STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No. 2009-AL-07-0226
Appellate Case No. 2011-186086

Upstate Forever, South Carolina Native Plant Society, and South Carolina Wildlife Federation, ... Petitioners,

vs.

South Carolina Department of Health and Environmental Control and Greenville Water System, ... Respondents.

BRIEF OF AMICUS CURIAE TROUT UNLIMITED, THROUGH ITS MOUNTAIN BRIDGE CHAPTER, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Frank S. Holleman III
Nicholas S. Torrey
Southern Environmental Law Center
601 West Rosemary Street, Suite 220
Chapel Hill, NC 27516
(919) 967 1450
(919) 929-9421 (fax)
Counsel for the Amicus Trout Unlimited, Through Its Mountain Bridge Chapter

David D. Armstrong
P.O. Box 10855
Greenville, SC 29603
(864) 241-0633
Legal Advisor to the Board of Trustees of Trout Unlimited and its Executive Committee and Counsel for the Amicus Trout Unlimited, Through Its Mountain Bridge Chapter

December 19, 2012

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Regulations

Constitutional Provisions

By granting the petition and reversing the Court of Appeals, the Supreme Court can further the restoration of trout streams and rivers throughout South Carolina and prevent a serious disruption of the handling of administrative law cases.

Amicus curiae Trout Unlimited, through its Mountain Bridge Chapter, submits this brief to highlight the exceptional importance of the issues at stake in this case. The case is not moot because the relevant activity and impacts are not merely a temporary construction project but rather the extension of the life of Greenville Water System's Table Rock Reservoir for decades into the future. Moreover, because the Court of Appeals decision leaves unresolved the question of DHEC's obligation to protect the fragile coldwater trout habitat of the South Saluda by requiring minimum flows in its water quality certification for this activity, and because the decision will have serious unintended consequences for future cases involving the lifting of stays in permit challenges before the ALC, the Court should grant the petition for a writ of certiorari and reverse the decision of the Court of Appeals.

Interests of Trout Unlimited and Its Mountain Bridge Chapter

Trout Unlimited. Trout Unlimited is a national coldwater conservation organization founded more than fifty years ago and now supported by more than 147,000 volunteer members in approximately 377 chapters. From Maine to Hawaii and Alaska to Florida, the mission of Trout Unlimited is to conserve, protect, and restore North America's coldwater fisheries and their watersheds.

Trout Unlimited works to ensure that robust populations of native and wild coldwater fish once again thrive within their North American habitats, so that our children can enjoy healthy fisheries in their home waters. Trout Unlimited collaborates

with other conservation interests, local communities, and state and federal partners to protect, reconnect, restore, and sustain watersheds as coldwater habitat. Such efforts are crucial if North America's trout and salmon are to survive the host of threats facing them during the 21st century.

Over 50 years after its founding in 1959, no other conservation organization is as well placed as Trout Unlimited to make a difference for the nation's coldwater fisheries. From its beginning, Trout Unlimited has been guided by the principle that if we "take care of the fish, then the fishing will take care of itself." And that principle is grounded in science. "One of our most important objectives is to develop programs and recommendations based on the very best information and thinking available," said Trout Unlimited's first president, Dr. Casey E. Westell, Jr. "In all matters of trout management, we want to know that we are substantially correct, both morally and biologically." The Trout Unlimited website is www.tu.org.

Mountain Bridge Chapter. The Mountain Bridge Chapter of Trout Unlimited is made up of Trout Unlimited members and volunteers in the Greenville-Spartanburg-Anderson area of South Carolina. Founded in 1974, the Mountain Bridge Chapter is the original South Carolina chapter of Trout Unlimited. The Chapter's mission is: "To conserve, protect, and restore South Carolina's trout fisheries and their watersheds (and on a selective basis, those of western North Carolina) through chapter and member activities, advocacies and common goals." The Chapter works to "ensure that robust populations of native and wild coldwater fish continue to thrive within their original South Carolina range, so that our descendants can enjoy healthy fisheries in their home waters."

The Mountain Bridge Chapter currently has 520 members primarily living in the Upstate of South Carolina. At its outset, the Chapter helped with the effort to establish Jones Gap State Park and helped start the other two chapters of Trout Unlimited in South Carolina. Its website is www.mbtu.org.

Members of the Mountain Bridge Chapter fish in the South Saluda River. The Mountain Bridge Chapter has conducted a river clean up of the South Saluda and has adopted the section of Highway 11 that runs along the South Saluda for litter clean ups. The Mountain Bridge Chapter has supported the efforts to improve and restore the South Saluda as trout habitat.

This amicus brief is submitted by Trout Unlimited through its Mountain Bridge Chapter, hereinafter referred to as "Trout Unlimited."

ARGUMENT

The Court should grant certiorari and hear this case for three reasons. First, the Court of Appeals did not analyze the facts of the case in its order, nor did it consider the arguments of amicus curiae Trout Unlimited, all of which demonstrate that the relevant activity in this case is not merely the replacement of a conduit but rather the extension of the useful life of GWS's entire water impoundment system, so that simply replacing the conduit in no way moots the issues in this case. Extending the life of the reservoir implicates the existing uses of the river on an ongoing basis and DHEC is required by South Carolina's anti-degradation regulations to protect those uses by ensuring adequate minimum flows.

Second, the policy implications of the Court of Appeals decision demand hearing and reversal in order to forestall an unacceptable unintended consequence of the decision:

litigants such as Petitioners in this case would no longer be able to consent to the lifting of automatic stays in ALC proceedings, lest they lose their right to appeal on mootness grounds. This result would be profoundly inefficient because it would unnecessarily delay important projects such as the one in this case from going forward and would unnecessarily burden the ALC system.

Third, granting certiorari also is essential because of the importance of this issue to the State. The extraordinarily large number of dams in the Saluda-Reedy watershed means that the need for minimum flows in this river basin is critical to protect one of South Carolina's rare coldwater trout fisheries and the extensive restoration work that has been accomplished by state and federal agencies, conservation groups, and dedicated individuals. Further, the same is true for river systems across the State.

I. The Court of Appeals Order Overlooked the Larger Significance of the Conduit Replacement in this Case.

The order granting Respondents' Motion to Dismiss the case as moot does not analyze the facts of this case. By granting the Motion to Dismiss, the Court of Appeals accepted without analysis Respondents' premise that this case is about merely replacing a conduit and the only environmental impacts are the temporary impacts from the construction of the new pipe. However, that simply is not the case. As the authorities cited below demonstrate, replacing the conduit is an action to extend the life of the Table Rock Reservoir; as a result, DHEC's authority to impose conditions in its water quality certification is not limited—in scope or in time—to the temporary construction project.

The Greenville Water System takes the position that the certification allowing it to install a new main water pipe for the South Saluda Table Rock Reservoir has nothing

to do with the existence and use of the dam and the reservoir. Both as a legal and a factual matter, this position is simply wrong.

The pipe in question is in reality the sole conduit transporting water from the reservoir for use by the Greenville Water System and its customers. Without this conduit, the reservoir and the dam serve no useful purpose. The original conduit, which has been an essential element of the Table Rock Reservoir, is old and worn out. In order to extend the useful life of the Table Rock Reservoir and the dam that creates it, a new conduit must be installed. The need for the new conduit has never been questioned.

In other words, there are three critical parts to the Table Rock Reservoir; without any one of them, the Reservoir would not exist as a water source for the Greenville Water System. There must be a dam. There must be a reservoir behind the dam. And there must be a conduit to transport the water in the reservoir created by the dam. In the absence of any one of these three essential parts, the other two are useless to the Greenville Water System.

Without the pipe and the certification that allows it, there is no reason to dam the South Saluda River and to interfere with its normal flows. Indeed, since the original pipe is becoming obsolete and may at some point fail, the new pipe is essential and required for future withdrawals of water from the Table Rock Reservoir and the South Saluda River system.

Thus, when deciding whether to grant a 401 certification allowing the continued and future use of the water of the South Saluda through a new conduit that will transport water from the impoundment of the South Saluda headwaters, DHEC has the authority—and the responsibility—to consider the ongoing impacts of the dam and the reservoir on

the water quality of the South Saluda and the other uses of the South Saluda, in addition to its use as a water source for the Greenville Water System.

Trout Unlimited, like the Petitioners, does not oppose the Table Rock Reservoir or suggest that it should be dismantled. Trout Unlimited recognizes the importance of the reservoir for the region's water supply and the Greenville Water System's customers, which is why the Petitioners consented to lifting the stay on construction of the replacement conduit. The issue in this case—DHEC's obligation to consider a minimum flow condition in its 401 certification—is not rendered moot by completion of the conduit replacement.

Moreover, there is no reason why DHEC cannot put in place reasonable conditions that allow for flows to protect and restore the health of the South Saluda, and there is no reason why the Greenville Water System—which obtains its water from three different reservoirs and has many unused opportunities for better water management, efficiency, operation, and conservation—cannot continue to operate the Table Rock Reservoir effectively while providing adequate flows for the health of the South Saluda. Reasonable conditions would take into account water supply needs, seasonal flows necessary to sustain aquatic life, temperature, drought, and other relevant factors.

Courts analyzing similar situations have recognized the authority of the permitting agency to place conditions on installations, projects, permits, and certifications that extend the useful lives of reservoirs and that involve their essential parts. These courts recognize that such authorizations, including Section 401 certifications, are an appropriate mechanism for a regulatory agency to impose minimum flow conditions

because the authorization of an integral component of a water diversion system implicates that system as a whole.

Facts virtually identical to those in this case were analyzed in *Sequoia Forestkeeper v. U.S. Forest Service*, 2010 U.S. Dist. LEXIS 131381 (E.D. Cal. Dec. 3, 2010), *modified on reh'g on other grounds*, 2011 U.S. Dist. LEXIS 26447 (E.D. Cal. Mar. 14, 2011) (attached hereto as Attachment A). In that case, the Forest Service re-issued a special use permit for an elevated pipe running across Forest Service land that diverted water from an 1890 dam to a ranch. The Court held that the Forest Service had the authority to impose minimum flow conditions for the stream as part of its re-issuance of the special use permit for the pipe.

In *Sequoia Forestkeeper*, the special use permit was necessary for the pipe to exist (because the pipe runs across Forest Service land and cannot continue to do so without a permit), and in the case of the South Saluda, the Section 401 certification likewise is necessary for the pipe to exist (because the certification is required before the pipe may be constructed). In *Sequoia Forestkeeper*, as in the instant case, the continued operation of an impoundment depended upon a conduit, which in turn depended upon an agency authorization. Neither the *Sequoia Forestkeeper* pipe nor the Greenville Water System pipe can exist without the authorization in question; in both cases the pipe is a prerequisite for accessing the water stored by the dam. The *Sequoia Forestkeeper* court correctly reasoned that in authorizing the conduit, an agency could consider the effects of the impoundment that depended upon that conduit, and therefore could impose minimum flow conditions on the impoundment as a whole as part of the authorization.

The *Sequoia Forestkeeper* court's holding thus demonstrates that authorization of a water pipe—where it is essential to the operation and use of an impoundment—can validly be conditioned upon adequate flows to protect the stream impounded by the dam.

In addition, the court in *Sequoia Forestkeeper* recognized that the pipe itself was conceptually inseparable from the dam because both were integral parts of a single system for diverting water. The court referred to the pipe alone as the "diversion" ("water has flowed from Fay Creek to the Sellers' ranch through this diversion"), and also referred to the combined dam and pipe system as a single "water diversion structure," stating that "[t]he diversion 'dams up the entire stream channel.'" *Id.* at *4-5. The means of impounding water and the means of transporting it for use are but two components of a single system, and minimum flow conditions validly encompass that system as a whole.

In keeping with this reasoning, the court emphasized that a user's preexisting water rights do not prevent an agency from exercising its authority to protect water quality and existing uses by conditioning its authorization for a conduit on minimum flow requirements. *Id.* at *57 (citing *P.U.D. No. 1 v. Wash. Dep't of Ecology,* 511 U.S. 700, 720-21 (1994), for the principle that requiring minimum stream flows does not interfere with a state water allocation because such a condition neither "reflect[s] nor establish[es]" a water right).

Likewise, in *Trout Unlimited v. U.S. Dep't of Agriculture*, 320 F. Supp. 2d 1090 (D. Colo. 2004), the court held that the Forest Service could impose minimum bypass flows as a condition on the renewal of a land use authorization required in order to continue operating a reservoir constructed in 1929. Like the certification in this case, which allows the installation of a replacement conduit, the authorization in *Trout*

Unlimited was necessary for the reservoir to continue to be used. The court stated that flow conditions imposed upon this authorization "neither reflect nor establish a water right; rather, they merely address the nature of the use to which a water right might be put once the right is obtained from the State." *Id.* at 1105-6 (citing *P.U.D. No. 1*, 511 U.S. at 721-21). Even though the easement itself did not involve the withdrawal or discharge of water, the court held that the agency validly could impose minimum flow requirements as a condition of the authorization.

The same logic was followed by the Court in *P.U.D. No. 1 of Pend Oreille County v. State Dep't of Ecology*, 51 P.3d 744 (Wash. 2002) ("P.U.D. II"). There, a power utility was applying for permission to change the point of diversion of waters to which it already possessed water rights. The court held that the state certifying agency and review board could, in certifying under Section 401, impose conditions requiring a minimum flow of water in a creek, regardless of the applicant's existing water rights in that creek. *Id.* at 764.

The key fact is that the minimum stream flow requirement was imposed for a change in the *location of water diversion, not for any change in the amount of water withdrawn*. The utility's 1907 right to divert 110 cubic feet of water per second was unchanged by the proposed relocation. In other words, a certification for a change in the means by which water was withdrawn – but not for any alteration in the amount of water withdrawn – could be conditioned upon the user maintaining minimum flows in the river.

This point is important in the South Saluda case, because the Greenville Water System emphasizes that it does not propose to withdraw any additional amounts of water from the Table Rock Reservoir by way of its new conduit. But the same was true in

P.U.D. II; there, the location of the water diversion did not affect the amount of water the utility had a right to withdraw. As with the South Saluda, this change was integral to the operation of the entire system of water withdrawal and use, even though the amount of water withdrawn would not change, and the court found minimum flow conditions to be authorized under Section 401.

Moreover, in the South Saluda case, without a new pipe or conduit, at some point the Greenville Water System would not be able to withdraw any water at all from the Table Rock Reservoir. The certification for the new pipe enables the withdrawal of large amounts of water from the South Saluda for decades into the future, and it is only reasonable that the certification authorizing the means for such withdrawals would include conditions protecting the water quality of the South Saluda into the future.

While temporary construction impacts may trigger the 401 certification process, DHEC's delegated Clean Water Act authority allows it to impose conditions that go beyond the scope of the particular discharge that triggers the Section 401 certification requirement. Instead, DHEC has the authority and obligation to look to the "activity as a whole" in imposing conditions that are necessary to ensure compliance with state water quality standards or any other appropriate requirement of state law—including requiring minimum flows to protect existing and designated uses. *P.U.D. No. 1*, 511 U.S. at 711-12. Moreover, South Carolina's own water quality certification regulations require DHEC to consider all potential water quality impacts, direct *and* indirect, of a proposed project. S.C. Code Regs. 61-101(F)(3).

Because DHEC possesses this authority to impose minimum flow requirements, it is required to do so by South Carolina's water quality regulations: "Existing water uses

and the level of water quality necessary to protect these existing uses *shall* be maintained and protected . . . . The *stream flows necessary to protect classified and existing uses* and the water quality supporting these uses *shall* be maintained . . . ." S.C. Code Regs. 61-68.D.1 (emphasis added).

Thus, the issue in this case is neither theoretical nor moot: do South Carolina's water quality regulations require DHEC to consider protecting the stream flows necessary to support the trout waters affected by the impoundment system in this case? Nothing about the completion of the conduit replacement negates the Court's ability to decide that question and to require DHEC to consider adding minimum flow conditions to the 401 certification. *See Curtis v. State*, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (S.C. 2001) ("A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief.").

In numerous cases, courts have held – contrary to the ruling of the Court of Appeals here – that completion of a construction project does not moot environmental challenges, including 401 challenges. *See City of Olmstead Falls v. U.S. Envt'l Prot. Agency*, 435 F.3d 632 (6th Cir. 2006); *Airport Neighbors Alliance, Inc. v. U.S.*, 90 F.3d 426 (10th Cir. 1996). *See also Ware v. U.S. Fed. Highway Admin.*, 255 F. App'x 838, 839 (5th Cir. 2007) ("despite the fact that construction is complete, appellants ultimately seek relief from noise brought on by the highway... [C]ompletion of construction does not undermine the benefits of further noise mitigation measures . . . that could be added based on a new, FAHA-compliant noise analysis"); *Columbia Basin Land Prot. Ass'n v. Schlesinger*, 643 F.2d 585, 591 n.1 (9th Cir. 1981) (challenge to EIS not moot where

towers and transmission line had been in place since 1978: "were the Court to find the EIS inadequate, or the decision to build along Route D-1 arbitrary and capricious, the agency would have to correct the decision-making process"); *Pa. Envt'l Council v. Bartlett*, 454 F.2d 613, 625-26 (3d Cir. 1971) (holding that completion of a road project did not moot a claim because "[i]f we found that a violation of the federal statutes relating to the protection of the environment had taken place, the fact that the road was complete would not necessarily preclude the possibility of an equitable decree making right some part of the wrong"); *Buck Mountain Cmty. Org. v. TVA*, 629 F. Supp. 2d 785, 791 (M.D. Tenn. 2009) (case was not moot because the court could fashion effective relief for NEPA violations despite completion of transmission line).

II. Because the Court of Appeals Order Would Produce Economic and Judicial Inefficiencies, Certiorari Is Appropriate.

The order granting Respondents' Motion to Dismiss will have significant adverse policy implications, and as a result it warrants consideration by the Supreme Court. If the Court of Appeals decision stands, parties challenging an activity such as the construction project in this case will be forced to oppose the lifting of the automatic stay imposed in contested cases pursuant to the Administrative Procedures Act ("APA"), S.C. Code Ann. § 1-23-600(H)(2), lest they be deprived on mootness grounds of their due process right to judicial review under the South Carolina Constitution, Art. 1, § 22.

Thus, rather than consenting to lifting the automatic stay and allowing important construction projects to move forward efficiently, as Petitioners did in this case, litigants challenging permits would have no choice but to oppose the lifting of the stay in a hearing pursuant to S.C. Code Ann. § 1-23-600(H)(4). This situation would burden the ALC process significantly because these parties would be forced to contest the lifting of

an automatic stay rather than consenting and thus avoiding an adversarial hearing on the lifting of the stay. Moreover, such a situation would create significant economic inefficiencies because the party challenging a permitted activity would be disincentivized from consenting to that activity proceeding.

Here, Petitioners do not oppose the construction of the conduit, and they consented to lifting the stay for that reason. Petitioners have explained that they did so because there is nothing about completion of the conduit construction project that should affect the Court's ability to decide the question of whether DHEC was required to impose minimum flow conditions as part of its 401 certification. That certification is still enforceable and by its own terms requires compliance after the construction is completed.

Petitioners also have explained that even if the completion of construction rendered this case moot, which it does not, two distinct exceptions would apply. First, the issues in this case are of public importance and of imperative and manifest urgency, *see Ashmore v. Greater Greenville Sewer Dist.*, 211 S.C. 77, 96, 44 S.E.2d 88, 97 (S.C. 1947) ("questions of public interest originally encompassed in an action should be decided for future guidance, however abstract or moot they may have become in the immediate contest."). Second, the issues in this case are capable of repetition yet evading review, *see Byrd v. Irmo High Sch.*, 321 S.C. 426, 432, 468 S.E.2d 861, 864 (S.C. 1996). The Court of Appeals decision discussed only the first of these exceptions. It did not mention, let alone analyze the applicability of the second exception. Yet the Court of Appeals decision has created the potential for numerous similar permit and license challenges to be rendered moot by the lifting of an automatic stay, since many such permitted projects would be completed before the Court of Appeals could render a

decision on the appeal of a contested case—despite the fact that forward-looking permit conditions could still be modified after the project was complete. The Court of Appeals decision ignored this issue and it must be addressed.

III. The Natural Resources at Stake in this Case Are Exceptionally Important and Warrant the Grant of Petition for Certiorari

The rarity and value of the trout habitat at stake renders the issue in this case a question of exceptional importance. An inventory of dams prepared by the Saluda-Reedy Watershed Consortium (SRWC) reveals that the Saluda-Reedy watershed alone contains 164 regulated dams and more than 2,500 unregulated dams.[1] Saluda-Reedy Watershed Consortium, Watershed Insights Report No. 2: Regulated Dams in the Saluda-Reedy Watershed (2004), attached hereto as Attachment B. Half of all these dams will exceed their design life by 2015. *Id.* Many of the unregulated dams may require permits when they are modified, upgraded, or their useful life is otherwise extended.

Thus, an extraordinary number of impoundments are altering the natural flow of the Saluda and its tributaries and are potentially subject to permitting and minimum flow requirements. As a result, it is imperative that the Court decide DHEC's authority and responsibility to consider imposing such minimum flow requirements when authorizing actions to extend the useful life of these water impoundment systems.

Trout Unlimited emphasizes that DHEC has the clear general authority and obligation to set conditions on the Greenville Water System certification in order to fulfill its duty to protect the water quality of the South Saluda. The governing regulation, Regulation 61-101, provides DHEC broad authority and obligation to set conditions when

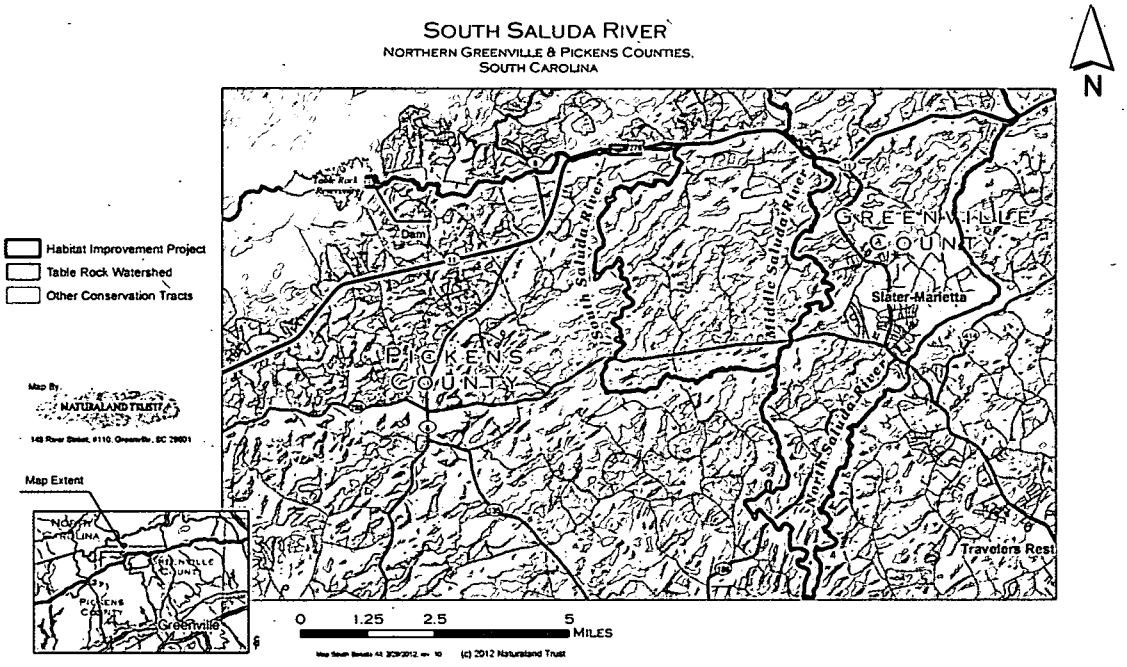
[1] SRWC is a broad-based group of universities, public agencies, private consultants, and non-profit organizations whose mission is "assuring clean, healthy, and abundant water for a sustainable economy and environment throughout the Saluda-Reedy Watershed."

issuing a Section 401 water quality certification. DHEC "shall also set forth any limitations, conditions, or monitoring requirements necessary to assure maintenance of classified or existing water uses and standards and compliance with other requirements of these regulations or other appropriate requirements of State law," Regulation 61-101 A. 5., and DHEC is required to consider "all potential water quality impacts of the project, both direct and indirect, over the life of the project including: (1) impact on existing and classified water uses; (2) physical, chemical, and biological impacts, including cumulative impacts; (3) the effect on circulation patterns and water movement," Regulation 61-101 F. 3 (c). The United States Supreme Court has held that water quantity is not distinguishable from water quality where its impact on designated uses is concerned. *P.U.D. No. 1*, 511 U.S. at 719.

Trout Fishing in South Carolina. Trout fishing is an important conservation, recreation, and economic activity in South Carolina. South Carolina receives $14.2 million in economic benefits from a trout fishery that serves over 49,000 anglers. *S.C. Department of Natural Resources Annual Accountability Report (2009-10)* at 46; *S.C. Department of Natural Resources Annual Report (2002-03)* at 98. The local impact is even greater, because most of South Carolina's trout habitat is concentrated in northernmost Greenville, Pickens, and Oconee Counties.

Because of the impacts of development and land use change, South Carolina has lost much of its original trout habitat. Every mile and every stretch of stream is important. Not surprisingly, at least since 1984, it has been the official policy of DNR to protect this precious resource. *See 1984 Resolution of S.C. Wildlife and Marine Resources Commission*, attached hereto as Attachment C.

The South Saluda River. The headwaters of the South Saluda River are now inundated by the Table Rock Reservoir of the Greenville Water System. The South Saluda exits the Reservoir and flows as the border between Pickens and Greenville Counties until it joins the Middle Saluda. The Middle Saluda ultimately joins with the North Saluda to form the main Saluda, which flows all the way to Columbia.



The South Saluda has historically been a trout fishery. The old Cleveland Trout Hatchery (which can be visited on the grounds of Jones Gap State Park) was established as South Carolina's first fish hatchery in 1931, and fish from that hatchery were stocked in the nearby South Saluda River.[2] The South Saluda runs at the base of Caesar's Head along the Cherokee Foothills National Scenic Highway (popularly known as Highway 11), making it extremely accessible to residents and tourists as a trout fishery.

However, over time the South Saluda has been degraded. Its forests were cut for timber and agriculture, raising the water temperature and releasing large amounts of

[2] http://www.southcarolinaparks.com/jonesgap/jonesgap-unique.aspx.

sediments into the river and its tributaries. The river was straightened when Highway 11 was constructed. Ponds were built on most of its tributaries, and releases from the sun-baked top layers of the ponds' water warmed what had been a cold mountain river and thus degraded trout habitat.

But the most serious impact has been the Table Rock Reservoir, which flooded the headwaters and blocked the normal flow of water into the river. The Reservoir completely disrupts the normal seasonal ebbs and flows of water essential to a healthy river system and a thriving fish population. As well, during hot dry months the river's flow is greatly reduced, further degrading the cold water habitat.

As a result, the South Saluda had become a shallow, warm, water-starved, and degraded river. The trout fishery hung on, but barely.

Concerned citizens and organizations, including Trout Unlimited, have worked to upgrade the South Saluda. Partners for Trout is an alliance of state and federal agencies, individuals, and groups dedicated to restoring and protecting South Carolina's trout waters. It includes Trout Unlimited.[3] Partners for Trout has long focused on the South Saluda, and through years of effort, the South Saluda has come a long way.

First, DNR purchased land on Highway 11 and the South Saluda at the base of Caesar's Head, to protect the river and to provide public access for trout anglers. The Department regularly stocks the river with trout.

Second, additional parts of the South Saluda and its watershed have been acquired and preserved. Naturaland Trust is South Carolina's second oldest land trust and was instrumental in the protection of Caesar's Head State Park, Jones Gap State Park, the

[3] *See, e.g.* http://cooperativeconservation.org/viewproject.asp?pid=640; http://www.sc.nrcs.usda.gov/Current%20Development%20newsletters/CD_February%2007/Parnters_for_Trout.html; http://www.upstateforever.org/Newsletters/Fall'02Newsletter/RestoreandProtectFall_02.htm

Jocassee Gorges, Stumphouse Mountain Heritage Trust Preserve, and many other special places in the South Carolina mountains.[4] It has acquired and is acquiring 140 forested acres along the South Saluda adjacent to the DNR property, where it allows public access for trout fishing. It has also acquired over 300 acres of nearby properties including South Saluda tributaries and trout streams. These acquisitions include preservation of the forest and thus ensure a cooling canopy for the South Saluda and some of its tributaries.

The effort has been supported by many agencies, citizens, and donors, including the Petitioners, Greenville Women Giving, the Hollingsworth Funds, John I. Smith Charities, the Symmes Foundation, the Jolley Foundation, the Graham Foundation, the federal Land and Water Conservation Fund, DNR, the S.C. Conservation Bank, S.C. Department of Parks, Recreation, and Tourism, the S.C. Department of Transportation, and the Scenic Byways Grants program of the U.S. Department of Transportation.

At the same time, the Natural Resources Conservation Service ("NRCS") of the U.S. Department of Agriculture worked to install bottom water releases on the dams on the tributaries of the South Saluda. These devices release the colder water from the bottoms of ponds into the streams, thus reducing thermal pollution of the South Saluda. Today, every impoundment that flows into this stretch of the South Saluda has a bottom cold water release device, including the pond on the old Camp Spearhead property protected by Naturaland Trust and DNR's lake on the Ashmore Heritage Trust Preserve.

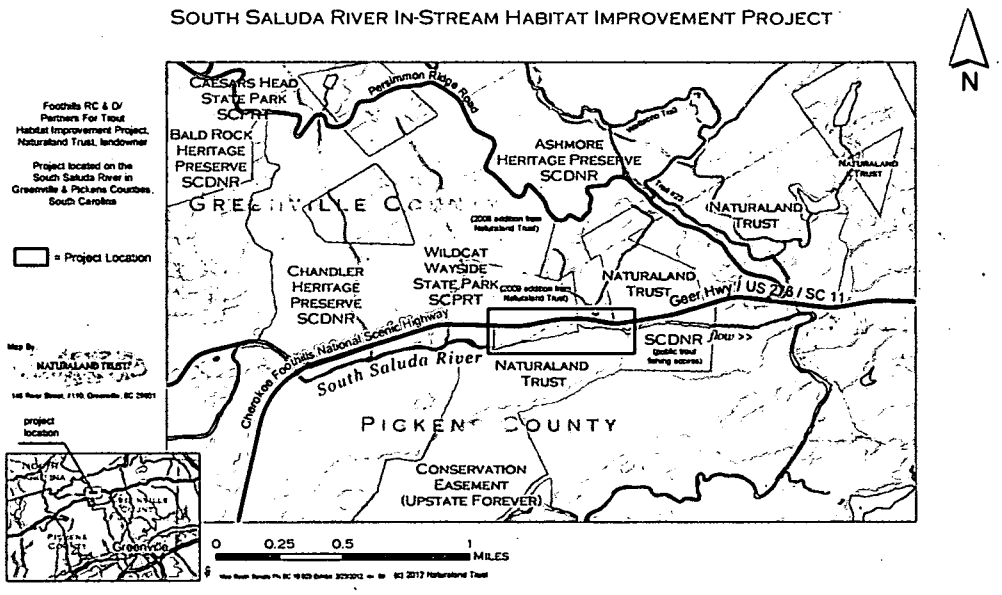
Most recently, the Wildlife Habitat Improvement Program of NRCS funded the installation of in-stream rock vanes in the stretch of the South Saluda owned by Naturaland Trust to improve habitat for trout and other aquatic biota. These structures

[4] *See, e.g.*, http://www.sctrails.net/trails/agencies_org/dscorg.html; http://www.youtube.com/watch?v=K8fzySd0yys.

create deep pools and re-create habitat that had been destroyed when the river was straightened. At the same time, the project eliminated muddy pull offs that were silting the South Saluda, by installing gates and boulders to block inappropriate parking. This project received the Bootsie Manning Habitat Award from the S.C. Wildlife Federation.[5]

Petitioner Upstate Forever, Save Our Saluda (a local river group), and Trout Unlimited have conducted river clean ups along this section of the South Saluda. Recently, the Mountain Bridge Chapter has adopted the section of Highway 11 running along the South Saluda and has picked up trash along the Highway and the river.

Below is a map indicating the project location and photographs of the river in the areas where the work has been done.

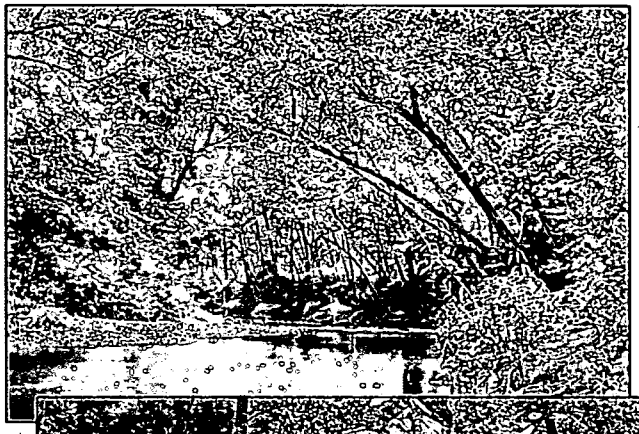


[5] http://www.scwf.org/index.php/events/full-calendar/147-conservation-awards-banquet-2012.

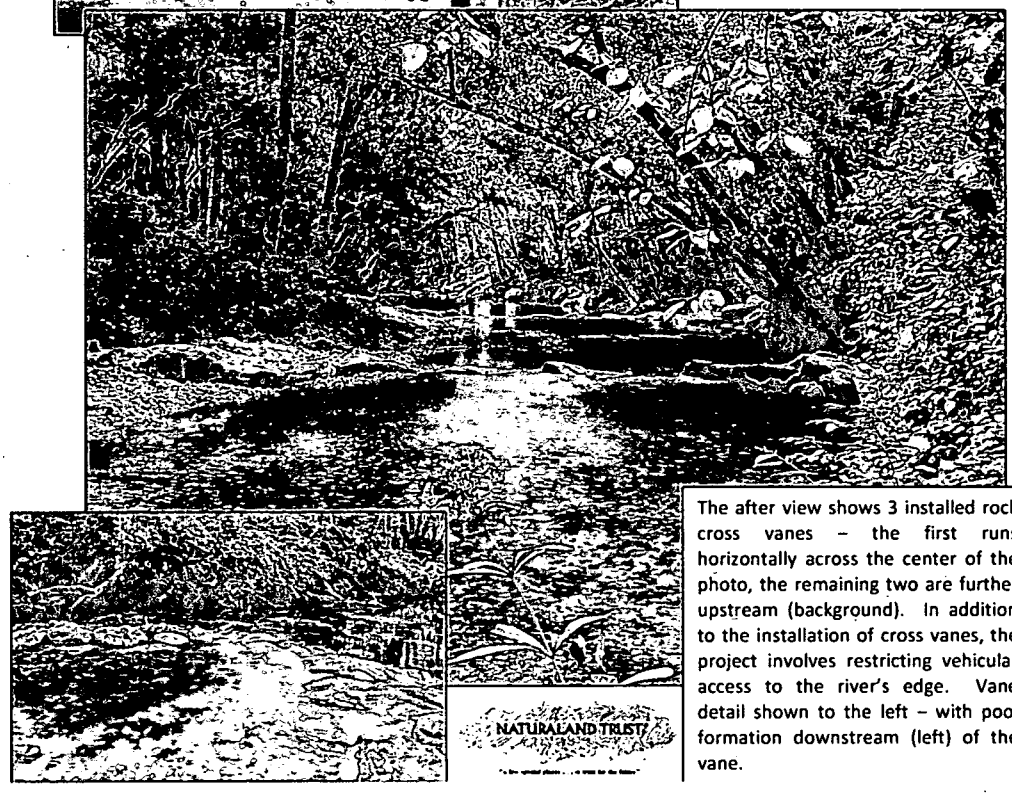
SOUTH SALUDA RIVER
IN-STREAM HABITAT IMPROVEMENT PROJECT

VIEW OF TYPICAL INSTALLATIONS

Before
August 11, 2011



After
September 8, 2011



The after view shows 3 installed rock cross vanes – the first runs horizontally across the center of the photo, the remaining two are further upstream (background). In addition to the installation of cross vanes, the project involves restricting vehicular access to the river's edge. Vane detail shown to the left – with pool formation downstream (left) of the vane.

TYPICAL PUBLIC ACCESS SIGN

There is one missing piece in this community-wide effort to restore the South Saluda: the Greenville Water System. As the owner of the Table Rock Reservoir, the System does more than any other entity to determine the health of the South Saluda, one of South Carolina's most accessible trout fisheries. Yet the System has been conspicuous in its failure to take part. Instead, the System is before this Court litigating with organizations whose members and officers include constituents and consumers of the System and community leaders who have worked to improve the South Saluda.

Trout Unlimited believes that the needs of all of the community can be met and well served through reasonable conditions on the Section 401 certification. The South Saluda and its waters are a public asset, and the Greenville Water System is a public trust. It is not necessary to degrade the South Saluda, its fishery, and its biological health in order to serve the water needs of the System. The best interests of the entire community

should be taken into account, and, as set out above, DHEC has the authority to see that the Section 401 certification serves the interests of South Saluda and the entire public.

Trout Unlimited rarely inserts itself into litigation. However, Trout Unlimited believes that it is important for the Greenville Water System to participate in the South Saluda restoration effort, and it appears that a decision from this Court and the regulatory process is the only way to obtain its participation.

Broader Implications. This case has implications far beyond this one river and watershed. Many streams and rivers in South Carolina are blocked by impoundments, including trout streams. When a dam owner applies to DHEC for a Section 401 certification or a permit necessary to extend the useful life of the reservoir and the use of the waters impounded by a dam, DHEC must have the authority to put in place conditions to protect water quality of the stream or river on which the dam is located. Otherwise, South Carolina's water quality and the future of its fisheries will be gravely threatened.

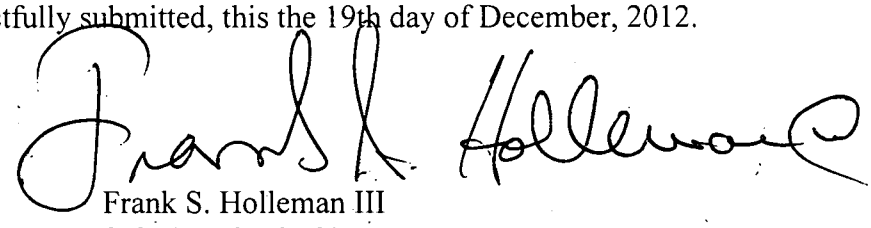
Without adequate minimum flows, the South Saluda will not be restored. The impacts of the continued operation of the Table Rock Reservoir on habitat, fishing, recreation, trout, and the water quality of the South Saluda River[6] are certainly factors that DHEC is empowered and required to consider when issuing a Section 401 water quality certification for a new conduit necessary to continue the operation of the Table Rock Reservoir for many decades to come. DHEC will carry out its statutory and regulatory responsibilities only by putting in place reasonable flow requirements that protect the water quality and uses of the South Saluda—an important natural resource of great value to the entire community.

[6] Downstream, the Saluda River is used by other communities for drinking water supplies and for discharge of treated wastewater.

Conclusion

Granting the petition and reversing the Court of Appeals will protect trout streams and other South Carolina waters by establishing DHEC's authority to put in place conditions requiring minimum flows when issuing certifications or permits for essential parts of dams and impoundments. The flows in dammed rivers and streams determine the existence and vitality of our fisheries and enhance the quality of life for all in South Carolina.

Respectfully submitted, this the 19th day of December, 2012.



Frank S. Holleman III
S.C. Bar No. 2564
Nicholas S. Torrey
Southern Environmental Law Center
601 West Rosemary Street, Suite 220
Chapel Hill, NC 27516
(919) 967 1450
(919) 929-9421 (fax)
fholleman@selcnc.org

Counsel for the Amicus Trout Unlimited, Through Its Mountain Bridge Chapter

David D. Armstrong
S.C. Bar. No. 416
P.O. Box 10855
Greenville, SC 29603
(864) 241-0633
(864) 271-9136 (fax)
david@armstrongfirm.com

Legal Advisor to the Board of Trustees of Trout Unlimited and its Executive Committee and Counsel for the Amicus Trout Unlimited, Through Its Mountain Bridge Chapter

ATTACHMENT A

Unpublished Case

SEQUOIA FORESTKEEPER, Plaintiff, vs. UNITED STATES FOREST SERVICE, et al., Defendants.

CASE NO. CV F 09-392 LJO JLT

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

2010 U.S. Dist. LEXIS 131381

December 3, 2010, Decided
December 3, 2010, Filed

SUBSEQUENT HISTORY: Modified by, Reconsideration denied by, in part, Reconsideration granted by, in part, Summary judgment granted by, Remanded by *Forestkeeper v. United States Forest Serv., 2011 U.S. Dist. LEXIS 26447 (E.D. Cal., Mar. 14, 2011)*

PRIOR HISTORY: *Forestkeeper v. United States Forest Serv., 2010 U.S. Dist. LEXIS 66657 (E.D. Cal., June 11, 2010)*

COUNSEL: [*1] For Sequoia ForestKeeper, Plaintiff: Hilton Stoddard Williams, LEAD ATTORNEY, Paul Hastings Janofsky and Walker, San Francisco, CA; Katharine Chao, LEAD ATTORNEY, Paul Hastings Janofsky & Walker, San Francisco, CA; Rachel Susanna Doughty, Sanjay M. Ranchod, LEAD ATTORNEY, Paul Hastings Janofsky and Walker (San Francisco), San Francisco, CA; Rene Peter Voss, Attorney at Law, San Anselmo, CA.

For United States Forest Service, Abigail R Kimbell, in her official capacity as Chief of the United States Forest Service, Tina Terrell, in her official capacity as Forest Supervisor for Sequoia National Forest, Tom Tidwell, Chief of the United States Forest Service, Defendants: J. Earlene Gordon , GOVT, LEAD ATTORNEY, US Attorney's Office, Sacramento, CA.

JUDGES: Lawrence J. O'Neill, UNITED STATES DISTRICT JUDGE.

OPINION BY: Lawrence J. O'Neill

OPINION

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT (Docs. 58, 71)

INTRODUCTION

Plaintiff Sequoia Forestkeeper initiated this action to seek judicial review of defendant United States Forest Service's ("USFS's") [1] re-issuance of a Special Use Permit ("SUP") to Robert Sellers and Quarter Circle Five Ranch (collectively "Sellers") in 2003, pursuant to the Administrative Procedure Act ("APA"), [*2] *5 U.S.C. §§701-706*. The SUP authorizes Sellers to use a water diversion that diverts water flowing from Fay Creek via a dam located within the boundaries of the Sequoia National Forest for private use ("diversion"). Sequoia Forestkeeper argues that by re-issuing the SUP, the USFS violated: (1) the National Environmental Policy Act ("NEPA"), *42 U.S.C. §§4321-4347*, for failure to prepare an Environmental Assessment ("EA") or an Environmental Impact Statement ("EIS") despite warnings from the California Department of Fish and Game, Sequoia Forestkeeper, and downstream

landowners that the SUP would result in significant harm to the environment (first cause of action); (2) NEPA, for failure to take a "hard look" at the environmental impacts of the re-issuance; (3) the National Forest Management Act ("NFMA"), *16 U.S.C. §§1600-1687*, because the SUP fails to comply with California resource and environmental law (third cause of action); and (4) NFMA, because the SUP fails to comply with Sequoia National Forest Land and Resource Management Plan ("Forest Plan"), which requires compliance with the water quality standards of the Clean Water Act, *33 U.S.C. §§1251-1387* (fourth cause of action).[2] [*3] The parties filed cross-summary judgment motions, arguing that based on the administrative record and the law, each is entitled to judgment as a matter of law. Having considered the record and the parties' arguments, this Court finds that although the USFS did not violate the NFMA substantively, it violated NEPA by failing to consider requests to include a minimum bypass flow restriction in the SUP or to require monitoring devices to be installed. Accordingly, this Court GRANTS in part and DENIES in part the parties' cross-summary judgment motions and REMANDS this action to the USFS for further consideration.

1 Defendants are the United States Forest Service, Tina Terrell, in her official capacity as Forest Supervisor for the Sequoia National Forest ("Ms. Terrell"), and Abigail R Kimbell, in her official capacity as Chief of the United States Forest Service (collectively "USFS").

2 Sequoia Forestkeeper withdrew its fifth and sixth causes of action in its motion for summary judgment.

BACKGROUND

Fay Creek

Fay Creek is a tributary of the South Fork of the Kern River, located at the southern end of the Sierra Nevada Mountain Range. Fay Creek supports a variety of ecosystems and resources, including [*4] riparian habitat important to trout, wild flowers and grasses, and willow, alder, and cottonwood trees. Administrative Record ("AR") at 19. Fay Creek also serves as the primary drinking water source for many wildlife species in the area. *Id.*

Diversion

In 1890, a water diversion was created in lower Fay Creek, approximately 1/8 mile north of Quarter Circle Five Ranch owned by Sellers. The dam and diversion are located within the Sequoia National Forest, approximately 500 feet north of the Forest's southern boundary with the Quarter Circle Ranch. Since at the late Nineteenth Century, water has flowed from Fay Creek to the Sellers' ranch through this diversion. The original diversion structure was replaced approximately 30-50 years ago.

The current water diversion structure uses concrete and part of a large rock outcrop to create a small dam approximately 12 feet high and 8 feet wide. AR at 582. The dam is built in a narrow, bedrock-controlled stream channel in Fay Creek, and is tied to a natural rock outcrop that has partially dammed Fay Creek and created a small waterfall. AR at 186. The diversion "dams up the entire stream channel." AR at 145. The dam and rock outcrop have created a small [*5] pond in Fay Creek that backs up the water approximately 30 feet. Elevated piping runs from Fay Creek's small dam across a dry hillside to the Quarter Circle Five Ranch. The diversion pipe, 6-10 inches in diameter, is two feet below the top of the spillway. AR at 582. At the base of the dam is a valve which is designed to allow water to pass through the dam. AR at 129.

History of SUP and Water Permit

The water diversion structure came under the province of the USFS in 1967. In that year, the USFS granted the first SUP for operation of the dam to divert water to Quarter Circle Five Ranch. Seller's predecessor diverted water from Fay Creek from 1967 to 1973 by permission from the USFS.

In 1973, the State of California ("State") granted the owner of Quarter Circle Five Ranch a Water Diversion and Use Permit (#S008264) ("water permit"). AR at 56-58. The permit was granted under a claim of riparian right for water diverted from the creek for use on the ranch.

In 1983, the ranch, SUP, and water permit were transferred to Sellers. AR at 385-86, 388-94. The USFS re-issued an SUP to Sellers in 1989, and again in 2003. AR at 397-404, 406-15. The 2003 SUP is the subject of this action.

2003 SUP Notice [*6] and Comment

On January 28, 2002, the USFS sent out a public notice that it was considering a re-issuance of the Sellers SUP. AR at 1. The notice reads, in pertinent part:

> The Quarter Circle 5 Ranch was granted water rights from the State of California in 1973 to remove 0.129 cubic feet per second (CFS) of water from Fay Creek. The permitted area for the Quarter Circle 5 Ranch diversion covers approximately .015 acres. The decision to be made is whether there are extraordinary circumstances, or conditions associated with the proposed actions, which may significantly affect the environment. If no extraordinary circumstances are identified, a project file and Decision Memorandum will be completed as required in FSH 1905.15 chapter 31.2 (9/21/92). If extraordinary circumstances are identified, the decision will be made to prepare an environmental assessment or environmental impact statement based on the significance of the environmental effects.

Id. The USFS received public comment on the proposed re-issuance, including two comment letters in support of the action, two letters with no comment, and four opinion letters opposed to the re-issuance of the SUP, unless conditions were included [*7] to ensure minimum flow or water quality. AR at 14-26. The USFS contends that it considered all of the public comments on the proposed action, including information provided after the public comment period had experience.

The USFS put together an interdisciplinary team to determine whether extraordinary circumstances existed to justify an EA or EIS on the re-issuance of the Sellers' SUP. AR at 143-50. All members of the interdisciplinary team concurred that extraordinary circumstances did not exist. *Id.*

In addition, the USFS reviewed information supplied by the State Department of Fish and Game. Stanley Stephens ("Mr. Stephens"), a senior biologist with the California Department of Fish and Game, wrote the USFS a letter in which he expressed concern over the Fay Creek diversion. In the December 31, 2002 letter, Mr. Stephens offered that, in his opinion, "allowing the complete de-watering of Fay Creek on the relatively short reach of national forest lands not only affects the fish, wildlife, and plants there on federal lands, but also on a much longer reach of Fay Creek downstream of the Forest boundary on private lands." AR at 124. Mr. Stephens recommended that the USFS "include language [*8] in the permit that requires the owner and operator of the dam to bypass adequate flows at all times to keep downstream resources in good condition." *Id.* Mr. Stephens also requested that the USFS study the potential adverse environmental affects of the SUP through an EIS. Mr. Stephens suggests that the USFS "incorporate criteria or conditions in the reissued Use Permit to minimize or eliminate the impacts of the diversion structure and reduction in flow." *Id.* In addition, Mr. Stephens requested the USFS to address the issue of sediment management at the Fay Creek diversion. *Id.*

The USFS responded to the State Department of Fish and Game as follows, in pertinent part:

> As you know, the diversion and a portion of the water transmission line are located on public land. We will be issuing anew special use permit to Mr. Sellers that will set forth conditions for the use of the diversion and water transmission line on National Forest System land. For example, Mr. Sellers is responsible for maintaining the structures in good repair. The Forest Service will contact Mr. Sellers to ensure that the recently discovered leakage in the water transmission line has been repaired. We do not have authority [*9] to put conditions on his water rights as your staff recommends. We are forwarding your fax and its attachments, as well as Senior Biologist/Supervisor Stanley Stephens' letter to...the State Water Resources Control Board, Division of Water Rights, Compliant Unit[.]

AR at 132-33.

Sellers' Commercial Water Sales and Neighbors' Concerns

In mid-2001, Sellers' neighbors began to express concerns to authorities over Sellers' use of Fay Creek.

Sellers' neighbors saw commercial water trucks coming from Sellers' ranch, and believed that Sellers was selling commercially the water diverted from Fay Creek. Sellers' neighbors were opposed to his commercial spring water operation, and wrote to the difference State and local county officials requesting an investigation. AR at 92-98. In addition to the commercial water sales issue, the neighbors expressed concerns about the safety of the large water trucks frequently driving on the narrow road near their homes. The neighbors, *inter alia*, wrote a complaint regarding the Fay Creek diversion to the California Water Resources Control Board, claiming that the quantity of water diverted by Sellers adversely affects the public trust resources of the State. [*10] In a July 18, 2001 opinion letter, California Water Resources Control Board, Division of Water Rights, explained that it had investigated the neighbors' claims. AR at 51. The opinion letter notes that Sellers' predecessor was granted a water permit in 1973 for riparian rights to the Fay Creek water. *Id.* The opinion further notes:

> Water under this statement is used to irrigate 200 acres or less of pasture/crops/domestic gardens and for stockwatering 400 head or fewer of cattle. Water is diverted at an average rate of approximately 325 gallons per minute, with total annual use averaging 110 acre-feet. Given the conditions described herein, it is presumed that Mr. Sellers is exercising a valid riparian right to the water from Fay Creek for use on his ranch.

Id. The opinion concluded that there was insufficient evidence "to justify action against the Ranch or Mr. Sellers." *Id.* at 52. The State Water Resources Control Board referred Sellers' neighbors to the California Department of Fish and Game to gather evidence, if any, to justify a termination or modification of Sellers' water permit. *Id.*

In mid-2002, Sellers' neighbors expressed concerns to the USFS regarding its proposed re-issuance [*11] of the SUP. The Sequoia District Ranger responded to the neighbors concerns and investigated the allegation that Sellers was selling water from Fay Creek. In the investigation, the District Ranger discovered that the water Sellers was selling came from natural springs located on Sellers' property, and did not involve the Fay Creek dam diversion. AR at 113, 118-19. Accordingly, the District Ranger advised Sellers' neighbors that the USFS had no authority over water rights issued to Sellers by the State, and advised them to approve the California State Water Resources Board. AR at 100-106.

The District Ranger forwarded copies of the neighbors' correspondence to the State Water Resources Board. The State Water Resources Board addressed the neighbors' concerns by letter:

> [The District Ranger] has indicated that the District is planning to issue the Ranch a special use permit. This permit is not related to the diversion for bottled water purposes, but would instead allow the Ranch to transport water from Fay Creek over Forest Service land, under an existing claim of water right, for the purpose of irrigation, stockwatering, and domestic use.
>
> Please be advised that the U.S. Forest Services' [*12] special use permit does not convey a legal basis upon which to divert and/or appropriate water, but grants the permittee access to and use of Forest Service land in accordance with the terms and conditions of the permit. Any diversion of water, regardless of its point of origin, must have a legal basis of right pursuant to California water law.

AR at 134-35.

2003 SUP

On February 28, 2003, Cannell Meadow District Ranger Judge Schutz issued a Decision Memorandum ("Decision Memo") recommending that the Sequoia National Forest Supervisor issue a ten-year SUP to Sellers for the Fay Creek Diversion. AR at 143. The Decision Memo reported that "[n]o extraordinary circumstances were identified during scoping as potentially having effects, which might significantly affect the environment. Input from both internal and external scoping was used in designing and modifying the proposal." AR at 147. The Decision Memo concluded that the SUP "may be categorically excluded from documentation" in an EA or EIS because it was a

"continuation of minor special uses of National Forest System lands that requires less than five contiguous acres of land (FSH 1909.15 Chapter 31.2). *Id.* The Decision Memo also concluded [*13] that re-issuance of the SUP "is consistent with the Sequoia Land Management Plan, the Mediated Settlement Agreement, and Sierra Nevada Forest Plan Amendment...The project is consistent with all categories of the National Forest Management Act." *Id.* The Decision Memo recommended to re-issue the SUP. Forest Supervisor Arthur L. Gaffrey approved the Decision Memo and authorized the SUP on September 15, 2003, and the Seller's SUP was re-issued. AR at 412.

The 2003 SUP authorizes Sellers to use or occupy National Forest System lands for "water transmission and diversion of domestic and irrigation water." AR at 406. Sellers pays $30 per year for the rights granted by the SUP. *Id.*

Disputed Facts

The parties dispute whether Fay Creek flows continuously throughout the year, or whether Fay Creek is an intermittent creek. There is evidence that in some years, water has flowed year round, whereas in most years, the creek does not flow beyond the diversion in summer months. The parties dispute whether Fay Creek may be classified as a "fishery" or a "navigable water." The amount of water diverted is also disputed. Sellers is permitted to divert 0.129 cubic feet per second (cfs), which is about one [*14] gallon per second, yet it has been estimated that as much as 325 gallons per minute (over five times as much) is diverted to Sellers, with a total annual use averaging 110 acre feet. The parties also dispute the nature of the habitat, if any, in Fay Creek beyond the diversion. The parties interpret differently the findings of multiple studies of Fay Creek, included in the administrative record. These studies include a 1987 study, 1988 study, a 1997 study, and various reports made by the interdisciplinary team the USFS put together in 2002. These disputed facts form the basis of Sequoia Forestkeeper's claims.

DISCUSSION

Sovereign Immunity and Statute of Limitations

The USFS argues that this Court lacks subject matter jurisdiction over Sequoia Forestkeeper's action, because it is barred by the statute of limitations, and therefore, the government's sovereign immunity. This Court must consider this threshold issue before addressing the merits of Sequoia Forestkeeper's claims. *Steel Co. v. Citizens for a Better Env't., 523 U.S. 83, 94-95, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998).* In considering a motion to dismiss for lack of subject matter jurisdiction, the plaintiff, as the party seeking to invoke the court's jurisdiction, [*15] always bears the burden of establishing subject matter jurisdiction. *Tosco Corp. v. Communities for Better Environment, 236 F.3d 495, 499 (9th Cir. 2001).* The court presumes a lack of subject matter jurisdiction until the plaintiff proves otherwise. *See Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 114 S.Ct. 1673, 1675, 128 L. Ed. 2d 391 (1994).*

Sequoia Forestkeeper asserts claims against the USFS pursuant to the APA. The APA waives the federal government's sovereign immunity for suits by persons who have been "adversely affected or aggrieved" as a result of agency action. *5 U.S.C. §702.* Pursuant to *28 U.S.C. 2401(a)*, however, suits against the United States "shall be barred unless the complaint is filed within six years after the right first accrues." This six-year statute of limitations applies to actions for judicial review under the APA. *Wind River Mining Corp. v. United States, 946 F.2d 710, 712-13 (9th Cir. 1991).*

In an APA action, the six-year statute of limitations begins when the final agency action issues. *5 U.S.C. §704; Crown Coat Front Co. v. United States, 386 U.S. 503, 87 S. Ct. 1177, 18 L. Ed. 2d 256 (1967).* The USFS contends that the final agency action was made on February 28, 2003. Because this action was not filed until [*16] March 2, 2009, the USFS concludes that the action is untimely. For the following reasons, the USFS's statute of limitations arguments fails.

The USFS argues that the February 28, 2003 Decision Memo was the final agency action. "To determine when an agency action is final," the Court considers, inter alia, "whether its impact is sufficiently direct and immediate and has a direct effect on...day to day business." *Franklin v. Massachusetts, 505 U.S. 788, 796, 112 S. Ct. 2767, 120 L. Ed. 2d 636 (1992)* (quoting *Abbott Labs. v. Gardner, 387 U.S. 136, 152, 87 S. Ct. 1507, 18 L. Ed. 2d 681(1967)).* "An agency action is not final if it is only the ruling of a subordinate official or tentative." *Id. at 796-97.* "The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Id.*

Applying the applicable legal standards, the February 28, 2008 Decision Memo was not a final agency action. The February 28, 2003 Decision Memo was a "Proposed Action and Decision" to reissue the SUP to Sellers. AR at 143. The Decision Memo was signed by the Sequoia District and provided a recommendation to re-issue the SUP. The first sentence of the Decision Memo reads: "I have decided [*17] to recommend to the Forest Supervisor that a ten-year Special-Use authorization be reissued[.]" The Decision Memo includes a "proposed action" to be implemented in the future, after approval by the Forest Supervisor. The Decision Memo contemplates that the "planned issue date for these permits is in March, 2003." Thus, the plain language of the Decision Memo makes clear that it is not a final action to have an immediate and direct impact. Indeed, the SUP was not re-issued until September 15, 2003, when the permit was approved by the Forest Supervisor. AR at 415. Thus, the February 28, 2008 Decision Memo lacked finality, because it was a proposed action, written by a "subordinate" to the Forest Supervisor, that had no immediate effect. The SUP took immediate effect once it was approved by the Forest Supervisor on September 15, 2003. Accordingly, the statute of limitations began to accrue at the time the SUP was re-issued, which was the final agency action. *See Forest Guardians v. United States Forest Serv., 370 F. Supp. 2d 978, 985 (D. Ariz. 2004)* ("When the special use permit was issued...[plaintiff's] cause of action accrued"); *see also, Franklin v. Mass., 505 U.S. 788, 796-97, 112 S. Ct. 2767, 120 L. Ed. 2d 636 (1992)* [*18] ("An agency action is not final if it is only the ruling of a subordinate official, or tentative[.]"). Because the statute of limitations began to accrue on September 15, 2003, this action that was filed on March 2, 2009 is timely.

Documents Beyond Administrative Record

In its summary judgment motion, Sequoia Forestkeeper submits, and relies on, documents outside of the administrative record. Sequoia Forestkeeper submits the declarations of Michael Klinkenberg, Ara Marderosian, Harold Simolke, and Daniel Christenson. Sequoia Forestkeeper also submits several documents attached as Exhibits A through F.

Sequoia Forestkeeper does not explain how this Court can consider these extra-record documents in its motion. In an administrative review of an agency action, however, the Court generally restricts its review to the administrative record. *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv., 450 F. 3d 930, 943 (9th Cir. 2006)*. The Court reviews "the full administrative record that was before the [decision-maker] at the time he made his decision." *Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971)*.; *5 U.S.C. §706*. The Court "normally refuse[s] to consider evidence [*19] that was not before the agency because 'it inevitably leads the reviewing court to substitute its judgment for that of the agency.'" *Id.* (quoting *Asarco, Inc. v. EPA, 616 F.2d 1153, 1160 (9th Cir. 1980))*. The Court may permit submission of extra-record materials only in limited circumstances, including: (1) if it is necessary to determine "whether the agency has considered all relevant factors and has explained its decision," (2) "when the agency has relied on documents not in the record," (3) "when supplementing the record is necessary to explain technical terms or complex subject matter"; or (4) where there is an allegation of bad faith. *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv., 100 F.3d 1443, 1450 (9th Cir. 1996)* (citations omitted).

In its motion for summary judgment, the USFS moved to strike the documents Sequoia Forestkeeper submitted and relied on outside of the administrative record. The USFS argues that these documents are immaterial, and do not meet any of the factors required to submit extra-record information. The USFS points out that these exhibits are documents that did not exist at the time the decision was made to re-issue the Sellers SUP in 2003, and submits [*20] that Sequoia Forestkeeper cannot attempt to supplement the record seven years after the decision was made to add new information. This Court agrees. *See Lands Council v. Powell, 395 F.3d 1019, 1030 (9th Cir. 2005)* ("Were the federal courts routinely or liberally to admit new evidence when reviewing agency decisions, it would be obvious that the federal courts would be proceeding, in effect, de novo rather than with the proper deference to agency processes, expertise, and decision-making. Here, the risks presented by the supplemental evidence are serious[.]"). Moreover, Sequoia Forestkeeper apparently concedes that it submitted the extra-record documents without authority, as it failed to address the USFS' motion to strike in its opposition to the USFS' motion for summary judgment. Accordingly, this Court STRIKES the declarations and exhibits submitted by Sequoia Forestkeeper, and considers only the administrative record in these cross-motions for summary judgment.

Standards to Review Merits of Plaintiffs claims

Sequoia Forestkeeper asserts that the re-issuance of the SUP violated NEPA (counts one and two) andNFMA (counts three and four). Alleged violations of NEPA and NFMA are subject [*21] to juridical review under the APA. *Blue Mts. Biodiversity Project v. Blackwood, 161 F.3d 1208, 1211 (9th Cir. 1998)*. This Court reviews an agency's actions pursuant to the APA under two standards. *Price Rd. Neighborhood Ass'n. v. United States DOT, 113 F.3d 1505, 1508 (9th Cir. 1997)*.

For disputes that are primarily factual, this Court "shall...set aside" agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law," or found to be "without observance of procedure required by law." *5 U.S.C. §706(2)*. Although the Court's review is "searching and careful," the "standard is narrow." *Ocean Advocates v. United States Army Corps of Eng'rs, 402 F.3d 846, 859 (9th Cir. 2005)*. The arbitrary and capricious standard is "highly deferential, presuming the agency action to be valid and [requires] affirming the agency action if a reasonable basis exists for its decision." *Indep. Acceptance Co. v. California, 204 F.3d 1247, 1251 (9th Cir. 2000)* (quotations and citations omitted). Under such deferential review, the Court may not substitute its judgment for that of the agency. *Marsh v. Or. Natural Res. Council, 490 U.S. 360, 376, 109 S. Ct. 1851, 104 L. Ed. 2d 377 (1989)*; *Kern County Farm Bureau v. Allen, 450 F.3d 1072, 1076 (9th Cir. 2006)*. [*22] Thus, the Court will not vacate an agency's decision under the "arbitrary and capricious" standard unless the agency:

> has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the produce of agency expertise.

Nat'l Assn. of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 658, 127 S. Ct. 2518, 168 L. Ed. 2d 467 (2007) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983))*. On the other hand, a reviewing court will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Id.* (quotations and citations omitted).

When a dispute is primarily legal in nature, or concerns a threshold question of law, this Court applies the more lenient "reasonableness" standard. *Ka Makani 'O Kohala Ohana Inc. v. Dept. of Water Supply, 295 F.3d 955, 959 (9th Cir. 2002)*. "[W]here an agency has decided that a particular project does not require the preparation of an EIS, without having conducted an environmental assessment, [*23] and [the court is] dealing with primarily legal issues that are based upon undisputed historical facts," then the Court applies a "reasonableness" standard. *Id.* Under this standard, the Court will uphold the agency's decision unless it is unreasonable. *Friends of the Earth v. Hintz, 800 F.2d 822, 836 (9th Cir. 1986)*.

The USFS asserts that this Court should apply the more stringent "arbitrary and capricious" standard to its review of the USFS decision to re-issue the SUP. Sequoia Forestkeeper apparently concedes that this is the applicable standard, as Sequoia Forestkeeper leaves unaddressed the reasonableness standard, and argues that the USFS's decision was "arbitrary and capricious." Although this dispute is less factual than a dispute in which an EA or EIS is prepared, the "historical fact" upon which the SUP Memo Decision was based are not undisputed. The issues of this action are factual and legal in nature.; i.e., whether Fay Creek is a fishery or a navigable water, and how much water flows through the diversion. Accordingly, this Court shall apply an "arbitrary and capricious" standard to its review of factual issues, but will consider pure questions of law under the reasonableness [*24] standard.

NFMA Claims

The parties begin their arguments with Sequoia Forestkeeper's NFMA claims. In its third cause of action, Sequoia Forestkeeper argues that the SUP violates the NFMA, because it fails to comply with California resource and environmental law. In the fourth cause of action, Sequoia Forestkeeper asserts that the re-issuance of the Sellers SUP violates NFMA, because it fails to comply with the Sequoia Forest Plan, which requires compliance with the water qualify standards of the Clean Water Act, *33 U.S.C. §§1251-1387* ("CWA").

The Court reviews narrowly a challenge to a USFS decision pursuant to NFMA. In *Lands Council v. McNair,*

the Ninth Circuit clarified a federal court's review of the actions of the USFS. *537 F.3d 981, 984 (9th Cir. 2008)* (en banc). As set forth above, the review pursuant to the "arbitrary and capricious" standard is narrow, and this Court shall not substitute its judgment for that of the agency. A federal court grants "the Forest Service the latitude to decide how best to demonstrate that its plans will" satisfy the goals of the forest plan and NFMA. *Id. at 992*. This Court "defer[s] to the Forest Service as to what evidence is, or is not, necessary [*25] to support" its analysis. *Id.* The Court's "proper role is simply to ensure that the Forest Service made no clear error of judgment that would render its action arbitrary and capricious." *Id. at 993*. Accordingly, this Court:

> look[s] to the evidence the Forest Service has provided to support its conclusions, along with other materials on the record, to ensure that the Service has not, for instance, relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id. at 987 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983)* (internal quotations omitted).

Whether USFS Violated NFMA by Failing to Specify Minimum Flows in the SUP

Pursuant to NFMA, the USFS develops a land and resource management plan, or Forest Plan, for each national forest which directs how each forest must be managed. *See 16 U.S.C. §§1604(a); 1604(f), 1604(i); 36 C.F.R. §251.54(e)(1)(ii)*. After a Forest Plan is developed, "all subsequent agency [*26] action, including site-specific plans such as the [re-issuance of the SUP] must comply with the NFMA and be consistent with the government plan." *Lands Council, 537 F.3d at 989* (citing *16 U.S.C. § 1604(f)*); *see also, Idaho Sporting Cong., Inc. v. Rittenhouse, 305 F.3d 957, 962 (9th Cir. 2002)* ("[A]ll management activities undertaken by the Forest Service must comply with the forest plan, which in turn must comply with the Forest Act.").

The Sequoia Forest Plan governs Fay Creek. Pursuant to the Sequoia Forest Plan, the USFS must "[p]rotect fishery streams by specifying minimum flows necessary to maintain fisheries habitat and allowing removal of no more than 50 percent of the flow at any time." AR at 245. Sequoia Forestkeeper argues that the USFS erred not to specify minimum flow requirement in the Sellers' SUP because Fay Creek is a fishery. The USFS contends that it was not required to include minimum bypass flows in the SUP because Fay Creek is not "fishery habitat" below the dam and diversion structure.

The USFS concluded that the portion of Fay Creek below the diversion did not constitute a fishery. The parties agreed that this conclusion was based on a September 16, 2002, "Fisheries [*27] and Watershed Analysis" of the water diversion, prepared by Teresa Tharalson, Zone Fisheries Biologist, Acting Zone Hydrologist ("Fisheries Analysis). AR at 201-19. The Fisheries Analysis reviewed the past Fay Creek surveys to conclude: "Fay Creek has a permanent fishery above the diversion structure, but not below it." AR at 206. The relevant portion of the Fisheries Analysis reads:

> Fay Creek does have a fishery above the water diversion structure. This stream has been surveyed three times, usually in the upper reachers. A 1988 fishery survey found fish in Fay Creek above the water diversion structure.
>
> A 1975 fishery survey (Boyer et al., 1975) found that Fay Creek was dry below the diversion structure and there was little water in Fay Creek upstream of the Quarter Circle 5 Ranch. The surveyors wrote that they doubted that Fay Creek had a fishery in the lower reaches and that they also doubted Fay Creek could sustain a significant fishery (*ibid.*).
>
> A 1988 fishery survey found fish below True Meadow downstream past the Forest boundary, almost to the Quarter Circle 5 Ranch (Knotts, 1988). In this survey, the fish identified as being either rainbow trout, or rainbow-golden trout

> hybrids...were [*28] seen in the upper, middle, and lower reaches of Fay Creek. Fish identified as Sacramento suckers were seen only in the lower reaches, below a long series of natural fish barriers. The presence of trout above the natural fish barriers in Fay Creek indicates that the fish were likely stocked in the upper reaches of this stream; then these fish spread into the downstream reaches of Fay Creek.
>
> A 1997 fishery survey found trout in the upper reaches of Fay Creek from below True Meadow to where FS road 22S12 crosses Fay Creek (Tharalson, 1997). The trout were not positively identified, but they did have strong par marks on their sides and white tips on their fins; indicating that these fish were either native trout or native-introduced trout hybrids. The 1997 survey went from just below road 22S12 upstream to True Meadow and Long Meadow, so only in the upper reaches was the presence offish in the [sic] or absence of fish in the middle and lower reaches was not documented in that survey.
>
> Fay Creek has a permanent fishery above the diversion structure, but not below it. Even if the lower reaches of Fay Creek loose [sic] much of their surface flow and the water gets over 75 F. during the summer, [*29] suckers can survive in dep bedrock pools that retain permanent surface water.

AR at 205-06. As to the effects of the diversion on "sensitive fisheries and riparian species," the Fisheries Analysis concluded: (1) there would be no effect on certain species; (2) most of the effect on certain species would have occurred in 1890 when the diversion was first built; and (3) the effects on species downstream from the diversion is unknown. As to the last conclusion, the Fisheries Analysis concluded:

> The diversion of 0.129 cubic-feet-per-second (cfs.) of surface water has lessened the amount of habitat in downstream areas for these species by the loss of downstream water in Fay Creek. The amount of habitat loss is unknown because there is no information on what this stream was like before 1890. Given the amount of water diverted (0.129 cfs.), and that there is not a defined channel all the way to the South Fork Kern River (Fay Creek flows through old alluvial deposits in its lower reaches); it is likely that without the present diversion structure that Fay Creek would not flow much further than it does presently.

AR at 207. The Fisheries Analysis also concluded that renewal of the Sellers' SUP [*30] "would have no additional effect [on] any [general] fisheries or riparian habitat in their areas because the current diversion structures have been in place for over thirty years and are currently stable." AR at 207. Acknowledging that the USFS must issue an SUP that complies with the CWA, the Fisheries Analysis provides:

> The past and current terms in the Special Use Permits for these diversion structures already address the permit-related Fisheries and Watershed issues that are within the Forest Service's jurisdiction. The permit terms already specify that the structures have to be kept in good repair, that the removal of any vegetation on Forest Service land would need prior approval, and that repair, modification, or replacement of the diversion structures on Forest Service land would need to be reviewed and approved by the Forest Service.

AR at 208.

The Sequoia Forest Plan defines "fishery habitat" as "[s]treams, lakes, and reservoirs that support fishes." The Forest Service Manual defines cold water fisheries as "aquatic habitats" that "predominantly support" particular fish species. AR at 777 (this document is submitted outside of the administrative record). "Aquatic habitat" is [*31] defined as "environments characterized by the

presence of standing or flowing water." The terms "predominantly" and "support" are not defined.

Sequoia Forestkeeper argues that the USFS's conclusion that Fay Creek is a fishery above the water diversion but not below it was arbitrary and capricious. Sequoia Forestkeeper contends that "historical Forest Surveys establish Fay Creek is fishery habitat, that the Forest Service considered the lower reaches to be fishery habitat, and that there were no facts to support the Forest Service's 2002 change of heart regarding categorization of the lower reaches.

Sequoia Forestkeeper contends that this Court should not defer to the USFS's conclusion that Fay Creek does not constitute a fishery below the diversion because the facts do not support this conclusion. Sequoia Forestkeeper relies on the 1988 survey that characterizes Fay Creek as a coldwater fishery to support its position. Sequoia Forestkeeper argues that the 1988 survey concludes that the "entire creek constitutes fishery habitat," including the lower portion of the creek downstream from the diversion. Sequoia Forestkeeper faults the 2002 Fisheries Analysis for emphasizing the 1975 survey [*32] that concluded that it is "doubtful" that Fay Creek contained "significant" fishery habitat below the diversion, and claims that the 2002 report "conspicuously omitted the fact that as a result of the of the 1988 survey the Forest Service categorized Fay Creek as a "cold-water fishery in good condition. Sequoia Forestkeeper contends that USFS's conclusion that it was not a fishery below the diversion was contrary to the facts in the record.

Sequoia Forestkeeper mischaracterizes the import and conclusions of the 1988 survey. The 1988 survey was conducted after a forest fire in the area. The objective of the survey was "to determine and assess the effects of the Fay Fire on the watershed and fisheries." AR at 152. The 1988 acknowledged that the 1975 survey concluded that Fay Creek was found to have too low a flow to support a viable fishery and served as a drainage channel. The 1988 survey explained that "from a fisheries standpoint, Fay Creek is in good condition." Significantly, however, the 1988 survey also concluded:

> In addition, there is little evidence of there ever being enough water to support a resident fishery year round. The abundance of water in 1988, can probably be linked [*33] to the lost of evapotranspirators (trees) after the Fay Fire had burned through. The lack of these natural "pumps" has increased the flow of overland water while decreasing that lost to evaporation.

AR at 153. Thus, the 1988 survey recognizes that the water flow and the conditions of the creek in 1988 were unusual. Even with the unusually high flow of water, the 1988 survey recommended that "Fay Creek be left in its present state to recover naturally" because of "the low water flows." *Id.* Moreover, the 1988 survey's conclusions do not state explicitly that it found fish below the diversion, or that it believed the area below the diversion to be a fishery. Although the 1988 survey discussed the upper, middle, and lower portions of Fay Creek, the 1988 survey does not distinguish the lower portion of the creek upstream and downstream from the diversion. In addition, the 1988 survey characterized the lower portion of Fay Creek to be "poor-habitat limited" for species reproduction, and described the stream flow condition to be "low," even in that year of abundant water. Thus, the 1988 survey does not establish conclusively that in 2002 the portion of Fay Creek below the diversion constitutes [*34] a fishery, as Sequoia Forestkeeper represents.

Moreover, Sequoia Forestkeeper's argument ignores other evidence in the administrative record that supports the USFS's conclusion. Sequoia Forestkeeper focuses on the 1988 survey to the exclusion of all other evidence available to the USFS at the time it made its decision. Sequoia Forestkeeper argues that the USFS's conclusion is contrary to the facts, yet the 1974 survey considers that the Fay Creek is not a fishery and would not support an aquatic habitat.

The USFS's determination that Fay Creek was not a fishery below the diversion was supported by the administrative record. The 2002 Fisheries Analysis, prepared by a USFS Acting Zone Hydrologist, considered all of the surveys of Fay Creek. The conclusion is consistent with earlier surveys that while fish may have been present from time to time in the lower reaches of Fay Creek, the conditions, natural barriers, and low water flow of Fay Creek did not support an aquatic environment that "predominantly supports" fish year-round. In addition, letters provided to the USFS by

longtime residents of Fay Creek downstream of the diversion affirmed that Fay Creek typically "goes dry around July [*35] 4th and does not start again until Labor Day or later." AR at 49, 97. Accordingly, the USFS conclusion that the area below the diversion was not a fishery was not arbitrary and capricious, as it relied on the expertise of its hydrologist/biologist and was supported by the historical data.

The Sequoia Forest Plan requires the USFS to "[p]rotect fishery streams by specifying minimum flows necessary to maintain fisheries habitat and allowing removal of no more than 50 percent of the flow at any time." The NFMA requires the USFS to comply with its Forest Plan. Because the USFS's conclusion that the portion of Fay Creek below the diversion was not a fishery, the USFS was not required to specify minimum flows in the SUP. Accordingly, the USFS did not violate the NFMA by failing to require minimum flow restrictions in the 2003 Sellers' SUP.

Whether USFS Violated NFMA by Failing to Demand a 401 Certificate

Sequoia Forestkeeper argues that the USFS violated the CWA because it issued the SUP without requiring State certification that the diversion would not impact water quality in Fay Creek. The NFMA requires the USFS to comply with the CWA, among other statutes. The Sequoia Forest Plan has a goal [*36] to "[p]rovide the technical services needed to comply with water quality goals as specified in the Clean Water Act."

Section 401 of the CWA requires every applicant for a federal license or permit which may result in a discharge into "navigable waters" to provide the licensing or permitting federal agency with certification that the project will be in compliance with specified provisions of the CWA, including State water quality standards ("*Section 401* Certificate"). No 401 Certificate was issued by the State before the 2003 SUP re-issued. Sequoia Forestkeeper argues that USFS's failure to require Sellers to obtain a *Section 401* Certificate from State was arbitrary and capricious, and violated the NFMA.

The USFS points out that a *Section 401* Certificate is required when a permit is issued which may result in a discharge into "navigable waters." The USFS argues that Fay Creek is not a navigable water, because it is a shallow, rock-filled creek which, in stretches below the dam, goes underground and historically runs dry for several months of the year.

The term "navigable waters" is defined as "the waters of the United States, including the territorial seas." *33 U.S.C. § 1362(7)*. The USFS [*37] interprets this definition narrowly, suggesting that Fay Creek must be navigable-in-fact to fall within the CWA. Sequoia Forestkeeper defines the term broadly, arguing that Fay Creek is a navigable water within the meaning of the statute. Sequoia Forestkeeper fails to consider the most recent and controlling United States Supreme Court or Ninth Circuit interpretations of the term "navigable waters," and the USFS misinterprets it. Accordingly, this Court first considers the appropriate interpretation of the term "navigable water," then determines that Fay Creek does not fall within the definition.

In *Rapanos v. United States, 547 U.S. 715, 126 S. Ct. 2208, 165 L. Ed. 2d 159 (2006)* the Supreme Court interpreted the term "navigable waters" as used in the CWA in a 4-4-1 plurality opinion. The Court unanimously agreed that the term navigable waters was not to be interpreted narrowly to require navigability-in-fact. The Court further agreed, however, that the term should not be applied as liberally as Sequoia Forestkeeper implores. The USFS relies on a four justice plurality, which ruled:

> the phrase "the waters of the United States" includes only those relatively permanent, standing or continuously flowing bodies of water "forming [*38] geographic features" that are described in ordinary parlance as "streams[,] . . . oceans, rivers, [and] lakes." The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall. The Corps' expansive interpretation of the "the waters of the United States" is thus not "based on a permissible construction of the statute.

Id. at 732 (citations omitted). This definition of "navigable water" may appear to exclude Fay Creek, because the evidence demonstrates that Fay Creek is not a "continuously flowing" body of water, and has been described as a channel to provide drainage for rainfall. As the plurality explained, however: "By describing 'waters'

as 'relatively permanent,' we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought. We also do not necessarily exclude seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months . . . ." *Id. at 733 n.5.* Considered further under this analysis, Fay Creek may qualify as a navigable water. Indeed, Sequoia Forestkeeper argues that even "intermittent streams" [*39] qualify as such.

As the Ninth Circuit recognized in *N. Cal. River Watch v. City of Healdsburg, 457 F.3d 1023, 1029 (9th Cir. 2006)* and *United States v. Moses, 496 F.3d 984 (9th Cir. 2007)*, however, Justice Kennedy's opinion is the "controlling rule of law." In his opinion, Justice Kennedy held that one must establish a "significant nexus" between wetlands and navigable waters to apply the CWA to the wetlands. *See also, United States v. Gerke Excavating, Inc., 464 F.3d 723 (7th Cir. 2007)* (adopting Justice Kennedy's "significant nexus" test as the rule of law). Justice Kennedy explained that:

> wetlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.' When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.

547 U.S. at 780.

Sequoia Forestkeeper relies on *Moses* for its position that even an intermittent stream [*40] can constitute a navigable water of the United States. In *Moses*, the Ninth Circuit considered "whether a seasonally intermittent stream which ultimately empties into a river that is a water of the United States can, itself, be a water of the United States." *Id. at 989.* The Ninth Circuit recognized *pre-Rapanos* case law that ruled that "even tributaries that flow intermittently are 'waters of the United States." *Id.* (quoting *Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 534 (9th Cir. 2001).* The Ninth Circuit's holding relied on the following analysis:

> [T]here is no reason to suspect that Congress intended to exclude from "waters of the United States" tributaries that flow only intermittently. Pollutants need not reach interstate bodies of water immediately or continuously in order to inflict serious environmental damage . . . . Rather, as long as the tributary would flow into the navigable body of water "during significant rainfall," it is capable of spreading environmental damage and is thus a "water of the United States" under the Act.

496 F.3d at 989 (quoting *United States v. Eidson, 108 F.3d 1336, 1342 (11th Cir. 1997)* (citations and footnote reference omitted).

The facts [*41] of *Moses* are distinguishable from the current case. The Ninth Circuit ruled that an intermittent tributary that empties into a river that is a water of the United States can be a "navigable water." The "intermittent tributary" at issue in *Moses* differs greatly from Fay:

> The man-made severance of Teton Creek at Alta, Wyoming, may have made the portion in question here dry during much of the year, but when the time of runoff comes, the Creek rises again and becomes a rampaging torrent that ultimately joins its severed lower limb and then rushes to the Teton River, the Snake River, and onward to the Columbia River and the Pacific Ocean.

496 F.3d at 991. Even in times of heavy flow, Fay Creek could not be described as "a rampaging torrent." In addition, and significantly, the creek in Moses flowed interstate to join directly navigable waters of the United States. Here, there is no evidence in the administrative record that Fay Creek joins (or would join) a navigable water downstream.

This Court finds that Fay Creek is not a "navigable water" of the United States within the meaning of the CWA under either *Moses* or *Rapanos*. In *Moses*, the

Ninth Circuit found that a "seasonally intermittent stream [*42] which ultimately empties into a river that is a water of the United States can, itself, by a water of the United States." *Id. at 989, 991.* The Court interprets the *Moses* decision to require a seasonal, intermittent stream to empty into a river to be defined as a "navigable water" itself. The *Moses* opinion supports this Court's position, in that it recognized that an intermittent creek or tributary is a navigable water "*as long as* the tributary would flow into the navigable body of water during significant rainfall" and is "capable of spreading environmental damage" *Id. at 989* (emphasis added). Fay Creek does not fall within this definition, however, because it does not empty into a navigable river, such as the Kern River. Similarly, and for these reasons, Fay Creek would not be considered a navigable water under Justice Kennedy's "significant nexus" test, either. Pursuant to *Rapanos*, Fay Creek would constitute a "navigable water" if "either alone or in combination with similarly situated lands in the region, [it could] significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *547 U.S. at 780.* As explained [*43] above, there is no evidence that water flowing through Fay Creek effects a body of water considered "navigable" in the traditional sense. The administrative record supports the USFS's position that Fay Creek is not a navigable water, since its "effects on water quality are speculative or insubstantial," such that Fay Creek "fall[s] outside the zone fairly encompassed by the statutory term 'navigable waters.'" *Id.* [3]

> 3 This Court's conclusion that Fay Creek is not a "navigable water" within the meaning of the Clean Water Act is consistent with applicable regulations. Under regulatory definitions, an intermittent stream may be a navigable water only if the "use, degradation, or destruction of which would *affect or could affect interstate or foreign commerce.*" *40 C.F.R.§ 122.2(c), (e); 33 C.F.R. §328.3(a).* There is no evidence that Fay Creek affects interstate or foreign commerce. In addition, these regulatory definitions must comply with the rule of law as stated by the United States Supreme Court.

Because Fay Creek is not a "navigable water" within the meaning of the CWA, the USFS did not err for failing to require Sellers to obtain a *Section 401* Certificate prior to the re-issuance of [*44] the SUP in 2003. Accordingly, the USFS's failure to require the *Section 401* Certificate did not violate the NFMA.

Whether USFS Violated the NFMA By Failing to Include Other Conditions in the SUP

Sequoia Forestkeeper alleges that the USFS violated the NFMA by failing to condition the SUP on compliance with other goals of the Forest Plan and the CWA, including to (1) "protect streamcources and adjacent vegetation to maintain or improve overall wildlife and fish habitat, water quality, and recreational opportunities; (2) protect downstream riparian rights; (3) protect "wildlife adaptations"; (4) ensure the "beneficial uses" for Fay Creek; and (5)"[r]equire compliance with applicable air and water quality standards established by or pursuant to applicable Federal or State law."

The USFS argues that the SUP contains conditions which are appropriate to protect and meet the Sequoia Forest Plan's goals and to require compliance with environmental laws. To protect vegetation, for example, the SUP requires Sellers to "obtain prior written approval from the authorized officer before removing or altering vegetation or other resources." AR at 410. In addition, Section III of the SUP contains the following [*45] condition to require compliance with federal, state, and local laws:

> The holder shall comply with all applicable Federal, State, and local laws, regulations, and standards, including but not limited to, the Federal Water Pollution Control Act, *33 U.S.C. 1251 et seq.*, the Resource Conservation and Recovery Act, *42 U.S.C. 6901 et seq.*, the Comprehensive Environmental Response, Control, and Liability Act, *42 U.S.C. 9601 et seq.*, and other relevant environmental laws, ans well as public health and safety laws and other laws relating to the siting, construction, operation, and maintenance of any facility, improvement, or equipment on the property.

AR at 407. As to wildlife adaptations, the USFS argues that it examined in some detail the effect on wildlife of the re-issuance of the SUP through the Fisheries Analysis, Biological Analysis, and other reports, and determined that there would be no significant effect on wildlife. Moreover, the USFS points out that the

above condition does require Sellers to comply with federal and State water quality standards.

The NFMA "unquestionably requires the Forest Service to 'provide for diversity of plant and animal communities...in order to meet overall [*46] multiple-use objectives.'" *Lands Council, 537 F.3d at 992*. The NFMA further requires the Forest Service to implement the goals of the applicable Forest Plan. "However, despite imposing these substantive requirements on the Forest Service, neither the NFMA and its regulations nor the [applicable] Forest Plan specify precisely how the Forest Service must demonstrate that its site-specific plans adequately provide for wildlife viability." *Id.* Because of the USFS's expertise in the area, this Court defers to its methods, and grants "the Forest Service the latitude to decide how best to demonstrate that its plan will provide for wildlife viability." *Id.*

Sequoia Forestkeeper fails to demonstrate that the USFS acted arbitrarily and capriciously by failing to condition the SUP to comply with various Forest Plan goals and environmental laws. The SUP contains a condition to require Sellers to comply with various environmental laws, including the CWA. The SUP also includes an additional protection for vegetation. The Court defers to the USFS that this condition best serves the goals of the Forest Plan, especially in light of the absence of evidence that Sellers has failed to comply with its provisions. [*47] Moreover, Fay Creek is in the MC6 (Mixed Chaparral) Management Area of the Sequoia National Forest. The MC2 has a grazing of livestock emphasis in mixed chaparral vegetation. This Court defers to the USFS's balance of the multiple uses of the forest. See, *16 U.S.C. § 528* ("it is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes."). Here, the water is used for, among other things, grazing of cattle on Sellers' land. Accordingly, the USFS has not violated the NFMA by failing to include further conditions in the SUP.

NEPA Claims

Introduction

"NEPA requires that a federal agency consider every significant aspect of the environmental impact of a proposed action and inform the public that it has indeed considered environmental concerns in its decisionmaking process." *Earth Island Inst. v. U.S. Forest Service, 442 F.3d 1147, 1153-54 (9th Cir. 2006), abrogated on other grounds by Winter v. NRDC, Inc., 555 U.S. 7, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008)*. NEPA is a procedural statute which "exists to ensure a process, not to mandate particular results." *Native Ecosystems Council v. Tidwell, 599 F.3d 926, 936 (9th Cir. 2010)*; [*48] *see also, Marsh v. Or. Natural Res. Council, 490 U.S. 360, 371, 109 S. Ct. 1851, 104 L. Ed. 2d 377 (1989)*. Because the statute is procedural in nature, the reviewing court will set aside agency actions that are adopted "without observance of the procedure required by law. *Natural Res. Def. Council v. U.S. Forest Service, 421 F.3d 797, 810 n.27 (9th Cir. 2005)*.

NEPA and its implementing regulations require federal agencies, including the USFS, to take a "hard look" at their actions, and to assess foreseeable environmental impacts of those actions, including direct, indirect, and cumulative impacts, in a forthright and public manner. *42 U.S.C. §4332(2)(C)(i)*; *40 C.F.R. §1508.7*. If a proposed agency action would "significantly affect the quality of the human environment," then NEPA requires the agency to prepare an EIS. *42 U.S.C. §4332(2)(C)*. If it is not clear whether an action will require preparations of an EIA, regulations direct the agency to prepare an EA to determine whether an EIA is required. *40 C.F.R. §1501.4(b)*.

An agency is not required to prepare an EIS or an ES when the proposed action falls within a "categorical exclusion" to NEPA's requirements. *See, 40 C.F.R. §§1501.4(b)*, 1502, *1508.4*, *1508.9*. Categorical exclusions [*49] are "actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in [NEPA] procedures adopted by a Federal agency." *40 C.F.R. §1508.4*. "By definition, then a categorical exclusion does not create a significant environmental effect; consequently, the cumulative effects analysis required by an environment assessment need not be performed. That assessment has already been conducted as part of the creation of the exclusion." *Utah Envt'l Cong. v. Bosworth, 443 F.3d 732, 741 (10th Cir. 2006)*; *Alaska Ctr. for Env't v. U.S. Forest. Serv., 189 F.3d 851, 853-54 (9th Cir. 1999)*. An agency may apply a categorical exclusion to its proposed action, however, only in the absence of extraordinary circumstances. *Bicycle Trails Council of Marin v. Babbitt, 82 F.3d 1445, 1456 (9th Cir. 1996)*; *Utah Envt'l Cong. v. Russell, 518*

F.3d 817, 821 (10th Cir. 2008). If "scoping indicates that extraordinary circumstances are present and it is uncertain that the proposed action may have a significant effect on the environment," then an EA must be prepared. AR at 266.

The USFS applied a categorical exclusion to its re-issuance [*50] of the Sellers' SUP. The applicable categorical exclusion is found in the Forest Service Handbook ("FSH") at 1909.15, Section 31.2.3, and excludes from NEPA's EIS or EAS analysis "[a]pproval, modification, or continuation of minor special uses of National Forest System lands that require less than five contiguous acres of land." The FSH provides "examples" of agency action that would fall into this exclusion, including "[a]pproving the continued use of land where such use has not changed since authorized and no change in the physical environment or facilities are proposed." *Id.* AR at 270-71.

Sequoia Forestkeeper's challenge to the re-issuance of the SUP pursuant to NEPA is three-fold: (1) the USFS did not take a "hard look" at the environmental effects of the SUP because it erroneously believed that it could not place a condition on Sellers' water rights; (2) the categorical exclusion does not apply because the diversion impacts an area larger than five acres and is not minor; and (3) extraordinary circumstances exists which requires either an EIS or EA. The USFS maintains that the re-issuance of the Sellers' SUP complied in full with NEPA. The Court considers each challenge below.

Whether [*51] USFS Violated NEPA by Concluding That It Had No Authority to Condition the SUP to Affect Sellers' Water Rights

Sequoia Forestkeeper asserts that the USFS's review of the re-issuance of the SUP was too narrow due to the USFS's conclusion that it had no authority to consider Sellers' water rights. Sequoia Forestkeeper argues that this assumption was false, and that the USFS has the authority to place conditions in its SUP that limits the unlimited water permit issued by State to Sellers. The USFS maintains that it has no right to interfere with state-granted water rights. Unjustifiably, neither party cites legal authority to support its position. Accordingly, neither party has satisfied its burden to establish it should be granted judgment as a matter of law on this issue.

Nevertheless, having considered the administrative record, applicable standards, and applicable law, this Court finds that the USFS acted arbitrarily or capriciously in its determination that it did not have the authority to condition the Sellers' SUP to maintain certain levels of water flow or to restrict the level of flow to the amount of water granted by State in its water permit.

Several parties requested the USFS [*52] to consider conditioning the SUP on minimum bypass flows. For example, in his letter to USFS, Mr. Stephens, State Department of Fish and Game Senior Biologist wrote:

> While we recognize the Forest may not have the authority to appropriate water, I believe you can help ensure that proper bypass flows occur, such that downstream needs are met. We would encourage the inclusion of language in the permit that requires the owner and operator of the dam to bypass adequate flows at all times to keep downstream resources in good condition. I encourage you to evaluate these concerns and integrate them into your EA, EIA, and incorporate criteria or conditions in the reissued Use Permit to minimize or eliminate the impacts of the diversion structure and reduction in flow.

AR at 124.

The USFS maintained throughout its internal and external scoping process that it did not have the authority to interfere with Sellers' water rights, granted by the State, and dismissed requests to consider minimum bypass flow conditions in the SUP. In a January 28, 2003 letter to California Department of Fish and Game, the Forest Supervisor wrote:

> As you know, the diversion and a portion of the water transition line are [*53] located on public land. We will be issuing anew special use permit to Mr. Sellers that will set forth conditions for the use of the diversion and water transmission line on National Forest System land. For example, Mr. Sellers is responsible for maintaining the structures in good repair. The Forest Service will contact Mr. Sellers to ensure that the

> recently discovered leakage in the water transmission line has been repaired. We do not have the authority to put conditions on his water rights as your staff recommends. We are forwarding your fax and its attachments, as well as [another letter from the State Department of Fish and Game] to...the State Water Resources Control Board.

AR at 132-33. In its Decision Memo, the USFS reiterates its position that "the Forest Service cannot place any conditions in a Special-Use permit which would infringe upon a water right." AR at 143. The Decision Memo noted that USFS "received three responses following the close of the public scoping period. All three letters addressed water rights and/or the natural resources concerns that are outside the scope of this decision." AR at 146.

This action "is not a controversy over water rights, but over rights-of-way [*54] through lands of the United States, which is a different matter, and is so treated in the right-of-way acts before mentioned." *Utah Power & Light Co. v. United States, 243 U.S. 389, 411, 37 S. Ct. 387, 61 L. Ed. 791 (1917)*. The SUP does not grant or alter Sellers' water rights. Section VII(E) of the SUP provides: "This authorization does not convey any legal interest in water rights as defined by applicable State law." The SUP does not allow Sellers a right to use the water that flows from Fay Creek; rather, it grants Sellers special use of the water diversion located on Forest Service lands to transmit water from Fay Creek to his private property. Sellers' water rights were granted by State. Thus, the issue is not whether the USFS had legal authority to grant water rights, but whether it had the legal authority to condition the SUP to require minimum bypass flows.

Federal law, including the Federal Land Policy Management Act of 1976 ("FLMPA") "specifically authorizes the Forest Service to restrict such rights-of-way [granted by an SUP] to protect fish and wildlife and maintain water quality standards under federal law, without any requirement that the Forest Service defer to state water law." *County of Okanogan v. Nat'l Marine Fisheries Serv., 347 F.3d 1081, 1086 (9th Cir. 2003)*. [*55] [4] In *Okanogan*, the Ninth Circuit rejected appellants' position that "the Forest Service does not have the authority to condition the use of the rights-of-way in a national forest on the maintenance of instream flows because such restrictions deny them their vested water rights under state law." *Id. at 1084*. The Ninth Circuit found that the USFS has the authority to condition water rights-of-way granted through an SUP in several federal statutes:

> The Federal Land Policy and Management Act of 1976 (FLPMA) authorizes the Secretaries of the Interior and Agriculture to "grant, issue, or renew rights-of-way over" public lands for "ditches . . . for the . . . transportation . . . of water." *43 U.S.C. § 1761(a)(1)*. Such rights-of-way "shall contain . . . terms and conditions which will . . . minimize damage to . . . fish and wildlife habitat and otherwise protect the environment" and that will "require compliance with applicable . . . water quality standards established by or pursuant to applicable Federal or State law." *Id. § 1765(a)*. In addition, the National Forest Management Act requires the Forest Service to specify guidelines for land management plans that "provide for . . . watershed, [*56] wildlife, and fish" and "provide for diversity of plant and animal communities." *16 U.S.C. § 1604(g)(3)(A) & (B)*. The Organic Administration Act, *16 U.S.C. § 475*, provides that "no national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows . . . ." The Multiple Use Sustained-Yield Act of 1960 (MUSYA), *16 U.S.C. § 528*, provides that "it is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes."

Id. at 1085. The *Okanogan* Court considered these statutes to "give the Forest Service authority to maintain certain levels of flow in the rivers and streams within the boundaries of the Okanogan National Forest to protect endangered fish species." *Id.; see also, Diamond Bar*

Cattle Co. v. United States, 168 F.3d 1209 (10th Cir. 1999) (affirming district court's finding that whether "Plaintiffs own certain water rights...does not change the fact that such rights do not deprive the Forest Service of its statutory authority and responsibility to regulate the use and occupancy [*57] of National Forest System lands."). Thus, the USFS had the authority to condition the SUP on minimum passage flow restrictions. *Accord, Trout Unlimited v. USDA, 320 F. Supp. 2d 1090, 1106 (D. Colo. 2004)* ("[P]ursuant to its regulatory authority, the Forest Service could have imposed bypass flows as a condition to the renewal of" permit to use Forest Service land:); *see also, PUD No. 1 v. Washington Dep't. of Ecology, 511 U.S. 700, 720-21, 114 S. Ct. 1900, 128 L. Ed. 2d 716 (1994)* (regulatory action under federal law to require minimum stream flows does not interfere with state water allocation because it neither "reflected nor established" a water right.").

> 4 The parties have been considering the legal issues presented in this action for almost nine years, since the initial notice for comment issued in January 2002. This action was filed nearly two years ago, and the parties have briefed these cross-summary judgment motions over the course of four months. Despite having nearly a decade to consider these issues, and four months to brief them, the parties failed to cite controlling law on the navigable waters issue, discussed *supra*, and failed to cite *any* legal authority for this central question as to whether the USFS had [*58] the legal authority to condition the SUP to limit the amount of water flowing through the diversion. The parties' failures are egregious, particularly in light of controlling, applicable law on these issues. The Court ADMONISHES both parties that failure to set forth controlling, applicable law in future motions shall result in an order to show cause why sanctions should not be imposed.

The USFS could have also considered requests to alter the diversion to limit the flow of water to the amount granted in Sellers' water permit. Sellers is permitted to divert 0.129 cubic feet per second (cfs), which is about one gallon per second. The 2002 biological, aquatic, and environmental assessments of Fay Creek assumed Sellers diverted this amount. Yet, one USFS study acknowledged that as much as 325 gallons per minute (over five times as much) is diverted to Sellers, with a total annual use averaging 110 acre feet. An alternative suggestion was to modify the diversion to have "measuring and data collection devices installed" or to install smaller pipes to monitor the water flow. AR at 63, 68. The request was made because "[m]easuring and monitoring the flow of water will allow for compliance [*59] with the State's permit." *Id.* The USFS dismissed this request without analysis or comment. Presumably, the USFS considered this to be an unauthorized interference with Sellers' water rights. As explained more fully above, however, the USFS has the federal regulatory authority to place conditions on its rights-of-way, and such an action would enforce, rather than restrict, Sellers' water rights. The USFS has included similar restrictions in other scenarios. For example, *in Idaho Watersheds Project v. Jones, 253 Fed. Appx. 684, 686 (9th Cir. 2007)*, "a term of [an] easement from the Forest Service require[d]" the holders of the easement "to install both a head gate and a fish screen before further diverting water from Otter Creek." *Id.* The Forest Service included that condition, and the Ninth Circuit upheld that condition, because "the Forest Service is obligated under law to impose restrictions on easements that minimize harm to wildlife." *Id.* Accordingly, the USFS erred to conclude that it had no authority to place conditions on the SUP, and violated NEPA by failing to consider these suggestions in its scoping period.

The USFS's erroneous conclusion that it had no authority to condition [*60] the SUP to require minimum bypass flows or other rights-of-way restrictions led to its unreasonable failure to consider the requests to do so in its scoping period. *Ka Makani 'O Kohala Ohana Inc. v. Dept. of Water Supply, 295 F.3d 955, 959 (9th Cir. 2002)* (when a dispute is primarily legal in nature, or concerns a threshold question of law, this Court applies the more lenient "reasonableness" standard.). "To take the required 'hard look' at a proposed project's effects, an agency may not rely on incorrect assumptions or data." *Native Ecosystems Council v. United States Forest Serv., 418 F.3d 953, 964 (9th Cir. 2005)*; *see also, Nat'l Assn. of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 658, 127 S. Ct. 2518, 168 L. Ed. 2d 467 (2007)* (court will vacate agency action if agency "entirely failed to consider an important aspect of the problem"). Accordingly, this Court finds that the USFS violated NEPA by failing to consider the request during its scoping period.

Although this Court finds that the USFS *could* have placed a minimum bypass flow or water meter condition

on the Sellers' SUP, this Court has no opinion as to whether it *should* have included such restrictions. As explained more fully below, this Court remands [*61] this issue to the USFS for further consideration. Specifically, the USFS shall address the requests to place certain conditions on the Sellers' SUP, including the request: (1) to condition the SUP on a minimum flow requirement; (2) to require a monitoring and measuring device be placed on the diversion; and (3) to reduce the size of the pipes that divert water from Fay Creek.

Whether USFS Violated NEPA by Applying a Categorical Exclusion to the SUP

The USFS concluded that the SUP qualified as a categorical exclusion, because it was a "continuation of minor special uses of National Forest System lands that require less than five contiguous acres of land." The USFS concluded that it may approve the SUP where, as here, it approved "continued use of land where such use has not changed since authorized and no change in the physical environment or facilities are proposed." Sequoia Forestkeeper argues that this decision was arbitrary and capricious, because the SUP is not a "minor special use" and impacts more than five contiguous acres of land. For the following reasons, this Court finds that the USFS did not act arbitrarily and capriciously by applying a categorical exclusion to the re-issuance [*62] of the SUP.

The SUP fits within the acreage requirements. The USFS described the "permitted area" as "approximately 0.15 acres." AR at 143. This area includes the dam structure, the "sand box" that is part of the diversion structure, and approximately 250 feet of diversion pipe to comprise the area "affected by the permitted structure." AR at 225. Sequoia Forestkeeper argues that "the area directly and significantly impacted by the dam/river diversion far exceeds five acres because of the direct impacts it causes downstream and on Sellers' operation of his ranch." Although the SUP might impact more than five acres of land, the categorical exclusion concerns the use of more than five acres of National Forest System land. The plain language of the categorical exclusion applies to "uses of National Forest System lands that require less than five contiguous acres of land." The use at issue-use of the diversion for water transmission--requires less than five contiguous acres of land. It is undisputed that the diversion covers only an area of approximately .015 acres of National Forest System land, and does not reach beyond five acres total, including Sellers' land.

The SUP would fall outside [*63] of the categorical exclusion if the special use was not minor, or, if the proposed action was a "major Federal action." As described more fully above, NEPA does not require an environmental analysis of all proposed federal agency actions. NEPA requires the preparation of an EIS only with respect to "major Federal actions" that significantly affect the quality of the human environment. Moreover, an EIS is not necessary "where a proposed federal action would not change the status quo," *Upper Snake River Chapter of Trout Unlimited v. Hodel, 921 F.2d 232, 235 (9th Cir. 1990)*, and is only required if the ongoing activity rises to the level of a "major Federal action." *County of Trinity v. Andrus, 438 F. Supp. 1368, 1388 (E.D. Cal. 1977)*. "By definition...a categorical exclusion does not create a significant environmental effect; consequently, the cumulative effects analysis required by an environment assessment need not be performed. That assessment has already been conducted as part of the creation of the exclusion." *Utah Envt'l Cong., 443 F.3d at 741*. Thus, this Court need not consider whether the direct, indirect and cumulative effects create a significant environmental effect. This [*64] Court need only consider whether the SUP approves a "minor" special use or a "major federal action."

This Court finds that the USFS did not commit clear error to determine that the SUP was a "minor" special use. NEPA and its regulations do not define either a "minor" special use or a "major Federal action." "No litmus test exists to determine what constitutes "major Federal action." *Save Barton Creek Ass'n v. Federal Highway Admin., 950 F.2d 1129, 1134 (5th Cir. 1992)*. Here, the USFS was guided by the FSH, which provides that the "continued use of land where such use has not changed since authorized and no change in the physical environment or facilities are proposed" qualifies under the categorical exclusion. This Court defers to the "agency's interpretation of the meaning of its own categorical exclusion...unless plainly erroneous or inconsistent with the terms of the regulation." *Alaska Ctr. for the Env't 189 F.3d at 857*. Here, the example was not plainly erroneous, and the re-issuance of the SUP fit the example. Thus, the proposed action satisfied the agency's interpretations of its categorical exclusion. In addition, both *Upper Snake River, 921 F.2d 232*, and *County of Trinity, 438 F. Supp. 1368*, [*65] support the USFS's

conclusion that the re-issuance of the SUP would not be a "major federal action." *See, e.g., Upper Snake River, 921 F.2d at 235* (operation of a dam, that had operated for years before NEPA was enacted was not a "major federal action" where its "operation is and has been carried on and the consequences have been no different than those in years past.").

The USFS had a reasonable basis to conclude that the SUP required fewer than five contiguous acres of land, and was for a "minor" use. Accordingly, the USFS did not act arbitrarily to conclude that the SUP qualified as a categorical exclusion. *See, Sierra Club v. Bosworth, 510 F.3d 1016, 1022 (9th Cir. 2007)* ("An agency's determination that a particular action falls within one of its own categorical exclusions is reviewed under the arbitrary and capricious standard.").

Whether USFS Violated NEPA by Finding that No Extraordinary Circumstances Exist

The USFS may apply a categorical exclusion only if there are no "extraordinary circumstances related to the proposed action." Sequoia Forestkeeper argues that extraordinary circumstances exist, because Mr. Christenson commented that Fay Creek "provides a wetland environment [*66] in an otherwise arid area." AR at 19. No other study characterized Fay Creek as a wetland. Accordingly, the USFS did not act arbitrarily and capriciously to find that there were no extraordinary circumstances. In addition, Sequoia Forestkeeper argues that the SUP allows a "complete de-watering of a stream that includes fishery habitat." Sequoia Forestkeeper also argues that the "cumulative impact" of the SUP should have been considered. The Court has addressed, and rejected, these arguments above. Although the State Department of Fish and Game opined that the SUP allowed the "complete de-watering" of Fay Creek during certain months, the USFS conclusion that no extraordinary circumstances existed was based on the USFS experts' opinions and other evidence supported in the record. Accordingly, the USFS decision was not arbitrary and capricious.

Relief

Because the USFS failed to demonstrate that it made a "reasoned decision" to re-issue the SUP "based on all of the relevant factors and information," the re-issuance was "arbitrary and capricious." *Id.* (citing *Marsh, 490 U.S. at 378*); *see also, 40 C.F.R. 1505.1.* "When an agency decides to proceed with an action in the absence of an EA or EIS, [*67] the agency must adequately explain its decision." *Alaska Ctr., 189 F.3d at 859.* "[W]hen an agency has taken action without observance of the procedure required by law, the action will be set aside." *Sierra Club, 510 F.3d at 1023* (citing *Idaho Sporting Cong., Inc. v. Alexander, 222 F.3d 562, 567-68 (9th Cir. 2000).*

Sequoia Forestkeeper requests this Court to: (1) declare that the USFS's decision to approve the SUP was arbitrary, capricious, and in violation of the NFMA and NEPA; (2) vacate the SUP and remand the matter to the USFS for the preparation of an environmental analysis; (3) order the USFS to condition the SUP to protect water quality, fisheries, and downstream, instream, and riparian habitat; (4) enjoin the USFS from operating the diversion without requiring a minimum flow of 50%; (5) enjoin the USFS from operating the diversion structure without installing automatic flow control devices; and (6) order the USFS to conduct periodic (at least weekly) monitoring of the diversion and to report these results. Sequoia Forestkeeper argues that it has satisfied all of the elements required for injunctive relief.

The Court may only grant a preliminary injunction "upon a clear showing [*68] that the plaintiff is entitled to such relief." *Winter v. NRDC, Inc., 555 U.S. 7, 129 S. Ct. 365, 375, 172 L. Ed. 2d 249 (2008).* "Plaintiffs seeking a preliminary injunction must establish that (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) a preliminary injunction is in the public interest." *Sierra Forest Legacy v. Rey, 577 F.3d 1015, 1021 (9th Cir. 2009)* (citing *Winter, 129 S.Ct. at 374*). In considering the four factors, the Court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter, 129 S.Ct. at 376* (quoting *Amoco Co. v. Vill. of Gambell, Alaska, 480 U.S. 531 542, 107 S. Ct. 1396, 94 L. Ed. 2d 542 (1987)*); *Indep. Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly, 572 F.3d 644, 651 (9th Cir. 2009).*

Likelihood of Success

As discussed more fully above, this Court finds that the USFS did not violate the NFMA, and did not err to find that the SUP fell within one of its categorical exclusions. This Court found that the USFS violated

NEPA, however, because it failed to consider some comments based on its [*69] erroneous conclusion that it had no legal authority to place conditions that would restrict water flowing through the diversion. Accordingly, Sequoia Forestkeeper has established the likelihood of the merits on this claim only.

Irreparable Harm Absent Injunctive Relief

Sequoia Forestkeeper argues that in "the NEPA context, irreparable injury flows from the failure to evaluate the environmental impact of a major federal action." *Sierra Club, 510 F.3d at 1034.* Indeed, "environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or of long duration, *i.e.*, irreparable." *Id.* (quoting *Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 545, 107 S. Ct. 1396, 94 L. Ed. 2d 542 (1987)).* Nevertheless, a violation of NEPA "does not automatically require the issuance of an injunction." *Id.* This Court disagrees with the USFS's claim that any NEPA violation is merely a "trivial violation" pursuant to *40 C.F.R. §1500.3.* As discussed more fully above, however, this Court also finds that Sequoia Forestkeeper has failed to establish that the "proposed project may significantly degrade some human environmental factor." *Nat'l Parks & Conservation Ass'n, 241 F.3d at 737.* Because the diversion [*70] has been in place since 1890, little evidence exists as to the impact, if any, that the diversion has had on that environment below it. Sequoia Forestkeeper has not established with specificity what irreparable harm would occur by allowing the diversion to continue to operate as it has for over 100 years. Accordingly, this factor disfavors injunctive relief.

Public Interest

The public interest favors injunctive relief. "[A]llowing a potentially environmentally damaging program to proceed without an adequate record of decision runs contrary to the mandate of NEPA" and contrary to the public interest. *Sierra Club, 510 F.3d at 1033.* "The preservation of our environment, as required by NEPA and NFMA, is clearly in the public interest." *Earth Island Inst. v. U.S. Forest. Serv., 351 F.3d 1291, 1308 (9th Cir. 2003).*

Balance of the Hardships

The purpose of a a preliminary injunction is to preserve the status quo if the balance of equities so heavily favors the moving party that justice requires the court to intervene to secure the positions of the parties until the merits of the action are ultimately determined. *University of Texas v. Camenisch, 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L. Ed. 2d 175 (1981).* "Status [*71] quo" means the last uncontested status that preceded the pending controversy. *See, GoTo.com, Inc. v. Walt Disney Co., 202 F.3d 1199, 1210 (9th Cir. 2000).* Here, the status quo would be to allow Sellers to continue to divert water through the diversion. Water has been flowing through the diversion for over 100 years. Sequoia Forestkeeper seeks a mandatory injunction that "goes well beyond simply maintaining the status quo [p]endente lite [and] is particularly disfavored.'" *Anderson v. United States, 612 F.2d 1112, 1114 (9th Cir. 1980)* (quoting *Martinez v. Mathews, 544 F.2d 1233, 1243 (5th Cir. 1976)); Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 878-79 (9th Cir. 2009).* Although the USFS may place conditions on Sellers' use of the diversion, and may require Sellers to attach monitors or meters, or install smaller pipes, it is not clear from the record how, or whether, USFS could stop the Sellers' use of the diversion altogether and how that would affect Sellers' water rights. The clear harm that a mandatory injunction would cause the USFS is greater than the undefined and speculative harm that Sequoia Forestkeeper claims would occur absent the injunction. Accordingly, [*72] this balance of the equities tips against the issuance of the injunctive relief sought. *See, Sierra Club, 510 F.3d at 1034* (recommending injunction to be limited to those projects that have not yet been approved).

Conclusion

For the foregoing reasons, this Court REMANDS this action to the USFS for further consideration and analysis, but ORDERS that the status quo should remain while the USFS completes its supplemental scoping analysis of its re-issuance of the SUP.

ORDER

For the foregoing reasons, this Court:

1. GRANTS judgment in favor of Sequoia Forestkeeper and against the USFS on Sequoia Forestkeeper's second cause of action;

2. GRANTS judgment in favor of the

USFS and against Sequoia Forestkeeper on Sequoia Forestkeeper's first, third, and fourth causes of action; and

3. REMANDS this action to the USFS for further consideration consistent with this opinion.

IT IS SO ORDERED.

Dated: December 3, 2010

/s/ Lawrence J. O'Neill

UNITED STATES DISTRICT JUDGE

ATTACHMENT B

Watershed Insights Report No. 2

Watershed Insights Report No. 2

Regulated Dams in the Saluda-Reedy Watershed

SALUDA-REEDY WATERSHED CONSORTIUM

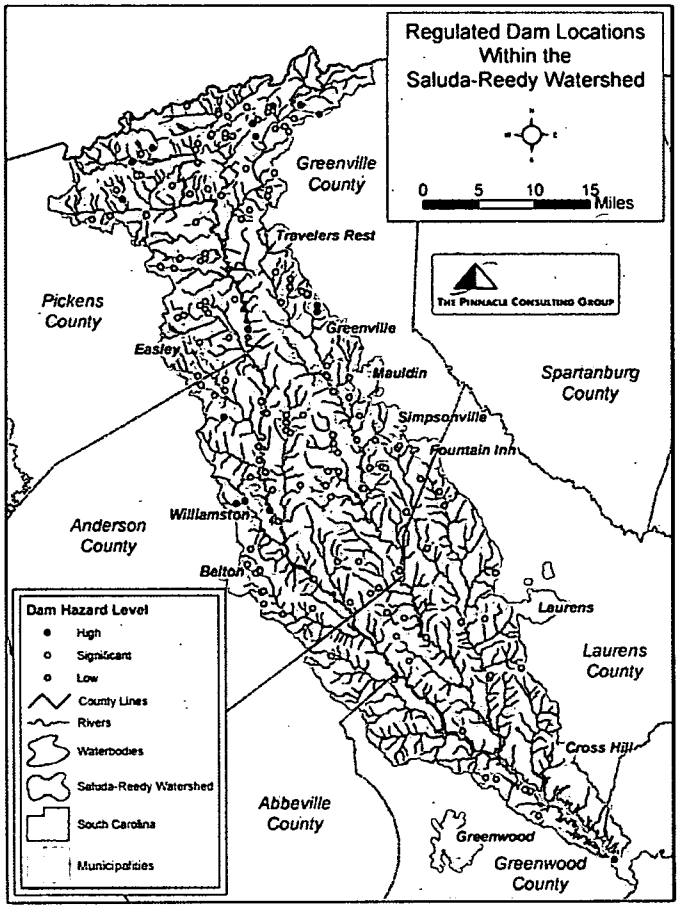
Pinnacle Consulting Group
A Division of North Wind, Inc.

To better understand the role and influence of dams on the streams of the Saluda-Reedy Watershed (SRW), the SRW Consortium (SRWC) recently inventoried all state and federally regulated dams within the watershed. For purposes of this study, "regulated" means those structures subject to SCDHEC or FERC regulations. Through this project we developed a comprehensive database of all available information on **164 regulated dams** and their associated impoundments. Information compiled in this database is relevant to public safety considerations of dam management as well as management of the ecological and hydrologic effects of the dams and their impoundments.

The **SRW** is defined as the **land area draining to Lake Greenwood**. This area includes the drainages of the Saluda and Reedy Rivers, and contains approximately **1,165 square miles** (~ 745,600 acres) of the Upper Piedmont of South Carolina.

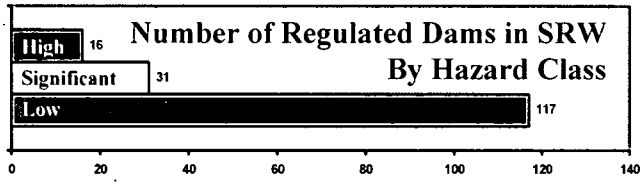
The dams database contains 10,332 records (thus far) related to attributes of the regulated dams and includes:

- Dam name, ownership, and identification numbers;
- Dam location, age, design and construction specifications;
- Dam discharge rate, impoundment area, storage capacity, hazard potential, and other design features.



Information for this inventory was gathered from the U.S. Army Corps of Engineers (USACOE), Federal Energy Regulatory Commission (FERC), and South Carolina Department of Health and Environmental Control (SCDHEC). All dams were spatially referenced in a Geographic Information System (GIS). The database was queried to identify dams that could pose potential safety concerns both to people and the environment. These queries identified many dams of interest. Key observations are:

- **Sixteen dams have a 'high' hazard rating.** This means that, in the case of a catastrophic dam failure the collapse is likely to cause loss of human life, along with high economic and environmental losses.
- **Many of these dams are old.** By 2015, 50% of these dams will be beyond their design life (50 years is typical).
- The **vast majority (81%) are privately owned.**
- **Five** of the **dams** are **regulated by FERC.** Of these, two have high hazard status, and three are low hazard dams.



Nationwide statistics indicate **most dams**, whether privately or publicly owned, are **marginally or inadequately maintained**.

In addition to the 164 regulated dams in the watershed identified through this study, we have also estimated the number of non-regulated dams in the SRW. Based on air-photo imagery, and review of related data, we have tentatively identified over **2,500 non-regulated dams within the SRW**. This is one dam for every 300 acres of land. This density of dams in the mixed agriculture and suburban landscape of the Upper Piedmont is consistent with findings elsewhere in the region.

The SRWC will continue to evaluate the role and significance of dams in the SRW during 2004, to include these issues:

- Assessment of older, larger, and higher-risk dams in terms of public safety hazards and risks to infrastructure;
- Identification of dams requiring maintenance and management attention;
- Identification of opportunities for modifications of dams to enhance or restore streams and wildlife habitats;
- Further characterization of the nature and condition of non-regulated dams;
- Examination of the fragmentation effects of dams on the hydrology and ecology of SRW streams;
- Identification of dams that may be critical in containing contaminated sediments.

While these structures provide a variety of benefits, even small dams can dramatically affect natural flow regimes, habitat, and water quality. The SRW contains many dams and impoundments that may be better managed to enhance public safety and more effectively protect both manmade assets and the natural environment.

This project was sponsored by the Saluda-Reedy Watershed Consortium and has involved technical work by Pinnacle Consulting Group.
Watershed Insights Report No. 2, authorized for release by SRWC on 21 May 2004. Key Contact: Dr. Dave Hargett, Pinnacle, dhargett@northwind-inc.com 864.787.8160.
The SRWC is a broad-based group of universities, public agencies, private consultants, and non-profit organizations focused on assuring "Clean, Healthy and Abundant Water for a Sustainable Economy and Environment Throughout the Saluda-Reedy Watershed".

ATTACHMENT C

1984 Resolution of S.C. Wildlife and Marine Resources Commission

S.C. Wildlife and Marine Resources Commission Policy

Recognizing the importance of the trout resource to the State of South Carolina, the South Carolina Wildlife and Marine Resources Commission [now the Department of Natural Resources], on November 16, 1984, passed the following resolution:

RESOLUTION

WHEREAS the trout streams of our State constitute a unique and irreplaceable scenic, recreational and ecological resource;

WHEREAS this resource is limited to less than 250 miles of streams that support trout fishing;

WHEREAS this resource is threatened by activities that would further reduce the quality and extent of the fishery;

WHEREAS it is the responsibility of the South Carolina Wildlife and Marine Resources Commission to protect, manage and conserve the fish and wildlife resources of this State.

THEREFORE BE IT RESOLVED by the South Carolina Wildlife and Marine Resources Commission:

1) That the impounding, diverting, polluting or the conducting of any other action which adversely impacts this scarce resource is hereby strongly discouraged.

2) That every effort be made to provide permanent protection for this resource through any and all means available.

3) That the staff of the South Carolina Wildlife and Marine Resources Department is hereby directed to implement this policy to the best of its abilities.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No. 2009-AL-07-0226
Appellate Case No. 2011-186086

Upstate Forever, South Carolina Native Plant Society, and South Carolina Wildlife Federation, ... Petitioners,

vs.

South Carolina Department of Health and Environmental Control and Greenville Water System, ... Respondents.

PROOF OF SERVICE

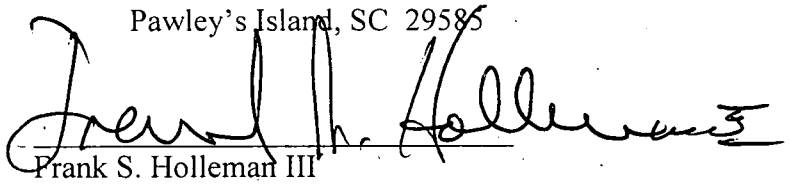
I hereby certify that on this date I served the Motion of Trout Unlimited, Through Its Mountain Bridge Chapter, to File Amicus Curiae Brief in Support Of Petition For Writ of Certiorari AND Brief of Amicus Curiae Trout Unlimited, Through Its Mountain Bridge Chapter upon all parties by placing copies of same in the United States mail, first class postage prepaid, addressed as follows:

Eugene C. McCall, Jr., Esquire
McCall Environmental, PA
PO Box 3027
Greenville, SC 29602

Stephen Hightower, Esquire
DHEC Legal Office
2600 Bull Street
Columbia, SC 29201

Randolph R. Lowell, Esquire
Willoughby & Hoefer, PA
PO Box 8416
Columbia, SC 29202

Amy E. Armstrong, Esquire
SC Environmental Law Project
PO Box 1380
Pawley's Island, SC 29585



Frank S. Holleman III
Council for Trout Unlimited,
Through Its Mountain Bridge Chapter

Chapel Hill, North Carolina
December 19, 2012