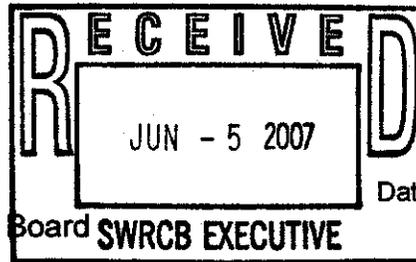


State of California

Memorandum



To: Song Her, Clerk to the Board
State Water Resources Control Board
Post Office Box 100
10011 Street
Sacramento, CA 95812

Date: June 5, 2007

From: Carl Wilcox, Acting Water Branch Chief
Department of Fish and Game, 1416 9th Street, 13th Floor, Sacramento, CA 95814

Subject: Water Right Enforcement Workshop

The Department of Fish and Game (DFG) appreciates the opportunity to comment on issues related to the development of a water right enforcement policy by the State Water Resources Control Board (SWRCB). DFG strongly supports the adoption of a water right enforcement policy that includes clear progressive enforcement actions and disincentives for violations, similar to the SWRCB Water Quality Program's existing enforcement policy. DFG's general comments are below, followed by our comments on the sixteen issues that will be discussed during SWRCB's Water Right Enforcement Workshop.

DFG notes that many of the issues to be addressed during the Water Right Enforcement Workshop are covered in the SWRCB Water Quality Program's enforcement policy. By using the components of that policy that have proved effective, and modifying those that have not, SWRCB can use the Water Quality Enforcement Policy as a guide to develop a water right enforcement policy or, if amended, as a comprehensive water right and water quality enforcement policy.

In commenting on the Notice of Preparation (NOP) for the SWRCB Draft Substitute Environmental Document (SED) currently being prepared for the North Coast Instream Flow Policy for Napa, Mendocino, Humboldt, Marin, and Sonoma counties (AB 2121), and the request for comments on the 2004 Trout Unlimited Petition (TU Petition), DFG has maintained that timely and consistent enforcement of the Water Code pertaining to water rights by the SWRCB is essential to ensure that public trust resources are protected and that violations are deterred. A water right enforcement policy should provide the public guidance on how to comply with the water right provisions in the Water Code and meet Water Code section 1825.¹ Such a policy should also ensure that the instream flow protections developed in response to Water Code section 1259.4 for Napa, Marin, Sonoma, Mendocino, and Humboldt counties succeed in providing meaningful fish and wildlife resource protection.

¹Water Code section 1825 states: "It is the intent of the Legislature that the state should take vigorous action to enforce the terms and conditions of permits, licenses, certifications, and registrations to appropriate water, to enforce state board orders and decisions, and to prevent the unlawful diversion of water." Also, the Strategic Plans for both Cal/EPA and SWRCB identify as a priority improvement in enforcement programs.

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DFG has expressed interest in coordinating with SWRCB to develop a clear enforcement policy to ensure compliance with Water Code section 1259 in its responses to SWRCB's workshop on TU's petition and the NOP for the SED. Those comments are incorporated herein by reference and in the responses below. DFG may supplement its written comments by oral testimony at the workshop.

Issue 1: Should the State Water Board adopt enforcement provisions in its AB 2121 policy?

Yes. The purpose of AB 2121 is to add to the state policy for water quality control specific principles and guidelines for maintaining protective instream flows under the water rights administration procedures. Enforcement of these policies, statutes, and regulations is critical to maintain the quality of water in the state. The NOP for the Water Code section 1259.4 project proposed that the project include an enforcement element. In response to that NOP, DFG comments strongly supported the need for enforcement provisions to ensure that the a water right holder implements and complies with protective instream flow measures prescribed under Water Code section 1259.4. Enforcement of the instream flow requirements is critical to ensure that the objective of Water Code section 1259.4 is met. Current enforcement activities by SWRCB have not curtailed unauthorized diversions that are harming resources in the sensitive watersheds of the five counties covered by AB 2121.

Issue 2: Should the State Water Board adopt an enforcement policy for areas of the state that are outside the mandated geographic scope of the AB 2121 policy? If the State Water Board adopts an enforcement policy that applies to other areas of the state, should it contain the same enforcement provisions as the AB 2121 policy?

Yes. DFG strongly supports applying any water right enforcement policy statewide to address the objective of Water Code section 1825. The policy should protect public trust resources and create an even playing field that deters violations of the Water Code and other state laws throughout the state. However, DFG does not support delaying implementation of an enforcement policy in the counties covered by AB 2121 while a statewide policy is being developed. Having in place an enforcement element to maintain instream flows is essential to ensure the objective of AB 2121 is met within the five counties under current SED review. Similar adverse impacts to public trust resources are known to be occurring in other counties which SWRCB also must address. DFG recommends that SWRCB extend the enforcement provisions developed under AB 2121 for use statewide to expedite a comprehensive policy.

Issue 3: How should the State Water Board set enforcement priorities? What factors should it consider in setting enforcement priorities?

As a general rule, SWRCB should focus its enforcement efforts on watersheds that are highly-impaired and where diversions and activities supported by those diversions pose the greatest threat to public trust resources, especially native species that are listed under the state and federal Endangered Species Acts. SWRCB should rank watersheds in consultation with DFG, the Regional Water Quality Control Boards (RWQCB), the National Marine Fisheries Service (NMFS), and the U.S. Fish and Wildlife Service (USFWS). In determining priorities, SWRCB should give considerable weight to the priorities in plans and policies already in place that identify resource management and restoration needs. If other departments and agencies have already begun enforcement actions on illegal water diversions under their own authorities, SWRCB should place priority on participating and assisting in those enforcement actions.

In addition to the selective watershed enforcement activities described in Issue 4 below, SWRCB should place a high priority on investigations of complaints filed or endorsed by DFG and other local, state, and federal resource agencies, and expedite enforcement actions in those cases. Enforcement activities should be geared toward remedying ongoing harm and preventing future harm. Therefore, enforcement should occur in all watersheds statewide where there is a potential for environmental harm to occur. All unauthorized water diversions should cease until resource protection issues are addressed and the appropriate protective measures are incorporated into projects as required under the Water Code. No diversions should be allowed to continue until SWRCB makes findings addressing protection of public trust resources consistent with the Water Code.

Issue 4: Currently the State Board's Division of Water Rights (Division) identifies one or more watersheds per year in which it will conduct compliance inspections. In the past, watersheds have been selected after consultation with the Regional Water Quality Control Boards, the California Department of Fish and Game, and federal fishery agencies. The Division selects the watershed(s) on which it will focus its enforcement resources based on potential impacts to water quality and aquatic resources. The Division then conducts both investigations of unauthorized diversions and compliance inspections of permitted and licensed water supply projects within the selected watershed(s). Should the State Water Board continue to focus its water right enforcement resources on a specific watershed? If not, what other basis should be used?

In addition to the enforcement priorities described in DFG's response to Issue 3 above, DFG recommends that SWRCB modify its current specific watershed enforcement approach to make it a more effective tool to protect public trust resources and to deter unauthorized diversions. While SWRCB's current watershed compliance inspections and investigations have successfully identified a large number of unauthorized storage reservoirs within targeted watersheds, the program has done little to provide a disincentive to others to engage in similar violations or to prevent continued illegal diversions after SWRCB identifies an unauthorized diversion. SWRCB currently allows projects to operate in violation of the terms of their issued water rights without penalty and also allows unauthorized diversion by those without a basis of right to continue without environmental review or protective terms and conditions in place. There are no consequences for most violations, which results in continuing harm to public trust resources, especially in those counties where highly impaired watersheds are supporting native species that are listed under the state and federal Endangered Species Acts.

Presently, when unauthorized use is identified in targeted watersheds, SWRCB instructs the diverters to apply for a water right to bring their diversions into compliance with the Water Code. Filing an application is an important first step, but it does not constitute compliance with the Water Code or state law and it does nothing to protect public trust resources because the diversion is allowed to continue without protective measures. For nearly every unauthorized diverter operating without a basis of right, the filing ends SWRCB's enforcement/ compliance process and there is no penalty, no deterrent, and no disincentive to continue the unauthorized diversion prior to a finding by the SWRCB as to whether the diversion is harming public trust resources.

In some cases, unauthorized diversions are currently being allowed to continue without protective measures for years because of the length of time it takes for SWRCB to complete the process to issue a permit. Protective measures are applied to the diversion only after the permit is issued. This approach has encouraged unauthorized diversions to continue because even if discovered, the diverter may continue without having to implement any protective measures, provided the diverter files an application. The current watershed investigations are only a first step; they do not act as an effective deterrent and they do not protect public trust resources. DFG is concerned that focusing all of the SWRCB enforcement resources on a watershed approach that stops short of protecting the resources might continue unchanged.

To improve this situation, DFG recommends that SWRCB include, at a minimum, the following activities in its watershed enforcement process after it discovers a violation:

- A progressive enforcement element that includes formal enforcement measures, such as the following.
 - A diverter without a permit or license must file an application and cease the unauthorized diversion until SWRCB environmental staff make the findings described in the Water Code relating to the protection of public trust resources.
 - For permitted and licensed diversions, SWRCB should gear its compliance efforts toward ensuring that protective permit terms and conditions, including adequate compliance and effectiveness monitoring, are followed. Until findings are made indicating harm to public trust resources will not occur, all unauthorized diversions must cease and the diversions must immediately come into compliance with the protective terms in the current permit(s) or license(s) covering the diversions.
- The methods used for watershed compliance/enforcement inspections seldom identify permit or license violations, unauthorized direct diverters, or diverters who are inappropriately claiming diversion under riparian or pre-1914 claim, or groundwater use when they are actually diverting flow within SWRCB's jurisdiction. SWRCB should modify its watershed investigation process to identify and resolve a wider range of violations. Watershed enforcement should be restructured to include all unauthorized diversions.
- The enforcement process should become more transparent, and as described below, the activities related to SWRCB enforcement and complaint response should be accessible on SWRCB's website.

Additionally, SWRCB enforcement activities are so severely limited that neither the current watershed compliance inspections nor an alternative approach based on complaint response can be effective without additional trained staff and a clear enforcement policy in place. To be successful in deterring violations and protecting public trust resources, any water right enforcement policy must deal with violations in a timely and consistent manner that establishes disincentives to would-be violators, while ensuring that diverters who comply with the law are not placed at a competitive disadvantage by those who do not comply with the law. With an appropriate water right enforcement policy in place, a restructured watershed enforcement approach can be coupled with a violation complaint program.

Issue 5: Should the State Water Board provide an opportunity for voluntary compliance or corrective actions before initiating formal enforcement actions and, if so, under what circumstances? How long a time should the State Water Board allow for voluntary compliance?

Aquatic resources in California's watersheds no longer have the resilience to withstand the impact of unauthorized diversions without protective measures that would avoid or minimize harm. For unauthorized diverters operating without a basis of right, there is no possibility of achieving voluntary compliance with the protective terms of a permit or license. To come into compliance these diverters must immediately cease their diversions, use, and storage of water until appropriate protective terms are in place and a permit is issued.

For those diverters operating in violation of the terms of their issued permits or licenses, the SWRCB should only provide opportunity for voluntary compliance or corrective action when it has initiated concurrently a formal enforcement action for the unauthorized diversion activities that could harm public trust resources. These unauthorized diversion activities may include the construction or enlargement of either instream or offstream reservoirs, changes in season or rate of diversion, moving or adding points of diversion, or applying water to unauthorized places of use. Given the sensitivity of the watersheds that support native aquatic species, particularly in the areas defined in Water Code section 1259.4, and the adverse direct and cumulative effects of diversions, these unauthorized diversion activities must cease until appropriate protective terms and conditions are developed, findings are made, and a permit is issued.

When dealing with diverters operating in violation of the terms in their permits or licenses, SWRCB may consider issuing a notice of violation (NOV) as a first step towards voluntary compliance, while at the same time preparing to initiate a formal enforcement action to avoid any delay if the diverter fails to correct the violation within the time period prescribed in the NOV. The time allowed for voluntary corrective action and ending unauthorized diversion practices should depend on the effects the diversions are having on public trust resources. If there is any potential for harm to those resources from diversions not in compliance with permit or license terms, compliance must be achieved immediately. If there is failure to comply with the NOV in the prescribed time period, formal enforcement action should begin immediately. For projects that do not pose potential threats to public trust resources, compliance should be progressive but not postponed beyond 30 days of the NOV. In cases where compliance cannot be achieved in 30 days, formal enforcement action should be initiated. In no case should repeated opportunities for voluntary compliance be provided at the same facility.

Additionally, projects that are in violation of the terms in their permits or licenses should only be given an opportunity to come into compliance on a voluntary basis if a monitoring and reporting plan (MRP) is developed, approved, and put in place. A MRP component should also be included in projects that are currently in the permitting process. To be effective, the MRP must be feasible and must be implemented. Like the MRP in waste discharge requirements/ National Pollutant Discharge Elimination System permits (NPDES/WDR permits), not submitting an MRP should be subject to penalty. Changes in the monitoring and reporting requirements made by staff after MRP approval must not be substantive. DFG recommends the Executive Officer approve proposed minor, non-substantive changes and the Board approve substantive changes. All staff changes to the new or existing permit monitoring and reporting requirements should be documented in writing to the Board at least quarterly with time allowed for public comment. An annual written report of violations or non-compliance with water rights permits and licenses and a period for public comment should be required.

Issue 6: The State Water Board has pending over 500 water right applications. Many of these applications were filed to seek authorization for existing but unauthorized, water supply projects. Should the State Water Board initiate enforcement against existing applicants that are diverting water without authorization? Under what conditions should the State Water Board initiate enforcement actions against these applicants?

Issue 7: The State Water Board has pending over 600 petitions to change existing water right permits or licenses. Many of these petitions were filed to seek authorization for change in place or purpose of use or points of diversions that have already taken place without seeking the required prior approval of the change from the State Water Board. Should the State Water Board initiate enforcement against existing petitions that are diverting water in violations of their water right permits or license? Under what conditions should the State Water Board imitate enforcement actions against these petitioners?

Both situations require enforcement actions upon discovery of the violation. Water diversions and changes to existing water right permits or licenses are subject to the Water Code statutes, the California Environmental Quality Act, and the Fish and Game Code statutes, among others, and the public trust doctrine. Simply filing an application or submitting a petition does not authorize a diversion or change under any of those statutes, nor does it ensure that the diversion or change is not harming public trust resources. At a minimum, SWRCB should not allow the illegal diversions or changes to continue until it makes certain findings, including that the diversion or change does not adversely affect public trust resources, in consultation with DFG.

Also, as mentioned above, allowing those with only pending applications or petitions to continue to divert gives unfair competitive advantage to those who act illegally and does nothing to protect public trust resources.

SWRCB's current water right enforcement policy is allowing hundreds of diverters within the area described in Water Code section 1259.4 to initiate and then continue unauthorized diversions prior to any environmental review, findings, and permitting. There is no accountability or operational requirements for the diverter without permits, thereby increasing the likelihood of harm to public trust resources. A Cease and Desist Order (CDO) is the appropriate enforcement action for diversions without SWRCB authorization. Additionally, an appropriate Administrative Civil Liability (ACL) should be issued and if a storage facility was constructed without appropriate permitting, SWRCB should work with other agencies to ensure that the impacts of removing or modifying the facility are minimized and/or mitigated. Unauthorized diversions should cease until SWRCB has consulted with other resource agencies and issued permits.

Issue 8: The State Water Board has four potential formal enforcement options available: (1) issuance of a Cease and Desist Order, (2) issuance of an Administrative Civil Liability (monetary penalty), (3) referral of the matter to the Attorney General for fines or injunction or both, and (4) revocation of a permit or license. In some cases, a violation may result in only one type of action, and in other cases, a violation could result in more than one type of action. What conditions should be present before the State Water Board considers imposing each of these potential enforcement options.

Based on the mandate in Water Code section 1825 and the Strategic Plans for both the SWRCB and Cal/EPA, SWRCB should move forward to develop and implement an improved enforcement program. Enforcement should be clear, progressive, and certain. Prior knowledge of the expected progression of enforcement may provide a disincentive for some considering an unauthorized diversion. DFG recommends that all enforcement actions for illegal diversions that are causing or have caused environmental harm be coordinated with other resource agencies. Also, violations and the outcomes of formal and informal enforcement actions should be made available, within legal limitations, on SWRCB's website.

Issue 9: If a Cease and Desist Order is determined to be appropriate, should the State Water Board provide an opportunity in the Cease and Desist Order for the recipient of the order to continue to divert water while coming into compliance? If so, what conditions and time schedule for compliance should the State Water Board impose? What other factors should the State Water Board consider in determining a reasonable time schedule for compliance to be included in any Cease or Desist Order?

A CDO should be issued for any diversions that are harming or could harm public trust resources or beneficial uses of water. All actions associated with the violation, including diversion, storage, or use, must cease immediately. There should be no allowance for unauthorized diversions to continue without a scientifically supportable finding that the continued activity would not result in harm. It must be the violator's responsibility to provide evidence to support a claim of no harm to the environment or the other beneficial uses to allow the SWRCB to make such a finding. It is reasonable, however, that the restoration portion of a CDO, including permanent removal of facilities, might include a reasonable time schedule for compliance due to permitting and consultation issues.

Issue 10: Under what circumstances, if any, should a Cease and Desist Order require the permanent removal of any illegal diversion facility?

If an illegal diversion facility or operational changes at the facility cannot comply with all local, state or federal laws, then it should be permanently removed. Additionally, it would be inappropriate to simply require removal without ensuring that the activities related to that removal do not result in additional damage to public trust resources. For that reason, the CDO should include appropriate permitting by and/or consultation with state and federal resource agencies to ensure that the removal does not result in additional harm to the environment. Violation of a CDO should trigger further enforcement actions as outlined in SWRCB's Water Quality Enforcement Policy.

Issue 11: The State Water Board has the authority to issue Administrative Civil Liability (ACL) of up to \$500 per day of unauthorized diversion and use or up to \$1000 per day for violation of a Cease and Desist Order. If an ACL complaint is deemed appropriate, how should the monetary penalty be calculated in order to ensure that the monetary penalty is effective in compelling compliance with water right law? What factors should the State Water Board consider in setting the amount of monetary penalty?

Monetary remedies are an essential component of an effective enforcement program. They provide a measure of compensation for the damage caused by the illegal activity and ensure that the illegal activity does not give an economic advantage to the offending party. They should compensate SWRCB and other agencies for their efforts to correct violations. SWRCB's Water Quality Enforcement Policy includes the appropriate factors SWRCB should consider to determine the monetary assessment. In addition to standard penalties that provide an economic disincentive in all cases, the ACL should also be weighted based on economic benefit derived from the unauthorized diversion, income generated over the term of

the violation, and include as a factor an economic assessment of environmental harm done over the term of the violation.

Environmental harm should be considered as the cost associated with temporal loss or impairment of habitat, the cost to fully restore any affected habitat, and administrative and enforcement costs. However, monetary remedies are only one component of an effective enforcement program; physical remediation of environmental damage must also be included.

Payment of any ACL penalty should also be accompanied by required compliance with the terms of the permit or license issued. If there is no permit or license for a diversion, ACL penalties should be assessed in the same way they would be for a failure to comply with the terms of a license or permit. However, because these diversions cannot come into compliance with the terms of any permit or license, SWRCB should issue a CDO in addition to the ACL until the SWRCB makes a finding under Water Code that there is no harm to public trust resources.

Issue 12: What factors should the State Water Board consider when determining whether to refer a violation to the Office of Attorney General for prosecution?

Specific statutes in the Water Code provide guidance on this issue and allow the SWRCB to make referrals to the Attorney General for civil enforcement. Again, the SWRCB will likely use the Water Quality Enforcement Policy as a model, but DFG expects that when several agencies are seeking monetary remedies under different state laws, a referral would be considered more efficient than a number of individual enforcement actions. Referral to the Attorney General for interagency enforcement actions may also be needed if a local district attorney is unwilling to pursue environmental cases, if there is a conflict of interest in participation by the local district attorney, or if there are other difficulties based on lack of resources to prosecute within a county.

Issue 13: What factors should the State Water Board consider when determining whether to revoke a water right permit or license as a result of violation of permit or license terms?

Any water rights enforcement policy should clarify that revocation can result from failure to comply with permit or license terms within a progressive enforcement process. From DFG's perspective, if harm to resources cannot be remedied with appropriate protective terms because of the nature of the activity, or if the water right holder cannot or will not comply with the protective terms, then revocation

should be considered as a reasonable option. If revocation is to occur, appropriate protective terms developed in conjunction with other agencies to render the facility unable to continue diversions must be included in any revocation or cancellation order to avoid additional harm to the environment.

Issue 14: The State Water Board has the authority to revoke water right permits and license if the water right fees due on the permit or license are not paid for five or more years. Should the State Water Board consider revoking water right permits and licenses for failure to pay water right fees? If so, under what conditions should the permit or license be revoked?

Revocation for failure to pay fees is a discretionary action by SWRCB allowed under Water Code sections 1539. Annual fee assessments support the SWRCB and there is an expectation that they be paid as notification to the applicant is made. Failure to pay puts the violator at an economic advantage when compared to others who comply, and therefore SWRCB should include revocation for failure to pay fees as part of its formal enforcement procedures. If revocation is considered by SWRCB, the permittee/licensee must show that the facility can no longer divert or impound water and that there is an alternative source of water to support the place of use so that any threat of illegal diversion is removed. Interagency coordination concerning removal to ensure no additional harm must also be included.

Issue 15: The State Water Board has authority to cancel a pending application if the applicant does not diligently act to acquire a permit. Should the State Water Board cancel an illegal water supply project for lack of diligence by the applicant? Under what conditions should the State Water Board cancel a pending application for an illegal water supply project?

Currently, violators can benefit from lack of diligence in pursuing a permit because unauthorized diversions are allowed to continue without protective restrictions in place until SWRCB issues a permit. This means that maintaining an unauthorized diversion with a pending application in place provides greater operational flexibility than a permit might allow. If diversions were not allowed until permits were acquired, applicants and petitioners would then have the incentive to exercise due diligence. DFG recommends that rather than canceling an application due to "lack of due diligence," SWRCB instead focus its enforcement authority on stopping the unauthorized diversion. This would likely result in an increase in due diligence by the applicant and would also avoid any debate over what constitutes "due diligence" in acquiring a permit.

Issue 16: Are there any other factors that the State Water Board should consider in regard to water right enforcement?

DFG recognizes that the enforcement program at SWRCB is both underfunded and understaffed. DFG encourages a new direction that would be adequately funded, incorporate additional support staff with environmental expertise into a combined SWRCB enforcement/compliance unit, and rely on better coordination with resource agencies to ensure that resource issues are adequately addressed. DFG also supports efforts to ease the enforcement burden on SWRCB and on other agencies with jurisdiction over the activities related to water diversion. This begins with writing permit terms and conditions that are scientifically-based and enforceable. The permit terms should reflect provisions of law that are enforceable as a practical matter. Permit terms and condition should be consistent, clear, and practically enforceable. Including a MRP and improved monitoring methods for both diverters in violation and those being issued new permits and licenses would be a positive first step toward achieving a greater level of compliance with less staff time. A significant problem with the current system is that the burden of proof of environmental harm is placed on enforcement staff, which requires them to complete assessments that involve significant additional effort. This burden should be shifted so that data and analyses to support a finding of no environmental harm are readily available from each project's monitoring reports.

DFG recommends that SWRCB examine and restructure its watershed approach to include not only the identification of violations but timely progressive enforcement actions as well. This will reduce the need to enforce on a project-by-project basis especially in sensitive watersheds where multiple diverters are operating without basis of right or outside of the terms of permits and licenses. This will likely include the need to issue both CDOs and ACLs within the watershed to ensure that public trust resources are protected. Diversions must not be allowed until they are in compliance with the Water Code and after findings have been made that harm to public trust resources will be avoided.

Allowing unauthorized diversions to continue without public disclosure of those violations compromises the enforcement capabilities and permitting authority of other agencies and rewards violators while putting those who obey the law at an economic disadvantage. Water rights complaints and violations should be made readily available by posting on SWRCB's website for public review. Not only should the complaints and violations be posted, but their resolution should be available on SWRCB's website as well.

SWRCB should also consider measures to prevent violations from occurring in the first place, such as improved outreach to agencies, consultants, and other

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professionals involved with water development and diversion projects. Outreach should clarify the intent and requirements of the water right enforcement policy SWRCB adopts and the consequences of not meeting those requirements.

DFG encourages the development of a strong and clear SWRCB water right enforcement policy that will allow enforcement procedures to remedy violations in a timely manner to better protect public trust resources. DFG recognizes there is also a need to address methods to adequately fund compliance/ enforcement activities and develop coordinated responses and enforcement alternatives that require less staff time to correct violations. DFG supports SWRCB's efforts to develop a water right enforcement policy and hopes that the comments above will assist SWRCB in those efforts. If you have any questions regarding these comments, please contact Ms. Annie Manji, Statewide Water Right Coordinator, at (916) 508-7203 or amanji@dfg.ca.gov; or me at (916) 653-9411 or cwilcox@dfg.ca.gov.

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AM/LH/CW/kg