they were drilling within 200 feet of a stream bed so that the Board could conduct a hydrological review and, if warranted, issue a cease and desist order. Living Rivers has not cited to any authority suggesting that the staff erred in not disclosing this particular proposal to the Board. The court has found that there is no fair legal argument that the Board could implement this regulatory concept.

COMPLIANCE WITH CEQA - EVALUATION OF IMPACTS, MITIGATION MEASURES, AND ALTERNATIVES.

Having found that the Board did not make clear and adequate public disclosures regarding the Board's limited ability to monitor and mitigate the impact of the anticipated increase in groundwater use as a result of the Policy, the court cannot, and does not, reach the issues concerning whether the Board's findings under Pub. Res. Code 21081 are supported by substantial evidence. *Rio Vista Farm Bureau Center v. County of Solano* (1992) 5 Cal.App.4th 351, 374.

EVIDENCE.

The court has considered all the evidence presented. The Court grants Petitioner's First and Second requests to add additional information to the record.

CONCLUSION.

The court directs the Board to vacate Resolution 2010-0021. The Board must adequately identify and discuss the potential mitigation measures to address the

anticipated increase in groundwater use as a result of the Policy. The public disclosures must disclose California's regulatory structure for water, explain what the Board can do legally, might be able to do legally, and cannot do under that regulatory structure, and identify and discuss the Board's feasible mitigation measures. The disclosure of the Board's potential mitigation measures must include an analysis of both the legal feasibility of the measures and the practical feasibility and effectiveness of those measures given the Board's resources.

The court leaves to the Board's discretion whether to recirculate the entire SED or only the portion dealing with the anticipated increase in groundwater use and the feasible mitigation measures. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 449; 14 CCR 15088.5(c).) The Board can make the determination whether the groundwater issues can be addressed in isolation or are interrelated with other aspects of the Policy. The court does not address whether the Board could ultimately determine that the benefits of the Policy as a whole outweigh the potential adverse impacts of increased groundwater use in what appears will be the absence of effective reporting and enforcement mechanisms. (Pub. Res. Code 21081(b); 14 CCR 15093.)

ORDER DIRECTING PREPARATION OF PROPOSED JUDGMENT.

The Court ORDERS that Living Rivers and the Board each prepare and serve a proposed judgment within fifteen (15) days of service of this proposed statement of decision. The parties may file objections to the competing proposed judgment 5 court

after service of that proposed judgment. The court asks the parties to both file their documents and to send MS Word versions to the court at Dept31.alameda.courts.ca.gov.

DATED: _____ _____

Evelio Grillo
Judge of the Superior Court