

APPENDIX A – Water Rights and Fish Habitat Impacts

CONJUNCTIVE USE AND WATER TRANSFERS – PHASE II (TASK 6)

Proposition 84

Department of Water Resources

Integrated Regional Water Management Planning Grant

Northern Santa Cruz County Integrated Regional Water Management

Agreement No. 4600009400

May 2015

Prepared by:

Santa Cruz County Environmental Health Services

Submitted to:

Regional Water Management Foundation

Department of Water Resources

Appendix A – Water Rights and Fish Habitat Impacts

- Best Best & Krieger. 2013. Memorandum: County of Santa Cruz Water Supply and Water Rights Issues.
- Hagar Environmental Science, June 2013, Flow Related Effects of San Lorenzo Water Transfer on Habitat for Steelhead and Coho Salmon.



BEST BEST & KRIEGER
ATTORNEYS AT LAW

Memorandum

To: John Ricker
Director, Water Resources Division
County of Santa Cruz

From: Best, Best & Krieger LLP

Date: October 28, 2013

Re: County of Santa Cruz Water Supply and Water Right Issues

I. Introduction

This memo provides an overview and general information regarding potential alternatives to divert water from the San Lorenzo River during high flow winter months to provide critically needed supplies to the Soquel Water District (Soquel), the Scotts Valley Water District (Scotts Valley) and/or the San Lorenzo Valley Water District (San Lorenzo), either for direct use or for groundwater recharge. It is our understanding that Soquel, Scotts Valley and San Lorenzo rely predominantly on groundwater, and all are facing current and projected water shortages within their service areas. One approach would be to partner with the City of Santa Cruz (City). The City has existing appropriative water rights to the San Lorenzo River pursuant to permits and licenses issued by the State Water Resource Control Board (State Board). In particular, the City has two licenses to divert water at Tait Street which are further discussed below. Another approach might involve application(s) for new water rights on the San Lorenzo by Soquel, Scotts Valley, San Lorenzo or a combination of those parties, independent of the City's existing rights. The contents of this memo have been discussed with the City's special water rights counsel, and feedback from counsel is incorporated herein.

II. Analysis

A. Overview of City of Santa Cruz Tait Street Post-1914 Appropriative Water Rights to San Lorenzo River

According to information you provided to us, the City of Santa Cruz has post-1914 appropriative water rights to the San Lorenzo River at Tait Street pursuant to two licenses issued by the State Board as follows:

- Tait Street Diversions and Wells - License Nos. 1553 and 7200: 12.2 cfs year-round with fish flow bypasses by agreement with the Department of Fish and Wildlife (DFW), as discussed below.

Based on the City's 2010 Urban Water Management Plan (UWMP) and submissions to the State Board in connection with the above-referenced licenses, it appears that during high flow winter months, in select years, available San Lorenzo River flows and diversion



BEST BEST & KRIEGER
ATTORNEYS AT LAW

capacity (supply) at Tait Street has the potential to exceed present City needs (demands). This difference in supply and demand creates a window of opportunity for other agencies to collaborate with the City to maximize use of its rights for the benefit of the region. The City's UWMP indicates that between 2006 and 2010, the City diverted on average approximately 5,796 acre-feet at the Tait Street Diversion and wells.¹ According to reports filed with the State Board, the City's Tait Street diversions were 6,336 acre-feet in 2008, 6,253 acre-feet in 2009, 4,506 acre-feet in 2010, 4,500 acre-feet in 2011, and 6,065 acre-feet in 2012. The filings also indicate the City reached its maximum rate of diversion (12.2 cfs) at some point in almost all of the months during these years and consistently diverted at this rate on a monthly basis (236 million gallons per month) when conditions permitted and there was sufficient City demand. Thus, while the City is exercising the full amount of the licenses, under certain circumstances there may be water available within the City's rights for use by the other agencies. Another benefit of the Tait Street licenses is that they authorize direct diversion, and do not involve use of the City's Newell Creek Reservoir. That reservoir is of limited capacity and is an essential element of the City's water operations and drought protection. The Tait Street diversions operate independently of the Newell Creek Reservoir water rights and operations.

B. Fishery Issues and Draft Habitat Conservation Plan

The City has worked closely with the DFW and the National Marine Fisheries Services (NMFS) to develop a Draft Habitat Conservation Plan (HCP) for an area that includes the San Lorenzo River. The purpose of the HCP is to provide the City with coverage under incidental take permits for activities that could potentially result in take of steelhead and coho salmon.² The focus of the HCP is on the development of a conservation strategy to avoid or minimize potential adverse effects of the City's diversions.

An important piece of the HCP relating to the use of excess water is the City's proposed instream flow targets for each waterway. According to the HCP, the targets represent a floor for City diversions such that diversions would not reduce flows below these certain levels.³ There are minimum flow targets proposed for the Tait Street diversion and wells.⁴ The City reports that it is now operating to those targets by agreement with DFW. For purposes of this analysis, we have not evaluated how these minimum flow requirements might impact the quantity of water that is diverted pursuant to the City's licenses or the timing and quantity of any available water not needed by the City. We understand that the County has worked with the City and its consultants to model the impact of the flow targets on the City's diversions and has calculated potential availability of additional flow under various scenarios, all of which maintain flow targets below Tait Street. As discussed below, any type of appropriative diversion from the San Lorenzo River will almost certainly be subject to rigorous review by multiple agencies to

¹ 2010 UWMP, Pg. 3-8.

² HCP, Pg. 9.

³ HCP, Pg. 35.

⁴ HCP, Pg. 38. The proposed minimum flow targets for Tait Street are organized into three tiers and vary considerably based on the time of year and rearing baseflow conditions.



BEST BEST & KRIEGER
ATTORNEYS AT LAW

determine whether the diversion will result in adverse impacts to fish, wildlife or other instream beneficial uses.⁵

C. Using Surplus/Excess Water Maximizes Reasonable and Beneficial Use

Based on our discussions with you and your discussion with City staff (Bill Kocher and Kevin Crossley), this analysis assumes that under certain circumstances the City currently does not utilize the full amount of water that could be diverted under its appropriative rights to the San Lorenzo River at the Tait Street facilities. This is consistent with the typical municipal development pattern, and is the basis for the “municipal diligence doctrine” under California water rights law described below. Indeed there is no indication that any portion of the City’s rights are subject to any claims of loss, forfeiture or abandonment. As noted above, although the City fully exercises its rights in terms of maximum rates of diversion, under certain conditions the City currently does not utilize the full quantity of water available under its vested rights, as is normal with virtually all water rights. More specifically, it appears that except in dry and critically dry years, the City does not always use the full quantity of its rights during high flow winter months (i.e., November through April) from Tait Street.

Generally speaking, a municipality that holds appropriative rights to surface water is not required to use the full amount of its rights, but rather is able to “grow into” its rights, and the non-use of its full right does not result in loss, forfeiture or abandonment of any portion of the municipal right. (See, e.g., Water Code §§ 1203, 1462.) Regarding any presently unused portion of the City’s Tait Street appropriative rights, such unused amounts, assuming they can be quantified at the technical level, can be put to additional reasonable and beneficial use. This approach is supported by Article X, Section 2 of the California Constitution and related case law.⁶ It also finds support in various provisions of the California Water Code that apply to temporary and/or urgency uses of waters, which are discussed in more detail below.

D. Short-Term Options – City’s Existing Water Rights

1. Temporary Urgency Transfer. Water Code section 1435 authorizes the State Board to grant a permittee/licensee a temporary change to a different point of diversion, place of use, and/or purpose of use where an urgent need exists for the temporary change. These temporary change orders automatically expire after 180 days, but may be renewed by the State

⁵ See, e.g., Water Code §§ 1243, 1257, 1257.5, 1425(b)(3), 1435(b)(3), 1727(b)(2).

⁶ As provided in Article X, Section 2 of the California Constitution, the reasonable and beneficial use doctrine generally provides that no person or entity can have a protected interest in the unreasonable or non-beneficial use of water, and that the waste or unreasonable use, method of use, or method of diversion of water shall be prevented in the interest of the people and for the public welfare. (Cal. Const., Art. X, § 2; Water Code §§ 100-101; *United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82; *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224.)



BEST BEST & KRIEGER
ATTORNEYS AT LAW

Board, and may be modified or revoked in the State Board’s discretion.⁷ Prior to issuing a change order, the State Board must make all of the following findings:

- The permittee has an urgent need to make the proposed change;
- The proposed change may be made without injury to any other lawful user of water;
- The proposed change may be made without unreasonable effect upon fish, wildlife, or other instream beneficial uses; and
- The proposed change is in the public interest (including conditions to ensure that other users and fish and wildlife are not injured).

“Urgent need” means the existence of circumstances from which the State Board may in its judgment conclude that the proposed temporary change is “necessary to further the constitutional policy that the water resources of the state be put to beneficial use to the fullest extent of which they are capable and that waste of water be prevented.”⁸ The Board may not find that an “urgent need” exists if it determines in its discretion, and if applicable, that the petitioner has not exercised due diligence in petitioning the State Board for a non-urgent petition (see Water Code § 1725) or in pursuing such a petition.⁹ With regard to the scenarios discussed herein, the City would not be pursuing an additional non-urgent petition and therefore this discretionary factor would likely not apply.

As applied to the San Lorenzo River and the circumstances described above, the City, as the permittee/licensee, would petition the State Board for a temporary change to the place of use in connection with the City’s existing water permits/licenses to transfer water on an urgency basis to Scotts Valley, Soquel and/or San Lorenzo (assuming that the point of diversion and purpose of use would not need to change). The petition for change would need to establish an urgency basis for the State Board to make the above findings, possibly including that the overdraft situation is important enough to warrant emergency action, and that water which currently could be put to reasonable and beneficial use, which is excess to the needs of the fishery as provided in the HCP, is wasting to the ocean. Given that the definition of “urgent need” is very broad, and given the compelling Article X, Section 2 arguments that apply in this scenario, the parties could likely make a strong showing that an urgent need exists. Although Water Code section 1435 does not expressly require that a “water emergency” must be declared in order to demonstrate urgent need, that type of declaration or the imposition of water restrictions by one or more of the districts would likely be relevant.

The City would also have to demonstrate that other lawful users would not be injured, that fish and wildlife would not be unreasonably harmed, and that the transfer is in the public interest. Assuming that the City would be proposing to transfer surplus or conserved

⁷ Water Code § 1440.

⁸ Water Code § 1435(c).

⁹ Id.



BEST BEST & KRIEGER
ATTORNEYS AT LAW

water (see discussion below) within its existing appropriative rights, these findings should be more easily supported than otherwise. However, given the presence of protected anadromous fish and related habitat in the San Lorenzo River, the State Board, DFW and NMFS would all likely conduct a review to determine the potential impacts of such a temporary transfer. In addition, and as referenced above, a petition for a non-urgency temporary change, long term transfer, or expanded water right may need to be filed and pursued on a parallel basis by the district(s) benefitting from the urgency petition.

Pros:

- Expedited process.¹⁰ A hearing is not required but may be held in the Board’s discretion.
- The level of review is less exacting than a longer term transfer assuming the City can make a good case for the “urgent need.”
- A temporary urgency transfer by the water rights holder does not involve any new water rights, but only involves transferring water that is within the City’s existing water rights. Consequently, the potential impacts, if any, should be easier to quantify.
- No impacts to City’s water rights.

Cons:

- The transfer can only be for 180 days (although additional 180-day term(s) may be possible upon a new application).
- Urgency transfers are not statutorily exempt from CEQA, and if an individual exemption does not apply, it may cause significant delay.¹¹

¹⁰ State Board staff have indicated that temporary urgency transfers usually take less than 90 days to process, and can take less time depending on the circumstances.

¹¹ As noted below, temporary water transfers under Water Code section 1725 are expressly exempt from CEQA review. (Water Code § 1729; CEQA Guidelines § 15282(u).) A similar statutory exemption is not provided for urgency transfers under Section 1435, although some contend it should be. On this issue the State Board has adopted a regulation stating that “[a]ny order approving a change under Articles 15 [change in point of diversion, place of use or purpose of use], 16.5 [temporary urgency changes], or 17 [long-term transfer of water or water rights] shall include compliance with any applicable requirements of Division 13 (commencing with Section 21000) of the Public Resources Code.” (23 Cal. Code Regs. § 792.) Among other exemptions that could be considered, CEQA’s emergency exemption applies to activities such as (1) emergency repairs to facilities necessary to maintain service essential to the public health, safety, or welfare, and (2) specific actions necessary to prevent or mitigate an emergency (not including long-term projects undertaken for the purpose of preventing or mitigating a situation that has a low probability of occurrence in the short-term). (See CEQA Guidelines § 15269.) This appears to be a stricter standard than what the State Board requires to justify an urgency transfer under Water Code sections 1435 and 1425 (below), but it is not entirely clear. Another approach could seek to utilize CEQA’s catchall exemption, which requires no possibility of a significant effect on the environment. Here the parties would contend, among other things, that authorization already exists under the City’s right to divert the amount(s) in question. If an exemption does not apply, the required level of environmental review would need to be evaluated (i.e., Neg. Decl., Mitigated Neg. Decl. or EIR). All of these approaches involve some level of risk under CEQA, and if this option is



BEST BEST & KRIEGER
ATTORNEYS AT LAW

- The State Board may, in its discretion, modify or revoke the change order at any time (although not likely).
- A petition for a non-urgency change of some kind will likely need to be filed by the district(s) benefitting from the urgency petition.
- It is not known how the State Board would evaluate whether groundwater and other water shortage conditions in Soquel, Scotts Valley and/or San Lorenzo present an “urgent need,” although as indicated above, the parties could likely make a fairly strong showing of urgency.

2. Temporary Transfer. Water Code section 1725 authorizes permittees/licensees (the City in this case) to temporarily change the point of diversion, place of use, or purpose of use due to a transfer or exchange of water or water rights for up to one year if the transfer:

- Would only involve an amount of water that would “have been consumptively used or stored by the permittee or licensee in the absence of the proposed temporary change”;
- Would not injure any legal user of water; and
- Would not unreasonably affect fish, wildlife, or other instream beneficial uses.¹²

The State Board is required to make a decision within 60 days of receiving a petition, but may extend the time or decide to hold a hearing with the consent of the permittee/licensee.¹³

For purposes of Section 1725, “consumptively used” means the amount of water that has been consumed through use by evapotranspiration, has percolated underground, or has been removed from use in the downstream water supply as a result of direct diversion.¹⁴ In short, the transfer must involve water that otherwise would have been consumptively used in the absence of the water transfer. This is important because it could limit or eliminate the City’s ability to apply under this Section for a water transfer of previously unused water. However, an argument can be made that amounts of water no longer used because of conservation efforts or in lieu use of recycled water may be transferred and could apply towards this requirement.¹⁵ Determining if the water otherwise would have been “consumptively used” is the key factor for utilizing this kind of short term transfer from the City.

pursued we would recommend additional research and discussion with State Board staff. On its face, however, given changes in stream flows that presumably would occur, it is likely that an EIR would be required.

¹² Water Code § 1727(b).

¹³ Water Code § 1726(g).

¹⁴ Water Code § 1725.

¹⁵ Water Code § 1011(b). See also SWRCB “A Guide to Water Transfers” (1999) pg. 6-6.



BEST BEST & KRIEGER
ATTORNEYS AT LAW

Pros:

- Expedited process.
- Can be for up to one year, and potentially extended.
- No urgency requirement.
- Such transfers are specifically exempt from CEQA review.¹⁶
- No impacts to City's water rights.

Cons:

- Short-term.
- "Consumptively used" requirement could limit the City's ability to transfer previously unused surplus water, although amounts conserved by the City and offset by the use of recycled water may be relevant in this regard.¹⁷

E. Short-Term Options – New Rights

1. Temporary Urgency Permit. Similar to Water Code section 1435, Water Code Section 1425 allows for temporary diversions of water (up to 180 days with potential renewals) in certain cases where the State Board finds that an urgent need exists, the diversion and use will not injure any lawful user of water or have any unreasonable effect upon fish and wildlife, and the diversion is in the public interest. The definition of "urgent need" in Section 1425 is exactly as defined in Section 1435, as discussed above. As with Section 1435, there is no statutory exemption from CEQA for this kind of petition.

The major difference between Section 1425 and Section 1435 is that under Section 1425, the party applying for the temporary permit to divert water does not need to be a permittee/licensee with an existing water right. As applied here, either Soquel, Scotts Valley, San Lorenzo, or perhaps an entity composed of all districts (which could also include the County), could apply for a temporary urgency permit to divert water from the San Lorenzo pursuant to Water Code section 1425, independent of the City.

The State Board must make the required findings described above, and the applicant would have to provide sufficient information to demonstrate a reasonable likelihood that unappropriated water is available in the context of those findings. The City's existing appropriative rights and the minimum flow targets in the draft HCP would need to be considered in analyzing whether unappropriated water exists for diversion. According to the State Board's

¹⁶ Water Code § 1729.

¹⁷ The City's 2010 UWMP indicates that approximately 900 million gallons per year (2,761 acre feet) have been conserved in the past decade. (See UWMP, Pg. 6-27.)



BEST BEST & KRIEGER
ATTORNEYS AT LAW

Declaration of Fully Appropriated Streams, the San Lorenzo is not fully appropriated during the season of November 1st to May 31st.¹⁸

Pros:

- Expedited process.
- The level of review is probably less rigorous than a longer term permit application assuming the applicant(s) can make a good case for the “urgent need.”
- The applicant(s) can take the lead in applying, independent of the City and its water rights.
- Does not directly impact the City’s existing water rights.
- Creates access to “new” water.

Cons:

- Short-term.
- Unlike temporary transfers, there is no specific statutory exemption from CEQA, which could cause considerable delay unless another exemption applies.¹⁹
- It is not known how the State Board would evaluate whether groundwater and other water shortage conditions in Soquel, Scotts Valley and/or San Lorenzo present an “urgent need,” although as indicated above, the parties could likely make a fairly strong showing of urgency.
- May be opposed by the City.
- Applicant(s) would likely be required to file a petition for a new long-term water right in conjunction with the temporary request.

2. Application to Use Surplus Municipal Water. Water Code section 1462 provides a specific option for third parties to obtain a temporary permit to appropriate water that a municipality is entitled to use but is in excess of its current needs. Section 1462 provides:

Where permission to appropriate is granted to any municipality for any quantity of water in excess of the existing municipal needs therefor, the board may, pending the application to beneficial use of the entire appropriation permitted, issue permits for the temporary appropriation of the excess of the permitted appropriation over and above

¹⁸ Water Right Order 98-08, Exhibit A, Declaration of Fully Appropriated Streams, November 19, 1998.

¹⁹ See discussion above in Footnote 13.



BEST BEST & KRIEGER
ATTORNEYS AT LAW

the quantity being applied to beneficial use from time to time by the municipality.

This approach is also codified in Water Code section 1203, which states that a person may put surplus municipal water to beneficial use until such time as the municipality can use the surplus water.²⁰ This option would require a showing that the City is not yet using its full appropriate water rights.²¹ The process to make such an application is not well defined in the Water Code, and it is difficult to estimate how long such a process would take. Initial research indicates this option has not been used frequently. From a practical standpoint, a temporary permit seems most akin to a long-term transfer under Water Code section 1735 (below). The City's cooperation would be instrumental, and the State Board would likely require certain showings in support of this type of application.²² Section 1462 has very few details regarding process, and thus additional research and possibly conversations with State Board staff would be needed to move forward with this option.

F. Long-Term Options – City's Existing Water Rights

1. Long-Term Transfer. Pursuant to Water Code section 1735, the State Board may consider petitions for long-term transfers of water or water rights (more than one year). The State Board may approve such transfers “where the change would not result in substantial injury to any legal user of water and would not unreasonably affect fish, wildlife, or other instream beneficial uses.”²³ In addition, the State Board must provide notice of the petition and an opportunity for a hearing, including notice and an opportunity to review and make recommendations to DFW. Furthermore, unlike temporary transfers under Section 1725 (above), long-term transfers under Section 1735 are not specifically exempt from CEQA review. Consequently, processing this type of application can take a significant amount of time.²⁴ On the other hand, unlike a temporary change under Section 1725, there is no express statutory requirement that the transferred water be that which otherwise would have been consumptively used, and thus “surplus” water would be available to transfer. However, the “no injury” rule can have a similar effect.²⁵ Again, the analysis of potential impacts would be very important, and the State Board would likely require a long-term transfer to be evaluated in the context of the Draft HCP and the potential for decreased flows in the River.

²⁰ Water Code § 1203 specifically states that Section 1203 supplements Sections 1460-1464.

²¹ As noted above, the City needs and uses the full amount during certain times, and may need to alter its operations in light of demands imposed by the HCP.

²² As noted herein, Section 1735 applications are evaluated according to whether the change would result in substantial injury to any legal user of water or unreasonably affect fish, wildlife, or other instream beneficial uses.

²³ Water Code § 1736.

²⁴ Based on general/anonymous conversations with State Board staff, this process can take from one to three years, and in some cases longer.

²⁵ The differences between long term transfers and long term changes to a water right (see section on petitions to change place of use below) are not well defined. The Water Board has indicated that it can take matters not specified in the particular authorizing statute into account in reviewing and acting on long term transfers. (See footnote 21, Revised WRO 2002-13.)



BEST BEST & KRIEGER
ATTORNEYS AT LAW

Pros:

- May be effective for many years.
- May directly transfer surplus water regardless of whether it would have been consumptively used, thus providing greater flexibility.
- No impact to City's water rights. This is true even if the water rights themselves are transferred, as they revert back to the City at the termination of the transfer period.
- A long-term transfer of unused water can help protect against losing a right for non-use, although in this case the City's water rights are not in any danger of being lost.

Cons:

- Longer approval process (possibly 1-3 years).
- No specific CEQA exemption applies.
- Because it is long-term, review of potential impacts to fish and wildlife in the context of the Draft HCP likely to be more rigorous.
- Not permanent, but effectively can be permanent in some cases depending upon terms of an agreement.
- Limited to surplus amounts within the City's existing water right, and does not guarantee any new water.

2. Petition to Change Place of Use. The City may also file a petition with the State Board pursuant to Water Code section 1701 to change the place of use of its water rights to add the Soquel, Scotts Valley and/or San Lorenzo service areas, which essentially would be an amendment to its existing Tait Street licenses. The City would need to show to the satisfaction of the State Board that the change would not injure any legal user of the water involved.²⁶ Section 1702 does not contain specific requirements to avoid unreasonable effects on fish and wildlife, although the State Board would likely require that type of analysis based on CEQA, the public trust doctrine and/or the existing HCP process. In addition, pursuant to Water Code section 1701.3, the State Board may also require information to demonstrate compliance with the Fish and Game Code and Endangered Species Act. In short, a change petition would likely involve a rigorous environmental review process.

This type of petition likely would take more than a year to process, as it is not specifically exempt from CEQA. However, we understand that the State Board generally tries to move these along and that they do not take as long as a new water right application, which can take between 2-5 years (or possibly much longer). This option presents a fairly straightforward approach, as it would simply expand where the City could use its water, which seemingly would

²⁶ Water Code § 1702.



BEST BEST & KRIEGER
ATTORNEYS AT LAW

be sold on some type of wholesale basis to Soquel, Scotts Valley and/or San Lorenzo. Similar to many of these options, an agreement would need to be worked out between the parties regarding amount and cost of any water transferred.

Pros:

- Relatively straightforward and possibly expedited.
- May be effective over the long-term.
- No impact to the City’s water rights.
- Using more water within an existing right can help protect the right, although in this case the City’s water rights are not in any danger of being lost.
- Assuming there is surplus water available for use within the City’s existing rights, this can be done without seeking a new permit.

Cons:

- While possibly expedited, can take a considerable amount of time.
- No “new” water right for the other Districts in the long-term, as any diversion would derive from the City’s existing rights.
- No specific CEQA exemption applies, and thus could involve extensive environmental review.

G. Long-Term Options – Application for New Water Rights to San Lorenzo

New appropriative applications on the San Lorenzo should be part of a larger long-term effort and strategy to secure sufficient and reliable water supplies for Soquel, Scotts Valley and San Lorenzo. As indicated above, the San Lorenzo River has not been declared “fully appropriated” by the State Board during the season of November 1st to May 31st. Consequently, new applications can be filed by Soquel, Scotts Valley and/or San Lorenzo, or other entities including the City, to appropriate water from the San Lorenzo River during those times.²⁷ The State Board’s current estimate to process new water right applications is two to five years, but it can take considerably longer depending on the complexity of the situation.²⁸ The State Board conducts an extensive analysis of a variety of different factors in deciding whether water is available to grant a new appropriative right, including potential impacts to the

²⁷ See, e.g., Water Code §§ 1202, 1205-1207, 1250 et seq.

²⁸ Based on the limited information that we have, it is difficult to predict how long this process would take. There are however a number of complexities involved that could cause it to take many years (possibly up to ten years or more), such as the existence of endangered species, the ongoing HCP process, and the multiple parties that have interests in the River (and whether they will be working together or not). Again, at this early stage, the timing required to process a new water right application is very difficult to predict.



BEST BEST & KRIEGER
ATTORNEYS AT LAW

environment and other users and the protection of the overall public interest. As with the long-term options discussed above, any new application to appropriate water would be subject to environmental review and, given the draft HCP, would likely be evaluated in concert with the current or a renewed HCP process.

Scotts Valley, Soquel, San Lorenzo, the City and/or others could agree to work together in filing a joint application. In advance of filing, the parties would collaborate on point(s) of diversion, place(s) of use, purpose(s) of use, quantity and other terms of a joint application. Collaborating would provide a number of advantages, including the avoidance of any potential conflicts between the parties, cost savings, and consistent communications with state and federal entities.²⁹ Furthermore, a joint application appears consistent with the State and State Board's emphasis on regional water planning. Because the parties are already working collaboratively, and based on the benefits of continuing to do so, a joint application should be given serious consideration.

Pros:

- Assuming a joint application or agreement by the parties, provides a long-term solution for a new water supply above and beyond existing rights.
- If water can be shown to be available, California law supports putting it to maximum reasonable and beneficial use.
- A new right does not impact the City's existing water rights.

Cons:

- Process likely to take a considerable amount of time. Although State Board staff indicates a 2-5 year process for new appropriative applications, the process here could take considerably longer (up to twice as long or more) because of endangered species issues, HCP development, limited supplies and multiple party interests involving the San Lorenzo River.
- No specific CEQA exemption applies, and thus environmental review would be extensive.
- Given existing fishery issues, review by DFW and NMFS likely to be rigorous and involve HCP processes.
- Unclear whether surplus water is available for appropriation.
- If the parties do not coordinate with each other, it may lead to conflict and leave regional water supply problems unresolved.

²⁹ For purposes of submitting a joint application, the agencies may need to form a JPA, enter a joint powers agreement, or otherwise formalize their relationship and understandings.



BEST BEST & KRIEGER
ATTORNEYS AT LAW

H. Moving Forward

Despite the potential hurdles, it is our recommendation that some variation of the short-term and long-term approaches discussed above should be considered and pursued. Assuming all of the parties are working together, a plan of action would likely involve the City, Scotts Valley, Soquel and/or San Lorenzo jointly pursuing a short-term temporary urgency transfer or temporary transfer, possibly in conjunction with a petition for a long-term transfer. A transfer would depend on the availability of excess water within or independent of the City's existing rights and the ability to transfer that water in a way that does not harm the fishery. Both issues would need to be evaluated in more detail. A petition for a change in place of use and/or point of diversion may also be considered. The longer-term aspect of the overall strategy would involve an application for a new water right, either by one or all of the parties, or a long-term transfer that is effectively permanent pursuant to an agreement. For the reasons stated above, our recommendation at this point is for the parties to work together in developing a joint application based on an agreement between the parties.

III. Conclusion

As indicated above, all of these approaches will require a comprehensive effort, and will likely involve fishery issues, related habitat conservation plan processes, infrastructure other technical factors, and detailed State Board proceedings. In addition, as you know, we have reviewed a limited amount of documents and information, and while it appears that there are times when the City does not need the full amount of water available under the Tait Street licenses, we have not independently reviewed whether there is surplus high flow water in the San Lorenzo River, either within or independent of the City's existing rights. Provided such water exists, we believe that the temporary and/or long-term use of that supply is supported by the reasonable and beneficial use doctrine as set forth in Article X, Section 2 of the California Constitution and explained in numerous court and State Board decisions. We recommend that the County, Soquel, Scotts Valley and San Lorenzo continue to work closely and coordinate with the City to the greatest extent practicable regarding any filings to be submitted to the State Board.

Flow Related Effects of San Lorenzo Water Transfer on Habitat for Steelhead and Coho Salmon

Hagar Environmental Science

June 2013

For City of Santa Cruz and
County of Santa Cruz

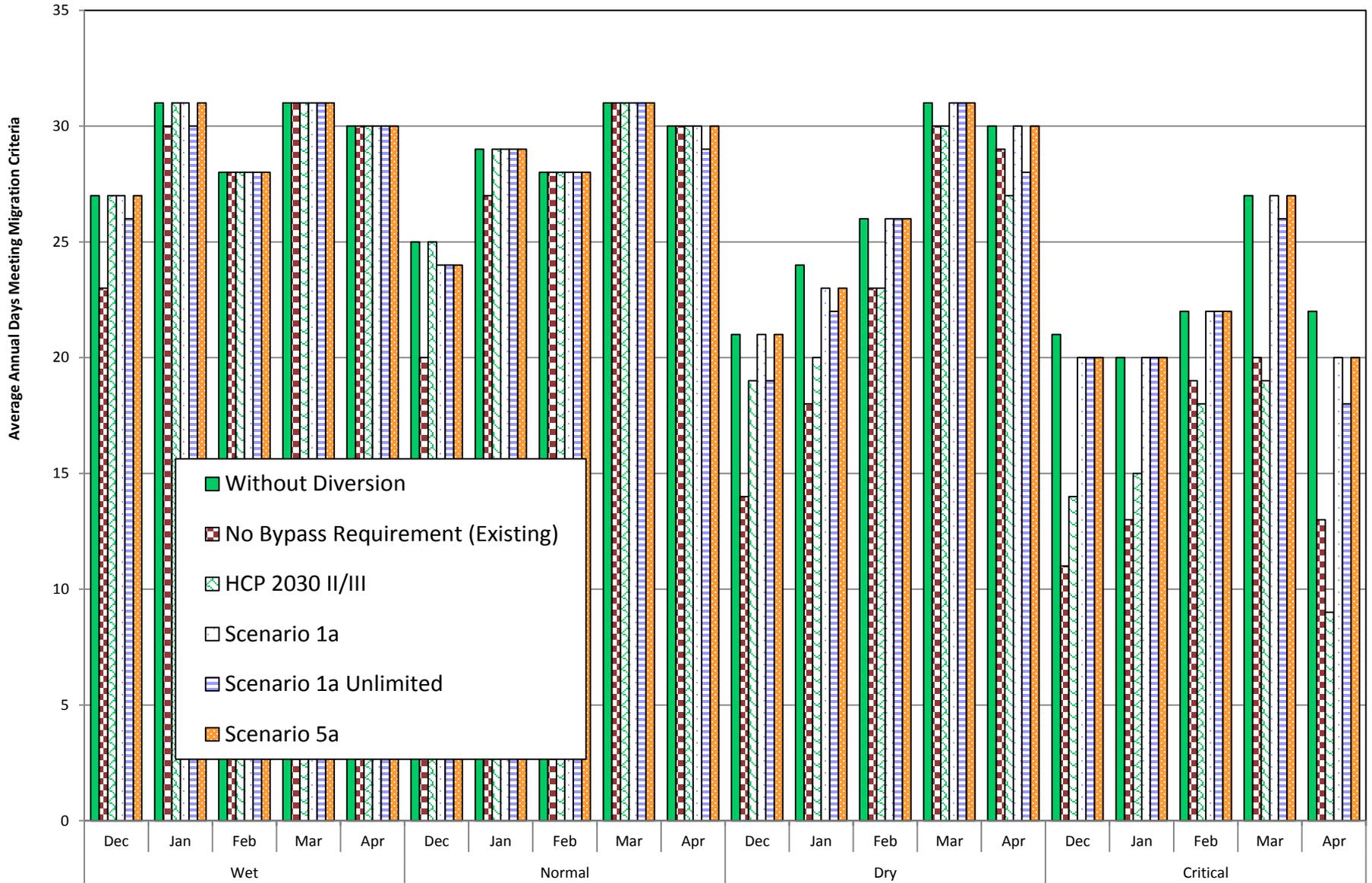
Methodology and Explanation

The effects on fish habitat of the proposed diversions for water transfer were evaluated by the City's fishery consultant, Hagar Environmental Sciences, using the same methodology that is being used in the HCP process to evaluate the effects of the City diversions. The fisheries consultants utilized data on channel conditions, habitat models, and the results of the yield analysis, specifically the residual flows with and without diversions, to estimate the effects on downstream habitat. The methods used in developing this data are fully described in HES 2011 (Assessment of Streamflow Effects on Migration, Spawning, and Rearing Habitat for Anadromous Salmonids in Streams Influenced by City of Santa Cruz Water Diversions including Newell Creek). The objective of the habitat assessment is to quantitatively determine the relationship between streamflow and potential migration, spawning, and rearing habitat for steelhead and coho salmon in the affected reach of the San Lorenzo River.

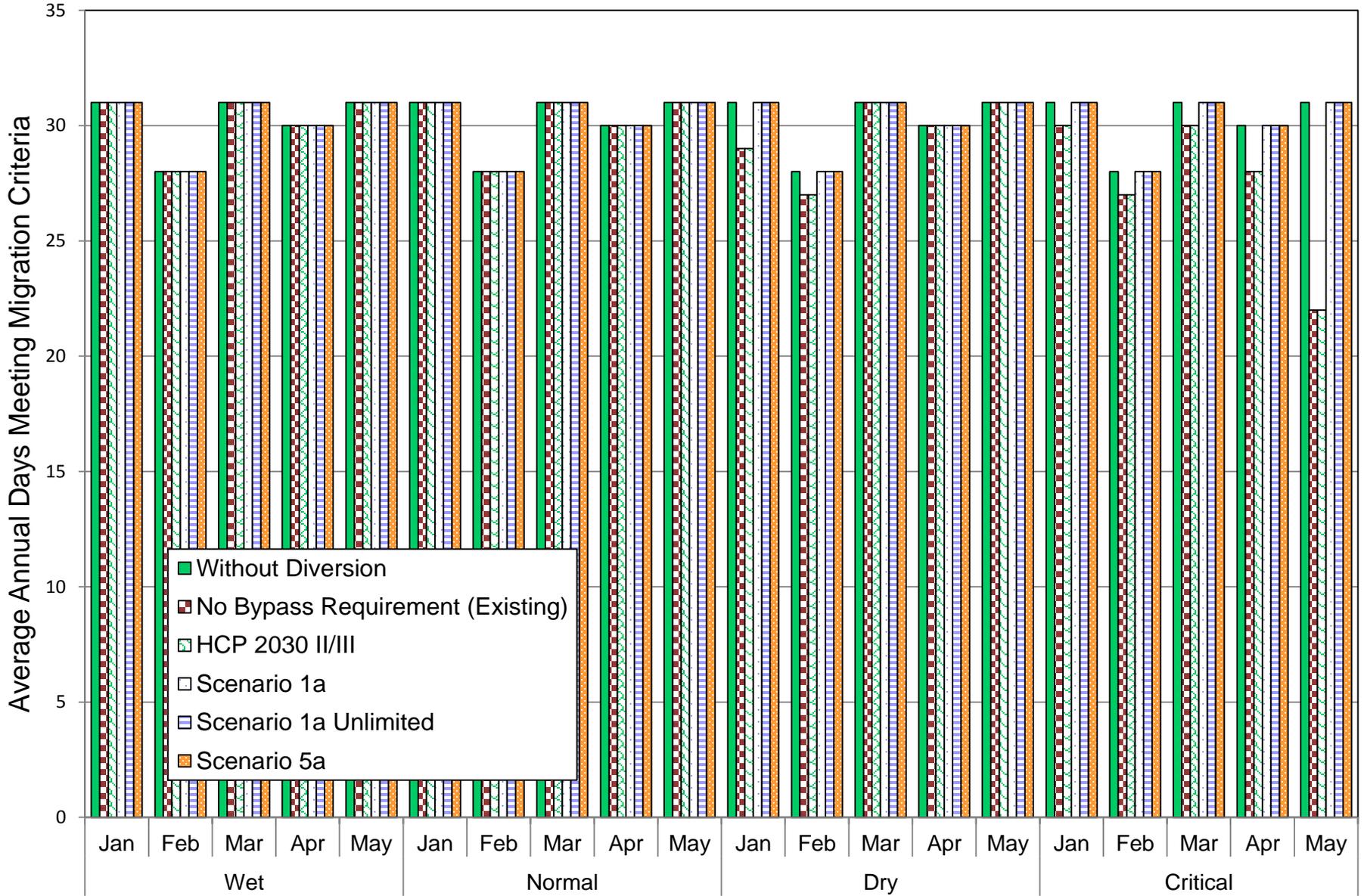
The critical life stages downstream of Tait Street November to April are steelhead adult migration (December to April), coho salmon adult migration (December to January) and smolt out migration (both species, January to May). HES calculated the average number of days each month that met migration criteria under six different flow scenarios:

- Without Diversions: Flow that would exist without any City water diversions (Unimpaired flow)
- Existing diversions with no bypass requirements and no transfers
- HCP 2030 demand, Tier 2/3 flows (City Proposal), with no additional diversion for transfers
- Scenario 1a: Transfer with Existing Diversion and Treatment Capacity (Scenario 1 from the report)
- Scenario 1a Unlimited: Transfer with Tait diversion capacity up to 14 mgd (Scenario 3 from the report)
- Scenario 5a: Treatment Plant upgraded to treat 200 NTU turbidity Tait capacity of 7.8 mgd (Scenario 4 from the report)

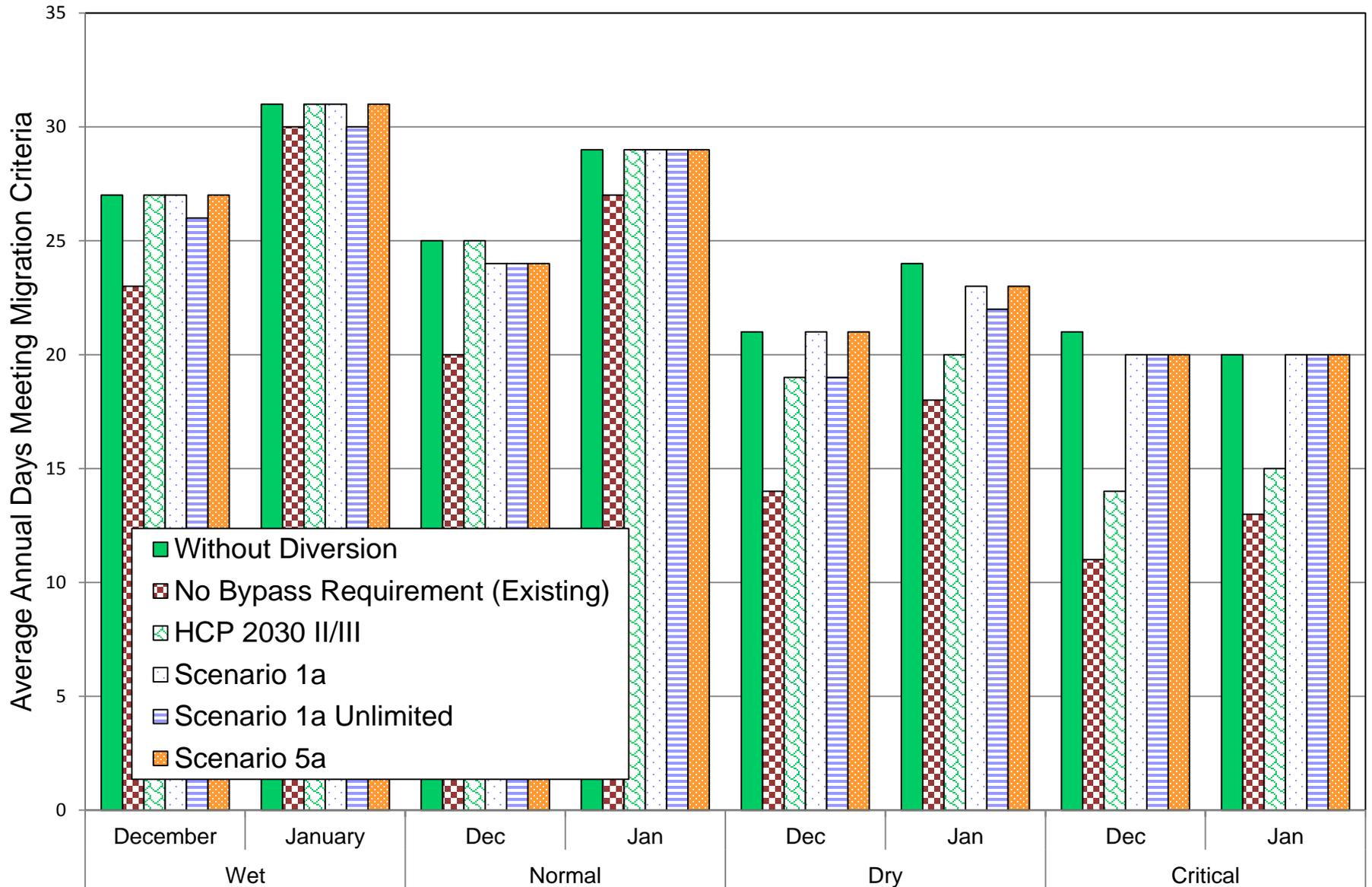
**San Lorenzo River below Tait St.
Steelhead Adult**



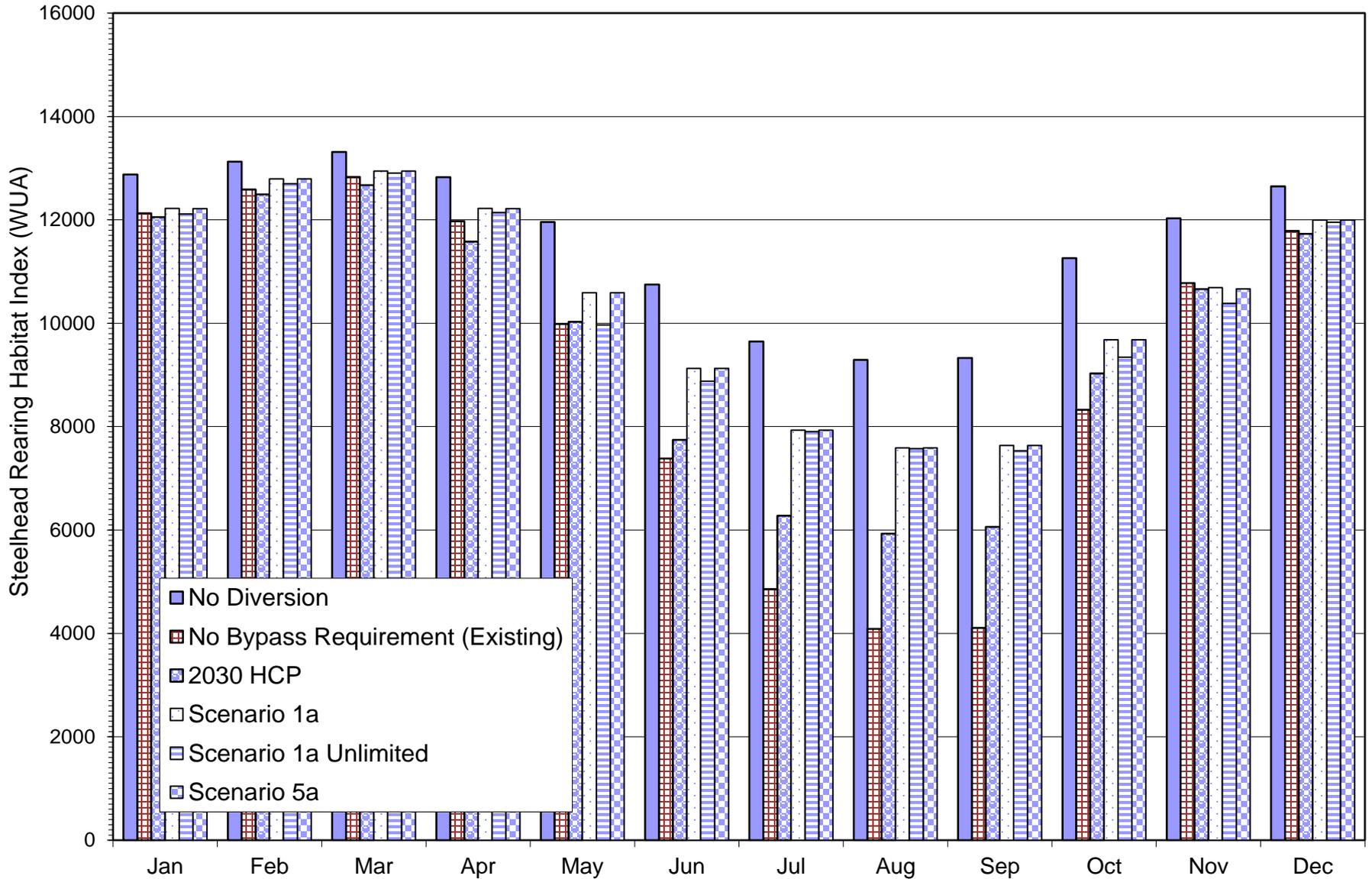
San Lorenzo River below Tait St. Smolt



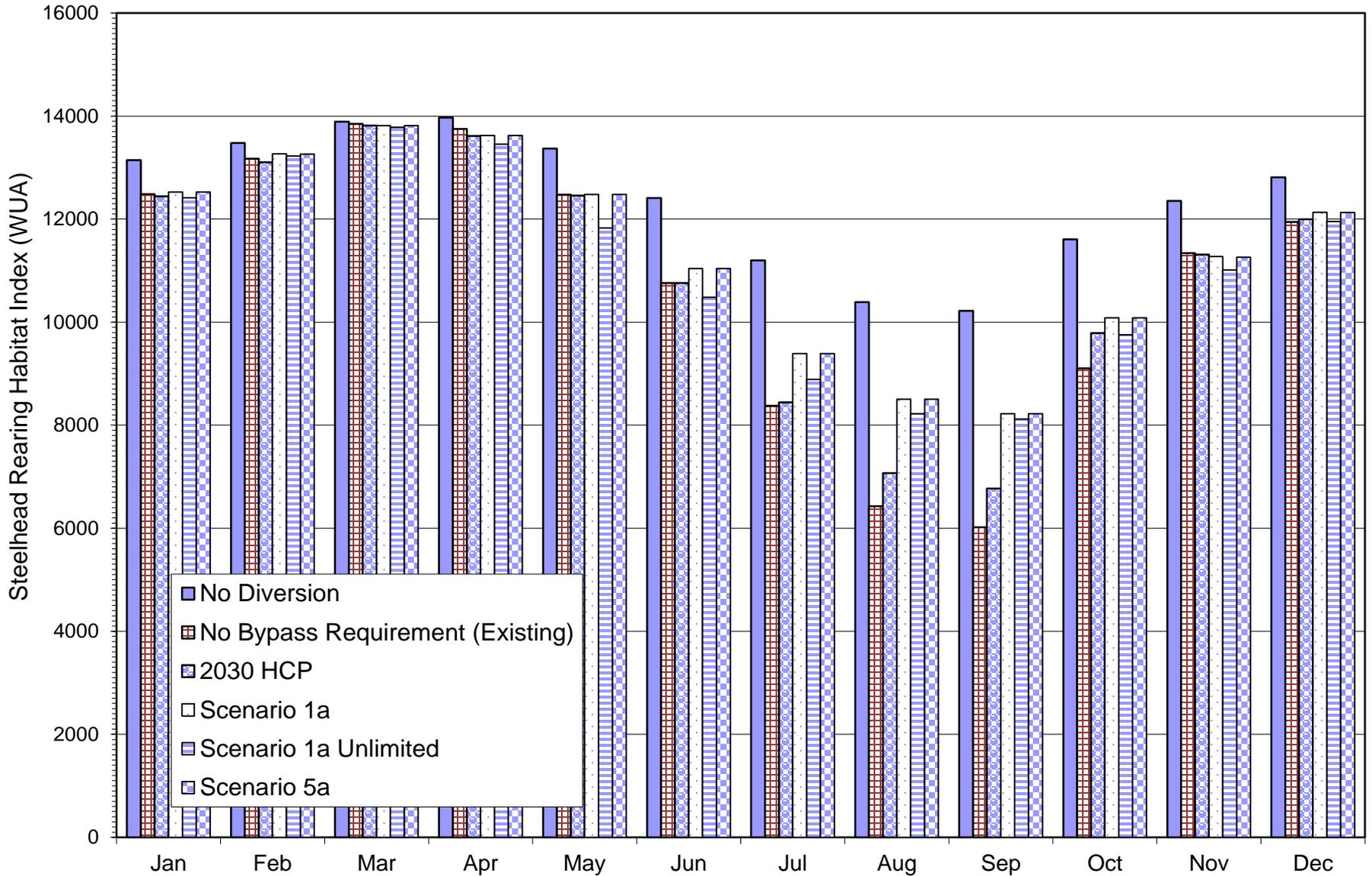
San Lorenzo River below Tait St. Coho Adult



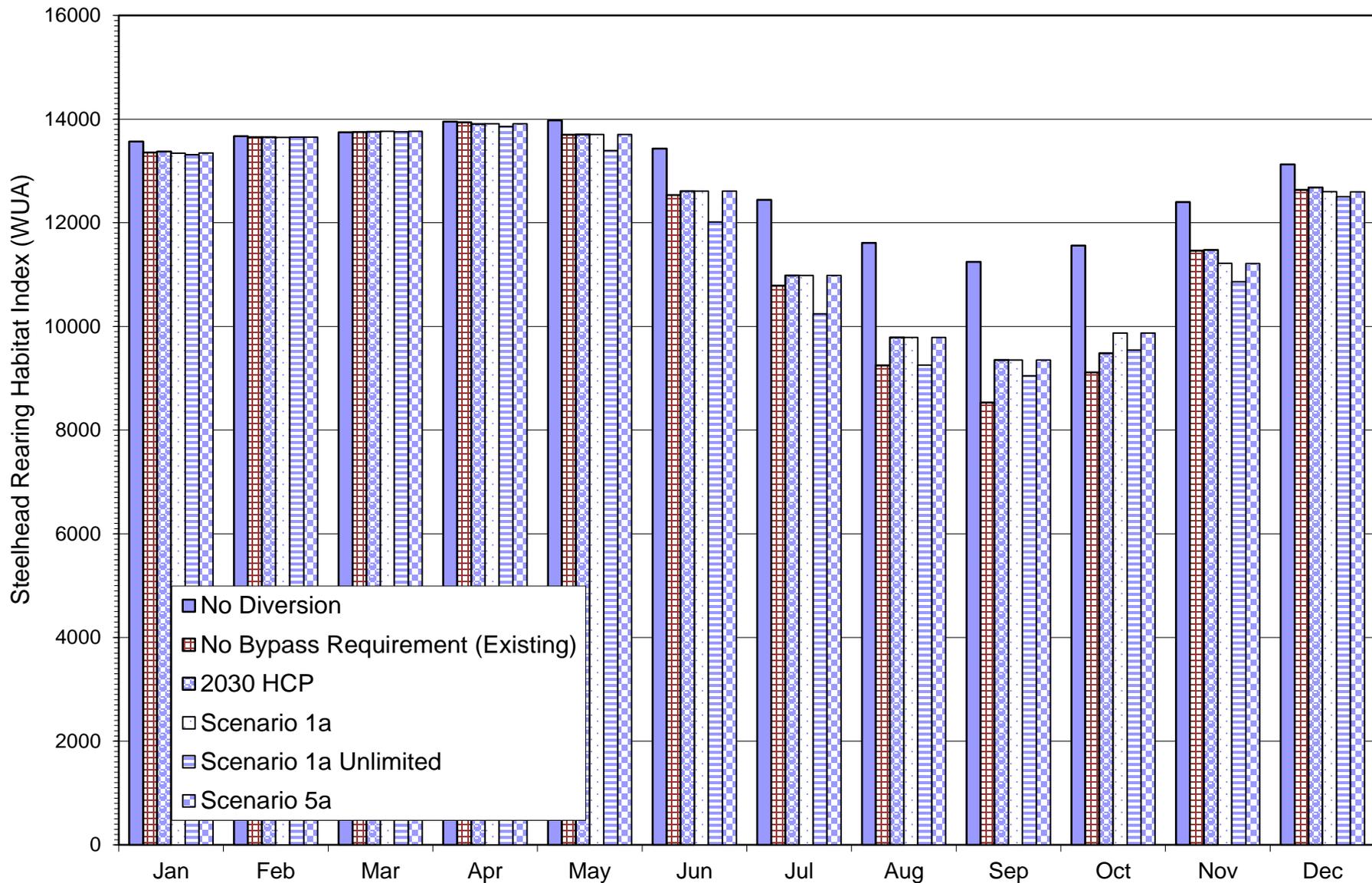
San Lorenzo River below Tait St. Critical Years



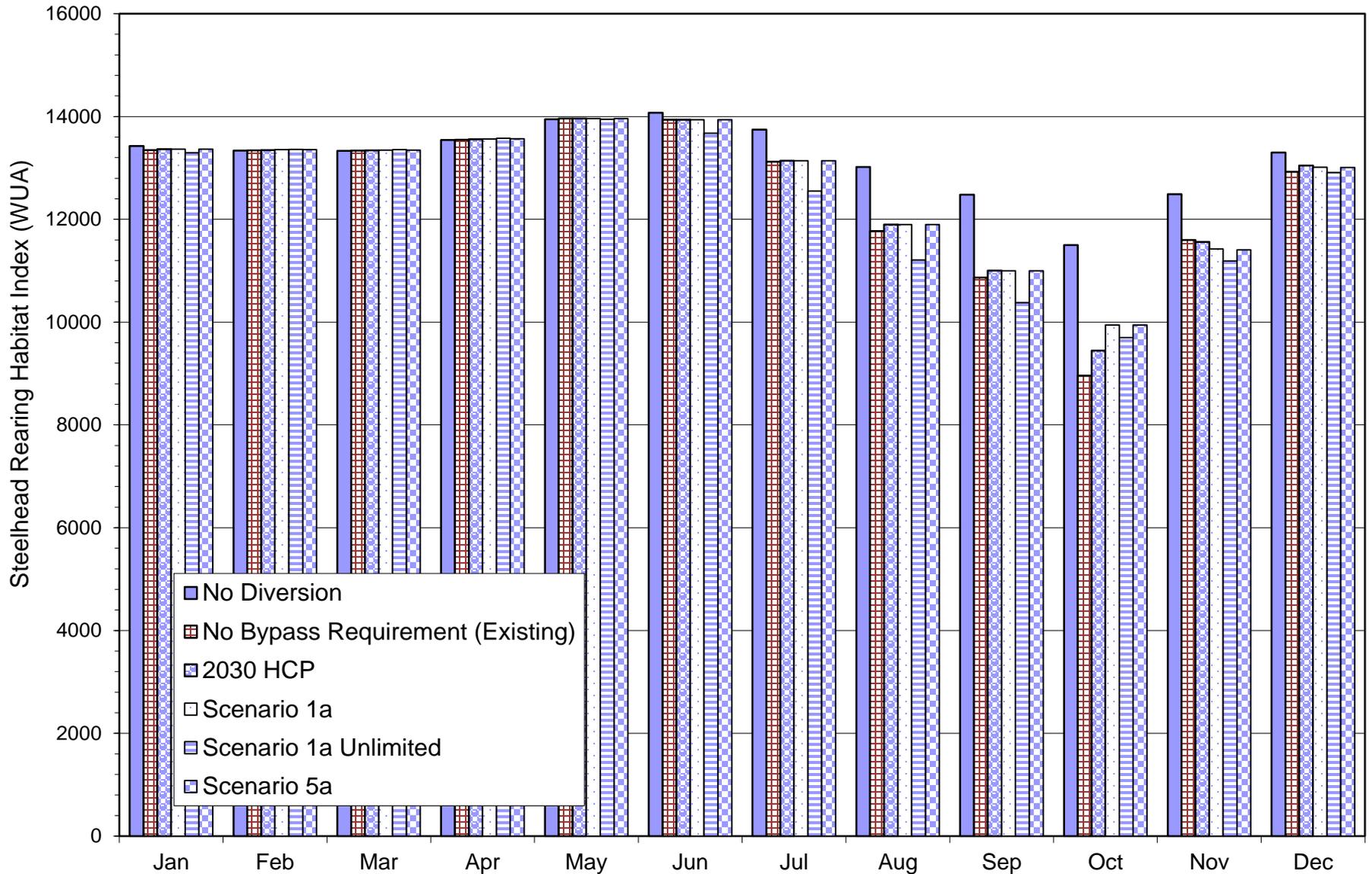
San Lorenzo River below Tait St. Dry Years



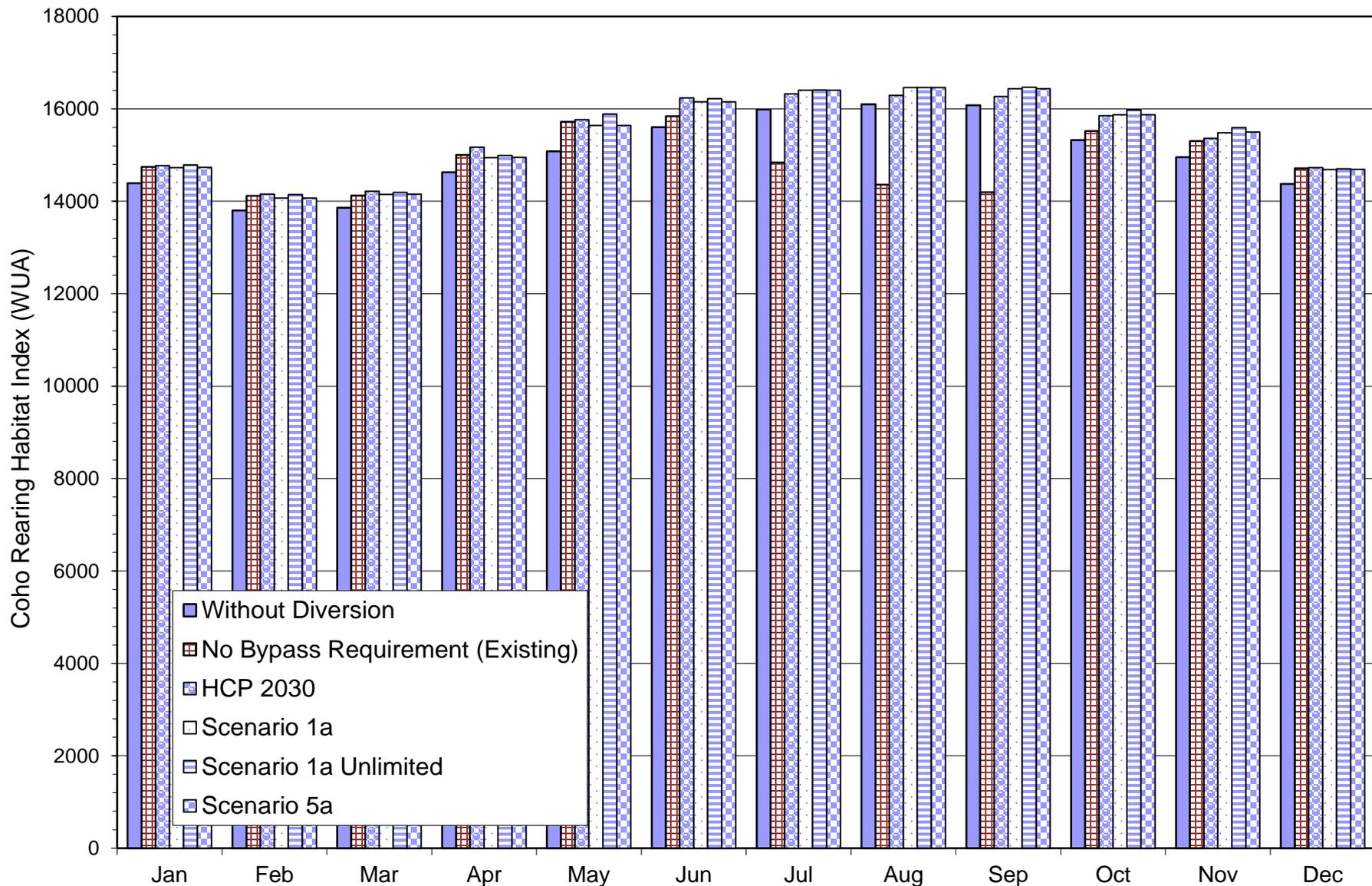
San Lorenzo River below Tait St. Normal Years



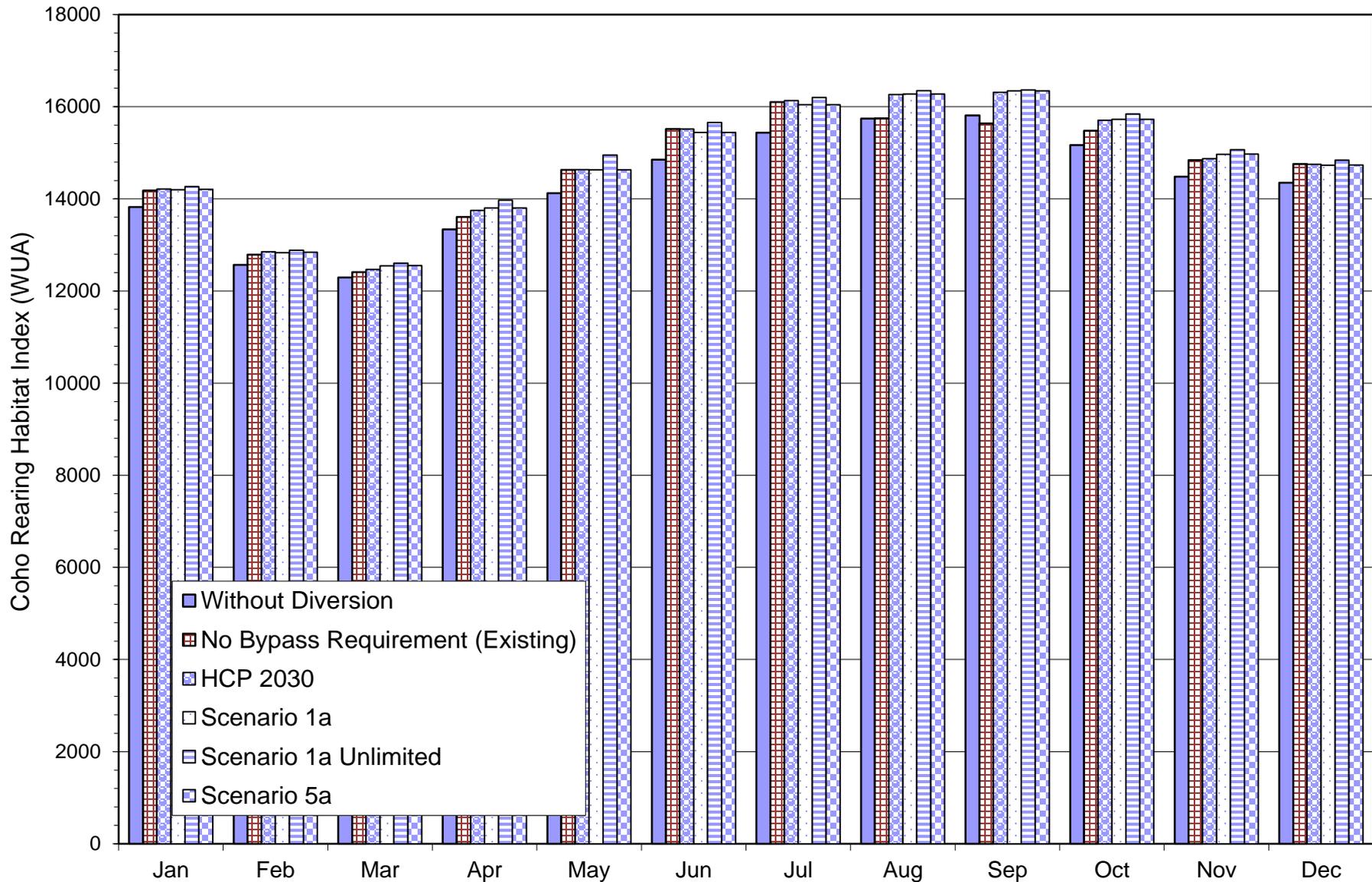
San Lorenzo River below Tait St. Wet Years



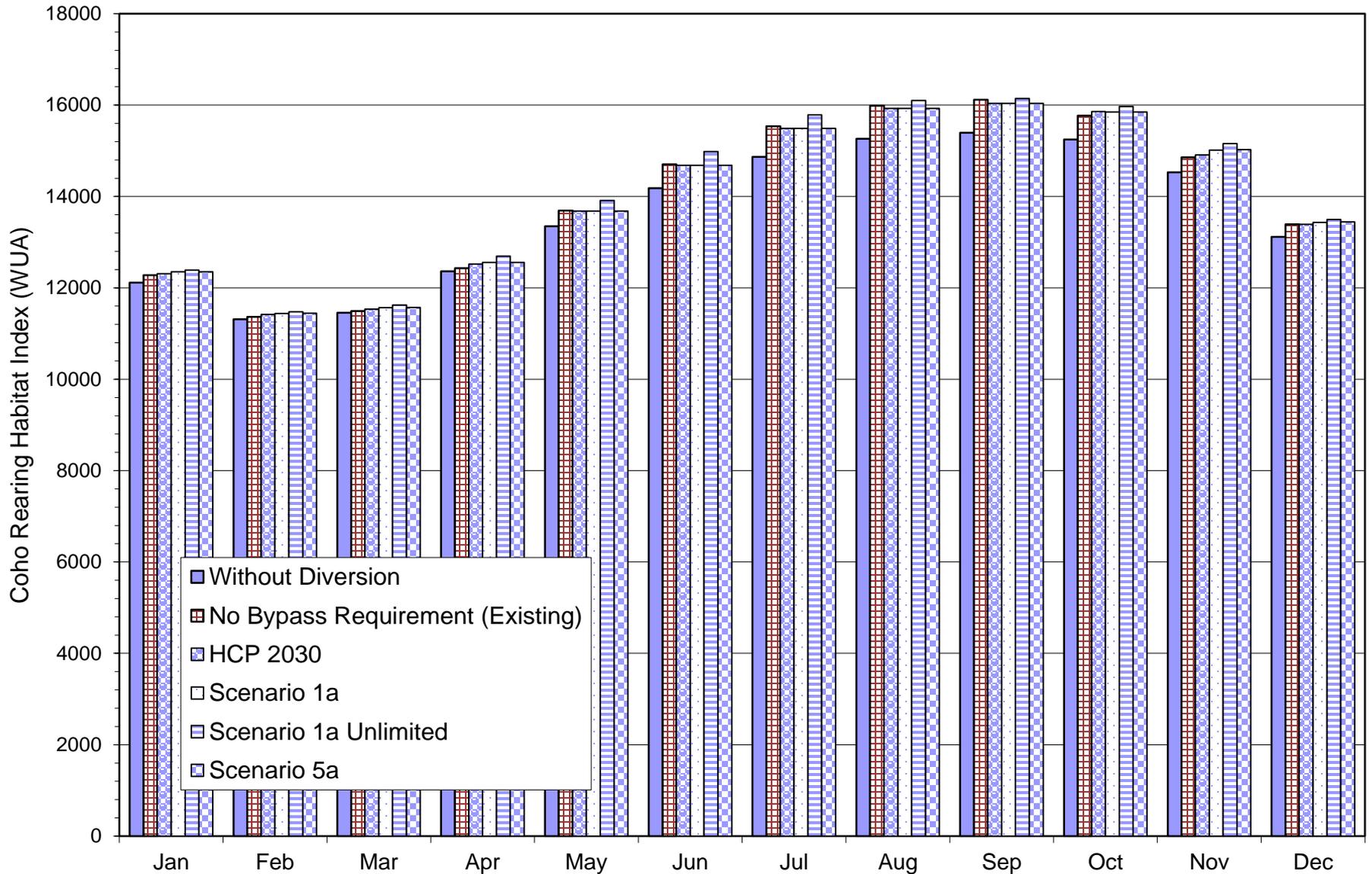
San Lorenzo River below Tait St. Critical Years



San Lorenzo River below Tait St. Dry Years



San Lorenzo River below Tait St. Normal Years



San Lorenzo River below Tait St. Wet Years

