
Resource Renewal Institute

Innovations for a Sustainable Future



April 30, 2008

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

DI. OF WATER RIGHTS
SACRAMENTO

2008 MAY - 1 PM 2:30

STATE WATER RESOURCES
CONTROL BOARD

Re: Policy for Maintaining Instream Flows in Northern California Coastal Streams

Dear Board members;

At the time AB2121 was passed (2004) the Water Board was aware of only 276 pending water rights applications for mostly illegal dams. One major outcome of the passage of this legislation has been an initiation of a research and policy process that has started to reveal the extent of illegal, unregulated water diversions in CA. As a result of the drafting of the proposed policy, a total of over 1700 unlicensed illegal diversions have been documented in the area covered by the Draft Policy. All public information currently available indicates that these illegal diversions were unknown to the various state and federal regulatory agencies, such as CDFG, DWR, and NOAA, that must approve such diversions under existing law. It is very likely that similar illegal diversions are even greater in extent and number than are known at this time.

We strongly support the implementation of a new policy that conforms to the directives of AB2121 and that includes the adoption of the Joint Guidelines. However, we find that the draft policy presented by the Water Board to be inadequate in addressing AB2121 and that it also completely fails to present a workable solution to bringing the current situation of illegal diversions under control. To be perfectly clear, we feel that the proposed draft policy neither present solutions that will properly implement state laws in regard to water rights nor suitably protects the public trust inherent in such rights.

Water rights and their enforcement are a complex administrative and management problem. **The Draft Policy, as presented, offers an inadequate response that seems to be mostly political in nature. We ask the Board to reject the existing Draft Policy until the primary concerns we raise below are addressed.** Our concerns are not just minor revisions or line corrections of various elements; we believe the Draft Policy is deeply flawed and unacceptable. Until these major issues are addressed it does not make sense for us to supply feedback on minor items found in the document.

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Primary Concerns with the Draft Policy:

1. Monitoring and Enforcement.

Existing state law is in place that provides a clear legal basis for the state to enforce well-defined water rights regulations that govern the diversion of water for use by private landowners. The problems that are supposed to be addressed by the Draft Policy emerging under the directives of AB2121 are a result of a lack of monitoring and enforcement by the designated state and federal agencies. The Draft Policy fails to provide any substantial guidance on this issue. The Draft Policy contains language that acknowledges that resources for enforcement are limited, but it fails to address any mechanism, either fees, fines, or legislative appropriations, that can provide adequate resources to support suitable enforcement of existing state laws or new the steps identified in the policy. Furthermore, the Draft Policy states that enforcement action must balance the impact of each violation with the cost of enforcement without giving any indication of how such costs will be determined and how the loss of public trust resources will be mitigated or resolved.

It is imperative that the Policy, in whatever form it is adopted, contains implementation measures that have real teeth. In the past the State has failed to adequately monitor diversions and it makes no realistic effort to penalize violators of state law in regard to illegal water diversions. Instead of penalizing the already identified 1700-plus violators it has detected, the policy proposes to give the violators special treatment so that their unauthorized diversions can be duly permitted on a permanent basis. Without strong enforcement water diverters will just continue to ignore state law and do whatever they please.

The Policy must contain specific timelines and mechanisms for enforcement and it must make recommendations that address the source and amount of resources required for enforcement. Without adequate funding proper implementation of any policy guidelines will not occur. In some cases, separating the cost of enforcement from actual policy is justified, however it is not feasible in this case, as without adequate funding no enforcement will occur, rendering the policy moot.

To further emphasize the deficiencies of the enforcement problem, we note that the Draft Policy makes no mention of how the State Board will obtain the staffing required to implement any new policy. According to current Water Board staff, the primary reason the Water Board has not been able to properly carry out the orderly processing of water diversion applications is the lack of adequate staffing. Without addressing the staffing question, the successful implementation of any new policy is doomed from the beginning.

2. Fisheries Impacts

A key intent of this policy was to focus on measures that protect native fish populations, with a particular focus on anadromous salmonids and their habitat. Even in the best possible outcome related to water diversions, fish will suffer, as a significant amount of

water will be continued to be diverted from our streams. Thus it becomes important to focus on specific impacts on salmonid populations at its various lifecycles stages. Current scientific information indicates that the most crucial fisheries issues are migration barriers, late summer survival during periods of low water, and the timing of the diversion season that contributes to decreases in the critical first flows in salmonid streams. The water diversions that will be allowed under this proposed policy must all be evaluated specifically for their impacts on fish lifecycle stages, and if possible, some weighting must be determined to give priority to keeping water instream during those times where diversions will have the greatest negative impact on fish.

3. Watershed Groups

While we normally applaud efforts by state regulators to engage stakeholders in implementing natural resource management solutions, we find the proposed "Watershed Groups" concept in the Draft Policy to be fatally flawed. According to the Draft Policy, diverters may form a "Watershed Group" and together negotiate with the Water Board a group compliance arrangement. The concept of a watershed group that actively participates in the diversion decision, working in unison with each other and state regulators is a worthwhile concept. However, it is imperative that the watershed group be made up of all stakeholders who have interests in the water in the basin including riparian landowners, fisheries advocates, other landowners, and other residents that live in or own property in the basin. The watershed group cannot be limited to diverters, as proposed in the Draft Policy. In addition, procedures must be developed that allow the Water Board to provide oversight to a proposed watershed group process and to adequately analyze solutions proposed by the group process. There appears to be no indication that the Water Board has evaluated such a process or if it is feasible. Lastly, we are concerned that individual responsibility for compliance would be lost in an as yet undefined group process. A watershed group process for regulating water diversions is likely to ignore basic public trust interests in allocating resources.

Conclusion

AB2121 was passed by the legislature and signed by the governor to address the critical problems related to water diversion that is causing severe damage to our salmonid fisheries. The Draft Policy fails to present a workable solution that will address these problems. Clearly any new policy that is proposed must address the practical problem of providing the resources needed to implement the policy. In this day and age, failure to do so insures that the policy will be ineffective and useless.

Sincerely yours,

David Katz
Steelhead Project Director

Huey D. Johnson
President