6/19/07 BdMtg Item 9
**WR Enforcement**
Deadline: 6/6/07 Noon

SIERRA CLUB
FOUNDED 1892
Redwood Chapter P.O. Box 466 Santa Rosa, CA 95402 Ph 544-7651

May 4, 2007

Ms. Song Her
Clerk of the Board
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

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MAY - 5 2007
SWRCB EXECUTIVE

Re: Water Rights Enforcement Workshop

Dear Ms. Her:

I have attached below our comment letter on the SED for the North Coast Flow Policy (AB 2121). These express our concerns and suggestions for improved enforcement and are on point for this workshop.

I would emphasize the role of professional consultants at page 5 below who have designed illegal dams and participated in representing those clients before the board. Such non-professional conduct must come to an end.

At page 6 we address the need for SWRCB to provide adequate staffing to meet its responsibility and give meaning to this effort.

We look forward to the hearing in June.

Very truly yours,

Daniel Myers

Daniel Myers

Redwood Chapter P.O. Box 466 Santa Rosa, CA 95402 Ph 544-7651

25 August 2006

State Water Resources Control Board
P.O. Box 2000
1001 I Street, 14th Floor
Sacramento, CA 95812

Re: Draft SED North Coast Instream Flow Policy Comments

Attention: Ms. Karen Niiya Division of Water Rights

Dear Ms. Niiya;

We appreciate the opportunity to comment on the environmental review of this very important document. The passage by the legislature and signing of AB 2121 by the governor was a very major step in addressing the decline of our North Coast watersheds and the salmonid fishery. We welcome and support the prospect of instream flow protection, an end to new onstream dams and a new enforcement policy proposed in the 2002 Draft Guidelines drafted by the California Department of Fish and Game and National Marine Fisheries Service. Our comments are based upon what we have experienced first hand and represent our interest in the restoration and protection of the salmonid fishery and public trust uses of these watersheds.

We have been working for many years in the watersheds of AB 2121. We have personally seen the Navarro River, referenced in the Draft Guidelines, reduced to dryness. Summer flows have dropped progressively over the past

three decades[1] as more and more diversions have been placed on the river. The Navarro Watershed Restoration Plan of June 1998 by Entrix Inc. states:

> *… studies indicate that summer flows in the lower reaches of Anderson , Rancheria and Indian Creek are at times significantly reduced by agricultural pumping. In aggraded stream reaches summer flow may be entirely subsurface. Several monitored streams dried up completely, or had only isolated pools during the late summer months…*

In 1998 the Department of Water Resources (DWR), in response to complaints, initiated a new Watershed Investigation Program (WIP). By using existing aerial photographs of the Navarro River Watershed, the program identified the existence of 94[2] unpermitted dams requiring applications. The study was conducted using aerial maps of 1991[3] of the Navarro River watershed. The DWR log of submitted applications and approved permits for the Navarro Watershed through 1991 shows 68 existing storage sites. These newly discovered 94 diverters added to the existing 68 permitted diverters represent 58.3% of the total diversions.

Another WIP aerial survey by DWR of the Maacama Creek tributary of the Russian River disclosed " 73 sites, of which 64 had reservoirs with no known water rights."[4] We agree with the Trout Unlimited/Audubon Petition that these studies show a majority of the diverters at the time of the study were illegal and unknown to DWR.

These two aerial surveys, both in the geographic scope of AB 2121,disclosed;

- Four dams were voluntarily removed,
- 52 did not require permits
- Approximately 150 of the diverters, either voluntarily, or in response to Administration Civil Liability (ACL) fines, applied for water rights permits and entered the regulatory system.
- 122 inspections were necessitated by the DWR

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[1] See attachment A

[2] See SWRCB Order WR 2000-03

[3] See Trout Unlimited Petition Section 102 page 34 footnote 1..

[4] See SWRCB Order WR 2000-11

- Several uncooperative diverters incurred ACL fines that did not cover SWRCB's costs of enforcement.

These surveys done in 1998 indicate that there were more unpermitted diversions in those areas than permitted. The magnitude of the problem is as yet not fully determined, but these 1998 surveys done with 1991 GIS maps represent only a small proportion of the geographic scope.[5] If the Navarro and Maacama surveys turn out to be typical, the backlog will become *significantly* larger. Two current surveys in Sonoma County in process should be evaluated as soon as relevant data is available.

The problem is not just the <u>number</u> of unpermitted dams onstream, it is that the dams are constructed prior to environmental review. Many of these dams on the Navarro River were constructed onstream, without any provision for by-pass or even the capability of retrofitting a suitable by-pass. These dams are still in the application stage, still involved in studies, still unpermitted eight years after being "outed" by the WIP program.

The aerial surveys of 1998 did not stop the practice of building onstream unpermitted dams but rather confirmed that one can get away with it by applying for a water diversion permit. The Director of the SWRCB reported at the recent scoping meeting that 70% to 80% of all current pending applications are for existing illegal diversions! Because no penalties are assessed for diversion without permit, the current regulatory system tends to promote evasion of the law.

Unpermitted agricultural diverters have an economic competitive advantage over those who comply with the rules. They have usually not paid for the necessary studies on water availability, may have built less expensively on stream perhaps without by-pass control, may not have paid fees associated with water rights permits and, evaded the payment of property tax (as was shown in Mendocino County) for their capital improvement.[6] The permit policy needs to require compliance of all to achieve economic equity

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[5] See Trout Unlimited Petition Section 102 page 34.

[6] See attached letter of the Mendocino County Assessor.

NO NEW ONSTREAM DAMS

The first, most essential step is to reassert control over the watershed and stop the continued construction of new onstream dams and illegal diversions. To that end we support the adoption of the 2002 Draft Guidelines (Section 3, page 6) that states:

> *3) No Additional Permitting of Small On-Stream Reservoirs*
> *Water diversion projects requiring new permits should avoid Construction or maintenance of on-stream dams and reservoirs, including unpermitted storage ponds….*
>
> ***Justification:*** *On-stream reservoirs should be prohibited…*

The term "avoid" instead of "prohibit" was probably used because Section 7 sets out reasonable exceptions in the section titled Special Circumstances Allowing Onstream Reservoirs. However, we suggest limiting administrative discretion to those stated exceptions and suggest the following language:

> *Construction or maintenance of on-stream dams and reservoirs, including unpermitted storage ponds is prohibited unless covered by the exceptions listed in Special Circumstances Allowing Onstream Reservoirs.*

ENFORCEMENT

We have addressed most of our suggestions to the Project Goals and Objectives at Page 6 of the Checklist that states "*…the Division (DWR) proposes to include an enforcement element as part of the policy that will govern water rights enforcement actions…"* We would like to see policy provisions to return the rule of law to the process. We strongly believe there should be an enforcement policy that has consequences for failure to comply, not simply for punishment, but to restore fairness to the process. To that end we would offer several specific recommendations for consideration.

GRACE PERIOD

A short grace period should be established prior to a date certain when the no-new-dams-onstream policy goes into effect. This could encourage unidentified illegal diverters to come out of the shadows and apply for

permits under the current policy. The grace period could make adoption of the new policy more palatable to diverters giving them an option of the current policy where they would voluntarily come into the system, submit an application and bring their diversion into compliance, or failing to do so, stay in the shadows until discovered and face removal under the new policy. It would also make the point that violation of water rights law will, in the future, no longer go unpunished.

FINANCIAL DISINCENTIVES

Progressive financial consequences must attach for the failure to comply with the new policy prohibiting building onstream dams. We would suggest non-discretionary automatic fines based on the acre-foot capacity of the diversion. Additional discretionary fines could be imposed for willful misconduct.

PROFESSIONAL CONSULTANTS LIABILTY

Many dams are built with professional advice prior to application that are incapable of compliance with the water rights law. Applications are submitted to the Water Board by consultants that intentionally contain false or misleading information that results in the permitting of illegal dams. Diverting water without a permit is breaking the law and anyone who directly participates in that should be held responsible. The regulatory system currently imposes civil liability only upon the applicants and not their representatives. We recommend that in the case of willful misconduct of design professionals, the new policy include financial and/or professional sanctions such as denial of the right to represent clients before the board or in the permitting process. Design professionals who produce designs in conformance with the law should not be at a financial disadvantage to those who do not.

WORK WITH THE REGIONAL WATER QUALITY CONTROL BOARD

The North Coast Regional Water Quality Control Board's (RWQCB) prepares Action Plans to address temperature TMDL impairment in North Coast rivers. The WIP program should be coordinated with this activity. Current temperature TMDLs for the Scott and Shasta Rivers have established the relation of high instream temperatures to low flow from diversions, but these TMDLs do not have the definitive data that the WIP program would provide. Essentially all of the rivers in the geographic scope of AB 2121 are listed as temperature impaired and will be

addressed by RWQCB in the future. Aside from the WIP program, DWR and RWQCB have a common interest in unpermitted diversions that should be examined. They also now have a common interest in restoring adequate instream flows to coastal rivers.

WATERSHED INVESTIGATION PROGRAM WIP

This is an excellent program that has disclosed the extent of illegal dams on a watershed basis and should be continued. We suggest that a summary report be prepared on the findings of each study and be made available to the public, internal staff and other regulatory agencies. That is not the case now. The studies should be done in cooperation with the county's planning or resource agency and shared with the county's assessor and the RWQCB.

INCREASE STAFFING FOR DWR

The long delays in the current processing of applications pointed out in AB 2121 needs to be addressed since the provisions of AB 2121 will increase that load. Six staff members for the enforcement group is **not** adequate. We understand the reluctance of the senior staff and the Board to request additional personnel, however in this case it is the legislature and governor that is asking this staff to take on additional administrative work. This is work that will benefit the economy of the state by more efficient and equitable distribution of water. It is important to have the necessary resources to succeed. It would be very unfortunate to adopt these guidelines and have them fail for the lack of sufficient personnel.

PROVIDE INCENTIVES FOR APPLICANTS

Applicants who comply with the system and present applications with all the necessary studies showing water availability and environmental compliance with the water law should be authorized for construction expeditiously. Priority should be given to proposed legal diversions over those that are not. Where water availability reports are complete and all other environmental concerns addressed, a temporary permit system authorizing the start of construction should be considered .

DAM REMOVAL

Dam removal is not normally a desired outcome but must be considered in appropriate cases. There will be many difficult decisions where there isn't any easy answer. We ask that criteria be developed by DWR that would justify an order to remove a dam. The burden to fix such problems should be on the applicant with a time limit from date of application. Criteria should identify issues that must be brought into conformance such as fish passage, season of diversion, diversion rate and volume of diversion as well as CDF&G Stream Bank Alteration Permits, CEQA review

DWR TO COORDINATE WITH COUNTY PLANNING

DWR and the counties in the geographic scope should establish regular communication channels on the construction of new dams. Currently DWR sends the counties information and requests that they pass it on to dam builders informing them of their obligation to apply for a water rights permit. That is not adequate. The DWR should require that the counties provide DWR summary reports of new dam construction. Counties have this information and can routinely supply it to DWR. Mendocino County reported 66 new dams in a 2000-2001 report[7] following the 1998 WIP study. This information is far more timely, accurate and less expensive to obtain.

We are aware of alternatives that propose to by-pass the current water policy with a watershed approach to administration. These efforts may have limited benefit but do not address the basic compliance and enforcement issues. We also question the viability of such programs in counties where the necessary resources for support do not exist. We are concerned that this should not be a foil to evade fixing the basic regulatory water rights system.

The urgent need for the regulatory reform of AB 2121 is apparent in an environment where the great majority of water rights applications are for illegal pre-existing diversions and where a very large percentage of our water is diverted illegally and unseen by the regulatory system. This has to be stopped. The Draft Guidelines are a major step in the right direction. We

[7] See attached.

support them and endorse the provisions prohibiting future onstream dams. We support the instream flow provisions critical to the fishery and supportive of our obligations under the TMDL program. The refinements proposed by Trout Unlimited are consistent with our goals. To succeed this entire program must have the necessary funding and staff support.

We would encourage the State Board to implement their resolution 2006-0046 that would expand the geographic scope of these measures to include the Klamath River and its tributaries. The Eel River and its tributaries must also be included as soon as feasible. We look forward to addressing the final Draft SED.

Very truly yours,

Margaret Pennington
Chair, Redwood Chapter Sierra Club

Chris Malan
Water Committee Chair, Redwood Chapter Sierra Club

Daniel Myers
Water Committee Chair, Mendocino Group Sierra Club
707 895-3887

CC: Catherine Kuhlman
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