



Redwood Chapter P.O. Box 466 Santa Rosa, CA 95402 Ph 544-7651  
30 April 2008

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

2008 APR 30 AM 9:02  
OFFICE OF WATER RIGHTS  
SACRAMENTO  
STATE WATER RESOURCES  
CONTROL BOARD

**Re: Comment Letter – AB 2121 Policy**

**Attention: Ms. Karen Niiya Division of Water Rights**

Dear Ms. Niiya;

Over 1771 unlicensed illegal dams constructed in the area covered by the Draft Policy were unknown to the authorities in each of the five Counties. These dams were unknown to the Department of Fish and Game (CDF&G) whose approval was required. These dams were unknown to the Division of Water Rights (DWR) whose approval was required by law prior to construction. The dams were unknown to National Oceanic and Atmospheric Administration (NOAA). The legislature in passing AB 2121 was aware of only 276 pending water rights applications for mostly illegal dams. They had no idea of the magnitude of this problem.

Four years ago the direction to the Board in AB 2121 was succinct and clear;

*(c) In June 2002, state and federal fish agencies released their updated "Guidelines for Maintaining Instream Flows..." These Joint Guidelines represent the first time state and federal fish agencies presented to the board specific fish measures in guideline format that are the minimum necessary conditions to preserve a level of stream flow that ensures that anadromous salmonids will not be adversely impacted by diversions.*

*(e) The adoption of these Joint Guidelines is necessary for the protection of fisheries resources even if these guidelines are required to be amended from time to time.*

While we support the directives of AB 2121 and the adoption of the Joint Guidelines, we find the Draft Policy unresponsive to the direction set out above and instead offers

a political response to a massive technical and administrative problem. The Draft Policy fails in several major ways.

- The Policy is essentially silent on enforcement. It would continue the policies that have created the current conditions.
- The Draft Policy gives illegal diverters the option to form watershed groups that could enable them to avoid individual compliance requirements for bypass flows.
- The Policy ignores design consultants role of actively participating with diverters in the construction of illegal dams.
- The Policy extends the season of diversion from December 15<sup>th</sup> back to October 1<sup>st</sup>. This allows two and a half more months of diverting early fall rains in contradiction of the Joint Guidelines, past DWR practice and the purpose of this Policy.
- The Policy documents 1771 illegal dams, and yet makes no recommendation for increased staffing necessary to bring the dams into compliance.

### ENFORCEMENT

The map in the SED, Unauthorized Dams, Figure 6-2 shows the location and extent of illegal dams concentrated in the subject area. While the identification of these 1771 illegal dams is important and beneficial, we find it difficult to understand why there has been so little effort to expose it in the past, considering it was not that difficult to obtain and very significant. Earlier studies in 1998 must have made the department aware there was a larger problem throughout this region.

While the past lack of enforcement is not acceptable, the Draft Policy does not seriously intend to address correcting it. At page 34 the Policy states;

*Every violation deserves an appropriate enforcement response. Because resources may be limited, however, the State Water Board will balance its need to complete its non-enforcement tasks with the need to address violations. It must also balance the importance or impact of each potential enforcement action with the cost of that action*

This is an irresponsible denial of the Board's statutory obligation. Are our water right laws to be enforced only if cost effective? And which costs are to be measured in that determination, just the administrative costs of DWR or the cost of lost public trust resources? This Draft Policy, that states that DWR cannot afford to enforce

the law, is the same mind-set that has produced this enormous problem in which we now find ourselves. But even if enforcement were limited to cost effective criteria, every illegal dam would have to individually be addressed. A bank robbery is a one-day event but an illegal dam steals water continuously day after day to which it has no right. It steals from the public trust uses, it steals from those dependent on fisheries resources and steals from farmers in their watershed who have respected the law. The identified 1771 illegal dams and those not yet identified each “deserve an appropriate enforcement response.”

In the absence of any provision for restitution or fines for the many years of unlawful diversions, these dams owners will have “moved to the front of the line” over those who have complied with the law. This is not addressed. We would propose that the draft include strong economic disincentives for water taken without permit until such diverter physically brings the system into full compliance. We do not see that the 1771 illegal diverters will pay any penalty to the state or suffer any inconvenience from the Policy Draft for past illegal diversions or for their continued diversions over the next few years as they continue to delay compliance. Money talks and the law walks.

Where the State Board has been willing to go beyond “informal enforcement” the record has been little better. We would cite the letter of the Friends of the Navarro Watershed<sup>1</sup> chronicling a ten-year enforcement case against a flagrant violation that is no closer to correction today than it was at the beginning. The Draft Policy does not address this *laissez faire* attitude prevalent within the administration.

#### WATERSHED GROUPS ALTERNATIVE

We would note that the boundaries of the Draft Policy do not cover all “Northern California Coastal Streams” as the title of the draft implies. The Joint Guidelines referred to the “Mid-California Coastal Streams” It is the area which AB 2121 defines that has been highly impacted over recent years by the rapid conversion to the production of grapes for the wine industry. While ostensibly defined by fisheries populations, it really describes the current boundaries of the wine grape boom in Northern California. The introduction in the Draft Policy does not mention the rapid expansion of vineyards nor identify the associated 1771 unpermitted dams as a significant factor. Instead the problems are attributed to:

*A number of factors...climatic variation, disease, predation, loss of genetic diversity, fish harvesting, and land and water use are all considered to pose an ongoing threat to salmonids.*

The principle issue of illegal water diversions for the wine industry is not mentioned or discussed in the Draft Policy, but this is what this entire issue is all about. There are references in the exhibits concerning the costs faced by the owners without

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<sup>1</sup> See Friends of the Navarro Watershed 30 April 2008 comment letter.

water rights to bring their dams into compliance. There is also an exhibit pointing out the economic importance of the wine industry to the counties. We believe these establish that this industry is economically strong and able perform within the law

as others do. The costs to bring an illegal dam into conformance is not a penalty, but only the usual cost of doing business.

While the Joint Guidelines proposed by CDF&G and NOAA set out a clear path to restoration of the area, representatives of the wine industry have promoted an alternative approach called the Watershed Group. The term Watershed Group has a positive implication that is undeserved in this case. This is not an organization of all the stakeholders in a watercourse but is by definition limited to "a group of diverters" who will probably include many of the listed 1771 dam owners who have evaded the law in the past.

The Joint Guidelines of 2002 delineates a reasonable policy for minimum bypass flows. The Draft Policy incorporates these guidelines but on Page 40 it offers an *alternative approach*,

*"...the watershed approach...may be a viable alternative to evaluating individual projects."*

Diverters may form a "Watershed Group" and together negotiate with the Water Board a group compliance arrangement. We believe that individual responsibility for compliance would be lost in an as yet undefined group process. Diverters who have chosen in the past to openly disobey the law, may well use the opportunity to obfuscate and delay compliance. The fox would now be in charge of the hen house and would periodically report to DWR that the chickens are all fine.

The principal advocates who have generated this alternative were Robert Anderson, the Executive Director of the Sonoma County Winegrowers, Wagner and Bonsignore design consultants for many of the dams in questions, and their attorneys. Those "winegrowers" they represent have a vested economic interest in reducing the costs to correct the problems of their illegal dams. Based upon the past conduct and financial interests of those who knowingly violated the water rights laws, we do not believe they should be entrusted to voluntarily correct the situation.

We do not oppose the principle of a real watershed group working together on instream flow issues that would include all water users, agencies and advocates of the public trust uses. Until there is a group process with sufficient detail and enforcement provisions that assure individual compliance, it should not be included in the Policy. We suggest this be limited, if used at all, to a single pilot project demonstrating its merits, enforceability and utility. As proposed in the draft it appears to be a get-out-of-jail-free-card.

### **PROFESSIONAL CONSULTANTS LIABILITY**

We include a letter from NOAA's Marine Fisheries that demonstrates the role design consultants have played as a contributor of the AB 2121 problems. We would also refer to CDF&G scoping comments<sup>2</sup> that point out the role of the design consultant as a source of the problem and the need for a "certification program" to correct that conduct.

Most of the current problems caused by the illegal onstream dams could have been avoided by regulations imposing penalties on professional consultants who have designed illegal structures and represented those clients before the Water Board. On the Navarro River we have experienced extensive unpermitted onstream dams constructed without bypass of any kind that discharge only when full, yet are represented by design consultants to DWR as being capable of bypassing stream flows prior to the start of the winter diversion season in December.

Diverters do not act alone in their open disregard of the law. Design professionals who participate have knowledge of the law and must advise clients of those constraints. Where the consultant chooses to ignore the water rights law and actively participate in the design or representation of clients violating the water rights law they should be held equally responsible with the owner and denied the right to represent clients before SWRCB hearings and be subject to serious professional sanctions.

The existing disconnect between the consultants participation and any negative consequences is a major reason for what has been an open season on taking water illegally. In the absence of design consultants willing to evade the law, most of the abuse that has taken place would end. Dealing with this one issue is perhaps the simplest and most effective action that should be taken by the Draft Policy to reverse the current abuses.

### **PERIOD OF DIVERSION**

We believe that setting the start of the diversion season up 2.5 months earlier than recommended in the Joint Guidelines of CDF&G and NOAA to be without merit or reason. We would also refer to DWR's response<sup>3</sup> in 1997 regarding 28 applications on the Navarro River that did not permit diversions earlier than November 15<sup>th</sup> on the Navarro River. They subsequently adopted the December 15<sup>th</sup> date that has been in effect for some time.

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<sup>2</sup> Robert W. Floerke, Regional Manager Dept of Fish and Game August 25, 2006

<sup>3</sup> Letter of Edward C Anton, Chief Division of Water Rights April 18, 1997

We have attached a report by fisheries biologist Patrick Higgins, (pages 3 and 4) that details the rationale for keeping the recommended December 15<sup>th</sup> date, but one does not need to be an expert to know that reducing instream flows during the months of October, November and half of December, as the Draft Policy proposes, decreases the critical first flows for our rivers and streams<sup>4</sup>.

The only possible rationale for this change would be an attempt to excuse many of those identified 1771 illegal dam owners filing applications from the necessity of constructing bypasses. The Joint Guidelines require these dams be retrofitted so that they do not stop the early rains from reestablishing flow to nearly dry creek beds. Nearly all of these dams will be found to have little or no capability of bypassing early flows. Most will not deliver any water to the watercourse until they have filled and spill over much later in the season. It would appear that the very early diversion date may be an end run in this Policy Draft to deal with those illegal dams needing bypass, as opposed to enforcing the requirements for bypass as set out in the Joint Guidelines.

#### **INCREASE STAFFING**

The Draft Policy is silent on the need for additional personnel for the Water Board's staffs. If staffing is not to be addressed, this entire Draft Policy is pointless. Current staffing cannot deal with the existing backlog of 276 applications from 2004. Inadequate staffing is the cause of the failure to be aware of the 1771 unpermitted dams. So how will DWR be able to process the applications that come in from those 1771 diverters with problem attitudes and problem dams?

AB2121 was passed by the legislature and signed by the governor to address these environmental problems, not to continue the status quo. The Draft Policy responds to that legislation as if it were an un-funded mandate. We believe the correct response is to take AB2121 at face value and let the legislature know that you have the will to fix the problem and what is needed in financial resources to get the job done. The costs of motivated staffing adequate to enforce our water laws would be a small fraction of the expense that must now be invested in the TMDL program and AB2121 Joint Guidelines needed to reclaim our rivers.

The North Coast Regional Board faced with a similar responsibility to address TMDL impairments for sediment (including much of this area) is issuing a policy statement that defines the problems, proposes a plan to address the problems, sets out a schedule and details the personnel needs to accomplish their plan.

This Draft's position stated above that there will be "limited resources" undermines the entire program and continues an ingrained pattern of curtailing the enforcement of environmental regulation by limiting staff resources. We see this pattern throughout other state and federal agencies. The SWRCB needs more than

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<sup>4</sup> See Patrick Higgins report attached

**just additional staff, it also needs new leadership that places the public interest above personal and corporate financial interests of water users and strictly adheres to the rule of law.**

**For the reasons above we do not support the Draft Policy. We do support AB2121 and the Joint Guidelines and would encourage the Water Board to reject the Draft Policy until it addresses the issues above. Until it does, continue operations under section 1259.4 using the Joint Guidelines. We urge that you listen to and act upon the comments of the agencies and those who support the protection of public trust interests and the rule of law.**

**Yours truly,**

**Jay Holcomb Chair  
Redwood Chapter of the Sierra Club**

**Diane Beck  
Redwood Chapter of the Sierra Club**

**Daniel Myers  
Redwood Chapter of the Sierra Club**

**Attached: Report of Mr. Patrick Higgins, Fisheries Biologist, Letter of NOAA May 11, 2000**

**CC:  
William Hearn NOAA  
Robert Floerke CDF&G  
Paul Mason  
Jim Metropulos  
Catherine Kuhlman RWQCB  
Brian Johnson  
Patrick Higgins**