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State of California

Before the State Water Resources Control Board

Policy Direction On Water Rights Enforcement

**Workshop to Receive Information Regarding Policy Direction On Water Rights
Enforcement - June 19, 2007**

State of California

Written Comments by Bob Baiocchi

The SWRCB is requesting comments from interested parties in the development of a policy direction on water rights enforcement that effects anadromous and resident fisheries and their habitat. The following are the comments of Bob Baiocchi.

I testified before the State Water Board as an expert witness in water right matters at the Bay Delta Hearing. I have been involved in filing complaints for violations of mandatory daily fish flow requirements below dams and diversions in California with the State Water Board and the Federal Energy Regulatory Commission. My mailing address is: Bob Baiocchi, P.O. Box 1790, Graeagle, CA 96103 with an e-mail address of baiocchi@psln.com

The California Legislature enacted California Water Code Section 1259.4 (AB 2121), which requires the State Water Board to adopt a policy for principles and guidelines to maintain instream flows in coastal streams within the counties of Marin, Sonoma, Napa, Mendocino and Humboldt by January 8, 2008. The State Water Board will consider whether to include enforcement provisions in the AB 2121 streamflow protection policy.

Statement of Reasons For Comments to the State Water Resources Control Board

1.. The State Water Board must adopt a policy to enforce daily by-pass flow requirements below dams and diversions in water right permits and licenses to cover all of California. Anadromous fish species need flows to migrate and spawn in ALL coastal rivers and streams in California, and not solely in the North Coast area of California. Resident fish species such as trout need daily flows below dams and diversions to survive in good condition throughout California.

2.. The State Water Board must conduct investigations to determine whether claimed riparian water rights are valid and said investigations should be included in said policy to be adopted by the State Water Board. The unauthorized diversion and use of the state's water is unlawful and must be prevented and most likely affects anadromous and resident fisheries and their habitats because of the lack of mandatory daily mandatory flow requirements

3.. The State Water Board should conduct investigations to determine whether claimed pre-1914 water rights are valid and said investigations should be included in said policy to be adopted by the State Water Board. The unauthorized diversion and use of the state's water is unlawful and must be prevented and most likely affects anadromous and resident fisheries and

their habitats because of the lack of daily mandatory flow requirements below pre-1914 water rights dams and diversions.

4.. Fines for violations of water right and license terms and conditions such as mandatory daily flow requirements for fish, including diverting and storing the state's water without a valid water right, must be increased to a level similar to the Federal Energy Regulatory Commission's fine requirement, which is up to \$10,000 for each day of violation. That type of fine will get the attention of water diverters, and should prevent unauthorized use of the people's water that affect public trust fishery resources such as stealing the people's mandatory daily fish flow requirement water for self-serving reasons.

5.. The state's water belongs to the people of the state of California. The value of water is about \$100 per acre-foot or more, and most likely will increase significantly over time. Consequently, the enforcement of terms and conditions of water right permits and licenses must be a top priority in the policy set by the State Water Board. Secondly, the State Water Board must increase its staffing for the Division of Water Rights to enforce terms and condition of water rights permits. In addition, the State Water Board should increase the staffing of the Complaint Unit of the Division of Water Rights so that complaints by the public against illegal diversions are given top priority and are promptly and thoroughly investigated. The people should not be ignored when claimed violations occur.

6.. The State Water Board must develop a program for said enforcement policy that includes unannounced on-site inspections for compliance of terms and conditions of all water right permits and licenses. Voluntary compliance may not work unless there are fulltime-gauging devices below ALL diversions and dams to determine daily and hourly compliance of daily environmental/fishery stream flow requirements, including measuring the amount of water diverted and/or stored. Anadromous fisheries and their habitat, resident trout fisheries and their habitat, and other fish species and their habitat, including other aquatic species and their habitat rely on daily mandated stream flows requirements below diversions and storage dams to survive. Fisheries are public trust resources and assets owned by the people of California, and are protected by state and federal law. The State Water Board must not avoid protecting the people's trust assets.

7.. There are about 500 water right applications pending before the Division of Water Rights. The State Water Board in said policy must not allow applicants to divert water without a valid "conditioned" water right permit. "Conditioned" means with environmental protection measures such as mandatory daily stream flow requirements to protect fish and aquatic life, fish screens, fish ladders, water quality protection measures, et al.

8.. There are about 600 water right petitions pending before the Division of Water Rights. The State Water Board in said policy must not allow petitioners to divert or store water without a valid "conditioned" amendment to its water right permits and licenses. "Conditioned" means with environmental protection measures such as mandatory daily stream flow requirements protect fish and aquatic life, fish screens, fish ladders, and water quality protection measures, et al.

9.. There must be mandatory daily flow requirements below all diversions and dams in said water right permits and licenses to protect and maintain anadromous fisheries and their habitat, resident trout fisheries and their habitat, and other fish species and their habitat, including other aquatic species and their habitat. I reference California Fish and Game 5937 and the Public Trust Doctrine. I also reference the Mono Lake Decision and the duty of the State Water Board to protect public trust assets. The mandatory daily flow requirements must be based on science and the results of instream flow fishery studies to protect the people's fish and aquatic trust assets in rivers and streams in California.

10.. The State Water Board has the authority to issue under Administrative Civil Liability Code (ACL Code) of up to \$500 per day of fines for unauthorized diversion and use or up to \$1,000 per day for violation of Cease and Desist Order. As stated above, fines for violations of water right terms and conditions, including diverting and storing the state's water without a valid water right, must be increased to a level similar to the Federal Energy Regulatory Commission, which should be up to \$10,000 for each day of violation. Hydro projects in California divert and use the state's

water and both the federal and state fines must be consistent and similar. Exemptions for flow violations should not be allowed.

11.. The State Water Board policy should refer all violations of water right permits and licenses to the Attorney General for investigations and prosecution with no specific political favors or free passes for violators whether the diverter is the US Bureau of Reclamation or the California Department of Water Resources.

12.. The State Water Board policy must include a mandatory condition to revoke a water right permit or license as a result of violations of water right permit or license terms and conditions. Continued violations of mandatory daily flow requirements on an annually basis must not be tolerated by the State Water Board regardless if fines have been imposed.

13.. The State Water Board must remove all illegal diversion structures pursuant to a Cease and Desist Order or pursuant to a Board Order by the State Water Board.

14.. Engineering companies and law firms have taken advantages of the Board's staff when declaring due diligence for extensions of time when putting the people's water to full beneficial use pursuant to a permits issued by the State Water Board. There must be a five-year period in said policy that requires diverters to put the state's water to full beneficial use or the water must revert back to the people, which is a statue in the Water Code that is not enforced. When extensions of time are requested, said policy must require that the daily by-pass flow and/or requirements in permits are re-evaluated to insure the anadromous and resident fisheries and other aquatic species are protected because many permits and licenses that were issued many years ago did not have adequate protection measures for the anadromous and resident fisheries and their habitat..

15.. The State Water Board policy must cancel pending water right applications when the applicant fails to act in a due diligent manner such as missing deadline dates required by the Board's staff or delaying required studies and reports required by the Board's staff.

16.. Without the enforcement of water right permits and licenses by the State Water Board, compliance of the terms and conditions of water right permits and licenses will be ignored leading to overuse and damages to the people's public trust fisheries and aquatic resources and other resources of the State of California.

17.. The State Water Board must enforce the provisions of the California Constitution and the provisions of the California Water Code, and other environmental statutes and improve these provisions with strict enforcement in the enforcement policy.

18.. The State Water Board must provide the Governor with a budget that provides for additional staffing and strict enforcement of water right permits and licenses, and the enforcement of existing provisions of the California Constitution and the existing provisions of the California Water Code. Presently the Division of Water Rights is significantly understaffed, which leads to poor enforcement and also leads to poor and rushed decision-making, which mostly likely causes adverse effects to anadromous and resident fisheries and their habitat (all life stages), and other aquatic species and their habitat (all life stages).

I cannot attend the State Water Board's Workshop because of my age and disabilities. I am requesting the workshop is accessible for the other disabled persons and also requesting the State Water Board to provide teleconference telephone availability for the disabled at no charge to the disabled. I would be more than happy to testify at the workshop based on my experience in the enforcement of water rights for the state's fisheries, but my disabilities preclude me from attending.

If the State Water Board decides to implement a Committee and/or Commission regarding the Enforcement Policy, I would be more than happy to serve provided accommodations can be made for my age and disabilities.

Please place my written comments into the public records for said workshop and also provide me with a copy of the State Water Board's Enforcement Policy when the Board has adopted said policy. Thank you for the opportunity to submit comments to the State Water Board and its staff.

Respectfully Submitted

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Retired Water Rights and Fisheries Consultant

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Former Advisor: California Resources Management Company
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Former Member of the Oroville Recreation Advisory Committee
Former Secretary, Butte County Fish and Game Commission
Former Executive Director of a Public Interest Organization
Former Vice President, and Conservation Chair, NCCFFF
Former Staff, Safeguard Environmental Protection Agency
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Dated: May 7, 2007

Certificate of Service

Honorable Governor Arnold
State Capitol
Sacramento, California
Via E-Mail

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Clerk to the Board

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Mr. Donald White
Mr. Eric Thesis
Mr. Russ Strach
Ms. Nancy Fisher
Mr. Howard Brown
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NOAA Fisheries
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State Water Quality Control Board
c/o Mr. Jim Pedri
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Via E-Mail

Mr. Takeshi Yamashita, Regional Director
Mr. Jonathan Yip, Engineer and Mr. Phil Scordelis, Fisheries Biologist
Responsible Office For FERC Streamflow Compliance
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Interested Parties (bcc - numerous)