



# CALIFORNIA FARM BUREAU FEDERATION

## OFFICE OF THE GENERAL COUNSEL

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Submitted via E-Mail

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May 19, 2014



Board Members  
State Water Resources Control Board  
1001 I Street  
Sacramento, CA 95814

Re: **5/20-21/14 BOARD MEETING - ITEM #12**  
Drought-Related Emergency Regulations for Curtailment of Diversions Due to  
Insufficient Flow for Specific Fisheries

Dear Board Members:

The California Farm Bureau Federation (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 nearly 78,000 agricultural, associate and collegiate 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.

The notice of proposed emergency rulemaking has given very little time for those affected by the curtailments to grasp either the proposal or its implications. This is very troubling both because this is a new approach to implementing the reasonable use doctrine, and because the effects of short notice curtailments are so significant to water users. Consequently, Farm Bureau requests that the Board carefully consider the legal and practical implication of the Emergency Curtailment Rule and take no action that is not actually necessary to achieve an essential objective.

### ***NMFS-CDFW Voluntary Drought Initiative***

One of the most troubling aspects of the Emergency Curtailment Rule is its intersection with voluntary local cooperative solutions currently in place and in

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development. The Board's notice of the Proposed Emergency Regulations to curtail to water rights in Mill, Antelope, and Deer Creeks came out almost simultaneously with the National Marine Fisheries Service (NMFS) and California Department of Fish and Wildlife's (CDFW) Voluntary Drought Initiative identifying those same watersheds as priority streams.<sup>1</sup> It is not clear whether the Board understood that when its coercive policy hit water users at the same time they were trying to find collaborative solutions, it would limit the ability of water users to respond to either. Farmer and ranchers, particularly in smaller watersheds like Mill, Antelope, and Deer creeks, generally do not have the ability to engage on multiple issues at the same time, which means that one or the other must suffer.

Another issue is the Proposed Emergency Regulations' lack of information about the long history of collaboration in these three watersheds. For decades water have worked and are currently working with with fishery agencies to find voluntary collaborative solutions to resource concerns. This is essential information for the Board to consider in determining whether or not there actually is an emergency situations justifying extraordinary action, and for the policy consideration of whether it is appropriate to disrupt voluntary collaborative efforts with coercive regulations.

### ***Local Cooperative Solutions too Inflexible***

Although the Proposed Emergency Regulations do identify a possible role for "local cooperative solutions," the language of this regulation is too inflexible to be meaningful. Specifically, section 878.2 provides that the such agreements with NMFS and DFW will be approved if the protection is "comparable to or greater than that provided by this regulation." This apparently means that the only way to reach a local cooperative solution is if the water user agrees to give up as much or more water than would be required by the regulation, even if the fishery agencies agree that the lesser amount is appropriate. Since the whole regulation is ostensibly predicated upon the recommendations of the fishery agencies, this makes no sense. Consequently the language should be modified to provide for any agreement that is acceptable to NMFS and DFW.

### ***Due Process***

Although we appreciate that Board actions in a drought must be prompt to be meaningful, this is not justification to unnecessarily abrogate due process. The documents supporting the Proposed Emergency Regulations repeatedly opines that "the current system is cumbersome." Suffice it to say that the fact due process is cumbersome is not justification for avoiding its requirements – particularly when up to this point there is a long and successful history of collaborative partnerships.

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[http://www.westcoast.fisheries.noaa.gov/protected\\_species/salmon\\_steelhead/voluntary\\_drought\\_initiative.html](http://www.westcoast.fisheries.noaa.gov/protected_species/salmon_steelhead/voluntary_drought_initiative.html)

***Impacts to Agriculture are Far More Onerous than anticipated***

The economic impacts analyzed by the Proposed Emergency Regulations are not accurate for several reasons. The primary reason is that the costs appear to be analyzed as they would apply to the operations of a district. However, the real cost is what impact it will have on individual farms and ranches, not the cost of supplying replacement water. Additionally, the report fails to recognize that some operations have no alternative supply, nor is there any infrastructure (wells or conveyance) to accommodate such water if it were available. Based upon information from our members, the ability to supplement with groundwater use is significantly over estimated. For these operations, the costs would be total, not a percentage. By example, one rancher has 1,400 animals on 700 acres of irrigated pasture. That pasture cannot simply be dried up for a month and then restarted as if it were a machine. Both the cows and the pasture would likely be irreparably harmed.

***Benefits to Fisheries are Overstated***

First, the Proposed Emergency Regulations would require certain flows or “full flow without diversion.” The problem is that by the regulation’s own assertions, lesser flows would not accomplish the intended purpose. This means that the water that could be beneficially used for agriculture, would be sent down the river to provide no benefit to the fishery resource. This would inherently be an unreasonable use of water.

Second, the Proposed Emergency Regulations do not provide for temperature impacts to fish. Many water users in these watersheds explained that over the decades of collaborative fish flow enhancement efforts in these watersheds temperature has been a key factor in considering whether flows were actually beneficial to the fish. The regulation has no such provision. Consequently the very likely scenario of limiting water diversions while providing water that is harmful to salmonids could occur, which would be an unreasonable use of water.

Third, it is not clear why both baseline passage flows established by the largest obstacles and pulse flows are required. It might be possible for lower baseline flows to sustain fish in good condition and pulse flows that would allow them to migrate over obstacles. This might accomplish the same purpose while also providing more water for water users.

Fourth, NMFS’ recovery plan (p. 29) provides that the height of spring run Chinook ends in early June, a point also made within documents supporting the Proposed Emergency Regulations. This fact coincides with the long standing history of collaborative solutions in the watershed. Consequently, it is not clear why the Proposed Emergency Regulations would extend the limited period through the end of June.

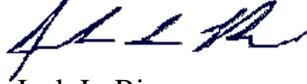
Letter to State Water Resources Control Board

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Thank you for your consideration of the points raised in this letter. And please forgive any typos or other editorial mistakes as time was very short. If you have any questions, please contact me directly at (916) 561-5667 or [jrice@cfbf.com](mailto:jrice@cfbf.com).

Sincerely,

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

Jack L. Rice

Associate Counsel

JLR/pkh