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March 5, 2015

Ms. Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-2000



Re: *Comment Letter—North Coast Temperature Policy and Action Plans*

Dear Chair Marcus and Members of the Board:

The California Farm Bureau Federation, Forest Landowners of California, Sonoma County Farm Bureau, California Cattlemen's Association, Mendocino County Farm Bureau, Buckeye Conservancy, California Licensed Foresters Association, and Humboldt County Farm Bureau (collectively "Farm Bureau") appreciate the opportunity provided by the State Water Resources Control Board ("State Board") to submit comments on the North Coast Regional Water Quality Control Board's ("North Coast Regional Board" or "Regional Board") Policy for Implementation of the Water Quality Objective for Temperature and Action Plans to Address Temperature Impairments in the Mattole, Navarro, and Eel River Watersheds ("Temperature Implementation Policy" or "Policy"). Farm Bureau raised numerous concerns before the North Coast Regional Board regarding the Temperature Implementation Policy and its resulting impacts to agriculture and forestry. Although the North Coast Regional Board released a Response to Comments document, many responses did not address or inappropriately dismissed the comments Farm Bureau and others raised. Therefore, Farm Bureau offers the following specific comments contained herein.¹

A. The Temperature Implementation Policy Is Unreasonable

Response:

Although Farm Bureau raised the below comments within its letter to the North Coast Regional Board, the Response the Comments document did not address or respond to

¹ For ease of reference, the format of this letter includes a response to the Regional Board's Response to Comments as to why Farm Bureau's comments are still pertinent, and then follows this response with Farm Bureau's October 13, 2103 comments.

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this issue (reasonableness standard). Although the Response to Comments contained general statements about the flexibility of the Temperature Implementation Policy and its associated regulatory certainty,² the document did not address the reasonableness standard (Wat. Code, § 13000), Porter-Cologne Water Quality Control Act's ("Porter-Cologne") express call for reasonable actions, and how the Temperature Implementation Policy unreasonably burdens agriculture and forestry. Thus, Farm Bureau's comments on the unreasonableness of the Temperature Implementation Policy are still pertinent.

Comments

Although the Porter-Cologne Act provides the Regional Board with the authority to regulate discharges of waste, this authority is not absolute. In enacting the Porter-Cologne Act, the Legislature laid out specific goals and objectives for the State's waters. Regional Boards must conform to all such statutory mandates, including the Legislature's objective:

The Legislature further finds and declares that activities and factors which may affect the quality of the waters of the state shall be regulated to *attain the highest water quality which is reasonable*, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.

(Wat. Code, § 13000, emphasis added.) In a recent decision, the California Supreme Court discussed the Legislature's intent, confirming its goal "to attain the highest quality which is reasonable." (*City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 619.)

The use of the term "reasonable" and the "reasonableness" standard is not limited to the express goals laid out in Water Code section 13000. Rather, the Porter-Cologne Act expressly calls for reasonable actions throughout. (See Wat. Code, § 13241, [calling for water quality objectives that will provide "*the reasonable protection of beneficial uses*" upon mandated review of specific factors], emphasis added; *id.*, § 13050(h), [defines "water quality objectives" as "the limits or levels of water quality constituents or characteristics which are established for *the reasonable protection of beneficial uses of water* or the prevention of nuisance within a specific area.'], emphasis added; *id.*, § 13263, [requiring regional water boards to take into consideration "water quality objectives reasonably required" to protect beneficial uses as well as all provisions of section 13241 when prescribing discharge requirements]; *id.*, § 13267(b)(1), [requiring technical or monitoring program reports for WDRs or conditional waivers to "bear a reasonable relationship to the need for the reports and the benefits to be obtained"].) Thus, when analyzing impacts to water quality and adopting policies, the Regional Board must comply with and conform to the Legislative intent of the Porter-Cologne

² Response to Comments General Comment #10 responses to Farm Bureau's concerns regarding the Regional Board's authority to prescribe waste discharge requirements rather than whether the Temperature Implementation Policy is reasonable in light of various Porter-Cologne sections, such as section 13000.

Act by applying the “reasonableness standard,” that is, evaluate if the Policy, activity, or control limit will *reasonably* protect the beneficial uses.

As discussed herein, the Temperature Implementation Policy, especially its prescription to “restore and maintain site potential shade conditions” (Temperature Implementation Policy, p. 2), is unreasonable as it expands the regulatory reach of the Regional Board beyond discharges of waste, creates unavoidable impacts to forestry and agricultural resources, protects one beneficial use to the detriment of others, and imposes unreasonable burdens and costs on the regulatory community.

1. The Temperature Implementation Policy Must Consider the Reasonableness of Water Quality Objectives in Light of All Beneficial Uses

Response

Within General Comment #9, the Regional Board responds to questions raised about the Policy’s exclusive focus on the beneficial use for cold water fisheries, stating that “the determination of adverse effects on beneficial uses is based on the thermal requirements of the most sensitive beneficial use present.” (Response to Comments, p. 13.) The Regional Board provides no citation for using the “most sensitive beneficial use present” standard and is silent on how the use of such a “standard” fails to balance beneficial uses and create the reasonable regulation of water quality. As such, Farm Bureau’s comments on the reasonable protection of all beneficial uses remain relevant and are included below.

Comments

The Temperature Implementation Policy focuses exclusively on water temperature for the protection of coldwater fisheries. While Farm Bureau recognizes the need to address activities affecting coldwater fisheries, the Temperature Implementation Policy focuses completely on this single beneficial use, failing to adequately consider the needs of or impacts to other beneficial uses. This does not adhere to the Water Code’s requirement that the Regional Board achieve what is reasonable given all of the beneficial uses (Wat. Code, § 13000), nor does it comply with the Regional Board’s Basin Plan. The Basin Plan lists the following existing and potential beneficial uses of water that have been designated as such and must be protected within the region:

MUN Municipal and Domestic Supply

AGR Agricultural Supply

IND Industrial Service Supply

PRO Industrial Process Supply

GWR Groundwater Recharge

FRSH Freshwater Replenishment

NAV Navigation

POW Hydropower Generation

REC-1 Water Contact Recreation

REC-2 Non-Contact Water Recreation
COMM Commercial and Sport Fishing
WARM Warm Freshwater Habitat
COLD Cold Freshwater Habitat
ASBS Preservation of Areas of Special Biological Significance
SAL Inland Saline Water Habitat
WILD Wildlife Habitat
RARE Rare, Threatened, or Endangered Species
MAR Marine Habitat
MIGR Migration of Aquatic Organisms
SPWN Spawning, Reproduction, and/or Early Development
SHELL Shellfish Harvesting
EST Estuarine Habitat
AQUA Aquaculture
CUL Native American Culture
FLD Flood Peak Attenuation/ Flood Water Storage
WET Wetland Habitat
WQE Water Quality Enhancement
FISH Subsistence Fishing

(North Coast Regional Water Quality Control Board Basin Plan, pp. 2-3.00-4.00.) The Water Code requires the Regional Board to balance uses by “attain[ing] the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.” (Wat. Code, § 13000.)

As currently drafted, the Temperature Implementation Policy presumes that all activities, especially livestock grazing, irrigated agriculture, and timber harvesting, will affect coldwater fisheries, and thus, such activities are in effect unreasonable (i.e., requiring various degrees of “impairment” of these competing beneficial uses in the name of fully protecting COLD Cold Freshwater Fish and WARM Warm Freshwater Fish beneficial uses wherever these preferred uses are very liberally assumed to apply). In several instances, attempts are made to justify temperature requirements by explaining the processes whereby the activity could affect coldwater fisheries. However, the Temperature Implementation Policy does not support these assertions with evidence nor does any corresponding analysis explain how the burden imposed on other beneficial uses, such as agriculture, is justified in light of the presumed uncertain benefit to coldwater fisheries.

The Temperature Implementation Policy, by failing to examine reasonableness and balance the beneficial uses, does not comply with the requirements of the Water Code. To do so, it would have to compare the benefits of particular regulatory activities to the burdens imposed by those regulations on other beneficial uses. To remedy this problem, the Temperature Implementation Policy must be modified to recognize that attempting to ensure that coldwater fisheries are “fully supported” could result in the impairment of

other beneficial uses, namely agriculture, which is already significantly strained. Therefore, the Temperature Implementation Policy must be analyzed for reasonableness.

2. The Temperature Implementation Policy's Regulation of Shade and Sunlight is Inappropriate

Response

General Comment #11 attempts to provide authority for the regulation of heat as a pollutant. Acknowledging that heat is not a waste for the purpose of the Regional Board's waste discharge permitting, the Response to Comments goes on to attempt to find authority to regulate heat by stating that Porter-Cologne does not limit the Regional Board's planning authority and since the Clean Water Act recognizes heat as a pollutant, the Regional Board can regulate it. (Response to Comments, pp. 14-15.) However, any authority of the Regional Board to regulate heat as a "pollutant" allegedly deriving from the federal Clean Water Act could only be undertaken in the context of a TMDL, whereas the Regional Board's proposed Temperature Policy extends beyond existing 303(d) impaired waterbodies to unimpaired waterbodies, and even high quality waterbodies. Notwithstanding the alleged authority to regulate heat as a pollutant, the Regional Board's Responses to Comments and to General Comment #11 in particular fail to address Farm Bureau's comments. The Responses to Comments are silent on the comments raised below, specifically that shade as a factor is likely *not* "reasonably controllable" and that any waste discharge requirement will need to take into consideration the beneficial uses to be reasonably protected as well as the factors listed in Water Code section 13241 (see Wat. Code, § 13263). Therefore, Farm Bureau's comments on the inappropriate regulation of shade and sunlight remain pertinent and are included below.

Comments

The Temperature Implementation Policy attempts to regulate sunlight, which is not a discharge of waste (see Staff Report, p. 30) by controlling shade. As stated in the Staff Report supporting the Policy, "This proposed amendment to the Basin Plan clarifies that the alteration of shade caused by human activities is a controllable water quality factor that must be addressed, as appropriate, in waste discharge requirements issued by the Regional Water Board, and regulatory actions by other state agencies." (Staff Report, p. 30.) However, whether impairments of beneficial uses due to a temperature exceedance caused by sunlight are a phenomenon that can be "reasonably controlled" requires balancing of the factors listed in Water Code section 13241. In this case, various characteristics within the proposed Policy and proposed "Action Plan" suggest that shade as a factor is likely *not* "reasonably controllable." In any case, even if it were "reasonably controllable" by permissible means, the approach proposed by the Regional Board is impermissible and in excess of the Regional Board's jurisdiction, at least as to the proposed approach, involving implementation of a region-wide Basin Plan water quality objective through general and individuals waste discharge requirements ("WDRs") and conditional waivers of WDRs.

3. *The Regional Board Does Not Have the Statutory Authority to Regulate Non-Wastes Through WDRs and Conditional Waivers of WDRs*

Response

In responding to comments raised regarding the regulation of controllable factors, General Comment #10 points to Water Code section 13263 and the Staff Report in order to provide the Regional Board with authority to regulate shade. Within its Staff Report, the Regional Board acknowledges that the “regulation of controllable factors through permitting by the Regional Water Board must be in the context of a discharge of waste.” (Response to Comments, p. 14 [citing page 29 of the Staff Report].) General Comment #10 goes on to cite section 13263 as the provision that “provides authority for the Regional Water Board to place conditions on controllable water quality factors related to an activity that discharges waste.” (Response to Comments, p. 14.) These responses, however, do not address the points raised in Farm Bureau’s comments, namely that if solar radiation is not a discharge of waste, as acknowledged in the Staff Report, the Regional Board cannot use its authority under section 13263 to prescribe *waste* discharge requirements. Accordingly, General Comment #10 fails to address the Regional Board’s statutory authority to regulate non-wastes through waste discharge requirements and conditional waivers of waste discharge requirements. Therefore, Farm Bureau’s comments remain pertinent for the State Board’s consideration, and for ease of reference, those comments are included below.

Comments

On page 30, the Staff Report acknowledges that “solar radiation loads are not a discharge of waste as defined by the Act.” Notwithstanding this, the Staff Report cites Water Code section 13263, which prescribes waste discharge requirements, to provide the legal authority to control sunlight through the retention of shade. Section 13263(a) states:

The regional board, after any necessary hearing, shall prescribe requirements as to the nature of any *proposed discharge*, *existing discharge*, or material change in an existing *discharge*, except *discharges* into a community sewer system, with relation to the conditions existing in the disposal area or receiving waters upon, or into which, the *discharge* is made or proposed. The requirements shall implement any relevant water quality control plans that have been adopted, and shall take into consideration the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other *waste discharges*, the need to prevent nuisance, and the provisions of Section 13241.

(Emphasis added.)

Section 13263 gives the Regional Board the authority to prescribe requirements that implement relevant water quality control plans relating to *discharges*. Thus, prior to implementing relevant water quality control plans, there must *first* be a discharge of

waste that could affect the waters of the state. (See Wat. Code, § 13260(a)(1).) Section 13263 gives the Regional Board the authority to “prescribe requirements as to the nature of” specific discharges. (Wat. Code, § 13263(a).) The Staff Report improperly reads Section 13050(i) into Section 13226 to arrive at the incorrect conclusion that the Regional Board has broad authority to prescribe any requirement “related to ‘any activity or factor which may affect the quality of the waters of the state.’” (Policy, p. 30.) However, this interpretation misconstrues the referenced statutes and improperly expands the Regional Board’s statutory authority.³

When construing the meaning of a statute, the reader looks to the plain meaning of the statute’s language. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 733, [“Our primary task in construing a statute is to determine the Legislature’s intent. (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 724, 257 Cal.Rptr. 708, 771 P.2d 406.) Where possible, ‘we follow the Legislature’s intent, as exhibited by the plain meaning of the actual words of the law....’ (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 632, 59 Cal.Rptr.2d 671, 927 P.2d 1175.)”].) The plain meaning of words within Water Code section 13263 clearly establishes when the Regional Board may prescribe requirements and implement relevant water quality control plans; the authority to prescribe is directly linked to a discharge. (*Olson v. Automobile Club of Southern California* (2008) 42 Cal.4th 1142, 1147, [“If the statute’s text evinces an unmistakable plain meaning, we need go no further.”]; *Jarrow Formulas, Inc. supra*, 31 Cal.4th at p. 736, [“Where, as here, legislative intent is expressed in unambiguous terms, we must treat the statutory language as conclusive.”].) Given that the language within Section 13263 is neither questionable nor ambiguous, the plain meaning is conclusive and one cannot read words or assumptions into the language. (See *Olson, supra*, 42 Cal.4th at p. 1151 regarding prohibition on interpreting a statutory provision on a mere assumption.) Thus, the Regional Board’s reliance on Section 13263 to regulate shade as a controllable water quality factor is flawed, unreasonable, and inappropriate since sunlight or solar radiation is not a discharge of waste. Therefore, any attempt to implement the Temperature Implementation Policy or Action Plans through waste discharge requirements or waivers of WDRs is also inappropriate and flawed given that the Regional Board must first be regulating a discharge of waste (of which sunlight is not) in order to prescribe requirements.

B. The Scientific Basis for the Temperature Implementation Policy and Action Plans is Incomplete

Response

The Temperature Policy would have the Regional Board use its authorities and actions to restore and maintain site-specific potential effective shade in riparian areas. (Policy

³ Protection of beneficial uses through water quality control plans and water quality objectives, on the other hand, is an authority the Regional Board possesses separate from its waste discharge prevention authorities (statutory authority is found in wholly separate chapters of Porter-Cologne).

4.100) This requirement will have significant economic and management impacts on landowners, as acknowledged in Regional Board’s own economic and CEQA analysis. As Farm Bureau explained in its comments to the North Coast Regional Board, it is because of these impacts and because the Policy is based almost entirely upon modeling, that the scientific basis must be as rigorous as possible.

To assist the Regional Board in identifying relevant scientific information, Farm Bureau pointed to two studies as examples of information indicating that “site specific potential effective shade” was more protective than necessary to protect beneficial uses. This is a very significant issue because these studies indicate that the significant burden of protecting “site specific potential effective shade” is unreasonable where the studies show active management reducing that standard can be sufficiently protective of beneficial uses.

The Regional Board failed to acknowledge this point and instead summarized the scientific studies as merely supporting the correlation between sunlight and water temperature. Such a response gives short shrift to the regulated community who must bear the burden of living with the implications of the Regional Board’s model.

To the extent the Regional Board relies upon the “as appropriate” phrase of the Temperature Policy as a means of addressing instances where “site specific potential effective shade” may be overly protective, this fails to address the actual implications of the Policy. The Policy establishes that the Regional Board will require, as a general rule, “site potential effective shade,” without offering sufficient guidance as to when this standard is not necessary.

The scientific studies identified by Farm Bureau were indicative of the fact the standard was overly protective and that guidance on a more appropriate standard could be developed. Therefore the Regional Board’s dismissal of this information is not appropriate and fails to provide the regulated community and regulators useful information on how the Policy will be implemented and why it is warranted.

C. The Substitute Environmental Document Fails to Comply with CEQA

1. The Substitute Environmental Document’s Analysis is Improper As it Relies Upon an Illegal Manner of Compliance

The California Environmental Quality Act (“CEQA”), Cal. Pub. Resources Code, §§ 21000 et seq, requires agencies to consider a reasonable range of foreseeable methods of compliance. For each method, the agency must consider impacts, mitigation, alternatives, costs, and technical factors. (Pub. Resources Code, § 21100; Cal. Code Regs., tit. 14, §§ 15064, 15126.6.) The Substitute Environmental Document’s (“SED”) analysis is improper as it relies upon an illegal vehicle for compliance, thus mischaracterizing the potential environmental impacts of the proposed action. In a general sense, the SED does not correctly analyze “the reasonably foreseeable

environmental impacts of the reasonably foreseeable methods of compliance” as it purports to (see Staff Report at pp. 92 and 100-101) for one overarching reason. Namely, the Regional Board’s reliance on Porter-Cologne waste discharge authorities to require maintenance and preservation of shade (which is not a “discharge”) illegally expands the Regional Board’s jurisdiction. This error then propagates through the much of the remainder of Staff’s analysis of environmental impacts.

2. The Substitute Environmental Document’s Environmental Review of Impacts Is Improper and Flawed

Response

In response to CEQA Comments #’s 6, 7, and 12, the Regional Board refers to its analysis of farmland and timber- and forest land impacts in Chapter 9 of the August 3, 2013 Staff Report. On pages 125 and 126 in Chapter 9 of the Staff Report, the Regional Board completes the checklist items from Appendix G of the CEQA Guidelines relating to Agricultural and Forest Resources. In that checklist, the Staff Report indicates that there may be “potentially significant” impacts relating to: 1) conversion of prime farmland, unique farmland, and farmland of statewide importance; 2) conflict with existing zoning for agricultural use, or a Williamson Act contract; or 3) other changes in the existing environment which, due to their location or nature, could result in conversion of Farmland, to nonagricultural use or conversion of forest land to nonforest use. With respect to 1) conflict with existing zoning for, or cause rezoning of, forest land, timberland or timberland zoned Timberland Production, and 2) the loss of forest land or conversion of forest land to non-forest use, the Staff Report concludes that there is “no impact.” The Report concludes that the identified “potentially significant” impacts to existing farmlands could impact some portion of not more than 5 percent of the land area of the North Coast Region, that these lands could not be replaced, and that the impact is therefore unavoidable. With respect to timberland and forest land, the Report concludes that there would be no effect on the legal classification and no direct conversion of such lands—and therefore no impact. As noted, the Report notes that such lands *could* be converted to non-forest use as a result of “other changes in the existing environment which, due to their location or nature, could result in conversion of Farmland, to nonagricultural use or conversion of forest land to nonforest use”; however, the Staff Report identifies this impact as “potentially significant,” but unavoidable. In its response to CEQA Comment # 12, the Regional Board points to various lists of potential compliance measures in Section 9.4 of the Staff Report, but provides no estimate, analysis, or range bearing on the potential magnitude of the possible environmental effects of these activities, or of their potential spatial distribution and extent. Similarly, in its response to CEQA #12, the Regional Board notes that the proposed action could “potentially change the use of [water rights] to protect beneficial uses.” In the “Hydrology and Water Quality” in Section 9.4 of the Staff Report, the Regional Board discusses the possibility of “potential significant” environmental impacts relating to loss of water supplies, alteration of surface water flows, and potential depletion of groundwater—but does not discuss any of the potentially significant associated impacts

from conversion of existing farm or grazing lands. In each case, the Regional Board's responses ultimately defer any more meaningful or detailed analysis, citing the current lack of information concerning potential impacts of any specific projects in the future. There is no further analysis of the Policy's impacts to existing farmland and timber- and forest land or water use patterns, and no attempt at quantification of potential direct, indirect, and cumulative impacts at even a programmatic level of detail. The Regional Board's responses to comments do not therefore meaningfully or adequately address Farm Bureau's related comments in Section C.2 and "Forest Resources" (both sections included below for ease of reference), and these issues remain a matter for proper consideration by the State Board.

Comments

The SED fails to properly analyze the potential impacts associated with the Temperature Implementation Policy and Action Plans pursuant to the CEQA. Specifically, the SED lacks proper review of impacts such as the loss of agricultural lands taken out of production due to proposed requirements and the cost of compliance, loss of agricultural lands through regulatory takings for the installation of riparian buffers, loss of available water due to stream dewatering, tailwater compliance measures, and the impacts from restrictions on the use land, water, and resources.

In order to preserve agriculture and ensure a healthy farming industry, the Legislature has declared that "a sound natural resource base of soils, water, and air" must be sustained, conserved, and maintained. (Food & Agr. Code, § 802(g).) Prior to negatively impacting agricultural lands, decision makers must consider the impacts to the agricultural industry, the State as a whole, and "the residents of this state, each of whom is directly and indirectly affected by California agriculture." (Food & Agr. Code, § 803.)

CEQA require analysis of significant environmental impacts and irreversible changes resulting from proposed projects. These include unavoidable impacts; direct, indirect, and cumulative effects; irreversible and irretrievable commitment of resources; relationships between short-term uses and long-term productivity; and growth-inducing impacts to the environment. Pursuant to CEQA, the physical environment includes agricultural lands and resources. Rather than conducting a thorough analysis of all potential impacts to agricultural lands, agricultural vitality, agricultural production, agricultural water use, and agricultural resources, the SED briefly concludes that the environmental analysis, as a whole, is general in nature. (Staff Report, p. 92.) This generalized review ignores or gives short shrift to numerous agricultural and other significant environmental impacts, failing to venture any attempt at even a programmatic range of potential impacts and instead relies on rote cataloguing of "foreseeable methods of compliance" of little informational value.

Additionally, the SED's environmental review is improper for the following reasons:

Forest Resources: The SED's finding of "No Impact" as to CEQA Appendix G.II.c "Agriculture and Forest Resource" (Staff Report, pp. 125-126) is incorrect. Although it is

perhaps true that “[n]o elements of the proposed Basin Plan amendment will rezone or force the rezoning of Timberlands Production or result in the conversion of forested land to non-forested land” or have any “impact on the classification of conversion of timberlands,” the Proposed Policy *would* impact many timberlands by rendering them unavailable and inaccessible as a “forest resource” in perpetuity. Accordingly, it is incorrect that there is no “conflict with existing zoning of forest land, timberland, or timberland zoned as Timberland Production.” In other words, even if the *zoning* remains unchanged as an administrative matter, the *use* of the land that is the *reason* for such zoning has been extinguished—and, thus, there is a clear “conflict” and potential significant adverse impact on the State’s “Forest Resources.”

Water Rights Amendments As Proposed Mitigation (Response): As the State Board is well aware, the maintenance and management of surface water rights is essential to agriculture. Farm Bureau does not believe the Regional Board appropriately responded to points raised in its comment letter in relation to water rights and instream flows (See NCRWQCB General Comment #12) and consequently repeats those comments here:

Comments: Water Rights Amendments As Proposed Mitigation: The proposed mitigation on pages 159 and 160 relating to the inclusion of certain proposed amendments to existing water rights permits relies on action outside of the Regional Board’s control or jurisdiction and is, therefore, improper. Also, the statement on page 160, suggesting that the CDFW can legally include “bypass flow requirements” in a Fish and Game Code 1602 permit for modification of a water diversion structure (as opposed to an extraction of water pursuant to a valid water right) is incorrect.

In responding to this point, raised by numerous commenters, the Regional Board stated that “In the case of conversion of a direct diversion, the Regional Board would take actions to ensure the associated riparian water right was converted to an appropriative right, either as a condition of use of grant funds, or through coordination with the Division of Water Rights.” As a threshold matter, it is not clear how riparian water rights can be “converted” to an appropriative right. At a minimum, if the Regional Board is going to exercise its authority to “take actions to ensure” such a conversion, it should explain how this will be done.

Even more troubling is the fact that the Regional Board seems to agree that it does not have authority to regulate water rights, yet then goes on to explain that it will “use all available means at its disposal to address these issues, as appropriate.” This can only be read to mean that while the Regional Board does not have direct regulatory authority over water rights, it will endeavor to use every available means to gain regulatory control over water rights by bootstrapping water use to water quality.

The Regional Board fails to appropriately identify the need for such an aggressive approach toward activities already managed by the State Board. The Regional Board also fails to adequately explain or assess the implications of such an approach.

3. The SED's Consideration of Project Alternatives Is Not Adequate

Response

In Section C.3 of Farm Bureau's October 14, 2013 comment letter, Farm Bureau commented essentially that the Regional Board failed to consider a reasonable range of alternatives when two of just three actual alternatives considered are predicated on regulation of shade and/or heat from solar radiation through the Regional Board's waste discharge authorities, rather than its water quality control and TMDL authorities. In response to CEQA Comment #5 (re: adequate range of alternatives under CEQA), and General Comment #10 (re: "regulation of controllable factors"), the Regional Board argues essentially two points: First, the Regional Board argues that the four alternatives considered in its SED constitute a legally adequate reasonable range of feasible alternatives under CEQA. Second, the Regional Board argues that Alternatives 2 and 4 are not infeasible alternatives in excess of its regulatory authorities and may, therefore, be considered as part of a reasonable range of feasible alternatives. The Regional Board's response to General Comment #10 merely asserts that the Regional Board's proposed regulation of shade "is in the context of discharges," and that Alternatives 2 and 4 are therefore feasible alternatives for which the Regional Board has legal authority to consider as part of a legally adequate reasonable range of feasible alternatives. The Regional Board's explanation does *not* explain *what* discharge provides the requisite nexus for its broad assertion of control over shade and solar radiation where, in many watersheds and locations, there would necessarily be no such nexus, especially in waters with no 303(d) listing or existing TMDL. Accordingly, the Regional Board has failed to explain what legal authority it has to propose or consider Alternatives 2 and 4 and, therefore, how it can include these alternatives as part of a legally adequate reasonable range of feasible alternatives. Because the CEQA- and alternatives-related comments raised in Section C.3 of Farm Bureau's October 14, 2013 letter are not adequately addressed in the Regional Board's responses to comments or its underlying documents, these issues remain pertinent matters for the State Board's consideration. For ease of reference, those comments are included below.

Comments

The Regional Board must consider all reasonable alternatives to the project. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal. 3d 376, 400, ["The foregoing CEQA provisions and Guidelines make clear that 'One of its [an EIR's] major functions . . . is to ensure that all reasonable alternatives to proposed projects are thoroughly assessed by the responsible official.' (*Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 197 [132 Cal.Rptr. 377, 553 P.2d 537].)"] The Guidelines require the evaluation of a "'reasonable range of alternatives to the project, or to the location of the project, which could feasibly attain the basic objectives of the project and evaluate the comparative merits of the alternatives.'" (Cal. Code Regs., tit. 14, § 15126, subd. (d).) These alternatives must be discussed, 'even if these alternatives would impede to some degree the attainment of the project objectives, or would be more costly.' (Guidelines, § 15126, subd. (d)(3).)" "'Feasible' means capable of being accomplished in a successful

manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors.” (Cal. Code Regs., tit. 14, § 15364; *Laurel Heights, supra*, 47 Cal. 3d 376, 402.) Alternatives to be evaluated must be potentially feasible and should feasibly attain most of the basic objectives of the project. (Cal. Code Regs., tit. 14, § 15126.6.)

Unfortunately, the alternatives analysis within the SED does not include a reasonable range of alternatives because two of the four alternatives are improper. Alternative 2 (uniform riparian buffer throughout region) and Alternative 4 (proposed action) are improper to the extent both rely on the Regional Board’s waste discharge authorities in order to implement WDRs, waivers of WDRs, or prohibitions of discharge. (See Staff Report, p. 97 Re: Alternative 2—“Waste discharge prohibitions within a riparian buffer would be the primary regulatory tool used to protect beneficial uses [from temperature impairments caused by solar radiation, as opposed to any discharge of waste].”) Other than the “No Action” Alternative, Alternative 3 (303(d) Listings & TMDL implementation one watershed at a time) is the only potentially legal alternative considered—and the only reason it is rejected and Alternative 4 identified as the “superior alternative” is because this “status quo approach” (Staff Report p. 98) “requires data collection and assessment and 303(d) listing for waters not yet identified” (*id.*), “requires technical TMDL development (extensive data collection, assessment, and modeling of load allocations) and the development of an action plan and Basin Plan amendment ” (*id.*), and (in staff’s view) “would be overly consumptive of staff resources” (Staff Report p. 99). All of these objections to Alternative 3 ignore the fundamental point that the approach proposed in Alternative 4 is improper due to the jurisdictional limitations on the Regional Board’s regulatory powers (waste discharges authorities separate and distinct from powers to adopt water quality control plans, basin-wide water quality objectives, and to develop and implement TMDLs).

The SED also rejects Alternative 3 on grounds that it would “create[] an unfair regulatory environment where some watersheds come under regulation much sooner than others,” and would “[d]efer the implementation of TMDL action plans for many years-to-decades.” (Staff Report, p. 99.) As to the first point, on the contrary, to assert region-wide regulatory control over shade without jurisdictional authority in watersheds without TMDLs “creates an unfair regulatory environment.” As to the second point, regarding deference of TMDL implementation “for many years-to-decades” it is not true that the Regional Board can do nothing to address possible temperature issues in watersheds without TMDLs. The Basin Plan’s temperature objectives are currently implemented by all Regional Board orders, waste discharge requirements, waivers of waste discharge requirements, prohibitions, TMDLs, and TMDL implementation plans, as all such regulatory actions must comply with the Basin Plan. (See Wat. Code, §§ 13263, 13269; Basin Plan, p. 1-3.00.) Thus, the dismissal of Alternative 3 is improper.

There is no reasonable range of alternatives where the Regional Board considers only one legal (and, therefore, feasible) alternative (Alternative 3), a “No Action” Alternative, and two illegal (and, therefore, infeasible) alternatives (Alternatives 2 and 4). Accordingly,

the Regional Board’s SED presently fails to analyze a “reasonable range” of feasible alternatives. (*Laurel Heights, supra*, 47 Cal. 3d 376, 404, [“The key issue is whether the selection and discussion of alternatives fosters informed decisionmaking and informed public participation.”]; Cal. Code. Regs., tit. 14, § 15126(d)(5).) This failure to properly consider project alternatives cannot be upheld under CEQA and the “rule of reason” for considering alternative project components and regulatory requirements.

Even if a full discussion leaves some uncertainty regarding actual impacts of the anticipated project, CEQA requires some discussion of probable impacts, project alternatives, and the environmental consequences of those contingencies. (*Vineyard Area Citizens for Responsible Growth, Growth, Inc. v. City of Rancho Cordova*, 40 Cal.4th 412, 432.) Such discussion must also be supported by substantial evidence and allow for public participation and review.⁴ (Pub. Resources Code, § 21091(d)(2); Cal. Code Regs., tit. 14, §§ 15088, 15121, 15384.) By failing to analyze probable impacts and merely concluding that impacts are speculative, the SED is improper and the error is prejudicial.

D. The Temperature Implementation Policy Fails to Evaluate Economic Costs

Response

The Regional Board’s response to ECON Comment #3 is non-responsive to Farm Bureau’s comments on the lack of adequate economic analysis in the Staff Report, including consideration of economic factors, estimated costs of program implementation, and the reasonableness and feasibility of one proposed alternative in terms of that alternative’s efficacy to achieve the protection of one beneficial use (here water temperature for fish) in comparison to other potential alternatives, on balance with all other beneficial uses. (See Sections E and E.1 of Farm Bureau’s October 14, 2013 comment letter, pp. 12-16.) In Chapter 10 of the Staff Report on page 164, the Regional Board acknowledges that it must “consider economics in establishing water quality objectives that ensure the reasonable protection of beneficial uses,” but then goes on to assert that it is “not obligated to consider the balance of costs and benefits associated with implementation of a TMDL or Basin Plan amendment,” and rather that “[i]t is only obligated to consider economic factors and may adopt a TMDL or Basin Plan amendment even if the costs are significant.” The Regional Board provides no citation in support of this assertion. Similarly, the Regional Board’s brief response to comments asserts, again without citation or support, that “[t]he economic analysis requirements are limited to an

⁴ By relying on conclusory language, lack of evidence, unidentified and unsubstantiated claims, and unlike comparisons to support its findings that no significant environmental affects will occur, the public’s ability to provide input, to collaborate with, and to aid in finding solutions to maintain and/or improve water quality is largely restricted and makes it impossible for the public, many of whom have actively asserted a keen and sophisticated interest in the development of revised/new discharge requirements, to fully participate in the assessment of project impacts and alternatives associated with the project. (See *Mountain Lion Coalition v. Fish & Game Comm.* (1989) 214 Cal.App.3d 1043, 1051.)

estimate and range of the cost of compliance measures and identify [*sic*] potential sources of funding, not economic losses[...].” The remainder of the Regional Board’s very brief response to comments deals with the feasibility of estimating losses from foregone timber harvest—an issue nowhere mentioned in Farm Bureau’s letter. Because neither the Regional Board’s economic analysis in the Staff Report, nor its responses to comments adequately address the issues raised in Farm Bureau’s October 14, 2013 comment letter, these issues remain an appropriate topic for independent consideration by the State Board.

Comments

The requirement to consider economics under Porter-Cologne Water Quality Control Act (“Porter-Cologne”) is absolute. Water Code, section 13141 explicitly mandates:

State policy for water quality control adopted or revised in accordance with the provisions of this article, and regional water quality control plans approved or revised in accordance with Section 13245, shall become a part of the California Water Plan effective when such state policy for water quality control, and such regional water quality control plans have been reported to the Legislature at any session thereof.

However, prior to implementation of any agricultural water quality control program, an estimate of the total cost of such a program, together with an identification of potential sources of financing, shall be indicated in any regional water quality control plan.

(Wat. Code, § 13141.) Before a Regional Board can impose waste discharge requirements or condition water quality certification for discharges from irrigated lands, Porter-Cologne requires that it “shall take into consideration” the following factors: “the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and the provisions of Section 13241.” (Wat. Code, § 13263.) Section 13241 in turn lists six “factors to be considered,” including “economic considerations” and “water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area.” (Wat. Code, § 13241.)

Anticipated program implementation costs to the agricultural community include increases in potential fees, management practice implementation, monitoring costs, report preparation, and costs for education, among other costs. Given that the impacts of water quality regulations may take years to materialize, the Regional Board should analyze the economic costs and impacts within a dynamic framework taking into account the projected changes in the economic situation *over time*.

In addition to direct costs imposed on the agricultural community, the Regional Board should evaluate indirect costs, including the economic consequences that are transmitted via market interactions to other groups, such as consumers. Water quality regulation, such as the Policy, increases the average cost of production and has a direct negative

effect on the producer and the consumer through the resulting increase in variable costs and the output price.

1. The Policy Is Unsupported by Any Adequate Analysis of Potential Economic Impacts or Substantial Evidence to Support a Conclusion That the Policy Constitutes a “Reasonable” Approach to the Problem

Response

See response to Section D, The Temperature Implementation Policy Fails to Evaluate Economic Costs, *ante*.

Comments

Staff’s analysis of the potential economic impacts of the Policy is inadequate. The Staff Report notes on page 164 that the Regional Board must consider economics in at least two specific contexts: First, the Staff Report acknowledges that (under the Porter-Cologne Act [Water Code section 13000, *et seq.*]) “the Board must consider economics in establishing water quality objectives that ensure the reasonable protection of beneficial uses.” (Staff Report, p. 164.) Second, the Staff Report notes that CEQA requires that the [Regional Water Quality Control Boards] analyze the reasonably foreseeable methods of compliance with proposed performance standards and treatment requirements.” (*Ibid.*; see, also, Pub. Resources Code, § 21000, *et seq.*)

The Staff Report acknowledges at page 164 only that the Regional Board must “consider economics in establishing water quality objectives” under the Porter-Cologne Act and “analyze [...] reasonably foreseeable methods of compliance” including “economic factors” under CEQA. (Staff Report, p. 164.) Beyond this, however, the Staff Report opines that “[t]he Regional Water Board is not obligated to consider the balance of costs and benefits with implementation of a TMDL or Basin Plan amendment.” (*Ibid.*) Rather, the Staff Report opines that the Board is “only obligated to consider economic factors and may adopt a TMDL or Basin Plan amendment even if the costs are significant.” (*Ibid.*) Unfortunately, this unduly narrow characterization of the Regional Board’s obligation to “consider” and “analyze” the potential economic impacts of the proposed action and also to regulate water quality in a reasonable manner is incorrect.

As detailed herein, multiple provisions of law require reasonable balancing of competing demands and beneficial uses and meaningful consideration of economic impacts of a proposed water quality regulation, including the relative costs and benefits of the regulation as an important measure of the proposed regulation’s “reasonableness.”⁵ Staff’s economic analysis (Staff Report, pp. 164, *et seq.*), rationale and purpose (Staff Report, pp. 1-2 and 29-31), and alternatives analyses (Staff Report, pp. 96-100) in support of the present Policy fail, both collectively and singly, to satisfy these requirements of law.

⁵ Section 13000 of the Water Code provides that “activities and factors which may affect the quality of the waters of the state shall be regulated *to attain the highest water quality which is reasonable, considering all*

The Staff Report’s rejection of a reasonable alternative utilizing the Regional Board’s established 303(d) listing, TMDL, and general water quality control planning authorities, based essentially on Staff’s assessment that such a strategy, would be “overly consumptive of staff resources[....]” was unreasonable. (See Staff Report, pp. 98-99.) In contrast, Staff’s preferred alternative, involving region-wide implementation of water quality objectives along with developed TMDLs was selected by Staff on the grounds that such an alternative constitutes “the most efficacious strategy for Regional Water Board staff resources,” “applies broadly to address all impaired waters and non-impaired waters,” and “focuses staff resources on regional implementation actions as opposed to the development of individual TMDLs[....]” (See Staff Report, pp. 99-100.) As explained *supra*, this rationale ignores the legal limits of the Regional Board’s jurisdiction under the applicable state and federal law. Moreover, while focusing myopically on the “efficacy” and convenience for Regional Board Staff, the rationale fails to balance the comparative burdens and “reasonableness” of the identified alternatives in terms of their relative economic impacts on competing beneficial uses, private individuals, small businesses, and the regulated community.

The Economic Analysis section of the Staff Report and the SED anticipates various “reasonably foreseeable methods of compliance” that in turn suggest a strong (albeit insufficiently analyzed) potential for various significant environmental impacts to farmland and agricultural resources, forest resources, hydrology, water quality, utilities and public services including water service and fire services and major economic impacts. (See Staff Report, pp. 100-120 [“Analysis of Compliance Measures, Potential Environmental Impacts, and Possible Mitigation Measures”], 121-163 [“Discussion of Potential Environmental Impacts”], 164-184 [“Economic Analysis”].) Dam removal activities and proposed region-wide actions to “maintai[n] and preserv[e] site potential shade,” “contro[l] erosion and sediment,” and “restore or maintain stream flows” with regard to irrigated agriculture, grazing, and timber-related activities similarly entail unquantified, but clear major economic impacts. (See Economic Analysis” Chapter, Staff Report, pp. 166-184.) Staff’s “analysis,” however, attempts no region-wide estimate of the potential economic impacts of Alternative 4 to inform the public or affected regulated community, even within a range. Instead, Staff’s “analysis” provides only a series of tables listing broad “ranges” of potential costs of various “Reasonable Compliance Measure” activities (see Staff Report, pp. 169-173), followed by a series of pages listing various programs that could provide potential “sources of funding.” Otherwise, Staff’s “analysis” consists entirely of a vague series of generalities regarding various limiting constraints on present estimation of future economic impacts (see, e.g., Staff Report, pp.

demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.” (Wat. Code, § 13000 [emphasis added].) Additionally, with respect to water quality regulations affecting agriculture, section 13141 requires that “prior to [sic] implementation of any agricultural water quality control program,” the Regional Boards provide “an estimate of the total cost of such a program, together with an identification of potential sources of financing, shall be indicated in any regional water quality control plan.” (Wat. Code, § 13141)

164-165), the assertion on page 164 that the analysis needn't "balance [...] costs and benefits [...] even if the costs are significant" (Staff Report, p. 164), and the terse conclusion on page 175 that is the sum total of Staff's analysis regarding the program's economic cost to the regulated community that "[p]otential sources of funding" could include "monies from private and public sources" (see Staff Report, p. 175).

As explained, the Staff Report's economic analysis, rationale and statement of the reasons, proposed action, and environmental analysis fail to satisfy the Regional Board's mentioned obligations to balance and consider economic impacts, to weigh alternatives, and to regulate water quality in a reasonable manner.

E. Conclusion

The California Farm Bureau Federation, Forest Landowners of California, Sonoma County Farm Bureau, California Cattlemen's Association, Mendocino County Farm Bureau, Buckeye Conservancy, California Licensed Foresters Association, and Humboldt County Farm Bureau appreciate the opportunity to submit comments to the State Board on the North Coast Regional Board's Temperature Implementation Policy and Action Plans. The signatories to this letter urge the State Board to reassess the adequacy of and need for the Temperature Implementation Policy given the comments expressed herein as well the existence of the current water quality objectives within the North Coast Basin Plan that adequately address temperature. Specifically, the signatories urge the State Board to remand the issue back to the Regional Board for further development and deliberation. If you have any questions, please feel free to contact Kari Fisher (kfisher@cfbf.com) or Justin Fredrickson (jfredrickson@cfbf.com).

Very truly yours,

California Farm Bureau Federation
Forest Landowners of California
Sonoma County Farm Bureau
California Cattlemen's Association
Mendocino County Farm Bureau
The Buckeye Conservancy
California Licensed Foresters Association
Humboldt County Farm Bureau

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