



# CALIFORNIA FARM BUREAU FEDERATION

GOVERNMENTAL AFFAIRS DIVISION

1127-11TH STREET, SUITE 626, SACRAMENTO, CA 95814 • PHONE (916) 446-4647

May 10, 2006

By Facsimile: (916) 341-5620

State Water Resources Control Board  
Attn.: Song Her, Clerk of the Board  
1001 I Street  
Sacramento CA 95814

06/07/06 Bmtg Item  
Scott River Watershed  
Deadline: May 10, 2006



Subject: Comment Letter – Sediment and Temperature TMDL in the Scott River Watershed

Dear Ms. Her:

California Farm Bureau Federation, speaking on behalf of its 53 member County Farm Bureaus and their more than 88,000 members throughout California, is pleased to have the opportunity to provide the following comments in response to the State Water Board's April 27 notice regarding the above identified TMDL.

## Procedural Comments

CFBF notes that the April 27 Notice is vague as to the scope of actions that the State Water Board is considering in connection with this TMDL, referring only generally to "specific recommendations on flow options that the State Water Board might take in the watershed."

CFBF objects to the vague nature of this notice, since it provides no information to the reader as to the scope of action that the Board may take in regards to the Scott River TMDL, and also because it is not clear why the prior comment period was inadequate or why it was re-opened. Further, the notice fails to disclose why the Board declined to approve the TMDL when it was properly noticed before the Board on April 19, why the hearing set for that date did not proceed, and why the State Water Board's staff report recommending approval of the Scott River TMDL was withdrawn.

CFBF also notes that the nature of the April 27 notice, as related to the announcement that the TMDL will be considered further at the Board's June 7 meeting, creates a rather significant procedural issue. CFBF expects that all comments will be posted to the Board's website, so as to make them immediately available to interested parties, and that the Board allow for further comment on submitted proposals and on any proposals actually advanced by the Board staff.

This is particularly of concern to those whose 'specific recommendations on flow options that the State Water Board might take in the watershed' are that the Water Board should approve the Scott River TMDL as adopted by the North Coast Regional Water

State Water Resources Control Board  
May 10, 2006  
Page 2 of 3

Board, and should take no action to develop 'flow options.' Such parties are at a clear disadvantage in making comments, in that they are without the benefit of knowing what 'specific recommendations' on which to comment.

#### April 19 Hearing and Workshop

CFBF's understanding of the April 18 hearing on the Scott River TMDL is that it was converted into a workshop, and that some amount of staff and public comment and Board Member discussion was devoted to the February 9, 2006 decision of the Third District Court of Appeal in the consolidated appeals from the Board's Decision 1641 arising out of the Bay-Delta Proceeding "Robie Decision". It is understood that at least one Board Member, and possibly Board staff as well, advanced the view of Robie Decision that it imposes an obligation on the State and Regional Water Boards to incorporate flow standards and/or water rights provisions in any TMDL in which flow is an 'issue.'

Given this understanding, CFBF objects to the State Water Board addressing such a fundamental policy issue as reducing water rights through the TMDL process in such a non-transparent way. Absent an interest in the specific TMDL that is before the Board, it is not reasonable to expect that members of the public would have any idea that such a major policy shift is being considered by the Board, or the underlying legal basis on which that shift is premised.

#### Robie Decision

A review of the Robie decision indicates that it is largely applicable only to the unique circumstances of the Bay Delta and the permitting and operations of the State Water Project and Central Valley Project. There is no basis to assert that the Robie Decision imposes any mandate or obligation on the State Water Board to (a) establish a flow objective in any water quality plan, or (b) implement any adopted flow objective through a water rights proceeding. All the Robie Decision says on this subject is that if the Board adopts a flow objective in a water quality plan, and if the implementation provisions of that plan call for a water rights proceeding to implement the flow objective, then the Board lacks the legal authority to 'waive' the flow objective during the water rights proceeding.

This interpretation is reinforced by the procedural posture of the D-1641 appeals and the specific question that Justice Robie was addressing. It was the Board's position that it had discretion to implement the pulse flow objective or not in the Bay Delta Proceeding, citing the statutes applicable to action on pending applications for water rights. The Court disagreed that those statutes were even applicable, and only then stated that even if applicable, the Board lacked the discretion it asserted under those statutes. But these comments were made by the Court in dismissing the Board's argument, not as the rationale for the Court's underlying decision. That rationale focused instead on language in the Porter Cologne Act that requires the Board, when taking an action that could affect water quality, to give effect to the applicable water quality plans. Nothing in the Robie Decision actually requires the Board to initiate such an action in the first place.

State Water Resources Control Board  
May 10, 2006  
Page 3 of 3

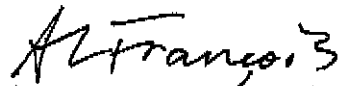
There are other significant issues that the Board should consider in whether the Robie Decision imposes any obligations in connection with the Scott River TMDL.

First, there are no actual flow objectives established for the Scott River, and hence there is no impairment for flow in the Scott River. On that basis alone, the Board has no authority to impose a flow standard in the TMDL process or to try to change any water rights to achieve any such flow standards.

Second, the Board should note, as was apparently discussed at the April 19 Board meeting, that that Scott River water rights are adjudicated by the Siskiyou County Superior Court, and as such the Water Board does not have authority to convene a water rights proceeding under its own jurisdiction. The Board's only option in the case of the Scott River would be to file a petition to modify the existing decrees in the Superior Court for Siskiyou County.

Based upon the foregoing, CFBF opposes any action by the State Water Resources Control Board to try to adjust the water rights of farmers and ranchers in the Scott River Watershed in order to meet temperature goals that are the subject of the Scott River TMDL for Temperature and Sediment, and opposes the Board's consideration of such a fundamental policy shift in the context of an individual TMDL decision without adequate notice to the public of the nature of the action being considered.

Very Truly Yours,



Anthony L. François, Esq.  
Director, Water Resources

cc: George Gomes, CFBF  
John Hewitt, CFBF  
Siskiyou County Farm Bureau

Agricultural Council of California  
California Association of Winegrape Growers  
California Farm Bureau Federation  
Regional Council of Rural Counties  
Western Growers Association

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Dear Ms. Her:

The above listed organizations oppose any action by the State Water Resources Control Board to try to adjust the water rights of farmers and ranchers in the Scott River Watershed in order to meet temperature goals that are the subject of the Scott River TMDL for Temperature and Sediment. If you undermine the Scott River water rights, we can only anticipate that you will be re-opening water rights elsewhere in the state next.

According to reports of the Water Board's prior workshop on this matter, the reason that the Water Board is considering this action is due to its interpretation of Justice Robie's decision of February 9, 2006, dealing with the Bay Delta Proceeding. That case dealt with the unique circumstances of the San Francisco Bay Delta, and the permitting and operations of the State and Federal Water Projects, and has no application to the Scott River TMDL or any other TMDL. In particular, we are unaware of any flow objectives being established outside of the Bay Delta, and the Robie decision imposes no obligation on the State Water Board or Regional Water Boards to establish them, or to implement them through water right decisions if they were established. We also doubt the Water Board's authority to impose a flow standard or adjust water rights in order to implement the federal requirements of a TMDL.

Cooperative conservation efforts show great success in achieving water quality objectives, in the Scott River and throughout California, and there is no reason to undercut the good faith efforts of farmers and ranchers by attacking their livelihood, which is dependant on their water rights.

**CALIFORNIA FARM BUREAU FEDERATION****FACSIMILE TRANSMITTAL COVER SHEET**

DATE: 5/10 TIME: 4:00 PM FAX # CALLED: 341-5621

TO: Song Her

FROM: Anthony Francois

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- ☐ PURSUANT TO YOUR REQUEST

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**FAX - (916) 446-1391**