



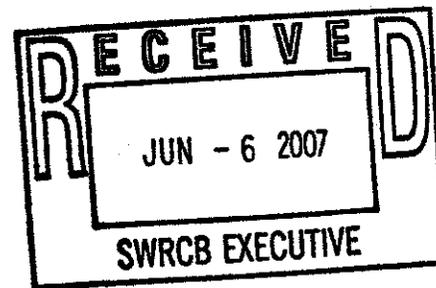
**UNITED STATES DEPARTMENT OF COMMERCE**  
**National Oceanic and Atmospheric Administration**  
NATIONAL MARINE FISHERIES SERVICE  
Southwest Region  
777 Sonoma Ave., Room 325  
Santa Rosa, CA 95404-4731

6/19/07 BdMtg Item 10  
**WR Enforcement**  
Deadline: 6/6/07 Noon

June 5, 2007

In response refer to:  
SWR/F/SWR3:RWB

Song Her, Clerk to the Board  
State Water Resources Control Board  
1001 I Street  
Sacramento, California 95814



Re: Water Right Enforcement Workshop

State Water Resources Control Board:

Thank you for the opportunity to provide comments on development of Division of Water Rights enforcement policy. NOAA's National Marine Fisheries Service (NMFS) has responsibility for conservation and recovery of California's threatened and endangered anadromous salmonids under the Endangered Species Act of 1973 as amended. I will provide our comments in the same order as the discussion items outlined in the Revised Notice of Public Workshop signed May 3, 2007, by Song Her.

- Assembly Bill (AB) 2121 articulates stream flow protection policy specifically developed for the protection of anadromous fishes along California's central and north coast regions. The protections afforded by this policy are critical to the protection and recovery of central and north coast salmon and steelhead. Yes, we are in favor of fair and consistent enforcement provisions to ensure implementation of AB2121 provisions, and we urge the State Water Board to develop and implement an enforcement program.
- AB2121 is customized for the central and north coast regions. Specific minimum flow or seasonal limitations for diversions developed under AB2121 would most likely not be applicable to other regions, but it could serve as a template for similar policies to apply to other areas. New policies should also include provisions for enforcement.
- Among other things, AB2121 affords protections for anadromous fishes in spring and summer months when flows are limited for juvenile outmigration and rearing. These protections are most critical in stream reaches where rearing juvenile salmon or steelhead



are present. So, highest priorities should be watersheds and stream reaches where listed salmon or steelhead are present.

- The State Water Board's approach is presumably constrained by the availability of resources. NMFS does not have an understanding of the of the State Water Board's resources for enforcement and, therefore, will not comment on the efficacy of the past approach. However, should the practice of identifying watersheds on an annual basis continue, NMFS would like to continue being consulted.
- Voluntary compliance is always preferable over enforcement, but as noted by the State Water Board "an economic incentive to violate water right laws exists." In addition, many private sector water diverters have been out of compliance with water right laws for five to 10 years. When Division of Water Rights enforcement policy is final, that policy should be noticed to the public and implemented after 30 days.
- Pending water right applications are not water rights. Some deference to applicants may be appropriate in view of the State Water Board's inability to process water right applications. However, all such unauthorized diversions should have generic terms and conditions applied in order to be allowed to continue. Those terms and conditions should ensure a limited season of diversion, minimum bypass flows (February median), and that cumulative diversions are not detrimental to aquatic resources. Enforcement actions should be applied in all instances where these assurances cannot be verified.
- Pending petitions to change existing water right permits or licenses are of concern to NMFS if the changes are to increase the amount of diversion, or to divert in a season of the year that would adversely affect aquatic resources. Changes should be conditioned to ensure a limited season of diversion, minimum bypass flows (February median), and that cumulative effects are not detrimental to aquatic resources. Enforcement actions should be applied in all instances where these assurances cannot be verified.
- Because of the State Water Board's inability to process water right applications and petitions, some deference might be allowed for parties with pending applications. Applicants that are limiting their season of diversion, providing a minimum bypass flow (February median), and considering cumulative effects may be allowed to continue on an interim basis for up to some established time limit. Cease and Desist Orders may be a tool to provide incentive for diverters to adopt these measures, and should be the first level enforcement option followed by civil liability, referral to the Attorney General and revocation of permits, or applications.
- Under circumstances where applicants that are limiting their season of diversion, providing a minimum bypass flow (February median), and considering cumulative effects, the State Water Board may allow diversion to continue. Also, provisions might be made whereby summer riparian diversions are stopped in exchange for ongoing diversion; a one year period would be reasonable to reach full compliance.

- Unauthorized diversion facilities should be removed if and when they are an obstruction to fish passage, and when facilities cause a significant reduction of flows in salmonid rearing or spawning habitat.
- The State Water Board should use its discretion and set civil liabilities at a rate that would offset any potential monetary gains accrued as a result of unauthorized diversion, and have an additional amount to penalize unauthorized diverters.
- Referral to the Attorney General for prosecution should consider the severity of the adverse impacts to aquatic resources, and the duration of those impacts.
- The State Water Board should consider whether there has been harm to salmonid habitat in determining whether to revoke a water right permit or license; egregious harm would justify revocation.
- NMFS defers to the State Water Board on the matter of fees, funding, and penalties for non-payment of water-right related fees.
- Lack of diligence on the part of the applicant would justify the State Water Board cancelling a pending application for an illegal water supply project. Whenever an illegal project causes adverse impacts to trust resources, and the applicant does not diligently pursue a permit and construction of needed bypass facilities to implement seasonal diversions and minimum bypass flows, the State Water Board would be justified in cancelling the application.

If you have questions or comments about this letter, please call me at (707) 575-6058.

Sincerely,



Dick Butler  
Santa Rosa Area Office Supervisor  
Protected Resources Division