

California Sportfishing Protection Alliance
"An Advocate for Fisheries, Habitat and Water Quality"

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Ms. Song Her
Clerk to the Board
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Regarding: Comments of the California Sportfishing Protection Alliance for the 2007 State Water Resources Control Board Workshop on Water Rights Enforcement

Dear Ms. Her:

The California Sportfishing Protection Alliance (CSPA) appreciates the opportunity to share its thoughts and comments on water rights enforcement with the State Water Resources Control Board.

CSPA has, over the years, protested numerous water rights applications. In addition, CSPA has initiated numerous enforcement actions regarding water quality violations through its Watershed Enforcers program. CSPA, as an organization dedicated to preserving the state's fisheries, has an enormous interest in a rigorous program of water rights enforcement.

General Issues

The water rights division of the State Board is greatly understaffed. According to an e-mail written by a Board staff member which was passed along to us, there were, in April, 2006, 73 water rights complaints outstanding and 3.75 staff members to address them. The particular complaint referenced, filed in May, 2005, still has not, to our knowledge, been addressed.

Water rights protests sometimes seem to simply fall off of the map. CSPA recently missed a deadline to address the Board regarding an application it had protested years previously. After literally years of inaction, we were provided 30 to 45 days to file a notice of intent to appear at the hearing. The person who had filed the protest on behalf of CSPA is no longer with the organization, and we were unable to locate the original paperwork in order to file a timely notice of intent to appear at the hearing.

Processing applications in a reasonable amount of time will also encourage compliance. Nobody wants to wait years to see his situation addressed. Uncertainty in process and timing acts as a deterrent to entering the system. Moreover, an agency that cannot follow its own rules and fulfill its mandates does not command the respect it needs to operate effectively.

Public interest groups are hamstrung by the de facto secrecy that surrounds water rights monitoring and compliance. Contrast the website maintained by the Federal Regulatory Energy Commission, where, excepting matters which raise security issues, every comment, protest, intervention, report, ruling and so forth is made public on the web the day it is filed. For water rights in California, there is no way to easily track a proceeding. Protests are not on the web. Complaints are not on the web. The current disposition of applications is not on the web. Timelines totally lack transparency, and fall into limbo for months or years, only to reappear with short deadlines.

Auditing of water use is not public. It seems that it is basically left to the water user to account for his own use. Since accounting of water use lacks public accountability, it is left to vastly understaffed staff to do any auditing. In our experience, it takes a citizen watchdog or a neighbor or an injured party to raise a red flag; the flag languishes all too often unless a member of the public is prepared to birddog the matter at the Board or in court.

CSPA's overall recommendations for the State Board as a whole are:

- Ask the legislature for the funding needed to effectively carry out all Board mandates.
- Hire, and train as needed, additional skilled staff; provide staff with appropriate funding and other forms of support.
- Back the staff with the institutional will to allow it to do its job.
- Set and follow reasonable timelines. This requires good management and sufficient staff.
- Create and staff a serious auditing program for water rights accounting.
- Daylight all Board processes, especially using the internet, and promote electronic participation in Board proceedings.

CSPA's general recommendations for the water rights division in particular are:

- Prioritize the watersheds in the state within one year.

- If any period of any form of leniency is chosen, limit it to that one year, and condition it on the immediate acknowledgment and cessation of all illegal diversion.
- After one year, when watersheds are prioritized, start going after and shutting down illegal diversions and diverters.
- Assure in particular compliance with water rights rules and limitations which condition rights held by agencies of the state and federal government. This not only accounts for the largest water users, but it creates an atmosphere of respect, so that it is clear that the Board is both fair and serious.
- Prioritize enforcement on the basis, first, of the amount of water at stake (size of diversion in acre-feet), and, second, by the extent of the environmental impact, particularly on anadromous fish.
- Apply penalties for breaking the law that are sufficient to deter future lawbreaking. They should consider the amount of economic gain and the amount of environmental damage a violation of the Water Code has allowed. They should be increased for those who are caught in the act. Mitigations overseen by the Board should be considered, on a case-by-case basis, in lieu of or in partial lieu of monetary penalties.

Specific issues relating to Water Code section 1259.4

CSPA is very concerned with the cumulative impacts of diversions in the North Coast rivers and streams covered by recently enacted Water Code section 1259.4. Many streams and their fisheries in Marin, Sonoma, Napa, Mendocino and Humboldt counties are in the throes of death by a thousand cuts.

The Board needs to assign, hiring as needed, a qualified team to address the cumulative effects of diversions in these counties. The team will need a hydrologist capable of modeling watersheds and an engineer other than the hydrologist; although ideally the hydrologist will also be an engineer and the engineer a hydrologist. It will need several environmental scientists with training in fisheries. It will need an expert or experts on contract. Finally, it will need a manager whose determination to stop illegal diversions is matched by the political will on the part of the Board to back him up.

Using adequate staff and funding, this team as a first step should actively inventory existing diversions and facilities, authorized and unauthorized, as well as existing applications for not yet existing diversions. A watershed approach is appropriate. The team should, simultaneous to its inventory work, prioritize watersheds for enforcement action, and develop a rationale.

Within a year of its formation, the team should start going after and shutting down illegal diversions. It is important that the baseline for possible adjudications of new and even

existing legal diversions not be diminished by water that is stolen. Depending on how much instream water is left when illegal diversions are at least accounted for, the Board may also need to make public trust re-adjudications of water rights in some watersheds where cumulative legal diversions have damaged aquatic resources.

The issue of small storage diversions for frost protection in particular be treated as one mega-complaint.

CSPA suggests that funding for this team and its project be created by the legislature as an outgrowth of AB 2121. We also suggest that the Senate Natural Resources Committee assume an oversight role, and appoint an Oversight Committee composed of seven or nine stakeholders (in any case, an odd number), including a senator and a representative of a fisheries group, to report to the Senate the effectiveness of the team and its activities. The team needs to set short timelines, and the oversight committee needs to assure that they are complied with.

Futures actions by the Board

The Board should hold a workshop or workshops on questions of policy and law related to compliance. We suggest that the Board begin by addressing the following:

Under what circumstances is storing water for frost protection a reasonable beneficial use?

Do limits on rates of direct diversion also apply to diversions to storage, particularly offstream storage? We note that in many of the North Coast drainages, in this past winter, many areas received only one major storm. With no limitation on the rate of diversion, diversions to ponds during this one large storm could have blocked passage and spawning for most of the year's spawning fish in any given small spawning tributary.

Do the Board's imposed rates of diversion refer to instantaneous rates, average rates, or some combination, and when is each metric in effect?

Conclusion

CSPA thanks the State Water Resources Control Board for the opportunity to address the Board regarding water rights enforcement.

Respectfully submitted,

Chris Shutes
FERC Projects Director
California Sportfishing Protection Alliance