

Water Branch input for Water Rights Enforcement Policy

1) Interim Conditions for illegal diverters coming into compliance

Currently, there may be adverse or unreasonable impacts to the State's public trust resources when an illegal diverter is coming into compliance through obtaining a water right. In many cases, after an existing diversion submits a water rights application the diversion continues to operate as is. The previously illegal diversion is free of protective conditions until a license or permit is issued. In addition, the project was constructed and operates without considerations of the potential impacts to the public trust resources which include fish and wildlife. The water right application process can take years at times, allowing adverse or unreasonable impacts to public trust resources to continue without accountability until the diverter receives their permit or license. With the State Water Board, the Department wants to explore adding interim conditions to a previously illegal diversion while the diverter is in the process of obtaining a water right. This would allow for some accountability and protection of public trust resources until the water right is granted. Existing policies could be used to guide and implement interim conditions, such as the Cannabis Policy and the Policy for Maintaining Instream Flows in Northern California Coastal Streams. A Flow Assistance Request Form can be submitted to the Department's Water Branch to assist in developing more site-specific conditions using desktop analyses and field surveys.

2) Recommending monetary penalties that incorporate avoided/exempted CEQA costs

The Department has some concern there is a perception amongst water users that CEQA can be avoided through building a diversion prior to submitting a water right. An illegal diversion that is discovered and enforced upon usually comes into compliance afterwards through submitting a water rights application. The illegal diversion is then typically categorically exempted from CEQA as an Existing Facility (CEQA Guidelines § 15301), therefore enabling the diverter to avoid CEQA entirely.

Water Code § 1055 authorizes the Executive Director of the State Water Board to issue a complaint for any violation of Water Code § 1052, which involves unauthorized diversions of water. The State Water Board may, after any necessary hearing, adopt an order setting an administrative civil liability (ACL) for such unauthorized diversions. The Department estimates that in some cases the ACL may be less than the estimated costs of complying with the water rights process and CEQA. If the diversion is used for a business-related purpose, this could pose as an unfair economic advantage to business owners who do comply with the water rights process and CEQA and may be defined as an "unfair competition" under Business and Professions Code § 17200.

Department staff expressed their concerns regarding CEQA exemptions for existing diversions coming into compliance to the permitting section of the State Water Board's Division of Water Rights but was informed that CEQA baseline could not be set in the past for illegal projects. This

was established by the court case *Fats vs. County of Sacramento* (August 27, 2002), which stated CEQA was not the appropriate venue to address prior illegalities. However, language added to the CEQA Guidelines at the end of 2018 updated Section 15125 (Environmental Setting), allowing for a project's baseline to reference "historic conditions" if it will "provide the most accurate picture practically possible of the project's impacts." This would allow for an illegal diversion's impacts to public trust resources to be addressed and appropriately accounted for.

The Department would like to explore the possibility of incorporating the following into the Water Rights Enforcement Policy:

- Recommend CEQA analysis be conducted for illegal diversions coming into compliance through referencing historical conditions (environmental setting before construction of diversion) for baseline, or;
- If the diversion is exempted from CEQA, recommend that the State Water Board impose an ACL that, pursuant to Water Code § 1055.3, includes all relevant circumstances including the cost of CEQA compliance and the unfair economic advantage to business owners who do comply with the water rights process.

The Department believes this would allow for either the public trust to be properly accounted for or provide a strong disincentive towards future illegal diversions that attempt to avoid CEQA compliance. The Department believes that these recommendations should be utilized for egregious violations to the water rights process, rather than employed to all violations. The Department understands that only a portion of illegal diversions coming into compliance would warrant these enforcement options.