



Water rights policy: Pressing considerations

PRESSURE: By January 2008 the State Water Resources Control Board must establish a policy for maintaining stream flows for the North Coast Region, including Sonoma, Marin, Napa, Mendocino and Humboldt counties. This onerous and extremely difficult charge is compelled by legislative fiat, as adopted by 2004 legislation known as AB 2121, commencing at section 1259.2 of the Water Code. With increasing users demanding increasing water, this is a tall task for an understaffed, under-funded department. Nevertheless, the State Board has recently increased its efforts in divining a system of water rights enforcement that is both practical and fair.

Not forgotten in this task are more than 500 pending water right applications and more than 600 petitions to revise existing water rights, all waiting for review, revision, and stamped approval. This delay and frustration are nothing new to the State Board, but several recent problems have pushed water issues and ever-present water right controversies to the front page.

Water demands by an increasing population, potential weather change impacts (drought), and the demands of fisheries for instream flows have complicated the State Board's tasks exponentially. The policy mandate by AB 2121, then, compels very difficult decision making.

A. Emphasis on Enforcement

As part of this process, the State

Board has held workshops intent on exploring the use of enforcement practices as a component of its North Coast policy. This means North Coast water users will be subject to increasing scrutiny as the State Board analyzes its governmental role pertinent to water use, water rights, and water resources.

Enforcing water regulation by the state is seen as a major step in controlling the use of water, and the laws of the state fully support the premise. Questions remain, however, as to how the state may best enforce water policy for the public benefit.

Due largely to budget cuts, the State Board staff has decreased by nearly half over recent years, and the permitting and licensing of water rights has fallen far behind. Accordingly, water users who have sought to comply with the legal requirements of the state have been caught in a holding pattern waiting for their water right applications to be approved.

Now the State Board is threatening sanctions against water users who are not fully and properly licensed and permitted. Justifiably, North Coast water users are balking at the threat of fines and penalties for failing to comply with requirements the State Board has proven incapable of processing fairly and timely.

Rather than entering this fray directly, this article reports on recommendations the State Board should consider in developing its North Coast policy. Of course, water users as well should be

aware of policy considerations contemplated by the State Board.

B. Policy Considerations

1. Unauthorized Water Use – Some interested parties argue that unauthorized water use is widespread and causing significant damage to the interests of other water users. These assertions should be qualified, as the complexities of water rights in California are many. Pre-1914 rights, riparian rights, and sheetflow collection systems are all outside the jurisdiction of the State Board. While compliance with water law must be required, paramount among policy concerns must be the legal requirement of reasonable water use. Reasonable use should trump inadvertent non-compliance absent a showing of direct harm to other water users.

2. Damage Resulting from Unauthorized Water Use – Real damage to the environment or other water users' rights must be prevented and abated. Real damage, however, is rarely caused by inadvertent non-compliance or misappropriation, or reasonable water use. The State Board should prioritize instances where real damage is suffered by the environment or water users who are in compliance with state law. This priority addresses foremost the competing water interests in the state.

3. Voluntary Compliance – Absent a showing of actual harm to competing water users, non-compliant water users should be given a definite period of time within which to achieve proper legal

rights. Due to past difficulties encountered by water users seeking proper licensure and permit status, a compliance grace period should be allowed to all water users before penalties for non-compliance attach.

4. Penalties and Forfeitures—The State Board has the authority to issue fines of up to \$500 per day for unauthorized diversion and \$1,000 per day for violation of a Cease and Desist Order. Fines, obviously, can amount to extremely punitive measures. Such fines, penalties, or forfeitures of any water right are properly warranted only when non-compliance is intentional and causes actual harm. Penalties should not be used as a fundraising device and should not be levied in lieu of taxes or fees. Instead, a mutual sense of cooperation must exist between the public and the State Board. A variety of measures must be taken to promote such cooperation, but a policy encouraging voluntary compliance with a limited moratorium on penalties must be a first step.

5. Administrative Backlog Must be Cured—Prior to or concomitant with the adoption of any enforcement policy, the State Board must cure the backlog of petitions and license applications presently on its shelves. Enforcement directives by any entity that is not operating consistent with its own mandate would be difficult to enforce.

6. Watershed Analysis—Watershed management is not new to the world of water management and the environment, but it is underutilized. Water rights must be administered consistent with watershed resources. Rather than processing water rights individually, a watershed context should be given to applicants. This presents a better understanding of available resources and compels a more precise understanding of the relationships between resources and

competing water users.

7. Bureaucratic Reforms—Appropriate governmental support is critical to any governmental policy concerning water rights management, and hence enforcement. This practical component is necessary to resolve previous problems, much less to move forward in establish new policy and practice. As water becomes increasingly essential to a healthy and vibrant California, the state must address the inadequate support it presently provides to the State Board and its staff.

Certainty and predictability of water rights and resources cannot be achieved without a greater commitment by the legislature and governor to these critical issues. Policy cannot be well analyzed or established without sufficient

tools. Enforcement cannot be fairly handled without adequate staff. Intelligent water management may only be effectively addressed by a State Board with increased support.

C. Enforcement Policy Must Foster a Reformed System of Water Management

State law and regulation is best served when the public is well informed, knowledgeable, and invested in the interests to be protected. Water rights enforcement requires just such a commitment from state government and the public. The State Board has been instructed to make policy in a very difficult arena without necessary support—this, at a time when water and water rights are becoming scarcer and less predictable. This is PRESSURE.

ABOUT THE AUTHOR



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