

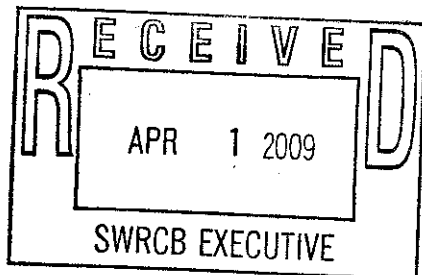


# CALIFORNIA FARM BUREAU FEDERATION

NATURAL RESOURCES AND ENVIRONMENTAL DIVISION

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April 1, 2009



*Via First-Class Mail & Email*  
[commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)

Jeanine Townsend, Clerk to the Board  
for Charles R. Hoppin, Chair  
STATE WATER RESOURCES CONTROL BOARD  
1001 I Street, 24th Floor  
Sacramento, CA 95814

**Re: 4/7/09 Russian River Frost Protection Workshop**

Dear Chairman Hoppin and Members of the Board:

At its April 7th Workshop the State Water Resources Control Board ("Board") will hear information regarding the impacts of diversions for frost protection on the Russian River. The purpose of this letter is to encourage the Board to support voluntary actions already underway and to recommend that the Board does not adopt emergency regulations similar to those for the Napa River.<sup>1</sup>

The California Farm Bureau Federation ("CFBF") 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. CFBF is California's largest farm organization, comprised of 53 county Farm Bureaus currently representing over 32,000 farm families and more than 85,000 individual members in 56 counties. CFBF 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.

CFBF, through its constituents Mendocino County Farm Bureau ("MCFB") and Sonoma County Farm Bureau ("SCFB," collectively with CFBF and MCFB "Farm Bureau"), has members that are directly involved with the issues to be discussed at the April 7 Workshop and who will be affected by any actions resulting from or informed by the hearing.

<sup>1</sup> The regulations quoted in the April 7 Workshop notice, 25 CCR 785, are hereinafter referred to generally as the "Napa Regulations."

### **Voluntary Efforts Should Be Supported**

Since last year's rare frost event, farmers, environmental interests, and agencies have engaged in a voluntary stakeholder-led effort to develop near-term and long-term solutions to frost protection issues. The Board should recognize and support these efforts by acknowledging the strategies this group has developed and taking appropriate actions to implement these strategies. The Board should be careful not to take an action that would directly interfere with the stakeholders' work or indirectly interfere with the collaborative spirit that has been demonstrated thus far.

### **Modify Flow Requirements**

As part of a near-term solution, the Board should consider supporting the proposal to increase the capacity of Lake Mendocino release obligations. Such modifications could preserve the limited amount of water in Lake Mendocino while ensuring that water is released when it is needed most.

Farm Bureau understands that the Mendocino County Russian River Flood Control and Water Conservation Improvement District recently petitioned the Board for an emergency change to the existing Russian River flow requirements. The Board should take immediate action on this petition in order to preserve stored water and help alleviate frost control concerns this year.

While modifying the flow requirements is an essential near-term action, it is also an integral part of any long-term solution. Therefore as part of a permanent solution to frost control issues on the Russian River, the Board should work with stakeholders to determine how flow requirements can be improved.

### **Increase Capacity of Lake Mendocino**

As part of a long-term strategy, the Board should consider supporting the proposal to increase the capacity of Lake Mendocino by raising Coyote Dam. This would allow water stored early in the year, during flood control operations, to be retained since there would be additional capacity to handle any late season rain events. Additional capacity would allow this early water to be saved without impairment of Lake Mendocino's flood control functions.

### **Russian River Concerns Different From Napa River Issue**

Because circumstances surrounding this year's Russian River frost control issue are different than those that existed on the Napa River in the 1970s, the Board should not attempt to replicate the Napa Regulations on the Russian River. As explained below, the regions are hydrologically different, the number and type of diversions are different, the history is different, the legal issues are different, and the results would be different.

The first distinction to recognize is that the Russian River is a very different water body and watershed than the Napa River. Russian River flows are significantly controlled by the operations of two large dams; which is not the case on the Napa River. The Napa River has four large municipal reservoirs which operate as fill and spill impoundments. None of these reservoirs is required to make releases for downstream water supply as occurs in the Russian River.

The Russian River watershed also differs from the Napa in the number, location, and types of water rights involved at issue. The Mendocino County Russian River Flood Control and Water Conservation Improvement District has rights to water stored in Lake Mendocino for agricultural customers along the Russian River. Napa County does not have an agricultural water supply district to oversee diversions releases and flow levels.

Another important difference is that the Napa Regulations were implemented over several years and were for the purpose of ensuring that frost protection continued in accordance with the priority system. In contrast, implementing Napa-style emergency regulations on the Russian River would be a rushed effort to deal with a different problem (elimination of frost protection as opposed to protection of priority rights) and would result in a de facto prohibition of diversion for frost protection.

### **Fix the Water Rights System First**

For many reasons adopting Napa-style emergency regulations is effectively a ban on frost protection. Aside from the practical limitations which preclude ready implementation of off-stream storage and watermastering, such regulations would also force water users into a very broken water rights system. The problems with the water rights system and the instream flows policy are well known and must be repaired before the Board can expect water users to forego their existing rights and apply for changed or new rights. The point is that it is not feasible to force people to build off-stream storage since that would require them to enter a broken water right process that can take decades to complete.

## Legal Issues

Although the workshop notice cites *State Water Resources Control Board v. Forni* ("Forni"), ostensibly to establish the authority of the Board to adopt such regulations in the Russian River, this case is not so broad as is implied. It is important to note that in *Forni* the Court held that "section 659 [now section 735] amounts to no more than a policy statement which leaves the ultimate adjudication of reasonableness to the judiciary."<sup>2</sup>

Basically, the holding of *Forni* was that direct diversion for frost protection might be an unreasonable method of diversion based upon the Constitution and the Water Code, but whether it is or not is a factual determination that must ultimately be made by the courts. Therefore, although the case was ultimately settled in a manner that complied with the Napa Regulations, the legitimacy of those regulations was not decided. This is explained in the last paragraph of the opinion which states:

In conclusion, we wish to make it unmistakably clear that all we hold today is that appellant's complaint states valid causes of action for either injunctive or declaratory relief or both, and that the question of reasonable use or reasonable method of use of water constitutes a factual issue which cannot be properly resolved by a motion for judgment on the pleadings.<sup>3</sup>

The rule then is that direct diversion may be an unreasonable use, but that determination is factually specific for a particular set of circumstances and may not just be replicated in other locations. As explained above, this year's concerns on the Russian River are very different than the 1970's issues on the Napa River. Adopting Napa-style regulations for the Russian River would ignore the differences between the regions and the issues. Furthermore, there is nothing to indicate that such drastic measures are necessary to achieve adequate protection of instream flows.

There is no factual basis to support regulations declaring direct diversion for frost protection or frost protection generally an unreasonable use of water. As indicated by the strategies developed by stakeholders, there are many less onerous and more effective actions the Board can take. So long as such options exist, declarations affecting the constitutional right to reasonably use water would not be valid.

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<sup>2</sup> *State Water Resources Control Board v. Forni* (1976) 54 Cal. App. 3d 743, 752.

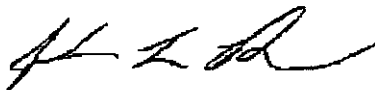
<sup>3</sup> *Forni* at 754.

**Conclusion**

In conclusion, Board should recognize and support the work that has already been done to address the impacts of frost diversions on stream flows. The Board should also take actions necessary to immediately modify Russian River flow requirements in order to preserve what water remaining in Lake Mendocino. Finally, it is very important that the Board does not seek to develop emergency regulations that would have the practical effect of prohibiting diversions for frost protection.

Thank you for your consideration of Farm Bureau's comments on this matter. If you have any questions, please feel free to contact Jack Rice at (916) 561-5667.

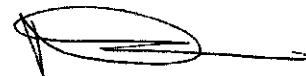
Sincerely,



**Jack L. Rice**  
Associate Counsel  
California Farm Bureau Federation



**Robert Muelrath**  
President  
Sonoma County Farm Bureau



**Mike Anderson**  
President  
Mendocino County Farm Bureau

JLR\mmm

cc: Frances Spivy-Weber, Vice Chair  
Arthur G. Baggett, Jr., Board Member  
Tam M. Doduc, Board Member  
Dorothy Rice, Executive Director  
Michael Lauffer, Chief Counsel