



CALIFORNIA FARM BUREAU FEDERATION

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September 16, 2011

Sent via E-Mail

commentletters@waterboards.ca.gov



Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

Re: Proposed Russian River Frost Protection Regulation

Dear Ms. Townsend:

Farm Bureau is a non-governmental, non-profit, voluntary membership California corporation whose purpose is to protect and promote agricultural interests throughout the state of California and to find solutions to the problems of the farm, the farm home and the rural community. Farm Bureau is California's largest farm organization, comprised of 53 county Farm Bureaus currently representing approximately 76,500 agricultural and associate members in 56 counties. Farm Bureau strives to protect and improve the ability of farmers and ranchers engaged in production agriculture to provide a reliable supply of food and fiber through responsible stewardship of California's resources.

Farm Bureau respectfully submits these comments on the September 1, 2011 draft of the Proposed Russian River Frost Protection Regulation ("proposed regulation") for the State Water Resources Control Board's consideration. This letter addresses changes to the language of the proposed regulation and issues that arose in the response to comments.

Although the language of the proposed regulation was modified, in meaning and effect it remains unchanged. The new language still asserts that frost diversions cause stranding mortality, that "coordinating or otherwise managing diversions" is "a reasonable alternative to current practices," and therefore frost diversions are "unreasonable unless conducted in accordance with a board-approved water demand management program to reduce their instantaneous impact." As illuminated with greater clarity in the responses to comments, to support of this proposition the SWRCB fundamentally relies upon two

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isolated instances of stranding, a short letter from NMFS, and a study by Dr. Deitch indicating that additional information is needed to determine whether problems may exist in different portions of the watershed. As with the prior versions of the proposed regulation, neither the premises nor the conclusion are supportable in light of the information before the SWRCB.

The key concerns with the new proposed regulation are: First, the “scope and magnitude of the problem” is never fully described or supported. Second, the proposed regulation still does not have a standard by which a reasonable water user can know whether they are in compliance with the proposed regulation. Third, the responses to comments explain that the proposed regulation merely shifts the burden of proof water users to prove their reasonableness, an unprecedented and unsupportable requirement. Fourth, the SWRCB does not appear to consider anywhere in the proposed regulation or its supporting documents that numerous frost surveys have been conducted since 2008 and did not find a problem, thereby significantly undermining the alleged “scope and magnitude of the problem.” Fifth, the responses to comments imply that the SWRCB has already made a determination, calling into question the purpose of the September 20, 2011 hearing.

The “Scope and Magnitude of the Problem”

In numerous responses to comments the SWRCB references the “scope and magnitude of the problem,” usually as a way of explaining why physical improvements to date are not adequate and the proposed regulation is necessary. However, neither the regulation nor the supporting documents ever actually describe the scope and magnitude of the problem such that a reasonable water user in the region could determine whether they are part of the problem. Water users would be very interested to know exactly, or even generally for that matter, what the “scope and magnitude of the problem” is, but nowhere does the SWRCB describe either.

The scope of the problem should describe where and when actual problems exist. The magnitude of the problem should describe the significance of this problem. The SWRCB does neither; instead, it relies upon two isolated instances of stranding, a short letter from NMFS, and a study by Dr. Deitch to conclude that since a problem might exist, a problem does exist. In doing so, the SWRCB ignores significant information refuting both the alleged scope and the alleged magnitude of the problem.

If the SWRCB cannot adequately describe the scope and magnitude of the problem, then how can it determine that the actions completed to date do not address the “scope and magnitude of the problem?” Clearly it cannot. Consequently, the SWRCB must describe the scope and magnitude of the problem if it is to adopt a regulation that ignores all of the activities that have solved problems on the basis they are not adequate.

One explanation for this inconsistency may be that the SWRCB does not actually perceive the problem to be that salmonids are stranded due to diversions for frost

protection, but that there is not adequate information to prove that each diverter does not do so. If this is the case, there are two issues that must be addressed. First, this is not what the proposed regulation provides, therefore it must be modified to reflect this true purpose and recirculated as required by law. Second, there is no support in the law for determining reasonableness based upon a failure to prove that one is not harming salmonids.

It is also important to note that as explained in the responses to comments, the SWRCB's reliance upon Dr. Deitch's paper to support the regulation is very confusing. This is because as indicated by Dr. Deitch's comment letter, the paper does not support the conclusion that there is a problem everywhere in the Russian River watershed, only that additional information is needed to determine if there is a problem. Thus this paper is not appropriately relied upon to support that there is actually a basin-wide problem in the Russian River watershed.

There Is No Standard

In spite of the changes to the proposed regulation and the responses to comments, the proposed regulation remains flawed because it fails to contain a reasonable standard by which a water user may know what is reasonable and why they are not reasonable. While the regulation clearly provides that water users must "manage diversions to prevent cumulative diversions for frost protection from causing a reduction in stream stage that causes stranding mortality," this general objective lacks the specificity necessary for a reasonable water diverter to know what it means.

If there is truly a problem with diversions, then the SWRCB should be able to describe what that problem is. Since the alleged problem is related to changes in stream stage, then the standard must be one describing the allowable change in stream stage. Absent such a clear standard, the water user cannot know what they must do and, furthermore, it is impossible to apprehend how the SWRCB can know what is reasonable.

Although in the response to comments the SWRCB appears to argue that the standard is to prevent stranding to salmonids, this restatement of the alleged problem is not a standard, it is an objective. Since it is axiomatic that water diversion affects stage, what is needed, by the SWRCB and water users to know whether something is reasonable or unreasonable, is what standards (stage changes) are required to achieve the objective. In this matter, the restating of the objective as a standard (to prevent stranding), is neither helpful nor adequate.

This problem is a troubling flaw because the determination of unreasonableness has preceded the determination of what is reasonable. This is not only logically inconsistent, but puts the water user in the impossible situation of being regulated without any idea of what the actual regulatory requirements will be.

Shifting the Burden of Proof

It was clarified in the response to comments that the proposed regulation places a burden on the water user to demonstrate reasonableness with an as yet undefined standard. However, the SWRCB does not point to any authority that permits it to use a regulation to shift the burden of proof water users to prove the reasonableness, particularly when there is no standard of reasonableness and no *prima facie* case has been made that an individual's water use is in fact unreasonable.

Need to Consider Stranding Surveys

From documents Farm Bureau received pursuant to its Freedom of Information Act and Public Records Act requests, it is evident that the SWRCB worked with NMFS and DFG since 2008 to find incidents of stranding in the Russian River watershed. Despite what appears to be a rather significant effort, no incidents of stranding were found. It is obvious that when considering the "scope and magnitude of the problem," this important information, tending to demonstrate neither the scope nor magnitude is as great as the SWRCB alleges, has been considered. There is no indication the SWRCB has done so.

Uncertainty About When Board's Decision Was Made

The responses to comments have an unsettling tendency to affirmatively state what the SWRCB has already concluded. For example, in numerous locations the response to comments states that "...the Board has determined..." However, it was our understanding that the board has not concluded anything until the meeting on September 20. If this understanding is incorrect please clarify. Regardless, the use of such language is discouraging because it tends to imply that new comments and information are not fully considered.

Specific Questions Regarding Comment Responses:

Comment 3.0.90 – The SWRCB's answer to this comment significantly confuses the SWRCB's position. On one hand it is clearly stated that the Board has considered all the "facts and circumstances of this case." What is "this case?" Is it intended to mean each diversion of water for frost protection in the Russian River watershed for every year? If so, it is not at all clear where in the record this analysis has been done.

Comment 3.0.92 – Does the SWRCB assert that it has continuing jurisdiction to amend water rights through a regulatory process?

Comment 3.0.94 – In response to comments about the Board's authority the SWRCB clarified that the justification for this regulation is that diversions for frost protection may

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present a risk of stranding. The point Farm Bureau wishes to make is that a use cannot be declared unreasonable simply because there “may” be a conflict between uses – there must actually be a conflict.

Conclusion

Farm Bureau appreciates the opportunity to comment on the proposed regulation. If you have any questions, please do not hesitate to contact me directly at (916) 561-5667 or jrice@cfbf.com. Thank you.

Very truly yours,

A handwritten signature in black ink, appearing to read "J. L. Rice", written in a cursive style.

Jack L.Rice
Associate Counsel

JLR:dkc