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Affiliate of Redwood Coast Watersheds Alliance

State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

CannabisWR@waterboards.ca.gov

Subject: Water Rights Enforcement

Dear Water Board Staff:

I am writing you in response to your request for ideas (as comments) directed at improving enforcement of water rights and diversion policy.

Coast Action Group has a very long history of supporting action to protect and recover beneficial uses on north coast rivers and streams (flow and diversion policy, enforcement of diversion and water quality policy, TMDLs, and Implementing Programs – WDRs and Waivers on forestlands and agricultural use lands). All of these efforts have been directed at attaining Water Quality Standards in water bodies listed on the State’s List of Water Quality Limited Segments (concerning the listing and recovery of north cost streams where the beneficial use of Cold Water Fishery is not being met – due to the pollutants of sediments, temperature, nutrients and lack of DO). Please be aware that flow impairment (in part – due to failure to enforce water rights and diversion policy) is a major factor contributing to the failure of these impaired waterbodies to meet (attain) Water Quality Standards.

Thus, it is obvious there needs to be consideration of issues appurtenant to enforcement of water rights and diversion policy – if the objective is to address and improve conditions on these impaired listed waterbodies.

Below – is the Summary of one case - that Coast Action Group and the State Board/Division of Water Rights has been working on for over 20 years. For over 20 years the State Board/Division of Water Rights has pursued compliance with conditions attached to North Gualala Water Company Permit #14853 and Application #31792. For 20 years the North Gualala Water Company has failed to comply with minimum by-pass flow standards, conservation standards, and failure to develop a contingency plan or alternative water source (all to the detriment of the fishery of the Gualala River).

Review of this file – that indicates that the State Board/Division of Water Rights attempted to enforce said conditions but has not been able to attain compliance over this period of time is an indication (point to areas of action) of what needs to be fixed to attain progress in enforcement. Thus, I am asking you to review this file in your consideration of water rights enforcement.

Discussing these issues with Steve Herrera and Barbara Evoy – the issue presented was that there was not sufficient staff to deal with these issues – which were piling up and backlogged to the point that not all that much was getting accomplished in the area of water rights and diversion enforcement. If the issue is staff (or the lack thereof) – then more work needs to be done to attain adequate staffing to address water right and diversion enforcement.

It is noted that there has been staffing added to deal with cannabis diversion issue enforcement. Though cannabis diversion issues exist and are a problem, cannabis issues (in sum total) are not the overwhelming issue. The issues are across the board – from all agricultural diversion(s) to urban and rural water company water supply issues – the development and enforcement of controls to protect beneficial uses (and water quality objectives) need to be addressed. There is no need of a special unit just to deal with issues related to cannabis cultivation.

Of course, enforcement issues should be managed on a prioritized basis – with the more serious issues being considered first.

There are issues with small (and large) water purveyors (public water systems) where the cost of resisting enforcement gets passed on to the rate payer. Thus, there is a financial benefit resisting compliance – where the cost of litigation, studies, and response to Orders is passed on to the rate payer. This issue also resides with the CPUC allowing such costs of resistance to be passed on to the rate payer. This issue needs examination – and – may only be solved through legislation.

Water Rights enforcement is a public trust issue – and must be focused on the public trust. Violations, either reported as complaints or discovered by staff, must be investigated and effectively administrated.

With the Trout Unlimited Petition (2004 – Attached) – pointed out many inequities and issues related to diversion (in a limited regional area – but applicable over the entire State). This Petition resulted in SWRCB Policy for the Maintenance of Instream Flows in Northern California Streams. Additionally, part and parcel to these ongoing enforcement issues was consideration of flow policy and enforcement on the watershed wide basis (paper – attached).

Re-visiting these issues might help with assessment related to development of more comprehensive enforcement policy.

POLICY ISSUES

We suggest that it may an important consideration for, both, the Regional Board and State Board staff to work together in a coordinated effort for attainment of goals (enforcement of State Water Code – including water rights and related conditions attached to a permit) and in the development of enforcement actions on specific cases.

For continuing violations ACLs may be applied. An evaluation of actual harm and/or potential harm must be a major factor in consideration of prioritization of enforcement actions and the application of any penalty(s). Additional factors of consideration – degree of threat, level of toxicity, and a grading scale - as applied (as policy language) appear to have a tendency to be discretionary. Discretionary action and application of policy may tend to be a major factor in the enforcement process. (there is no way around that fact). Thus, appropriate and beneficial outcomes must also consider the current status of the waters affected – high quality or impaired, cooperative attitude of the violating discharger, and the likelihood or assurance of remedy or recovery of the resource.

Commensurate and equitable penalties must meet standards: assurance of resource recovery, deterrence/resource protection, and be equitable in terms of lost resources (beneficial uses) and the cost of prosecution of an enforcement action. If “equity” is a consideration, as stated in the policy, all costs and effects must be part of that consideration.

Policy consideration of the factor of the divertor’s history and conduct is appropriate. Divertors that are culpably responsible for violations and/or that have demonstrated serious negative histories should be subject to (and understand that they will be held to) serious compliance standards and the possibility of extensive penalties. Insufficient penalties should not be allowed to be a cost of doing business – or – a cost that is passed on to the public. Likewise, accidental incidents and cooperative divertors should be acknowledged by working with them to resolve issues.

Equity is an issue to be acknowledged in the policy. However, certain facets of this issue are not fully realized in the policy (all costs to the resource/loss of beneficial uses and recovery costs). The policy application of “Equity” does consider issues of: competitive advantage, ability to pay, deferred expenses gained by not employing conditions or BMPs, etc.. However, the total cost consideration of applicable penalties, resource loss, recovery costs, and Board case management costs need to be addressed – in the enforcement policy. All costs attributable to actions needed to recover Water Quality Standards, including loss of beneficial uses (to the public), and related enforcement activity (including investigation and prosecution of a violation) must be considered in terms of Equity.

The concept of progressive enforcement is acceptable – if the desired outcomes of protection and/or recovery of beneficial uses is insured. Progressive enforcement fits with the need to manage limited resources and appears to be a logical approach for securing cooperation in goal attainment. If a violation is small, it may only take a phone call to get it fixed. However, if a violation is large and compromises beneficial uses, or when Water Quality Standards are not being met (waterbody impaired status exists), or when the discharger has a history of not being cooperative - in these cases formal enforcement actions should be prompt.

In cases where informal contacts are made seeking compliance - specific performance actions and deadlines should be made clear to the discharger and a record should be kept on these contacts and specific compliance details.

Alan Levine, for Coast Action Group