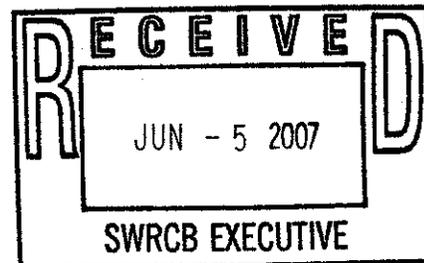




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June 5th, 2007

Ms. Tam Doduc, Chair
Members of the Board
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Dear Ms. Doduc and Members of the Board:

This letter is submitted as the comments of Environment Now and its partners regarding the State Water Resources Control Board's (State Water Board) Policy on Water Rights Enforcement.

In summary, we make the following recommendations:

1. The State Water Board should continue to focus its enforcement resources on a watershed basis. Moreover, the Water Rights Division's (Division) Watershed Investigation Program should be utilized more extensively.
2. The State Water Board should provide opportunities for voluntary compliance or corrective action only in very limited circumstances.
3. The State Water Board should issue cease and desist orders, and fines where appropriate, against existing applicants who are diverting water without authorization. However, staff should also make great efforts to reduce the backlog of water right applications. The administrative lag in the application process creates the impetus for unauthorized diversions.
4. The State Water Board should prioritize violations on streams and rivers which contain threatened fisheries and impaired streamflow conditions.
5. The State Water Board should exercise all four of its enforcement options: (1) cease and desist orders, (2) administrative civil liability (ACL) fines, (3) referral to the Attorney General for fines or injunctive relief, and (4) revocation of permits and licenses. Specific circumstances will dictate when each of these options is appropriate.

6. In order to fully discourage and deter violations, the State Water Board should assess ACL fines in the amount of \$500 per day, the statutory maximum, for unauthorized diversions and permit violations.

Watershed-Based Enforcement

In regulating water rights in California, the State Water Board has a duty to protect public trust resources, ensure reasonable use of water, maintain necessary streamflow levels, and assess the availability of water for appropriation. The Division must necessarily carry out these tasks on a watershed basis due to the dynamic nature of hydrologic systems. A watershed's hydrologic table is the sum of its parts and aggregate diversions have a tremendous effect on public trust resources throughout a particular stream system. Therefore, to effectively protect public trust resources and third party water right holders, the Division should assess water availability for entire watersheds and the effect of aggregate diversions on fish and wildlife.

The Division currently has a backlog of over 500 pending water right applications. A majority of the applications are for water rights on the North Coast where a particular stream system may contain dozens of unauthorized diversions. The cumulative effect of these diversions, some smaller than ten cfs and some in excess of one thousand cfs, is a decrease in streamflow levels and an increase in sediment levels, both of which adversely affect threatened Coho, Chinook and Steelhead fisheries.

In 1998, the Division initiated a pilot Watershed Investigation Program in three watersheds with high resource value to determine where illegal reservoirs were occurring. The watersheds selected for the investigation were: (1) Maacama Creek in Sonoma County, (2) Navarro River in Mendocino County, and (3) Pescadero Creek in San Mateo County. The Division sent letters to the owner of each reservoir and asked the owner to identify the basis of the water right for the reservoir, explain why the reservoir is not subject to the SWRCB's permitting authority, file a new water right application, or render the reservoir incapable of storing water.

The Division determined that 94 reservoirs identified by the investigation in the Navarro watershed were unpermitted. *See State Water Board, Order WR 2000-03.* The Division later identified 48 unpermitted reservoirs in the Maacama watershed. *See State Water Board, Order WR 2000-06.* Division staff then proceeded to conduct inspections after notifying diverters of their respective violations and allowing them a reasonable period to cure the violation by applying for a water right. The diverters either filed applications for permits or were forced to remove their reservoirs. Some also received ACL fines. This investigation proved very successful in ascertaining where unpermitted diversions were occurring and forcing conformance to the State Water Board's regulations. Although the Division selects four watersheds for investigation in any given year, very few investigations have actually been completed. The Division should allocate adequate funding for this program and complete at least four watershed investigations per year.

The Division should conduct the investigations in watersheds where unpermitted diversions are rampant, particularly on the North Coast where nearly 300 applications are currently pending and where threatened Coho, Chinook and Steelhead fisheries are located. The State Water Board has a duty under Water Code § 1259.4 (AB 2121) to adopt principles and guidelines for maintaining streamflows in coastal streams from San Pablo Bay to the Mattole River. Such guidelines may be established in other areas of the State under the State Water Board's discretion. These guidelines can and should be a part of the Division's enforcement program. Streamflow guidelines will do little good

without the regulatory teeth needed to ensure they are met. A corresponding enforcement policy should set a baseline and should rely heavily on streamflow data collected by the State Water Board or taken from sister agencies such as the Department of Fish and Game (DFG). DFG is currently required under Public Resources Code §§ 10000-10005 to identify and list watercourses for which minimum flow levels are needed to support fish and wildlife and prepare streamflow requirements for those watercourses for use by the State Water Board.

The North Coast should serve as a testing ground for incorporating streamflow guidelines into enforcement actions, thereby ensuring that baselines are met and resources are protected on entire watersheds. After a streamflow enforcement policy is successfully implemented on the North Coast, the Division should consider similar enforcement policies in areas of the State that are outside the geographic scope of the AB 2121 area. Such policies should contain similar enforcement provisions and should target flow-impaired watersheds.

Additionally, Division staff should expand the scope of the Watershed Investigation Program to include conjunctive use projects and groundwater pumping. Pumping from some groundwater basins, such as the Sacramento and Delta Central-Sierra groundwater basins, is restricted by statute. The State Water Board also has jurisdiction over transfers from recharged groundwater basins and transfers of groundwater in lieu of surface water (i.e. foregoing the use of surface water through transfers while pumping groundwater). Such activities require permits and/or transfer approval. The State Water Board should seek to prevent the unauthorized occurrence of these activities by including them in the Watershed Investigation Program.

Division staff should also conduct enforcement actions against certain pre-1914 appropriative water right holders and riparian right holders. The State Water Board retains jurisdiction over these two categories of water rights in order to prevent unreasonable use and injury to public trust resources. *See State Water Board, Order WR 95-4*. Combined diversions under these two categories comprise 38% of the total water appropriated in the state. Pre-1914 and riparian diversions occur on a grand scale and can potentially have a very adverse impact on the natural environment.

Voluntary Compliance

In order to preserve staff time and resources, the Division should allow *limited* voluntary compliance. Voluntary compliance is appropriate in situations where a party with a valid water right violates a permit condition or provision of law. After Division staff notify the water right holder of the violation, an opportunity to correct the situation without further administrative action may be appropriate. For example, if a permit holder is not complying with Permit Term 61, which requires fish and wildlife bypass flows on all Napa River permits upstream from the City of Napa, it may be appropriate to allow the permit holder a reasonable time to take corrective action. Division staff should give the permit holder a date by which they must finish construction of the requisite fish bypass. Division staff should then conduct an inspection to ensure that construction is complete and the permit holder is in full compliance with the permit term. Corrective action in this instance reduces the workload of Division staff by relieving the need for additional inspections, draft water right orders, and prosecution of violations before a hearing officer. Those who voluntarily come into compliance with permit and license terms once violations are called to their attention should receive reduced penalties, and in some cases no penalties at all. However, an enforcement policy which refuses to impose penalties on those who voluntarily comply would unacceptably undermine the incentive for permittees and licensees to understand and comply with the terms of their permits. The imposition of penalties in voluntary

compliance situations should remain an option in order to preserve the incentive to comply with permits and licenses in the first instance.

Voluntary compliance is *not* appropriate, however, where a party has diverted water without State Water Board authorization and made no effort to secure such authorization through the permitting process. By allowing parties to simply file applications upon discovery of their unauthorized diversions, the Division encourages diverters to avoid the regulatory process until they get “caught”. Therefore, the Division should issue a cease and desist order before allowing unauthorized diverters to file applications that essentially legitimize their violations. The Division should impose ACL fines on such parties to the fullest extent of the law, including a \$500 fine for every day the violation occurs, as authorized under Water Code § 1052. Only a cease and desist order coupled with a severe fine – a fine that is “felt in the pocketbook” – will fulfill California’s stated policy of preventing unpermitted water diversions.

This enforcement strategy must work in conjunction with a strong effort to significantly reduce the application backlog. As of December 2006, the last date a monthly progress report was issued, the Division’s backlog contained over 500 pending applications and nearly 600 pending petitions. Until the application process is stabilized, diverters will continue to construct unauthorized diversion projects, either while their application is pending or without filing an application at all. The Division should foster a three-pronged strategy to prevent such scenarios:

1. Instituting strict enforcement actions, including cease and desist orders and fines, against diverters who have not filed applications.
2. Processing applications and petitions in an efficient manner, including relying on input and data from sister agencies, such as the Department of Fish and Game, to reduce time and expense.
3. Allowing voluntary compliance measures, when appropriate, to free up Division staff to work on reducing the application backlog.

Enforcement Against Existing Applicants And Petitioners with Unauthorized Diversions

Hundreds of water right applicants have been awaiting approval for several years while their applications have remained pending in the Division’s backlog. Many of these applicants have begun constructing or have even completed construction on their proposed diversion projects. Existing applicants who are diverting without Division approval present a unique problem in the regulatory scheme. On the one hand, these parties understandably have become impatient with the slow administrative process. On the other hand, unauthorized diversions pose an imminent danger to fish and wildlife. The aggregate effect of multiple unauthorized diversions can significantly reduce streamflow and adversely impact threatened Coho, Chinook and Steelhead fisheries.

A viable solution should be sought to this delicate problem. If Division staff discover *any* type of unauthorized diversion during watershed investigations, they should issue a cease and desist order. Such diversions evade the agency’s authority and must be enjoined. Diversions by existing applicants are no exception and fines may be appropriate for them, but Division staff should recognize that violations by existing applicants are not as egregious as other violations. Varying levels of culpability exist in the realm of unauthorized diversions. Staff should seek to develop a “penalty range” to guide them in deciding how to match a specific violation to an appropriate punishment. For instance, existing applicants with unauthorized diversions of modest scale may only deserve a minimal ACL

fine. Those who divert from watersheds with high resource value without submitting an application probably deserve the maximum penalty. Others may fall in the middle.

The State Water Board should exercise its authority to cancel an application when an applicant has not acted diligently to acquire a permit. If the applicant has not made a good faith effort to complete the application process, especially if an illegal diversion is present, cancellation may be appropriate. The following conditions should be considered when determining whether to cancel an application:

- Applicant has begun diverting illegally while the application is pending.
- Applicant has failed to consult with the Department of Fish and Game regarding environmental impacts or streambed alteration (if applicable).
- Applicant has failed to produce an EIR or other pertinent environmental document necessary to ensure that the proposed diversion complies with CEQA.

Hundreds of petitioners have been awaiting authorization for changes in place of use, purpose of use or point of diversion. Existing petitioners should be treated exactly the same as existing applicants and should be issued cease and desist orders. These types of changes can impair streamflow and affect public trust resources as readily as unauthorized diversions. For instance, if a point of diversion is changed from one tributary of a river where Coho, Chinook or Steelhead fisheries are not present, and moved to an area where they are, the entire diversion now has an increased impact on public trust resources.

Priority Violations for Enforcement Actions

The Division should prioritize the following types of violation (this list is neither exhaustive nor in order, but merely provides examples of priority violations):

- Violations that occur in watersheds with high resource importance.
- Violations by diverters who have not filed applications or petitions to the State Water Board for the unpermitted activity.
- Violations that are one year or longer in duration.
- Violations that occur in watersheds where threatened Coho, Chinook and Steelhead are known to be found or where such species are known to range.
- Violations that result in high mortality levels of threatened Coho, Steelhead and Chinook.
- Violations involving barriers to stream passage.
- Violations involving a large number of acre-feet or a high rate of diversion.
- Violations on watersheds where senior water right holders are deprived of water due to the violation.

Enforcement Options

- As discussed above, cease and desist orders are appropriate in all cases where unauthorized diversions or unauthorized changes to point of diversion, place of use or purpose of use are occurring. All cease and desist orders should be effective immediately. The rationale behind cease and desist orders as regulatory tools is to stop illegal activity permanently or until the violator is able to come into compliance. If violators have an immediate need for water supplies then the onus must be placed on them to seek alternative sources. Cease and desist orders should not contain provisions allowing unauthorized diversions to continue while the

violator comes into compliance. On the contrary, if a particular diversion facility is substantially incapable of coming into compliance with its permit conditions, streamflow guidelines, or applicable law, it should be permanently removed. If a project is physically incapable of ceasing diversion (e.g. the project contains a bypass canal without a gate at the point of diversion), then mitigation or restoration measures may be appropriate.

- ACL fines are often appropriate when parties have diverted water without authorization or have changed a point of diversion, place of use or purpose of use without authorization. See the section below entitled “administrative civil liability” for more on ACL fine calculation.
- Referral of an enforcement action to the Attorney General may be appropriate in two instances. First, if a diverter has failed to comply with a cease and desist order, the State Water Board may refer the matter to the Attorney General pursuant to Water Code § 1845, to seek a temporary restraining order, preliminary injunction, or permanent injunction. Second, if an enforcement action is particularly complex, or imposes an inordinate evidentiary burden on the State Water Board’s enforcement staff, the Attorney General’s office may be better equipped to pursue the matter in superior court. Referral of these complex matters to the Attorney General may also provide the benefit of freeing up funding within the Division. We recognize, however, that *both* the Attorney General’s office and the State Water Board’s enforcement staff may have limited funds earmarked for such actions. We stand ready to support both entities in securing additional enforcement funding.
- The Division has historically only revoked permits and licenses for failure to pay water right fees or for undue delays in putting water allocations to reasonable and beneficial use. It is absolutely imperative that the Division begin revoking permits when terms and conditions are violated. The Division should allow voluntary compliance where appropriate (see the section on voluntary compliance above), but should use the revocation option where permit and license holders have violated terms and conditions on multiple occasions, resulting in public trust impacts. A typical permit contains several standard terms and often special provisions which protect fish and wildlife and require the permit holder to institute water conservation measures. Violations of such terms on environmentally sensitive watersheds, particularly the North Coast, could have far-reaching consequences.

Administrative Civil Liability

Water Code § 1052 states that an unauthorized diversion or use is a trespass and subject to ACL fines in the amount of \$500 per day for each day in which the trespass occurs. The clear public policy behind this section is that water right violations should be met with severe punishment. Moreover, the intent of the legislature was to include water transfers and changes in point of diversion, purpose of use and place of use within the meaning of the term “diversion”. The Division should interpret the provision accordingly. In addition, Water Code § 1845 states that any person who violates a State Water Board cease and desist order may be liable for ACL fines up to \$1,000 per day. In structuring ACL fines, the legislature was aware that only significant fines would effectively deter parties from diverting water without permits. This is particularly true for industry scale diverters, such as large wineries and water districts, which have the ability to treat such fines as a cost of doing business. To carry out the legislature’s intent, the Division should impose the \$500 or \$1,000 fine for each day in which the unauthorized diversion or violation of a cease and desist order occurs. The Division should seek to establish guidelines for ACL fines that are equitable, including caps where appropriate, but which also prevent diverters from treating penalties as a cost of doing business.

Environment Now and its partners appreciate the opportunity to submit these comments. We fully support the Division's mission to establish and maintain a stable system of water rights in California. In that regard, Environment Now and its partners look forward to providing input wherever possible to ensure that the Division is able to administer water rights as efficiently and effectively as possible.

Sincerely,

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