

KAHN, SOARES & CONWAY, LLP

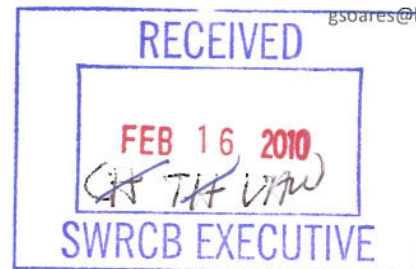
ATTORNEYS AT LAW

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February 4, 2010



Charlie Hoppin, Chair  
California State Water Resources Control Board  
1001 I Street  
Sacramento, CA 95814

Re: Proposed Regulation – Russian River

Dear Chairman Hoppin:

During the past few weeks several clients have contacted me including the California Strawberry Commission and California Citrus Mutual expressing interest in the above-referenced proposed regulation under consideration by the State Water Resources Control Board (Board). I attended your most recent workshop on this issue and it was my impression that you have created an atmosphere of cooperation between the affected growers and the Board that may lead to a successful resolution.

Notwithstanding your good work, my continuing interest on behalf of clients is to ensure that any resulting regulation does not create a precedent that could adversely affect growers in other regions of the state who may use water for frost protection. As you would expect, my clients are very sensitive to government action related to beneficial use and any resulting limitations that may be an impediment to good farming practices.

Attached for your consideration is a revised draft of the proposed regulation prepared by Board staff that attempts to be sensitive to issues before you without creating challenges for my clients in the future. Specifically, this draft does the following.

- 1) Subsection (a): Provides introductory language to specify the diversion of water for frost protection as a beneficial use. We think this statement is an important starting point in any such regulation in order to protect the integrity of Water Code section 100 and to serve as the

proper foundation for any limitations that would be placed on growers using water for frost protection.

- 2) Subsection (a): Modifies the timeline of March 15 to June 1, to March 15 to May 15. The thinking here is twofold. We are not aware of any information suggesting that the frost season in this region of the state should extend to June 1 of any year and further, we think it important that these restrictions be as limited in scope as possible so as not to unnecessarily interfere with production agriculture.
- 3) Subsection (a): Deletes "significant" as the standard for Board action with no recommendation at this time as to a preferred alternative. One of the underpinnings of the Administrative Procedures Act and reviewed by the Office of Administrative Law is that regulations will be clear on their face to affected parties. The preferred alternative is that a clear standard be established, as challenging as that may be, because of the uncertainties associated with the issue being addressed in this regulation (e.g. temperature; stream flow; rainfall).
- 4) Subsection (a): Deletes reference to Water Code section 100 because this section is specified as a footnote to the proposed regulation and therefore eliminating the need for redundancy.
- 5) Subsection (a): Deletes "harmful" in the part of the paragraph that relates to anadromous fish for the reason specified in paragraph 3) above.
- 6) Subsection (a): Deletes "significant" in the part of the paragraph that relates to instantaneous water diversion for the reason specified in paragraph 3) above.
- 7) Subsection (b): Deletes this subsection because it imposes an unreasonable burden on diverters of water. Further, the subsection as written is could be seen as a convenience for the Board and unclear as well. The subsection proposes that diversions are significant unless diverters can prove to the Board that the diversion is negligible. Rather than imposing a rebuttable presumption on diverters, the obligation of clarity rests with the Board to establish a clear standard for "significance" and for that matter, negligible. The benefit of this to both diverters and the Board is that the clear standard will speak for itself.
- 8) Subsection (c): Clarifying amendments.

- 9) Subsection (e): Deletes subsection (e) since these conditions are provided for by the authority cited in the footnote to the proposed regulation.
- 10) Subsection (e): Adds language specifying that this regulation cannot be used as a precedent in establishing regulations for any other region of the state.

I look forward to discussing this draft with you and Board staff as you move forward with the process.

Very truly yours,

KAHN, SOARES & CONWAY, LLP

A handwritten signature in black ink, appearing to read "George H. Soares", written over a printed name.

George H. Soares

GHS/ehs

Enclosure

cc: Rick Tomlinson, California Strawberry Commission  
Joel Nelsen, California Citrus Mutual

**STATE WATER RESOURCES CONTROL BOARD  
PROPOSED REGULATIONS**

**Draft Text of Proposed Regulations**

Amendment to Division 3 of Title 23 of the California Code of Regulations

*Add the following section:*

§ 740 Russian River, Special.

(a) Diversions from the Russian River stream system for purposes of frost protection are a necessary and beneficial use of water to protect a variety of crops from severe damage. During a frost, high instantaneous demand for water for frost protection may exceed the supply in the Russian River stream system and may result in uncoordinated diversions and possible infringements upon other rights. Therefore, diversions of water from the Russian River stream system, including the pumping of closely connected groundwater, between March 15 and May 15 determined to be \_\_\_\_\_ by the board shall be conducted pursuant to a board approved water demand management program. Any such water demand management program shall ensure that the instantaneous cumulative diversion rate does not result in a reduction in stream flow that is \_\_\_\_\_ to anadromous fish. Any program developed pursuant to this section shall be administered by an individual or governing body capable of resolving disputes and ensuring the conditions of the program are met. In addition, the program shall include, for the March 15 through May 15 period, monitoring and reporting to the individual or governing body responsible for administering the program, and to the board of (1) instantaneous water diversion rates for each water diversion that the board has determined to be \_\_\_\_\_ and (2) flows in the Russian River mainstem and any tributaries that support anadromous fish. The program shall provide for the transmission of monitoring data, in an appropriate format, not less than hourly, to an internet site accessible to the board.

(b) For purposes of this section, groundwater shall be considered closely connected groundwater if it is hydraulically connected to surface streams or mapped active stream channels and associated alluvial deposits on maps prepared by Stetson Engineers, Inc. dated February 22, March 8, or March 9, 2008.

(c) Any water demand management program developed pursuant to this section shall be submitted to the board for review and approval at least thirty days before the date when approval is requested. The board may require changes to the water demand management program at any time.

(d) Application of this section shall be restricted to the Russian River stream system and shall not be used as precedent with regard to any other region of the State.

NOTE: Authority cited: Section 1058, Water Code.

Reference: Section 2, Article X, California Constitution; and Sections 100, 275 and 1051.5, Water Code.