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July 5, 2011

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 Proposed Russian River Frost Protection Regulation ("proposed regulation") and Draft Environmental Impact Report ("DEIR") for the State Water Resources Control Board's consideration.[1] Since many of the points raised in this letter are also relevant to the Economic and Fiscal Impact Report and Initial Statement of Reasons, Farm Bureau requests the State Water Resources Control Board ("SWRCB" or "Board") consider these comments in regard to those documents as well.[2]

After three years of working to learn about and resolve the problems alleged in the National Marine Fisheries Service ("NMFS") February 19, 2009 letter to the SWRCB, the proposed regulation comes as a great disappointment. Based solely on anecdotal facts

[1] Farm Bureau is also a signatory to the letter submitted by Williams Selyem et al., which is fully incorporated herein by this reference.
[2] In the interest of readability, this letter refers to the DEIR, Economic and Fiscal Impact Report, Initial Statement of Reason, Fact Sheet, and related notices collectively as "supporting documents."

and simplistic assumptions, the proposed approach utterly ignores physical solutions already voluntarily put in place in favor of a regulation that would have the Board conditionally invalidate all water rights used for frost protection in the Russian River watershed.[3] While Farm Bureau remains committed to supporting efforts that make real world improvements to benefit fish and farmers, the proposed regulation is unnecessary, unjustified, and exceeds the SWRCB's authority. As the following comments explain, there are better alternatives which have not been analyzed, the facts do not support the proposed regulation, and the proposed regulation exceeds the SWRCB's authority and is contrary to due process.

Possible Alternative that Should Be Analyzed

While Farm Bureau is strongly opposed to the proposed regulation for the reasons detailed in this and other comment letters, there may be an appropriate alternative that would help support continued improvements for fishery resources while avoiding many of the significant problems with the proposed regulation.

One alternative the SWRCB should review and consider is actually a relatively simple, but fundamental, modification of the proposed regulation. Currently, the proposed regulation is a prohibition which declares that all diversions for frost protection are unreasonable and thus prohibited unless certain conditions are met. As described below, this amounts to an unjustified conditional extinguishment of certain water rights. To resolve this problem, the SWRCB should consider restructuring the proposed regulation from a declaration of what is not reasonable, to a statement of what is reasonable.[4] Like the regulation adopted for the Napa River, this type of regulation would be a policy statement, leaving determinations of reasonableness for the proper judicial or quasi-judicial proceeding.[5] While the supporting documents argue that the proposed regulation (with its blanket declaration of unreasonableness) is preferred because it would be too difficult to enforce anything else, such a desire for administrative convenience does not justify an abrogation of due process.

Such a policy statement would be factually and legally more supportable. Instead of making basin-wide declarations and forcing water users to prove their innocence by compliance with as yet unknown standards, a policy statement about what is reasonable would provide water users with information about how to achieve important

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[3] In the interest of readability, the term "Russian River watershed" is used to refer to the area covered by the regulation, which we recognize does not include the watershed above Warm Springs and Coyote Valley dams.

[4] *E.g.*, "Any diversion for frost protection from the Russian River watershed that is diverted in accordance with a board approved WDMP is reasonable."

[5] See *People ex rel. State Water Resources Control Bd. v. Forni* (1976) 54 Cal.App.3d 743, 752 holding that, "Properly construed, section 659 amounts to no more than a policy statement which leaves the ultimate adjudication of reasonableness to the judiciary."

improvements for the benefit of salmonids, without an unjustified regulatory declaration of unreasonableness.

NMFS Letter Not the Origin of Proposed Regulation

The DEIR, Notice of Proposed Rulemaking, and other supporting documents all point to a February 19, 2009 letter from NMFS to the SWRCB ("NMFS letter") as both the genesis of, and primary justification for, the proposed regulation. However, neither characterization is correct. In reality, as demonstrated by documents Farm Bureau received pursuant to a FOIA request, SWRCB staff actually requested, and even helped draft, the letter supposedly originating from NMFS. [6] Consequently, the supporting documents should be corrected to clarify that NMFS February 19, 2009 letter was requested by and drafted in part by SWRCB staff.

The Proposed Regulation is Not a Necessary Response to the NMFS Letter

Without explanation or support, the proposed regulation and supporting documents give the impression that the SWRCB is obligated to respond to the NMFS February 19, 2009 letter by adopting some form of prohibitive regulation. This is not true. In fact, responding to the NMFS letter with the proposed regulation is imprudent and, as indicated herein, inconsistent with the law.

While the Endangered Species Act ("ESA") prohibits individuals from "taking" listed species, it does not impose upon every regulatory body an affirmative obligation to regulate every possible action of every person that could potentially violate the ESA. The ESA is a self-executing, self-standing law, complete within itself for the specific purposes that law addresses. The Board has no obligation to assume (or impose on others) a responsibility the ESA does not itself impose.

While it is true that the SWRCB's own statutory charge obligates it to consider and protect instream and public trust resources on balance with all other uses, this obligation from the California Legislature does not amount to a delegation of omnibus responsibility for enforcement of the ESA. Such an assumption of responsibility is certainly not required, and in fact runs afoul of the Board's broader obligations to manage water for the general welfare by balancing various uses. The Board's zeal in the field of species protection does not permit it to abdicate these broader responsibilities in an effort to accomplish what is in effect enforcement of the ESA.

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[6] The documents received pursuant to Farm Bureau's FOIA and PRA requests are included on several CDs with this letter. Since these documents provide important information related to the origin, development, and factual justification of the proposed regulation, it is important the SWRCB consider them in regards to the proposed regulation. Consequently, Farm Bureau requests these documents be made part of the record for the proposed regulation.

Harm to Salmonids is Not Per Se Unreasonable

One of the many novel and unsupported assumptions underlying the proposed regulation is that any diversion or method of diversion that may harm salmonids or result in stranding mortality is *per se* an "unreasonable" method of diversion.[7] Effectively, this assumption would establish that any possible impact to a listed species means that a water user's water use is *per se* "unreasonable"—at least unless and until the water user has proven their innocence by submitting to an unknown battery of costly regulatory controls on the legal exercise of any otherwise legal water right. Such novel interpretation of the "reasonable use doctrine" has no basis in existing law.[8]

Under existing law, there are a number of specific and independent statutes requiring protection of species, including most prominently the ESA and California Endangered Species Act ("CESA"). However, the existence of these laws does not provide a basis for the proposition that because a water user may violate such a law in the future, a particular water use may currently be deemed unreasonable. This inappropriately attempts to merge the reasonable use doctrine with the ESA and CESA. Such a merger not only does not make sense, it is also unprecedented and inconsistent with existing law.

It should be evident that a water user with a reasonable method of diversion might violate the ESA by the unauthorized "take" of a listed species. This does not mean the use is unreasonable, it just means that the water user violated the ESA. In other words, the SWRCB's public trust obligations are in no way synonymous with or defined by the ESA or CESA.

The Proposed Regulation Fails to Balance Uses

In reasonable use determinations the Board or court must consider all of the facts and balance all beneficial uses. Here, the SWRCB has conducted no substantive factual inquiry and has made no attempt to balance beneficial uses. Rather, based upon anecdotal facts and unjustified extrapolation, the proposed regulation makes a universal declaration of "unreasonableness" throughout the watershed. Such an approach is an abrogation of the SWRCB's responsibility to balance uses.

Nonetheless, relying on this vacuum of information, the proposed regulation directs all water users to participate in an as yet undefined SWRCB-approved Water Demand Management Program ("WDMP") (regardless of whether these users have any impact or not), for the purpose of establishing whatever standards are necessary to entirely eliminate any possible risk of stranding mortality (regardless of the relative causes or inevitability of such stranding). If one does not participate in such a program, the

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[7] The two standards "may harm salmonids" and "may result in stranding mortality" are used somewhat interchangeably in the supporting documents and thus are both mentioned here.

[8] A review of the authority cited in the DEIR for this rule, *Environmental Defense Fund v. East Bay Municipal Utility District* (1980) 26 Cal. 3d 183, does not reveal any support for the assertion that conflict with species is *per se* unreasonable.

regulation imposes an absolute prohibition on any diversion of water for frost protection. While simple and ably targeted at achieving a single overriding objective, such an approach can hardly be called a proper "balancing" of uses; rather, it establishes the Board's goal of "preventing stranding" as *the* primary use and object of all water management throughout the watershed, to which all other uses must cede.

This unequal treatment is made evident by the fact that the obligation to "prevent stranding"—or in other words completely eliminate any risk of stranding whatsoever—sets an impossibly high standard. To ensure with 100% certainty that not a single fish could possibly be stranded due to any diversion or extraction of water for frost protection, it would likely require that diversions have absolutely no effect on stream stage. This could well mean that in many cases no water could be diverted. Taken to its absurd conclusion, this could even mean that the proposed regulation might impose on water users the obligation to augment flows to prevent any natural stranding that may occur during this period (since the objectives of the proposed regulation do not clearly distinguish between natural or diversion related stranding).[9] Of course, there is nothing balanced or "reasonable" about such an approach, but this is nonetheless how the proposed regulation is drafted.

To better appreciate how the proposed regulation does not properly balance uses, it may be useful to suggest what a balanced approach might look like: One scenario might be where the SWRCB, after considering whether certain diversions actually posed a threat of stranding, determined that a reasonable balancing of uses required an 80% probability that fish would not be stranded due to diversions for frost protection.[10] Such an approach would afford a reasonable degree of safety for the fishery resources, without giving one use absolute preference. Without such flexibility, the obligation to attain 100% certainty is likely unattainable, unworkable, and unreasonable.[11]

Of course, it is impossible to know from the information presented with the proposed regulation what actual obligations the standards of a Board-approved WDMP might require, but then it is equally impossible to know from the information presented whether there is in fact any widespread risk of stranding in the watershed. This reinforces the point made below that the SWRCB cannot support a declaration of unreasonableness without conducting a thorough factual investigation in the context of a formal evidentiary hearing.

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[9] The Williams Selyem *et al.* letter and the 2000 Biological Assessment for the Operation of Warm Springs and Coyote Valley Dams (hereinafter "2000 Biological Assessment" – a document within the SWRCB's records) provide evidence that, particularly in the spring as flows recede, stream stages drop and stranding occurs naturally. Furthermore, it is worth noting that the proposed regulation does not clearly distinguish between natural or diversion related stranding in describing the objectives of the regulation.

[10] The "80%" figure is for example only.

[11] For example, the degree to which diversions must be limited or changed to go from 50% to 80% certainty of preventing stranding may be relatively low. The degree of modification required to go from 80% to 95% is likely much greater. And the degree to which water users must limit or modify diversions in order to achieve 100% certainty no stranding will occur is exponentially greater.

To clarify, upon completing the proper factual investigation in an appropriate process, the SWRCB might indeed conclude a particular diversion or method of diversion is unreasonable in light of all the facts (including its effect on species). However, the SWRCB may not cut corners and arrive at such a result prematurely and improperly by means of a regulation that circumvents due process and avoids all of the necessary factual antecedents for a determination of "reasonableness." The proposed regulation impermissibly places its entire emphasis on the theoretical potential to pose some threat to species without any consideration of the relative burden to the water right holders or any actual benefit to the species.

There is Not Adequate Evidence to Support the Proposed Regulation

According to the supporting documents, the proposed regulation relies almost entirely upon two pieces of evidence to support the conclusion that all surface-water diversions and groundwater extractions throughout the Russian River watershed are unreasonable because they may harm or strand salmonids. These two pieces of evidence are the February 19, 2009 letter from NMFS and a paper by Deitch *et al.* titled, "Hydrologic Impacts of Small-Scale Instream Diversions for Frost and Heat Protection in the California Wine Country." However, reliance upon these two pieces of evidence is misplaced and inadequate to justify the proposed regulation.

In regards to the NMFS letter, and as described more fully in the numerous presentations and comments to the Board, voluntary efforts have fully resolved any contributions diversions for frost protection may have had on the strandings described in that letter.[12] Regarding the Deitch, *et al.* paper, Farm Bureau understands that Dr. Deitch sent a letter to the SWRCB disabusing the Board of the presumption that the study on Maacama Creek could be assumed to reflect conditions throughout the Russian River watershed, which clarifies that the Maacama Creek study does not justify a basin-wide regulation.

Notwithstanding the fact that neither the NMFS letter nor the Deitch *et al.* article can be used to justify a basin-wide declaration of unreasonableness, the supporting documents attempt to justify such a declaration by combining these anecdotal observations with some generic statements about viticulture and theoretical descriptions of frost protection methods to conclude that existing diversions for frost protection are unreasonable. Based upon these sparse facts and assumptions, the proposed regulation concludes that what has been actually observed and documented in two isolated and relative minor instances is in fact a problem endemic to the entire watershed. Such wild extrapolation, however, is improper and does not provide sufficient justification for the proposed regulation.

[12] The physical and managerial improvements that eliminated the potential diversions for frost protection that contributed to stranding are also described in the Williams Selyem *et al.* letter.

There is No Evidence to Support Inclusion of Groundwater Extraction

Another unsupported component of the proposed regulation is that it would apply to all groundwater extractions within the basin. However, there is no evidence in the record to demonstrate that groundwater extractions have the sort of instantaneous effect on stream flow that a direct diversion might have. In fact, there is evidence to the contrary that groundwater extractions, even if hydraulically connected, have a buffered effect on streamflow.[13] Furthermore, since the only evidence of stranding is allegedly connected to direct diversions, there is therefore absolutely no justification for extending the regulation to groundwater. This expansion is particularly unjustified in light of the SWRCB's obligation to review the facts and circumstances of each case when making a reasonable use determination.

The SWRCB Must Recognize and Analyze Natural Stream Stage Variation and Natural Stranding

Yet another factor the SWRCB must consider, and yet has not, is that significant and sometimes rapid stream stage changes occur routinely from a variety of causes, including naturally, *other than* frost protection. As evidenced by reviewing streamflow records for any number of north coast streams on the California Department of Water Resources website and the 2000 Biological Assessment for the Operation of Warm Springs Dam and Coyote Valley Dam, reductions in stream stage similar to those seen during the 2008 March-May frost season occur routinely.

In fact, it is precisely because streamflows vary naturally that it is possible to develop standards like the "Hunter criteria" which provide acceptable stream stage change rates for reservoir operations and other anthropogenic activities.[14] The proposed regulation and supporting documents do not indicate whether this science has been considered, why it has been rejected, or what standards should be used in place of the "Hunter criteria." Absent such information, it is not clear how the SWCB will address natural stream stage changes and instances of natural stranding.

No Evidence Hypothetical Frost Protection Practices are Problematic

The DEIR makes a number of general statements about frost protection practices that are apparently intended to demonstrate that there is widespread inefficiency in frost water practices. (DEIR p. 13) The problem is that these are all hypothetical statements. There is no evidence to show that these theoretical situations actually exist at all, let alone in

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[13] See Williams Selyem *et al.* letter.

[14] The Hunter (1992) criteria indicate that a stream stage change of 1inch per hour is acceptable. This is the criteria required for the operation of Warm Springs Dam and Coyote Valley Dam. Also, the FOIA documents received by Farm Bureau and others indicate that the SWRCB and NMFS were aware of these criteria. (Also see the Williams Selyem *et al.* letter.) This information along with information indicating that natural variations in the Russian River exceed these criteria is available in the 2000 Biological Assessment for the Operation of Warm Springs Dam and Coyote Valley Dam.

locations and to such a degree that it would pose any actual threat of stranding. Absent this supporting information, the Board may not rely upon merely hypothetical statements to justify the proposed regulation.

Objective of Regulation is Ambiguous and Prospective

The proposed regulation and supporting documents do not clearly describe the objective of the proposed regulation or establish any clear standards for the achievement of that objective. To judge by the proposed regulation, the apparent purpose is to "prevent stranding mortality." However, in the Draft Statement of Reasons the purpose of the WDMP is to ensure that cumulative diversions will not result in a reduction in stream stage that is "harmful to salmonids." While it appears that in most instances the phrase "harmful to salmonids" was struck in favor of the slightly clearer objective to "prevent stranding mortality," there remains confusion in the supporting documents as to which standard would be actually used.

The proposed regulation is also unclear in regard to the standard or standards which will be employed to achieve the objective of "preventing stranding mortality" or "preventing harm to salmonids." The most significant problem this poses is that the SWRCB has apparently rejected the existing science (namely the Hunter criteria from the 2000 Biological Assessment for the Operation of Warm Springs Dam and Coyote Valley Dam and elsewhere), without any clear indication of the standard that will replace it (or, for that matter, *why* some different standard is needed, if such is the case). It is likely that the reason no such standard has been set is because there has been no appropriate factual inquiry. In addition to the due process problems such a failure presents (described below), this presents the practical problem of requiring compliance to achieve an objective without any idea of what measure will be used to determine whether that objective has been achieved.[15]

This vagueness means that the five components of the WDMP do not provide enough detail: to analyze the project under CEQA, to justify the need for the regulation under Government Code section 11350, to support a declaration by the Board that diversions for frost protection are unreasonable, to provide to the regulated community adequate knowledge of what must be done to comply with the regulation, or to comply with due process.

The Proposed Regulation is Inconsistent with the Reasonable Use Doctrine

The most troubling aspect of the proposed regulation is the manner in which the SWRCB is proposing to exercise its authorities under the reasonable use doctrine. In the name of

[15] Adding to the uncertainty regarding what standard or objectives are expected, the Fact Sheet, in answer to the question "Why are frost protection regulations necessary on the Russian River?" answers that it is because frost diversions "can lower stream levels to the point fish become stranded." This is strange because it is not clear that the alleged problem was a "point," but rather was a "rate of change." Clarification is needed here.

administrative convenience, the proposed regulation radically breaks with all past precedent relating to the reasonable use doctrine and its application to water rights and water use in California.

A determination as to whether a particular diversion or method of diversion is reasonable or unreasonable is a judicial function. This becomes clear when one considers that: 1) both courts and the SWRCB have concurrent jurisdiction over reasonable use determinations (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 451); 2) "courts, including *Joslin* [*v. Marin Municipal Water District* (1967) 67 Cal. 2d 132] have uniformly determined that reasonableness is a question of fact requiring case-by-case consideration of the circumstances in each case. *Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.* (1935) 3 Cal. 2d 489, 567";[16] and 3) a declaration of unreasonableness affects a constitutionally protected property right by limiting, conditioning, or even extinguishing the underlying water rights (*Imperial Irrigation District v State Water Resources Control Board* (1990) 225 Cal. App. 3d 548, 562).

It is also telling that in *State Water Resources Control Board v. Forni* (1976) 54 Cal. App. 3d 743 ("*Forni*")—a case upon which the SWRCB relies heavily—a regulation similar to the proposed rule was upheld *not* as an actual declaration of reasonableness, but rather as a mere policy statement which left the ultimate adjudication of reasonableness to the judiciary.[17] Thus, the *Forni* case, *Imperial Irrigation District v State Water Resources Control Board* (1990) 225 Cal. App. 3d 548, and a long and venerable line of earlier cases leave no doubt but that determining reasonableness is a judicial function that may be done by courts or the SWRCB, but only through a judicial or quasi-judicial process on a case-by-case basis.

In fact, the proper approach is outlined at California Code of Regulations title 23, § 4000 *et seq.* in the Board's own regulations relating to the "Prevention of Waste, Unreasonable Use or Diversion of Water." Although the SWRCB may not be obligated to precisely follow these regulations, any procedure followed by the Board must preserve the basic due process guarantees that are reflected in these regulations. In other words, even if the SWRCB need not follow the precise letter of its own regulations, it must provide some comparable process to ensure the same substantive protections of due process.

The mere fact that the proposed regulation is to be generally and prospectively applied does not mean that the SWRCB is therefore enabled to transform into a quasi-legislative function what is necessarily a quasi-judicial function. Nonetheless, the Board apparently seeks to accomplish just such a transformation in the name of administrative convenience.[18] However, "administrative efficiency at the expense of due process is not

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[16] California Water II, page 48.
[17] *People ex rel. State Water Resources Control Bd. v. Forni* (1976) 54 Cal.App.3d 743, 752.
[18] Draft Initial Statement of Reasons, p. 3 stating that: "Without a comprehensive regulation, the State Water Resources Control Board would have to address diversions piecemeal, or in a complex and time-consuming adjudicative proceeding, as described below."

permissible."[19] Simply put, the SWRCB cannot follow a regulatory process to do what must be done through an adjudicatory process.

The Proposed Regulation is Inconsistent with Due Process

The SWRCB's authority to implement the reasonable use doctrine is both more powerful and more limited than its general regulatory authority. As the Board is well aware, there is legally no right to use water "unreasonably." Consequently, by declaring *all* diversions for frost protection "unreasonable," the proposed regulation would have the extraordinary effect of eliminating *all* water rights for frost protection unless and until the water users demonstrate compliance with certain as yet undefined procedural obligations.

This means that regardless of whether such diversions are "unreasonable" *in fact*, the proposed regulation would nonetheless impair vested water rights by declaring all diversions for frost protection "unreasonable" as a matter of administrative convenience. Thus, the proposed regulation would essentially create a new and unprecedented category of procedural unreasonableness. In so doing, the proposed regulation enters into direct conflict with fundamental due process requirements guaranteed under the United States and California Constitutions, and protected by the Civil Rights Act at 42 U.S.C. section 1983.

If adopted, the proposed regulation will be contrary to the Constitution and inconsistent with due process because: it would impair a constitutionally protected property right; it would impose a procedural obligation on legal water users through a regulatory (quasi-legislative) process even though the obligation here is properly an evidentiary one to be met by the Board through an adjudicatory (quasi-judicial) process; it lacks adequate factual support; it fails to provide clear standards for compliance; it applies indiscriminately to all diversions for frost protection whether or not there is any demonstrable risk of actual harm to salmonids; and it amends water rights without following the proper water rights procedures.

***Distinguishing the Napa River Regulations and* Forni**

The supporting documents point to the Napa River as an example of "regulatory precedent." However, as detailed below, this reference is misleading and any reliance is misplaced. An in-depth analysis of the Napa River situation, particularly the regulation and the First Appellate District case of *State Water Resources Control Board v. Forni*,[20] reveals that the proposed regulation shares nothing more than a superficial similarity with the Napa River example.

This superficial similarity does include a similar problem, that of "high instantaneous demand for water for frost protection by numerous vineyardists;"[21] and like the proposed

[19] *Manufactured Home Communities, Inc. v County of San Luis Obispo* (2008) 167 Cal.App.4th 705, 715.
[20] *People ex rel. State Water Resources Control Bd. v. Forni* (1976) 54 Cal. App. 3d 743.
[21] Cal. Code of Regs., tit. 23, § 735.

regulation, the Napa River regulations did declare certain "diversions of water" for frost protection between March 15 and May 15 to be "unreasonable in violation of Water Code section 100." However, the similarity ends with these simple and incomplete facts.

The difference between the Napa River regulation and the proposed regulation is that under the Napa River regulation the SWRCB properly left to an adjudicatory process the ultimate factual determination as to which individual diversions would be actually ruled unreasonable.[22] Thus, before the Board could in fact apply its rule to any diversion in the watershed, the Board correctly recognized that it first had to obtain a *judicial or adjudicatory determination* as to the "reasonableness" of each diversion in the watershed.

This is demonstrated by reviewing the legal question at issue in *Forni*—whether Water Code section 275, authorizing the SWRCB to "take *all appropriate proceedings* or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state," meant the Board's complaint "state[d] sufficient facts to constitute a cause of action for injunctive and/or declaratory relief."[23] Of course, the "appropriate proceeding" bearing on the question of unreasonable use is a formal proceeding before the Board or a court that would actually adjudicate the issue of reasonableness—*not* a quasi-legislative rulemaking process.

As sharply underscored by the *Forni* court, the question of "unreasonable use," as applied to an individual water right, cannot be determined in any way *other* than through a judicial or quasi-judicial administrative inquiry into the factual specifics of each case:

> [W]e 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 [court's ruling reversing the grant of summary judgment below], 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.* (Emphasis added.)[24]

"Properly construed," as the *Forni* court clearly stated in discussing the purpose and legal effect of the Board's Napa Valley rule at issue in that case, "section 659 amounts to no more than a policy statement which leaves the ultimate adjudication of reasonableness to the judiciary."[25]

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[22] See *ibid* ("*all diversions of water* from the stream system between March 15 and May 15 *determined to be significant by the board or a court of competent jurisdiction* shall be considered *unreasonable* and a violation of *Water Code Section 100 unless controlled by a watermaster administering a board or court approved distribution program*").
[23] *People ex rel. State Water Resources Control Bd. v. Forni* (1976) 54 Cal. App. 3d 743, 751.
[24] *Id.* at 754.
[25] *Id.* at 753

In addition to these fundamental legal and procedural distinctions, the Napa situation of the 1970s and the present-day Russian River situation can be factually distinguished as well.

First of all, the facts of the former case suggest that instantaneous demand for frost protection in the Napa Valley was at times actually "drying up the river."[26] By contrast, in the Russian River Valley drawdown from instantaneous demand for frost protection at the time of the only partially documented incident of fish stranding in 2008 involves a rate of decline of less than 1.5 centimeters per hour—and at no time is there any evidence to suggest that flows in the Russian River as a consequence of frost protection ever come anywhere even close to "drying up."

Second, in the Napa Valley the effect of instantaneous demand was an obvious infringement on vested water rights; certain diverters in the watershed were at times completely deprived of their water supply.[27] Thus, in Napa, the precise magnitude and location of such impacts were obvious, as was the cause. All of this was known and clearly documented as the result of an extensive adjudicatory proceeding.
In contrast, the proposed regulation is based solely on outdated (see discussion regarding improvements already made) anecdotal observations and unjustified extrapolations. There is very little, if any, factual information to document the precise nature or magnitude of any adverse impacts, or to establish any causal link between stranding and frost protection.

Even if such a declaration *were* factually justified, however, the ultimate determination as to which, if any, of all the hundreds of diversions in the Russian River watershed are "unreasonable," and which are "reasonable," is necessarily an adjudicatory determination that can only be reached by means of an appropriate proceeding before the Board or a court.

Thus, contrary to the assertion in the Board's rulemaking, neither the Napa River regulations nor the *Forni* case provide support for the Board's current approach. For that matter, neither does any other water right proceeding of the Board or any decision yet issued by the courts.

Procedural Unreasonableness

The proposed regulation would, for the first time, create a category of "procedural unreasonableness." Reasonable use determinations have in the past always required a case-by-case, factual analysis of the particular physical conditions involved in each situation. In a normal proceeding, the end result is a fact-specific determination as to

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[26] See, *e.g.*, *Forni* at 747. See, also, Cal. Code Regs., tit. 23, § 735 and "Judgment Granting Permanent Injunction," dated Dec. 29, 1976, *People of the State of California ex rel. v. Forni*, No. 31785, Superior Court of the State of California, County of Napa at 5.
[27] See *ibid.*

whether a particular diversion or method of diversion is in fact physically unreasonable in light of all of the relevant facts.

In contrast, the proposed regulation suggests that a use can be deemed unreasonable without any evidence of an actual physical conflict, but rather merely because that diversion is not operated "in accordance with a board approved water demand management program (WDMP)." The WDMP is then obliged to perform a number of strictly procedural tasks including determining whether or not the diversion actually has any physical "potential … to cause stranding mortality." If so, the WDMP is supposed to then identify corrective actions "that will prevent stranding mortality,"[28] or "cease diverting water for frost protection." While perhaps elegant in its simplicity, this approach is fatally flawed in that it completely ignores the fact that Constitutional obligation to use water reasonably is a physical obligation, depending on the facts in each case, and not a procedural requirement.

Unpacking how the proposed regulation would function, one could anticipate a number of legal anomalies concerning the supposed "reasonableness" or "unreasonableness" of any of the hundreds of affected diversions. For example, there might a water user extracting groundwater for frost protection that poses no risk of stranding salmonids. Even assuming *arguendo* that harming a salmonid is by definition "unreasonable," this person would be doing nothing factually or physically "unreasonable." But, under the proposed regulation, if that person fails to participate in a WDMP, the person's water use would be deemed a *per se* "unreasonable" use and that person would have no right to use water. Thus, under the Board's rule the unusual circumstance will inevitably arise that any number of water users' diversions might be physically and factually reasonable, but procedurally unreasonable.

A similar situation would arise in the case of a water user that might formerly have diverted water for frost protection in a manner that might have posed a risk of harm to salmonids, but who then made some change (or changes) that adequately and appropriately reduced this risk. Notwithstanding the fact that the water user physically removed any potential for conflict, that water user would nonetheless lose his or her water right for unreasonableness if he or she failed to continue to participate in a WDMP. The water users' right to use water would be artificially limited, constrained, or regulated away in a complete absence of any factual basis or evidentiary support for doing so.

The point of these hypothetical scenarios is to demonstrate that the proposed regulation simply may not rely on the reasonable use doctrine in the manner suggested in the proposed regulation. The situation simply does not justify the creation of a new category of "procedural unreasonableness," even if such an approach were legal. In point of fact, the Board's proposed approach is not merely unjustified and itself "unreasonable," it is contrary to the law.

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[28] It is not clear from the regulation whether the obligation to "prevent stranding mortality" is limited in any way or if the obligation includes preventing any natural occurrences of stranding that may happen as well.

SWRCB's Authority over Pre-1914, Riparian, and Groundwater Rights Is Limited

While it is clear the SWRCB has some authority over pre-1914, riparian, and groundwater rights, this authority is not coextensive with the Board's authority over post-1914 appropriative water rights. While the SWRCB may alter or modify post-1914 appropriative rights through various mechanisms provided for in the Water Code, this same regulatory authority does not extend to the pre-1914, riparian, and groundwater rights. Rather, the SWRCB's authority over those water rights is more limited. While in the exercise of certain quasi-judicial functions, the SWRCB, like the courts, may make certain determinations regarding pre-1914, riparian, and groundwater rights (including, specifically, a determination that a particular diversion, method of diversion, or method of use is "unreasonable" in light of the particular facts of each case), the SWRCB does not have the same authority to exercise quasi-legislative authority over pre-1914, riparian, and groundwater rights that it might be empowered to do in regards to post-1914 appropriative rights.

Permitted and Licensed Rights May Not be Amended by Proposed Regulation

Although the SWRCB does have its most expansive authority over post-1914 appropriative water rights, this authority is by no means unlimited. The proposed regulation purports to amend every license and permit issued in the area subject to the proposed regulation without any due process, including the statutorily required proceedings for amending a water right which require notice, a hearing, presentation of evidence, cross-examination, and other procedural safeguards. Here, the Board is in effect proposing to amend hundreds of individual water rights licenses and permits without providing any of the statutory due process protections it must provide for such a purpose.

The Proposed Regulations Ignore Water Rights Priorities

In addition to its failure to balance competing uses, the proposed regulation fails to appropriately consider water right priorities. In declaring all diversions "unreasonable" without distinction, the Board's rule makes absolutely no attempt to allocate any responsibility for mitigating the effects of water diversions among different classes of water users. Thus, riparians are treated the same as appropriators, and senior appropriators the same as junior ones. Like the novel attempt to designate all uses of water "unreasonable" without any appropriate due process protections or consideration of the facts, this complete disdain for water rights priorities represents a radical departure from all prior precedent and, we believe, is inconsistent with the law.

The Proposed Regulation Improperly Shifts the Burden of Proof

It is a longstanding presumption that a use is reasonable, particularly if it is a typical use in the area, and that the burden is on the party challenging the use to demonstrate

unreasonableness. (*Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.* (1935) 3 Cal. 2d 489, 547-548.) Here, the Board's proposed regulation reverses this burden of proof, establishing an assumption that all diversions for frost protection are *per se* "unreasonable," and shifting to the water users the burden of proving otherwise. Even stranger is that even if subsequently proven innocent, the water user is still apparently obligated to participate in the WDMP or risk prosecution.

Conclusion

Farm Bureau appreciates the opportunity to comment on the proposed regulation. While we are critical of the approach the proposed regulation suggests, we have proposed a reasonable alternative and look forward to continuing to work with the SWRCB and others to continue to actually improve conditions for fish. 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,

Jack L.Rice
Associate Counsel

JLR:dkc

Attachments: (These DVDs have been tested, but if they do not work, please contact Jack Rice and additional copies will be provided immediately.)
- PRA Response from Department of Fish and Game (2 discs)
- PRA Response from State Water Resources Control Board (1 disc)
- FOIA Response from National Oceanic and Atmospheric Administration (4 discs)