



Brian J. Johnson

Director, California Water Project

Trout Unlimited Staff Attorney

June 5, 2007

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

Re: Comments for June 19, 2007 Workshop to Receive Information Regarding Policy Direction on Water Right Enforcement

Dear Ms. Doduc and Members of the Board:

On behalf of Trout Unlimited (TU) and the Peregrine Chapter of the National Audubon Society (PAS), we submit the following comments for the public workshop for a water rights enforcement policy. Thank you for the chance to contribute to that effort and participate in what we expect to be a useful and productive endeavor.

We believe that the Board now has a tremendous opportunity to reform its practices for water right administration and restore a functioning water rights system for the first time in recent memory. Because of the confluence of a number of events – the AB 2121 policy, this contemplated enforcement policy, the Water Boards' strategic planning exercise, the efforts of many outside stakeholders to create new frameworks for water management – the coming year presents a great opportunity for the Board to make significant progress.

Because of our extensive history of work on the North Coast, our comments are most particularly directed toward the enforcement policy that must be adopted within the A.B. 2121 area. We believe, however, that many of our comments may be applicable to a statewide policy, and we support the adoption of such a policy.

Trout Unlimited and Peregrine Audubon

As you know, Trout Unlimited and PAS have a longstanding interest in these matters. Trout Unlimited is the nation's oldest and largest coldwater conservation organization, with approximately 150,000 members nationwide and almost 15,000 in California. The group's mission is to protect, conserve, and restore North America's native trout and salmon resources.

TU volunteer Stan Griffin was among the first to recognize the growing problem of unauthorized dams and highlight the pernicious cumulative effects of surface water diversions on tributaries within the region. Throughout the 1990s, Mr. Griffin and others doggedly insisted that the Board account for public trust resources in its permitting decisions. More recently, the

Trout Unlimited: America's Leading Coldwater Fisheries Conservation Organization

California Office: 1808B 5th Street, Berkeley, CA 94710

Direct: (510) 528-4772 • Fax: (510) 528-7880 • Email: bjohnson@tu.org • www.tu.org

organization was the primary supporter of A.B. 2121, which was authored by Senator Kuehl and signed by Governor Schwarzenegger and provides much of the impetus for the workshop.

Peregrine Audubon is the inland Mendocino County chapter of the National Audubon Society (NAS), a nation-wide conservation organization supporting a membership of approximately 550,000 through more than 500 local chapters. NAS has over a 100-year legacy of action, advocacy, and research. NAS was the lead plaintiff in the Mono Lake Cases, which established the first precedent that the public trust doctrine applies to the State's decisions in the allocation of water resources.

On October 27, 2004, TU and PAS filed our "Petition for Timely and Effective Regulation of New Water Diversions in Central Coast Streams," ("Petition") which remains pending before the SWRCB and other agencies. (The 70 page Petition, its 31 attached exhibits, and comments presented at the Board's March 17, 2005 workshop on the petition are available at www.waterrights.ca.gov/coastal_streams/tupetition.html.)¹ In the Petition, we exhaustively documented how water diversions along the north central coast have cumulatively contributed to the sharp decline of Coho salmon and steelhead fisheries within the Petition's geographic scope, which mirrors that of AB 2121. We demonstrated that the failure by the SWRCB, DFG, and other agencies to act on illegal diversions constitutes a systematic failure to discharge the agencies' duties under the Water Code, Fish and Game Code, and public trust doctrine. And we proposed numerous, specific recommendations for reform.

With leadership from Art Baggett and helpful assistance from Victoria Whitney and her staff, TU and PAS later joined a stakeholder working group to develop consensus recommendations for reform. That group, known informally as the North Coast Water Rights Working Group, consists of representatives for winemakers and grape growers, water developers, urban water users, other conservation groups, state and federal water agencies, and local governments. Most of the ideas emerging from that effort go far beyond the enforcement policy considered here. We hope that many of those ideas will be pursued following adoption of the AB 2121 policy, and we expect that others will be implemented independently by stakeholders working together.

The Need for Reform to Benefit Fisheries and Water Users

As the Board is well aware, you inherited a non-functional water right program, with particular problems along the North Coast. The problems with the existing water right permitting and enforcement programs are well documented – particularly within the AB 2121 geographic area. (See Petition at pp. 12-42; see also SWRCB Petition workshop comments by TU, PAS and others (at www.waterrights.ca.gov/coastal_streams/tupetition.html); 1997 SWRCB Staff Report on Russian River stream flows (www.waterrights.ca.gov/coastal_streams/russian_river_watershed.html); 2000 Peer Review (*id.*); 2002 NMFS/DFG Joint Guidelines (www.waterrights.ca.gov/coastal_streams/docs/nmfs-dgs-fish-guidelines_6-17-02.pdf); 2005 State Auditor report on water right processing (www.bsa.ca.gov/pdfs/reports/2005-113.pdf).

¹ We incorporate herein the contents of the TU/PAS Petition and our statements at the workshop.

The current system harms all sides.

- *Current practices punish water right applicants – especially those who seek to play by the rules.* Most water diverters want to uphold the law. Because of the application backlog, however, prospective water users must wait many years between the time they file a water right application and the time they receive a decision from the agency. The applicants who seek a water right before diverting water, as the law requires, are punished most of all. Predictably, some prospective water users in the AB 2121 region have chosen to divert first and seek a permit later. When those people are discovered diverting water without a permit, the agency almost always allows them to continue diverting water provided only that they file a water right application and pay annual fees. There is rarely any other consequence. As a result, the most conscientious landowners remain in application limbo while watching their neighbors and competitors profit for having failed to file an application in the first place.
- *The current system threatens fish, wildlife, and other public trust resources.* As the application backlog has grown within the AB 2121 area, our struggling salmon and steelhead species have fallen deeper down the path toward extinction. Most of the pending applications are for projects already constructed. Not only do they continue to operate without authorization. They also operate without any interim conditions designed to protect senior users or instream beneficial uses. The cumulative effects of water diversions are a major cause of the species' decline, as NOAA Fisheries highlighted in the federal ESA listings for Coho salmon and steelhead, and the California Department of Fish and Game pointed out in its Coho Salmon Recovery Strategy. (See Petition at pp. 13-18 and citations therein.)
- *Current practices fail to protect senior water right holders.* Just as unauthorized diversions are allowed to operate without any regard to potential harm on fish and wildlife, they are also allowed to operate without any regard to potential harm to senior water rights holders.
- *The current system severely impairs the SWRCB's ability to properly evaluate and condition applications.* The practice of applying for a water right after constructing a diversion and beginning operations, instead of before, makes the agency's job harder. Decisions to impose terms and conditions requiring a project retrofit, or even removal and relocation, can be more difficult to make and implement than would the same decision be if applied to new construction. In the AB 2121 region, for example, most existing but unauthorized diversions include an on-stream reservoir, and many of those are built in locations that are clearly inappropriate. The fact that the reservoirs are already constructed creates a significant dilemma for the Board. (See SWRCB's July 19, 2006 Notice of Preparation for the AB 2121 policy; North Coast Regional Water Quality Control Board's August 25, 2006 comments on the AB 2121 NOP.)

A permitting system such as we have today cannot be allowed to continue. TU and PAS propose three general solutions.

1. First, the agency must improve water right application processing so that people who want to follow the rules, can do so without undue delays. We believe the Board's adoption of the AB 2121 policy will help in that regard. More broadly, we remain committed to our efforts other stakeholders to develop better procedures for processing water right applications and petitions.
2. Second, promote best practices. We believe that regulatory agencies should reward best practices, just as they need to provide negative incentives for noncompliance. As you know, Trout Unlimited is working with representatives from the wine industry and other water users to develop new ways to manage water diversions and protect coldwater fisheries. In responses that follow, we will highlight a number of specific means to reward those who follow the best practices.
3. Finally, the solution must include sensible enforcement. Enforcement is essential not to extract punishment or to harm water users; it is necessary to ensure that beneficial uses are protected, and to level the playing field so that water users who attempt to play by the rules will no longer be at an unfair disadvantage.

Most of our suggestions can be implemented under existing statutory and constitutional authority. A few might require legislation. Most could benefit from additional staffing and funding. We encourage the Board to think broadly and to develop the best possible policy. If portions require legislation or resources, the Board should adopt those portions that do not, and seek legislation and funding for those that do.

In the comments that follow, Trout Unlimited will answer the questions posed by the workshop notice. We will also make numerous other specific suggestions to improve the agency's enforcement program. However, the specific suggestions are less important than the overriding imperative facing the Board, which is to reestablish a functioning water right system.

Response to Workshop Questions

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

Yes. The State Water Board must adopt enforcement provisions in its AB 2121 policy for the geographic area from San Francisco Bay to the Mattole River.

With AB 2121, the Legislature and the Governor expressed clear frustration with the crisis over water rights governance, and directed the SWRCB to adopt a policy for water right administration that would steady the ship. (*See* Stats. 2004, c. 943 [A.B. 2121], Legislative Findings [recounting stalemate over water right administration since 1997].) In order for the State Water Board to reestablish a functioning water right system within the AB 2121 geographic area, it will have to reform its manner of processing permits and adopt a sensible enforcement

policy. A permitting system cannot function if there is no mechanism in place to process permits for those who follow the law, or if there is no consequence for those who disregard the law.

More generally, the State's Recovery Strategy for California Coho Salmon, the state and federal endangered species listings, and the Water Code itself all place a high priority on adequate enforcement of existing laws in order to restore healthy populations of anadromous fish. (*See* Petition at pp. 13-18, response to Question 2 below, and citations therein.)

Your agency's July 19, 2006 Notice of Preparation for the AB 2121 policy indicated that the SWRCB intends to propose an enforcement component as part of its AB 2121 policy. We support that decision.

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, the State Water Board should have a written enforcement policy for water rights administration throughout the state. Water Code section 1825 provides: "[i]t is the intent of the Legislature that the state should take vigorous action to enforce the terms and conditions of existing permits and licenses to appropriate water and to prevent the unlawful diversion of water."

The Recovery Strategy for California Coho Salmon states that "enforcement to prevent unauthorized diversion and use of water and water permit processing" should be a "high priority." (Recovery Plan § 7.20, Enforcement of Existing Laws.) The Recovery Strategy, which was developed with input from the SWRCB, also calls out "streamflow," "water rights," and "fish passage" as priority areas of focus and identifies numerous specific actions for each, including the need to address unauthorized diversions and require better monitoring of diversions and streamflows. (*Id.*, §§ 7.1, 7.2, 7.3.)

Without a written policy to prioritize and direct its enforcement actions, it is difficult to see how the SWRCB can carry out its duties under the law. A written enforcement policy would also help provide transparency, consistency, fairness, and certainty for water users. It would assist the agency in protecting fisheries and other beneficial uses of water, and aid in the cost efficient use of public resources.

As to whether the statewide policy should be the same as the AB 2121 policy, we agree that certain basic principles are likely to apply statewide. However, California is a big state with varying water management needs, and we think the Board should have policies that can be adapted for local circumstances. There are issues particular to the AB 2121 area that require special attention and perhaps a different approach. We recommend that the State Water Board retain the flexibility for those issues to be addressed via provisions specific to the AB 2121 area.

However the Board chooses to structure its statewide enforcement policy, it *must not delay adopting the enforcement element of the AB 2121 policy*. That policy must be adopted, along with the remainder of the AB 2121 policy, by the legislatively mandated deadline.

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

Generally speaking, the State Water Board should focus on encouraging compliance, protecting senior water right holders, and conserving natural resources. Geographically, enforcement should be prioritized to those watersheds where there is reason to believe that water diversions are causing the most potential harm to beneficial uses of water. (See also our response to Question 4.)

In addition to prioritizing the prevention and remediation of harm, the State Water Board may also take into account other relevant factors, as it does in the Water Quality Enforcement Policy. Such factors might include, for example, the desire to have consistent responses to those who knowingly falsify or withhold required information, or for repeat violators.

4. Currently the State Water 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 specific watersheds? If so, how should those watersheds be selected? If not, what other basis should be used?

Yes, the State Water Board should continue to organize its water right enforcement investigations around particular watersheds.

Priority should be given to watersheds where there is reason to believe that (1) there are unauthorized water diversions and (2) stream flow related threats to human health or aquatic resources. When considering threats to aquatic fish and wildlife, the Board should give particular consideration to threats to rare, sensitive, threatened or endangered species.

The agency should also prepare a brief annual summary report providing the findings of that year's Watershed Investigation Program (WIP). The summary should disclose to the public the number of streams surveyed, number of potential unauthorized diversions identified in each, number of authorized diversions existing on each, and enforcement results. This summary could be released together with the legislatively required AB 2121 report.

The SWRCB should also work through the budget process to request additional funding for its WIP. (*See* Coho Recovery Strategy § 7.20.)

As of our 2004 Petition, the State Water Board selected only four watersheds for investigation throughout the entire State in any given year. (*See* Petition, p. 37.) In recent years, the WIP had only completed two such investigations within the geographic scope: namely, Maacama Creek and Navarro River watersheds. We noted that the Petition's (and A.B. 2121's) geographic scope is larger than Connecticut, Delaware, New Hampshire, New Jersey, and Rhode Island combined. At that pace, we wrote, the State Water Board would complete the first inspection of all such watersheds within this scope at an unknown date more than a decade hence.

Since we filed the Petition, the situation has become even worse. In recent years, the WIP program has essentially ground to a halt as a result of insufficient resources and competing demands. There may be some who actually prefer that result, but in the long run it harms most water rights holders by institutionalizing unfair business advantages and perpetuating a dysfunctional regulatory system.

Without an effective investigations and enforcement program, the agency will never get its program back on track. The SWRCB should prepare a WIP proposal that would complete the investigations within a reasonable period of time, and seek sufficient resources to get it done.

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?

The State Water Board should provide an opportunity for corrective actions under some circumstances. There will be many times—for example inadvertent or minor violations of a permit or license—when informal enforcement action is the appropriate response. In such cases, a verbal message, a letter, or a notice of violation followed by an opportunity to cure may be the best response.

It is important to emphasize, however, that filing an application for a water right is *not* “corrective action” for a diversion of water without a water right or a diversion in excess of the right. “Corrective action” means actually coming into compliance with the law, which means ending an unauthorized diversion.

Relying exclusively on voluntary compliance is less appropriate where there is clear evidence of harm to fish and wildlife or senior water users, where there is evidence of a knowing violation of the law, where there are repeat violations, or where the water user received a large unfair business advantage from the unauthorized diversion. For those cases, the State Water Board should develop and implement, at a minimum, a standard Administrative Civil Liability (ACL) assessment, and a program to require remediation of any harm the diversion caused.

We have an additional suggestion as well. The Board should evaluate a limited “grace period” for water users to file water right applications for previously constructed diversions. This “grace period” (perhaps one year from adoption of the AB 2121 policy) would be followed by a limited “moratorium.” During the grace period, water users could apply for a water right without facing heightened penalties. After the grace period, new water rights for previously operated illegal diversions would be granted only upon payment of the maximum statutory assessment. This approach would have the benefit of encouraging people with unauthorized diversions to voluntarily seek compliance, while also signaling a date certain after which the Board expects the practice of diversion without a water right to come to an end.

As for time, we believe that most corrective actions can be completed within a matter of months. More complicated corrective actions (for example, those that require construction) may take somewhat longer, but should usually not take more than one year.

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?

Yes, the State Water Board should address existing applicants that are diverting water without a water right. Most critically, the Board must act to prevent the ongoing harm caused by unauthorized diversions. Moreover, if the Board continues to allow unauthorized diversions to go forward without sanction, many water users will continue to divert first and ask for a permit later.

When it receives an application for an existing unauthorized diversion, the SWRCB should allow that diverter to continue to divert water while the application is pending *only if* the agency finds, on the basis of substantial evidence, that there will be no harm to listed species or other public trust values, and that there will be no harm to existing water right holders. An applicant that seeks authorization to operate on the basis of a pending application should have the burden of producing evidence to support the agency’s findings and be required to submit such information with the application in order to justify a temporary permit. If unauthorized diversions are allowed to continue with a temporary permit while the application is pending, the diversions should be subject to certain basic interim conditions such as a season of diversion and a standardized minimum bypass requirement.

If an unauthorized diversion eventually receives a water right permit, the SWRCB should tie issuance of the permit to payment of a standardized assessment. Such an assessment should be calculated to eliminate the unfair business advantage gained by unauthorized operations and to mitigate for the harm the diversion caused to fish, wildlife and other beneficial uses. (See also response to Questions 11 below.)

The SWRCB should ensure that funds from such assessments be used for stream or stream flow restoration projects in the region in which the diversion was located. An applicant could be encouraged to propose direct mitigation measures (such as stream restoration on applicant's property) as an alternative to assessment of an ACL. The SWRCB could then accept such measures where it finds the measures have an equivalent or greater value to the ACL that would have been assessed. Another approach might be to provide for Supplemental Environmental Projects.

Trout Unlimited and PAS would generally prefer that the agency direct the results of enforcement to restoration projects, as compared to the assessment of a monetary ACL. This is because the crucial imperative for the enforcement policy, as we see it, is to prevent and remedy harm. The regulated community may also prefer such a procedure because it limits the opportunity for a regulatory agency to engage in (or be perceived as engaging in) what is sometimes called "bounty hunting," that is, to treat its enforcement program as a stream of additional revenue. The Coho Recovery Strategy also recommends directing fines toward restoration projects in the watersheds in which the violation arose. (Recovery Strategy § 7.20.)

Again, we reemphasize that our intent is not to extract punishment or to harm water diverters. Rather, we mean to protect beneficial uses, and to create a level playing field for the vast majority of water users who want to play by the rules and have been at an unfair disadvantage in recent years.

- 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 changes in place or purpose of use or point of diversion 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 petitioners that are diverting water in violation of the conditions of their water right permits or licenses? Under what conditions should the State Water Board initiate enforcement actions against these petitioners?**

The widespread practice of making unauthorized changes presents similar administrative challenges as the widespread practice of unauthorized diversions discussed in Question 6. For example, it creates an uneven playing field for the most conscientious water users, who wait (sometimes for many years) for authorization before implementing the change. It also puts the SWRCB in a position of granting, denying or conditioning something that already exists, which is in practice (if not in law) more difficult than conditioning something that has not yet been constructed.

However, change petitions often present less risk of harm to instream resources or other water users than do new applications. (A change in place or purpose of use that would not affect return flows, for example, falls into that category.) It may be possible with many petitions for the agency to readily make a finding that the petition presents no plausible risk of harm, and therefore make findings necessary to allow the unauthorized change to continue while the petition is pending.

Even if there is no harm, allowing unauthorized changes to continue while the petition is pending leaves unresolved the problem of an unfair playing field for petitioners who wait for authorization, and creates unintended incentives to bend the rules. To address these problems, we recommend that the SWRCB consider an appropriate standardized ACL payable upon processing the petition.

- 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 the potential enforcement options?**

Given the complexity of these issues, we recommend that the Board focus initially on developing its enforcement priorities and objectives. Once the agency formulate its principles for how a functional enforcement system should operate, the agency can evaluate which specific enforcement tool is most appropriate for a given circumstance, and whether additional tools must be developed.

Again, we stand ready to work with the SWRCB if additional authority or resources are needed.

- 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 and Desist Order?**

The recipient of a CDO should divert water while coming into compliance only if the diverter can show that such diversion will cause no harm, or if it is impossible for the structure *not* to divert water without modifications. In the latter case, the time schedule should mandate compliance as quickly as feasible.

- 10. Under what circumstances, if any, should a Cease and Desist Order require the permanent removal of an illegal diversion facility?**

The agency should require removal of illegal diversion facilities where they cannot be operated (as the facilities currently exist or with practicable modifications) without causing unreasonable harm to senior water users, fish and wildlife, or other beneficial uses of water.

Within the AB 2121 area, for example, many of the pending applications are associated with previously constructed on-stream reservoirs. The current and anticipated SWRCB policy is

to disallow new on-stream reservoirs in most circumstances. As noted above, the fact that some reservoirs have already been constructed puts the SWRCB in the difficult position of whether to force the water user to remove the reservoir and reconstruct it in another location. Although such decisions are difficult, the SWRCB must be willing to require relocation of reservoirs that cause unreasonable harm wherever the agency would not have permitted construction of the reservoir in the first place. If it does otherwise, it will unfairly punish those who have played by the rules.

In some cases, the appropriate action may be an order to render a facility incapable of diverting water, and/or reroute the stream around the diversion and reservoir, rather than to require the entire facility to be removed. (For example, if an on-stream reservoir has collected significant quantities of sediment or contaminants which cannot easily be removed.)

The agency may also consider requiring removal of illegal diversions where the diversion's owner has repeatedly failed to comply with past directives and permit terms.

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 the monetary penalty?

Generally speaking, the standard assessment for an unauthorized diversion or violation of a permit or CDO should be sufficient to (1) mitigate for harm caused by the diversion and (2) provide restitution for the unfair business advantage gained by unauthorized operation of the facility. Assessments should be predictable and consistent.

The SWRCB should consider developing a standardized system for making assessments. Considerations might include the size, duration, location, and type of the diversion, harm to senior rights holders, harm to natural resources, and the value of alternative water. For example, a guideline for such standards could be an assessment for the water appropriated without authorization, valued at a comparable price as that being charged for similar water by the current highest-priced water district in the Central Valley (chosen from the largest 25 districts).

Where possible, funds should be used for stream restoration projects in the watershed in which the diversion operated. As noted above, TU and PAS would generally prefer such an outcome to the assessment of a monetary ACL because the ultimate goal is to prevent and remedy harm. One approach might be for the diverter to provide direct mitigation measures such as stream restoration, and the agency to accept such measures in lieu of monetary assessment, provided the agency finds they have an equivalent or greater value to the ACL that would have been charged.

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

Again, we recommend that the Board focus initially on developing its enforcement priorities and objectives. Once the agency formulates its principles for how a functional enforcement system should operate, the agency can evaluate which specific enforcement tool is most appropriate for a given circumstance, and whether additional enforcement tools must be developed. We stand ready to work with the SWRCB if additional authority or resources are needed.

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?

The SWRCB should revoke permits or licenses where diverters repeatedly violate the terms of their water rights, or have failed to cure repeated notices to correct violations.

The SWRCB's actions should be consistent, predictable, and transparent. This is one regard in which a written enforcement policy would be a great benefit for both water users and outside stakeholders.

14. The State Water Board has the authority to revoke water right permits and licenses 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?

Permit and license holders should be given notice that if they repeatedly fail to pay required fees their permits or licenses will be revoked. Again, the SWRCB's actions should be consistent, predictable, and transparent. This is another regard in which a written enforcement policy would be a benefit to all parties.

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?

First, we note that a water diversion should not be operated merely because the diverter has filed a water right application. If and when the SWRCB reestablishes this principle, it will have little trouble with a lack of diligence from applicants.

Even if a diversion is not operating, an applicant that fails to exercise diligence creates uncertainty for other water right applicants and water right holders. Therefore, the State Water Board must be willing to cancel applications for lack of diligence.

Without a consistent policy, however, there are likely to be cases in which the SWRCB believes an application should be canceled for lack of diligence and the applicant believes the delay is caused by the SWRCB or other agencies. In order to fairly cancel appropriate applications and to provide transparency and predictability to applicants, the agency should clearly define its procedures through a written policy.

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

Trout Unlimited and PAS have a number of further suggestions, which we detail below.

A. Best Practices

As the Board reestablishes negative incentives for illegal actions, it should also take the opportunity to provide more effective positive incentives for good practices.

The Board could, for instance, institute expedited application processing procedures for those prospective diverters who have refrained from constructing facilities and diverting water while their applications are pending.

The Board should also direct staff to work with stakeholders to develop expedited procedures for irrigators to make beneficial changes to their operations. In coastal areas with Mediterranean climates, for example, there is a widespread desire to substitute rainy season water stored in off-stream ponds as an alternative to more harmful diversions at other times of the year. This is one of the ideas discussed at length in our AB 2121 stakeholder working group, and it seems to be widely supported as a method of optimizing irrigation and conservation values. We believe that many irrigators in coastal areas who divert water in dry months pursuant to old licenses or riparian rights would be eager to substitute off-stream winter storage ponds, for both reliability and stewardship reasons. Trout Unlimited is actively pursuing a cooperative program with wine industry representatives, fish and wildlife agencies, and your staff to assist with permitting and financing these practices.

B. Monitoring and Reporting

With its enforcement policy, the State Water Board should remember the central role that effective monitoring and reporting plays in a functioning water rights administration system. This information is necessary to assure compliance, and to inform future decisions. Therefore, we recommend that for existing and new water rights:

- i. Each point of diversion should be required to provide continuous monitoring and reporting of diversion, or (if infeasible) an alternative that provides the functional benefit.
- ii. Each point of diversion should be required to provide real-time monitoring and reporting of physical conditions necessary to achieve a quantifiable

management objective for the affected reach, such as inflow, outflow, water quality conditions, depth or width of wetted channel, or some combination. Where the permits, licenses, or local stream management plans lack other quantifiable management objectives, each point of diversion should be required to provide at a minimum real-time monitoring and reporting of stream flows directly below each point of diversion.

- iii. The SWRCB should work with other agencies and stakeholders to develop a program for systematic gauging of priority streams, and to make stream flow information available in real time on the Internet. This information would be invaluable for individual water users, water agencies, and others with an interest in managing diversions to protect rivers and streams.

C. Mitigation and Restoration

Trout Unlimited and PAS have pursued unauthorized water diversions over all these years for a simple reason: they cause tremendous cumulative harm to fish and wildlife. In response to Questions 6 and 11 we suggest stream restoration as an alternative the SWRCB could accept for an equivalent ACL, where ACLs would otherwise be appropriate. Here, we propose a more direct approach.

All permits issued for diversions that have operated without authorization should include terms requiring mitigation and remediation of past adverse impacts on the stream, as well as its fish and wildlife resources. The SWRCB should require each property owner who has undertaken an unauthorized diversion to include in the corrective permit application proposed measures to remedy the past impacts. Specifically, we recommend that:

- i. The State Water Board should amend the standard form of application to require representations under oath, and with appropriate proof of the date when any existing diversion subject to the application began, and how much water has been stored or diverted.
- ii. An applicant who has undertaken unauthorized diversion should be required to implement within two years of notice of violation (as a condition of application approval) an agency approved plan to remedy the environmental impacts that resulted from such unauthorized diversion, regardless of the status of permit approval.
- iii. Impacts to be addressed include, but are not limited to, fish passage (adult and juvenile), impairment of natural sediment transport, and diminished or lost riparian habitat.

We understand that under the SWRCB's current interpretation of CEQA (with which we disagree) the baseline includes the unauthorized construction; therefore, CEQA provides

minimal opportunity for mitigation measures designed to address that harm. (*See* June 10, 2005 Chief Counsel's memo to V. Whitney.) However, as the SWRCB has repeatedly acknowledged, it is still required to conduct a public trust and public interest evaluation of each proposed permit, so the agency may require mitigation and stream restoration, regardless of where it sets the CEQA baseline. (*Id.*, pp. 1, 7-8.)²

D. Compliance Plans

Compliance plans should be prepared in advance of permit issuance, since the manner of complying with bypass and other permit terms strongly influences the determination of whether proposed terms are sufficient. In addition, we recommend that:

- i. In general, the design of each storage or diversion facility should, without active intervention (such as an operator's control), limit diversion to the allowed maximum and allow the required bypass flow.
- ii. A licensed engineer should be required to certify the adequacy of such designs.
- iii. To promote quicker processing of permit applications and better compliance, SWRCB should also convene a technical team of stakeholders and other agencies to develop standard reference designs for water diversions and storage. Such designs will focus on cost-effectiveness and enforceability, and might include designs for retrofitting existing diversions to comply with bypass requirements, constructing diversion points for new off-stream storage ponds, or (if it can be done) reliable and enforceable active management systems. The standard designs should be approved by SWRCB in advance for general use by prospective diverters.

E. Reserved Authority to Address Cumulative Effects

State Water Board should explicitly retain reserved authority to remedy cumulative impacts on fisheries, riparian habitat, and associated wildlife under applicable law (including ESA), in addition to general reservation to protect public interest. The term will specify the procedures for exercise of this authority, including a duty to periodically assess the cumulative impacts.

² To the extent the SWRCB adheres to the present CEQA interpretation, however, that interpretation places a greater obligation on the agency to have an effective enforcement program. (*Id.*, *see id.* at p. 5 [noting that the courts have stated that it is "preferable to rely on direct enforcement against illegal activities rather than using the CEQA baseline as a means to require mitigation in place of enforcement."].) Revisiting the CEQA baseline policy might provide a more elegant means to get to the same result.

F. Inspections

State Water Board or RWQCB staff, alone or with DFG or NOAA Fisheries staff, should have explicit reserved authority to inspect a point of diversion without prior notice. Peace officer status should not be necessary. The Water Boards should request sufficient funding to conduct the occasional compliance inspection.

G. Groundwater Pumping and Surface Flows

As Trout Unlimited emphasized in a recent report on groundwater in Western states, groundwater withdrawals are increasingly harming coldwater fisheries. We reported in “Gone to the Well Once Too Often: The Importance of Ground Water to Rivers in the West” (available at www.tu.org/groundwater) the disturbing trend of new water users to use wells because river flows are insufficient. Of course, much groundwater is directly connected to surface water, and the resulting draw-down of the water table can have significant consequences for surface water rights holders as well as fish.

Although the SWRCB lacks permitting jurisdiction over many types of wells, the enforcement policy developed by the agency should take into account the groundwater that does lie within its jurisdiction. Frequently, wells do draw from jurisdictional “subterranean streams” and harm fishery resources. This is true in much of the AB 2121 area, for example. Here, the SWRCB should develop maps showing the boundaries of its jurisdiction. The agency should also routinely consider such wells in its WIP and in response to complaints. Finally, the SWRCB should work with other agencies to develop information clarifying the relationship between groundwater pumping and surface flows, even if the well might not draw from a jurisdictional subterranean stream. Such information would be a great aid to water users and other interests seeking to conjunctively manage water within a basin.

H. Protecting the Public Trust and Preventing Unreasonable Use

The bulk of our comments focus on enforcement regarding post-1914 appropriative rights, for which the SWRCB has exclusive jurisdiction to issue and condition permits. Of course, these permits are not the agency’s only responsibility. It also regulates other rights, including pre-1914 and riparian, to prevent waste or unreasonable use. (*See* Water Code §§ 100, 275; California Constitution, Article X, section 2.)

More generally, the State Water Board must “provide for the orderly and efficient administration of the water resources of the state.” (Water Code § 174.) To perform these functions, the Board may: “(A) Investigate all streams, stream systems, portions of stream systems, lakes, or other bodies of water; (B) Take testimony in regard to the rights to water or the use of water thereon or therein; and (C) Ascertain whether or not water heretofore filed upon or attempted to be appropriated is appropriated under the laws of this state.” (*Id.* § 1051.)

The Board’s function “has steadily evolved from the narrow role of deciding priorities between competing appropriators to the charge of comprehensive planning and allocations of

waters.” (*National Audubon Society v. Superior Court of Alpine Co.*, 33 Cal.3d 419, 444 [1983]) The State Water Board may reexamine prior diversions to determine whether they should be changed to protect the public trust uses of the affected waters. (*See id.* at 446.)

Within the AB 2121 area in particular, an exclusive focus on new applications for water rights may not be sufficient to protect public trust resources, including endangered salmon and steelhead. Such a focus may also be unfair and inefficient. A comprehensive approach is more promising. We therefore propose certain narrow changes to the SWRCB’s current practices for the Board’s consideration.

First, in past WIP investigations, the SWRCB has largely ignored both groundwater wells and also direct diversions that appear to operate on a claim of a riparian right, without even a minimal attempt to determine whether such diversions are lawful. The agency has done so on the reasonable assumption that such investigations might be time consuming and difficult. It has instead focused on obvious surface impoundments without a recorded water right. The Board should direct staff, at a minimum, to verify that claimed riparian diversions within sensitive basins in the AB 2121 area are legitimate, and to verify that groundwater pumping is either non-jurisdictional or covered by an appropriative right.

Second, a small number of the most important permit terms may need to be applied to existing as well as new diversions. Specifically, we recommend that the Board consider within this class requirements for monitoring and reporting, as discussed above. In the AB 2121 policy, the Board should also be prepared to define when it is necessary to impose on existing diversions new conditions for bypass flows, fish passage, fish screens, and perhaps other subjects.

I. Coordination with DFG, Counties and Other Agencies

In the TU/PAS Petition, we noted the opportunity for improved coordination between SWRCB, Counties, and other state and federal agencies. We refer to our recommendations there. We note again that even today many counties within the AB 2121 area continue to grant permits for water diversion projects without regard to whether the applicant has a water right. If the SWRCB can work with the counties to improve coordination, it can cut the number of applications for previously constructed projects.

Similarly, we note that many municipalities in the AB 2121 area routinely grant development permits (and issue “will serve” letters) for urban development for which there is only a pending water right application or change petition. So long as this continues to be the case, the SWRCB will continue to find itself in the difficult position of considering applications for development that has already taken place.

J. Written Policy for Handling Complaints

TU and PAS recommend that the enforcement policy include additional guidance for the enforcement staff in handling complaints. The existing SWRCB guidance on complaints provides basic information on the process for filing or answering a complaint, but very little

guidance establishing priorities or standards for agency action. Additional guidance and transparency would benefit all parties.

It is also clear that the SWRCB's resources for investigating and prosecuting complaints are woefully inadequate. As it develops its enforcement policy it should determine the level of staffing and funds required to protect senior rights holders and public trust, and request such resources from the Legislature.

K. Contractors and Consultants

SWRCB should consider a program to register and/or certify consultants who design or construct water diversions, and ask applicants to use registered consultants. Consultants could, for example, be prohibited from representing clients in permit applications if those clients have used designs prepared by the consultant to build a diversion without permits. This could provide a powerful incentive for consultants to encourage scrupulous compliance with the law.

L. Fully Appropriated Streams

We recommend that the SWRCB once again make a regular practice of listing streams as fully appropriated when there is no available water that can be diverted without harming senior rights or the public trust.

M. Identification of Funding and Staffing Needs

The Board should direct staff to prepare an analysis of funding and staffing levels needed to accomplish the objectives of the enforcement policy and request the necessary funding.

Conclusion

Thank you again for allowing Trout Unlimited and Peregrine Audubon the opportunity to comment. We offer our input constructively, and hope our suggestions will prove useful in the search for solutions. We do not pretend to have all the answers, but we remain convinced that it is possible to reform water right administration in ways that work for all water users and for all beneficial uses.

For this workshop, the Board will receive a wide range of comments from stakeholders with broadly divergent views of the water right system. On individual questions, no two participants may agree. But we are likely to be united on a few key points. No one can deny the problems with the current system, the drastic decline of salmon and steelhead populations, or the need for change. A written enforcement policy is a good step forward.

We look forward to attending the workshop and to pursuing these matters at greater length. In the meantime, if you or your staff have any questions or would like to discuss the enforcement policy directly, please give us a call.

Sincerely,



Brian J. Johnson
Director, California Water Project
Trout Unlimited



Charlton H. Bonham
California Director & Senior Attorney
Trout Unlimited
1808 B 5th Street
Berkeley, CA 94710
(510) 528-4772
(510) 528-7880 (fax)



Richard Roos-Collins
Natural Heritage Institute
100 Pine Street, Suite 1550
San Francisco, CA 94111
(415) 693-3000
(415) 693-3178 (fax)
Counsel for Trout Unlimited and the Peregrine
Chapter of the National Audubon Society