



CALIFORNIA FARM BUREAU FEDERATION

NATURAL RESOURCES AND ENVIRONMENTAL DIVISION

2300 RIVER PLAZA DRIVE, SACRAMENTO, CA 95833-3293 • PHONE (916) 561-5665 • FAX (916) 561-5691

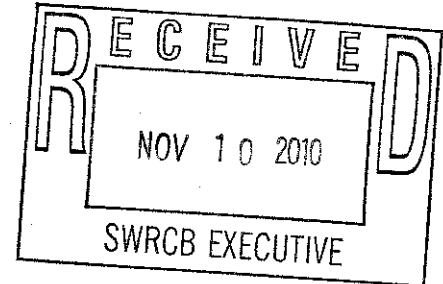
11/16/10 Bd Wrkshp Item 10
Instream Flow Studies
Deadline: 11/10/10 by 12 noon

Sent via e-mail

commentletters@waterboards.ca.gov

November 10, 2010

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



Re: Comment Letter – Instream Flow Studies Report

Dear Ms. Townsend:

The California Farm Bureau Federation 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 85,000 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.

Context of Comments in Relation to Delta Reform Act of 2009 and Public Resources Code section 10000, et seq.

The Board's notice of November 2 seeks public comments on the Board's "Draft Prioritized Schedule and Estimate of Costs to Complete Instream Flow Studies Pursuant to the Sacramento-San Joaquin Delta Reform Act of 2009." We are writing at this time to urge the Board to constrain the scope of the activities described in the present draft, as we believe the Board's report as presently drafted significantly exceeds the scope of the legislative mandate to which it responds.

The Delta Reform Act of 2009¹ directs the Board, by December 31, 2010, to "submit to the Legislature, a prioritized schedule and estimate of costs to complete instream flow studies for the Delta and for high priority rivers and streams in the Delta watershed, not

¹ Sen. Bill No. 1X (2009-2010 7th Ex. Sess.).

otherwise covered by Section 85086 [of the Act],² by 2012, and for all major rivers and streams outside the Sacramento River watershed by 2018.” In addition, section 85087 directs that “[i]n developing [the aforementioned “prioritized schedule and estimate of costs”], the board shall consult with the Department of Fish and Game (hereinafter, “DFG”) as to the timing of its [that is, the DFG’s] submission of [its own, separate and distinct] recommendations for instream flow needs.”³

From this language it is clear that the “instream studies” to which the Delta Reform Act refers are neither studies to develop “flow criteria [...] necessary to protect public trust resources” of the kind required under section 85086 of the Act, nor “proposed streamflow requirements [...] in [...] cubic feet of water per second” of the kind required of the DFG under Public Resources Code sections 10000, *et seq.*

“Instream Studies” Referenced in Water Code section 85087 Are Distinct from DFG “Minimum Flow Recommendations” under Public Resources Code section 10000, *et seq.*

The latter category of the “proposed streamflow requirements” refers to the flow recommendations the Legislature has directed the Department of Fish and Game (hereinafter, “DFG”) to develop for selected “streams and watercourses,” to be identified by the DFG “throughout the state,” “for which minimum flow levels need to be established in order to assure the continued viability of stream-related fish and wildlife resources.”⁴ These “minimum flow requirements” focus on the needs of “stream-related fish and wildlife resources” and, in developing them, the DFG is not required to consider existing water rights, or to do any “balancing” of past, present, or future beneficial uses of water (nor could it properly do so as the State’s trustee agency for fish and wildlife, and not a water rights or water quality permitting body). Rather, this duty falls to the Water Board, which body is directed to “consider” those “proposed [...] requirements”

² Section 85086 of the Delta Reform Act directed the board, “pursuant to its public trust obligations,” to develop “flow criteria” considered, in the board’s estimation after soliciting scientific information on the subject, “necessary to protect public trust resources” in the Sacramento-San Joaquin River Delta. These “flow criteria”—which were to “include the volume, quality, and timing of water necessary for the Delta ecosystem under different conditions,” which were to be “non-predecisional” with respect to any subsequent water rights proceeding of the board, and which expressly excluded any balancing of competing beneficial uses—are *separate and distinct* from both the “schedule and estimate of costs” and the “instream flow studies” referred to in section 85087. (See Final Report on Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem, August 3, 2010, http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/deltaflow/docs/final_rpt080310.pdf.)

³ Sen. Bill No. IX (2009-2010 7th Ex. Sess.), § 85087.

⁴ Pub. Res. Code, § 10000, *et seq.*

on balance with all of its other water rights, water quality, and other duties and powers, “in acting upon applications to appropriate water.”⁵

Water Code section 1257.5 Requires Mere “Consideration” of DFG “Minimum Flow Recommendations” on Balance with All Other Considerations within the Board’s Purview

Far from a single-variable exercise in isolation from all other considerations, the Board’s function in terms of its “consideration” the DFG’s “minimum streamflow requirements” in connection with any water rights applications coming before it, is a process that entails a multifaceted balancing of competing demands on a limited resource, in the public interest.

“In acting upon [an] application to appropriate water,” the Board must,

“consider the relative benefit to be derived from (1) all beneficial uses of the water concerned including, but not limited to, use for domestic, irrigation, municipal, industrial, preservation and enhancement of fish and wildlife, recreational, mining and power purposes, [as well as] any uses specified to be protected in any relevant water quality control plan....”⁶

Similarly, the board is affirmatively directed to “allow the appropriation [...] of unappropriated water under such terms and conditions as in its judgment will best develop, conserve, and utilize in the public interest the water sought to be appropriated.”⁷

Within the larger context of Board’s water rights and water quality context authorities, then, the Board’s “consideration” of the Department of Fish and Game’s “proposed streamflow requirements for fish and wildlife purposes” is but one of a variety of “considerations,” all of them subject in aggregate to the public interest and the California Constitution’s prohibition on waste or unreasonable use and policy in favor of maximal “beneficial use” of the water resources of the State “to fullest extent of which they are capable [...] in the interest of the people and for the public welfare.”⁸

⁵ See Water Code, § 1257.5 (“The board, in acting on applications to appropriate water, shall consider streamflow requirements proposed for fish and wildlife purposes pursuant to Sections 10001 and 10002 of the Public Resources Code.”)

⁶ Water Code, § 1257.

⁷ Water Code, § 1253.

⁸ Cal. Const., art. X, sec. 2.

Water Code § 85087 and Public Resource Code § 10000, et seq. Refer to Separate and Distinct “Instream Studies”

From the foregoing we may conclude that the Legislature’s earlier mandate as to the “proposed streamflow requirements” required of the DFG under Public Resources Code § 10000, et seq. continues undisturbed by the enactment of the Water Code § 85087 and that, consistent with the Board’s very different purpose and authorities, the “instream studies” for which the Board must presently develop a schedule and estimate of costs refers to a wholly different type of study.

The statute, afterall, could hardly be interpreted to direct the Board to generate a series of “instream flow studies” that focus entirely on a single beneficial use to the exclusion of others, as this would be fundamentally inconsistent with the Board’s balancing function in the area of water rights and water quality; nor could one reasonably suppose that the “instream studies” presently required under section 85087 are meant to be needlessly duplicative of the “proposed streamflow recommendations” already required of the DFG under PRC § 100000, et seq.

Furthermore, it would be both illogical and inappropriate for the Legislature to ask the Board to develop a schedule and estimate of costs for a series of studies that are not the Board’s responsibility, but rather the responsibility of the DFG, or to direct the Board to “consult with the Department of Fish and Game as to the timing of its submission of [its wholly distinct and separate] recommendations for instream flow needs,” if the “instream studies” referenced in section 85087 were not some new and different type of study the Legislature has intended to place, not under the authority of the DFG, but rather of the Board.

Section 85087 and the Delta Reform Act of 2009 Seek Cost Estimates as to Baseline Conditions, While Leaving Board Water Rights and Water Quality Authorities Undisturbed

The “instream studies” referenced in section 85087 refer, not to a study to generate a proposal of the kind already required of the DFG under PRC § 10000, et seq., as to any particular pattern or magnitude of flows for the protection fish and wildlife resources, but rather to a study of existing conditions in a stream or river, including existing water rights and water quality, relative to the fish and wildlife resources to be protected in each stream.

By Its Express Terms, the Reform Act Leaves the Board’s Powers and Authorities Unchanged

Corroborating this conclusion, it is pertinent to note that the Delta Reform Act of 2009 (“Reform Act”) specifically preserves and limits the Board’s power water rights, water quality, and public trust authorities without change.

Thus, section 85031(d) of the Reform Act specifies that

[N]othing in [the Reform Act] supersedes, reduces, or otherwise affects existing legal protections, both procedural and substantive, relating to the state board's regulation of diversion and use of water, including, but not limited to, water right priorities [...] and changes to water rights.

Moreover, as stated in the same section of the Reform Act,

"Nothing in [the Delta Reform Act] expands or otherwise alters the board's existing authority to regulate the diversion and use of water or the court's existing concurrent jurisdiction over California water rights."

Furthermore, as to the Board's authorities with respect to public trust resources and the "balancing" process required by *National Audubon Society v. State Water Resources Control Board*, 33 Cal.3d 419 (1983), section 85032 clarifies that nothing in the Act is to "affect" "[t]he application of the public trust doctrine" or "any water right."

In light of these express reservations of and limitations on the Board's existing power, then, any reading of section 85087 that purports to expand or alter the Board's previously existing to duty balance requirements of the public trust against other competing uses, or that would saddle the Board with trustee agency responsibilities formerly reserved to the Fish and Game Department, is we believe fundamentally inconsistent with the language of the Reform Act itself, which expressly preserves the Board's former duties and powers without change.

The Draft Report Significantly Exceeds the Scope of Section 85087

Despite the necessary conclusion that the "instream studies" in question are not a mere duplication or extension of the "proposed streamflow requirements" required of the DFG under PRC § 10000 and, rather, that they are something distinct and quite different, the current "Draft Prioritized Schedule and Estimate of Costs" appears to construe the Board's statutory charge in much broader terms than the language of the statute itself warrants.

Thus, among the activities contemplated by the current Draft for an "instream study" the Draft cites "flow/habitat modeling, fish passage studies, water temperature monitoring/modeling, developing timing of pulse flows, and compilation of hydrology"—activities which, in addition to their complete omission of any reference to existing water rights or water quality, moreover suggest that the Board's understanding of its charge is, not that the "instream studies" should be limited to an assessment of baseline conditions in the context of all uses, but that the Board believes the Legislature is, in effect, asking the Board to abandon or disregard its water rights and water quality

authorities, and henceforth assume the DFG's single-purpose objective and existing charge to develop flow recommendations solely for the protection of fish and wildlife.

The Board's Draft goes even further in Section IV to assume that an anticipated outcome of any future "instream studies" by the Board will be the identification "additional streamflows" which must then be set in "instream flow objectives." And it is only by means of an astounding feat of statutory extrapolation, that the Draft is able to conclude matter-of-factly on page 4 that, "If existing streamflows are insufficient to meet environmental needs, voluntary or regulatory are necessary to ensure that the flows are made available."

From here, the Draft continues in the same categorical terms to state that,

"After conducting instream flow studies, the next logical step would be to set instream flow objectives as part of the regulatory framework needed to prevent further ecological damage to the Delta or other California rivers and streams."

and that,

"Streamflow objectives can be set administratively [...] as part of the State Water Board's [water quality] planning processes [...] or directly as the result of a regulatory water rights action taken to amend specific water right permits and licenses."

Even if the Delta Reform Act made any mention of the "logical next step" of "instream flow objectives" however (and it patently does not), there is, in any case, nothing in this statement to suggest any acknowledgement on the part of the Board that the Board's duty and ability to subject water rights and water quality to the public trust is in turn subject to the public interest and the Board's necessary balancing of competing beneficial uses.

The Timeline for Set by the Delta Reform Act Is Deliberate and Reflects Both the Distinct Nature of the "Instream Studies" Referenced in Section 85087 and the Limited Scope of the Board's Task

A related issue concerns the Board's statutory timeline: The schedule and estimate of costs to "complete instream studies" for various Delta tributaries by 2012, and for all rivers and streams throughout the state by 2018, does not, as the Board objects in its Draft, set an "unrealistic" deadline, any more than did the "flow criteria" study under section 85086(c) or the DFG's "flow criteria and quantifiable biological objectives for aquatic and terrestrial species" under section 85084.5 of the Act.

All three are deliberately constrained, finite tasks designed, as stated in section 85086(b), to "establish an accelerated process to determine instream flow needs of the Delta for the

purposes of facilitating the planning decisions that are required to achieve the objectives of the Delta Plan.”

The Delta Plan, however, is “the Delta Plan,” and water rights, water objectives, and beneficial uses throughout the State did not originate with the Delta Plan, nor do they end with it. By the Delta Reform Act’s very terms, none of these studies has any legal significance outside of the Delta Plan, any impact on the Board’s past or existing authorities, or any effect upon or relevance to any formal water rights or water quality proceedings hereafter conducted by the Board.

Use of Instream Flow Recommendations or Studies under Water Code sections 85086(c), 85084.5, and 85087 to Regulatory Effect, for Purposes Other Than the Planning Purposes of the Delta Stewardship Council’s Delta Plan, Is Improper

To use or insinuate that flow recommendations or studies used under Water Code sections 85086(c), 85084.5, and 85087 may be appropriately used outside of the Delta Plan itself with binding or pre-decisional effect, whether in the context of present or future water right or water quality proceedings, Clean Water Act 401 certifications, enforcement proceedings, or any other context, is improper.

As noted previously, the “instream studies” referenced in section 85087 refer, not to the more comprehensive fish and wildlife-centered recommendations already required of the DFG under PRC § 10000, but rather to a relatively rapid reconnaissance- or inventory-level assessment of the existing condition of state’s rivers and streams (including not only existing instream flows, but also the legal beneficial uses that in part limit and constrain those existing instream flows).

The shortness of the timeline for completion of the Board’s charge under section 85087, and the existence a separate mandate as to required minimum flows for fish and wildlife resources under PRC § 10000, bolsters this conclusion. Moreover, from the architecture of PRC § 10000, et seq. and Water Code section 1257.5 we may again infer that the DFG’s single-purpose focus on the recommended flows for fish and wildlife resources was meant to be an activity separate from the Board’s broader consideration of “the relative benefit to be derived from [...] all beneficial uses [of water]”⁹ and “reasonable protection of beneficial uses,” considering various factors including “[p]ast, present, and probable future beneficial uses of water.”¹⁰

Conclusion

Farm Bureau thanks the Board for this opportunity to comment on the Board’s “Draft Prioritized Schedule and Estimate of Costs”—regrettably, a product which we see as the

⁹ Water Code, § 1257.

¹⁰ Water Code, § 13241.

Letter to Jeanine Townsend, Clerk to the Board

November 10, 2010

Page 8

most recent in a series of steps whose clear end is, first, to lay the foundation for a significant expansion of the Board's regulatory power and control and, second, as a longer term goal, to effect a regulatory reallocation of water resources throughout the state from existing uses, without parity or balance, to a single beneficial use.

The current approach, in which *ad hoc* reports and workshops wholly unconstrained by any evidentiary procedure or due process are employed as a means to set a supposed threshold of "necessary" flows for fish and wildlife that is then cited as the *de facto* measuring stick by which to gauge all other uses, is illegal, undemocratic, and contrary to the broad interests of the vast majority of Californians. It is not appropriate to subordinate existing uses in the name of a single interest.

In light of the numerous issues and concerns described above, we strongly urge the Board to revise its draft document to conform to the minimal requirements of its legislative mandate and no more.

Very truly yours,



Justin E. Fredrickson
Environmental Policy Analyst

JEF