



# CALIFORNIA FARM BUREAU FEDERATION

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May 28, 2014

Office of Administrative Law  
300 Capitol Mall, Suite 1250  
Sacramento, CA 95814

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

RE: OAL File No 2014-0523-05E  
Article 24 Curtailment of Diversions Based on Insufficient Flow to Meet All Needs  
Title 23, Sections 877, 878, 878.1, 878.2, 879, 879.1, 879.2

Dear OAL Reference Attorney and Mr. Shultz:

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. California Farm Bureau Federation 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. The California Farm Bureau Federation 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.

Tehama County Farm Bureau (collectively with California Farm Bureau Federation, "Farm Bureau") is an organization of approximately 800 farmers and ranchers in Tehama County who promotes family farms, agricultural education and our rural way of life.

Farm Bureau respectfully submits the following comments on the State Water Resources Control Board's ("SWRCB" or "Board") Emergency Curtailment Regulation<sup>1</sup> for your review.

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<sup>1</sup> "Emergency Curtailment Regulation" or "regulation" refer to Article 24 Curtailment of Diversions Based on Insufficient Flow to Meet All Needs; Title 23, Sections 877, 878, 878.1, 878.2, 879, 879.1, 879.2 (OAL File No 2014-0523-05E).

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This emergency regulation is an unprecedented action that presents several issues of first impression related to important constitutional principles. Therefore we request particularly careful consideration is given to the concerns raised in this letter and ask that OAL and the SWRCB provide meaningful responses to the issues described herein.

Although pursuant to Water Code 1058.5, the SWRCB's finding of emergency is not subject to review by OAL (Water Code 1058.5), the regulation still must meet the standards set forth in Government Code §11349.1, including necessity, authority, clarity, consistency, reference, and nonduplication. (Government Code §11349.6(b).)

### **The Emergency Curtailment Regulation is Not Necessary**

Government Code § 11349 defines "necessity," as meaning that the record of the rulemaking "demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements[...]"<sup>2</sup> The Emergency Curtailment Regulation does not meet this standard.

In describing the "Need for the Regulation," the Board asserts that "[i]mmediate action is needed to prevent the waste and unreasonable use of water in light of limited water availability during the drought." In response to this condition, the Board declares that it will "need to curtail water diversion when natural flows decrease so that water is available for: (1) senior water right users; (2) minimum flows for migration of state and federally listed fish in priority water bodies; and (3) minimum health and safety needs."

First, the SWRCB does not explain what "senior water rights" would be protected, or why the regulation is necessary to accomplish this purpose. Furthermore, the Board has not provided substantial evidence that minimum and pulse flows themselves do not constitute waste and an unreasonable use of water in light of other competing demands on the limited water resources in these watersheds. The Board has not provided substantial evidence that its curtailments would follow water right priorities, or that the curtailed uses constitute waste or unreasonable uses of water on balance with all other competing needs in these watersheds, including instream and public trust uses. The Board has not provided substantial evidence that the alleged benefits and potential harms to listed fish species have been properly balanced against the potential benefits and harms of ceasing or maintaining diversions in support of other established beneficial uses and legal uses of water in the basin. The Board has also not provided any estimate of the potential health and safety needs of the three affected watersheds and how these needs might interact with the fisheries needs and other water needs in the watersheds. Without this information, it is impossible to conclude the regulation is necessary.

Second, the Board asserts that the proposed rule is a necessary exercise of its new authority under Water Code section 1058.5 to "prevent the waste, unreasonable use,

unreasonable method of use, or unreasonable method of diversion, of water, to promote water [...] [and] to require curtailment of diversions when water is not available under the diverter's priority of right[...]" However, the Board has not provided substantial evidence that the curtailed uses in fact constitute waste or unreasonable use of water, or that there is not available water under a particular water user's priority of right, or that the proposed flows for fisheries are a reasonable use of water on balance with all other uses, or that they are indeed necessary to ensure survival of the species, or consistent with any benefit which might be said to justify the same.

Third, again relying on its new section 1058.5 authority, the Board maintains that the proposed emergency rule is being adopted "in response to conditions which exist, or are threatened, in a critically dry year immediately preceded by two or more consecutive below normal, dry, or critically dry years or during a period for which the Governor has issued a proclamation of a state of emergency under the California Emergency Services Act [...] base on drought conditions." The statewide drought situation, the Board's new authority, and the Governor's Statewide Drought Proclamations do not demonstrate the existence of an actual emergency in these particular watersheds, nor has the Board provided substantial evidence of the existence of such an emergency.

Finally, the recitals in support of the Board's Resolution No. 2014-0023 describe the follow need: "Due to extreme drought conditions, there is not enough water for all users or uses in most streams, and diversions under junior water rights will need to be curtailed to preserve flows for senior water right holders." The Resolution continues: "[S]ome streams that provide habitat and migration corridors for federally or state listed endangered species will not maintain the minimum flows for these species to survive unless water diverters curtail use[...]" This is again a generic assertion, based on a generalized and subjective assessment of hydrologic conditions statewide. There is no particularized and sufficient linking of these general assertions to the need for the Board's exercise of its new authorities in relation to any factually specific condition existing on the ground in any of the three watersheds. This information is required to demonstrate a necessity for the regulation.

### **The SWRCB Does not Have the Authority to Adopt the Emergency Curtailment Regulation**

The SWRCB asserts that Water Code sections 1058 and 1058.5 provide authority to issue the Emergency Curtailment Regulation. According to the SWRCB, the "revised emergency regulations implement, interpret, or make specific Cal. Const., Art., X §2; [21 sections of the water code]; National Audubon Society v. Superior Court (1983} 33 Cal.3d 419 ...." (Notice of Proposed Emergency Rulemaking.) However impressive this list of citations may be, it does not contain within it the authority to adopt the Emergency Curtailment Regulations.

First, in order for the SWRCB to have the authority to adopt the Emergency Curtailment Regulations, those regulations must be consistent with the due process required by the effect of

the regulations. OAL's review of the authority of the SWRCB to adopt these regulations is an important check on the Board's actions. Because the effect of the Emergency Curtailment Regulations is to limit particular vested water rights, at a minimum, a judicial or quasi-judicial process must be utilized. Such a process ensures that the appropriate substantive and procedural due process requirements are met. In this instance the SWRCB failed to utilize such a process, and instead utilized a quasi-legislative process to develop regulations that significantly altered a vested property right. Although this did serve the convenient purpose of reducing the rigor by which the SWRCB needed to justify its actions, the price paid is compliance with the requirements of due process. Consequently, the SWRCB lacks the authority to draft such a regulation.

Second, the SWRCB fails to distinguish between implementing reasonable use requirements and redefining what is or is not reasonable. Here the SWRCB asserts that a certain specific use (irrigation) in certain conditions is *per se* unreasonable, while another use in the same conditions is *per se* reasonable (water for fish passage for the tail end of the migration) without any regard or consideration of the relative burdens and benefits. This is clearly a determination of what is and is not reasonable. However, "what is a reasonable or unreasonable use of water is a judicial question depending upon the facts in each case." (*Cal Trout, Inc. v. State Water Resources Control Bd.* (1989) 207 Cal.App.3d 585,623, quoting the California Supreme Court in *Gin S. Chow v. City of Santa Barbara* (1933) 217 Cal. 673. 706.) Consequently, the SWRCB does not have the authority to accomplish this through an emergency regulation.

Finally, the Emergency Curtailment Regulation explicitly and practically implements the public trust doctrine, which is not authorized by either Water Code §1058 or 1058.5. Although the SWRCB suggests that the Emergency Curtailment Regulations implement the reasonable use doctrine as authorized by Water Code section 1058.5, it is clear from the language of the regulation and the record that this is not the case. In fact, there is nothing in the record to indicate that the SWRCB conducted the kind of detailed and balanced inquiry required by the reasonable use doctrine. To the contrary, it is evident from the record that the SWRCB simply took as absolute the assertions of other state and federal agencies and adopted those in order to "protect" a limited number central valley spring run Chinook to the total devastation of other uses. This is not a determination of what is reasonable, but a reprioritization of water rights based upon a skewed interpretation of the public trust doctrine. This fact is supported by the SWRCB's citation to the case of *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, to justify its authority to adopt the Emergency Curtailment Regulations. It must be pointed out that even *National Audubon* requires appropriate balancing of competing needs, an obligation ignored by the SWRCB in this case. Since the public trust doctrine is not cited as an authority for which the SWRCB may adopt emergency regulations in Water Code §1058.5, the Board lacks authority to do so in this instance.

### **No Actual Emergency**

Although the SWRCB's finding of an emergency is not reviewable by OAL, we nonetheless are compelled to point out that this situation does not constitute "a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare." (Gov. Code, § 11342.545.) In fact, this regulation is merely an expedient method of achieving an objective for which the Board has no authority. Even though this portion of the letter may not be relevant to OAL's review, we nonetheless take this opportunity to express our concerns to the SWRCB.

The Board's "Finding of Emergency" declares that "an emergency exists due to severe drought conditions, as identified in the Governor's drought emergency proclamations," and that "[i]mmediate action is needed to prevent the waste and unreasonable use of water in priority water bodies for threatened and endangered species in light of limited water availability during the drought." The finding declares that the Board "will need to curtail water diversions when natural flows decrease so that water is available for: (1) senior water right users; (2) public trust needs for minimum flows for migration of state and federally listed fish in [...] Mill Creek, Deer Creek and Antelope Creek; and (3) minimum health and safety needs." The Board asserts that "the emergency regulation is being adopted to prevent the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water," and that such action is justified in light of the "need for immediate action to prevent serious harm to the general welfare of the citizens of California."

The SWRCB relies heavily on the Governor's statewide Drought Proclamations, on the Board's new 1058.5 emergency rulemaking and related penalty authorities and, also, on the opinions of two fishery agencies concerning the needs of protected fish and the importance of Mill, Deer, and Antelope Creek as "priority tributaries" of importance to these species.

Information adduced by the SWRCB suggests that proposed minimum base and pulse flows might, at best, only marginally benefit a few individual members of the species. At worst, the same information suggests that these flows may draw fish into portions of these waterbodies where high water temperatures and low flows would render survival unlikely. In contrast, these dubious benefits come at great detriment to water users, business, and economic activities in these watersheds. There is no clear interest of overriding importance to "the general welfare" and no threatened "serious harm" to the "citizens of California," except from the proposed implementation of this rule.

There is also no "emergency" need to recategorize legal uses of water as "unreasonable uses" of water, where there is no sufficient factual showing that these individual uses of water indeed constitute a "waste" or an "unreasonable use" of water—and, particularly, where the Board has conducted no balancing of competing uses, and made no showing that its own proposed preferential use of water is not itself a "waste" or "unreasonable use" of water in light of demands from competing uses and current drought conditions existing in each of these watersheds.

Contrary to Government Code section 11346.1(b)(2), the Board's proposed rule is "based only upon expediency, convenience, best interest, general public interest, or speculation," rather than any actual emergency.

The Board's cites the existing authorities it possesses by means of which it could have proceeded in a traditional manner to demonstrate any unreasonable uses of water and to curtail any diversions in excess of available supply. Furthermore, the Board acknowledges that voluntary agreements to coordinate diversions and provide flows for fish are either already in place on each of these tributaries, or are currently in progress and likely to be implemented in the very near future. The Board had ample time to avoid an emergency situation—and even now has perfectly feasible, non-emergency options at its disposal.

The Board suggests that its emergency rule is necessary because such voluntary agreements are not binding, and because using its traditional authorities would be too cumbersome. Farm Bureau nonetheless maintains that neither of these reasons is sufficient to justify a novel inversion of the reasonable use doctrine, or to ignore California's well-established and long-standing water rights priority system. It is not clear there is such a thing as a "prophylactic emergency." Indeed such a rationale would fairly swallow any meaningful limit on the definition of an emergency.

Water users in these watersheds have shown remarkable stewardship, responsibility, and follow-through in working voluntarily with fisheries agencies in the past. Moreover, unlike users in most other streams and tributaries in the Valley, the water users in Mill, Deer, and Antelope Creeks have indirectly benefitted species by refraining from historic opportunities to undertake intensive development and alteration of the natural waterways and runoff patterns in these three watersheds. In the absence of major upstream storage, this means that flows in dry years are more likely to diminish, warm, or even entirely cease, earlier in the season. However, it has also meant that wild fish entering these streams continue to access quality habitat in the upper watershed. Where proven means to provide sufficient water and passage for both fish and other uses of water exist, the Board has shown no need for the proposed emergency rule.

### **Inadequate Notice**

Government Code 11346.1 requires that the SWRCB provide notice, including the "specific language proposed to be adopted," to interested persons at least five working days before submitting an emergency regulation to OAL. The language of the Emergency Curtailment Regulation was modified by the SWRCB at the hearing and notice of the "specific language" was not provided to interested parties until May 23, 2014, the same day that it was submitted to OAL. Under the provisions of section 11346.1, the regulation should not have been submitted to OAL until five working days after notice was provided to interested stakeholders, or on May 28, 2014. This would mean that comments would then be due to OAL five calendar days from May 28. Consequently, the deadline should be corrected allowing more time for comments to OAL.

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Even if the modifications were considered sufficiently related that notice was adequate for certain purposes, such changes also require additional time for public review. Government Code § 11346.8 provides that sufficiently related changes “shall be made available to the public for at least 15 days before the agency adopts, amends, or repeals the resulting regulation.” The changes were made and the regulation was immediately adopted on May 21, 2014. This appears inconsistent with the requirements of the code, consequently the regulation should be sent back to the SWRCB for compliance with this section.

### **Conclusion**

Farm Bureau appreciates the opportunity to comment on this important rule. Please contact Jack Rice at (916) 561-5667 or [jrice@cfbf.com](mailto:jrice@cfbf.com) with any questions or responses.

Very truly yours,



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