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A Vineyardist's View on Reasonable Use and Frost Protection Diversions Under California Water Law

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A VINEYARDIST'S VIEW ON REASONABLE USE AND FROST PROTECTION DIVERSIONS UNDER CALIFORNIA WATER LAW

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I. INTRODUCTION

I am not a grape farmer, but I was asked to write this Article because I[1] represented most of the grape farmer plaintiffs in the litigation that resulted in the California Court of Appeal's published decision in *Light v. State Water Resources Control Board*. The *Light* case involved a legal challenge to a California State Water Resources Control Board ("State Board") regulation concerning diversions of water for frost protection of grape and pear crops in Mendocino and Sonoma Counties.[2] As described in detail below, the State Board regulation imposes a de facto permitting system on frost protection water users, with the goal of protecting juvenile salmonids (steelhead trout and coho salmon) from being stranded in the gravel banks of the Russian River and its tributaries when river or stream flows are reduced by diversions for frost protection purposes.[3]

This Article will discuss the *Light* case from the perspective of my firm's vineyardist clients—including our understanding of the Reasonable Use Doctrine and its application to the frost protection regulation. As

*For my bio, please *see* http://www.somachlaw.com/attorneys_bio.php?profile=summary&id=11.

[1] More precisely, my firm, Somach Simmons & Dunn, represented most of the plaintiffs, and I served as lead counsel on the matter.

[2] Light v. State Water Res. Control Bd., 173 Cal. Rptr. 3d 200, 205 (Ct. App. 2014).

[3] *See* CAL. CODE REGS. tit. 23, § 862 (Westlaw 2015); Cal. State Water Res. Control Bd., Resolution No. 2011-0047, at 1 (Sept. 20, 2011), *available at* http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/russian_river_frost/docs/rs2011_0047.pdf [hereinafter Resolution].

an initial matter, let me explain why my clients filed suit. The vineyardist plaintiffs in *Light* filed suit because most of them believe that the frost protection regulation will put either themselves or their friends and neighbors out of business. The State Board estimated that a 160-acre vineyard would incur *initial* compliance costs of up to $352,000, with additional and significant annual costs.[4] Faced with these kinds of costs, many clients felt (and still feel) that their only alternative may be to forgo diverting water for frost protection and hope there is not a devastating frost event. In addition, many of the farmers and others were shocked at the lack of study offered in support of the State Board's theory that frost protection diversions, alone, were causing salmonid strandings, as well as the lack of study on what stream conditions are necessary to protect juvenile salmonids.

The underlying premise of the frost protection regulation is the theory that reductions in streamflow caused by frost protection diversions cause or contribute to stranding of juvenile salmonids in the exposed gravel banks of the rivers and streams in the Russian River watershed. One of the key issues in *Light* was whether good science supports this theory. From the perspective of my vineyardist clients, the State Board relied on very weak science in support of this theory. As always, perspective is crucial in determining what level of science is necessary to support a regulation that will impose major costs on vineyardists in Mendocino and Sonoma Counties. From the perspective of my clients, there ought to be sound science underlying the relationship between frost diversions and salmonid strandings before imposing any water use regulation. In contrast, members of the environmental and academic community seem less interested in examining the science and more inclined to accept the State Board's conclusion tying frost diversions to salmonid strandings—at least in my conversations with these folks.

The Background section presents information on frost protection and the fisheries issues that led to enactment of section 862 of title 23 of the California Code of Regulations ("Section 862").[5] Part III describes Section 862, and Part IV summarizes the law of reasonable use. Part V describes the arguments asserted by the plaintiffs challenging Section 862 and the rulings by the trial court and court of appeal. Part VI describes *Light* and discusses the implications of the court's ruling.

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[4] *See* Cal. State Water Res. Control Bd., Draft Notice of Proposed Rulemaking 6 (May 5, 2011), *available at* http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/russian_river_frost/docs/20110505_rulemaking_notice%20_final.pdf [hereinafter Draft Notice of Proposed Rulemaking] (proposing to add CAL CODE REGS. tit. 23, § 862).

[5] *Id.*

II. Background

A. Frost Protection

On spring nights in Mendocino and Sonoma Counties, when ambient temperatures drop below freezing, it is necessary to protect emerging grape and pear crops from damage caused by the cold temperatures.[6] Below-freezing temperatures will damage or destroy the developing green tissues of these plants.[7] The most effective method of protecting these crops from damage caused by cold temperatures is to continually and uniformly spray a mist of water onto the plants.[8] The misted water freezes over the plants and, so long as there is a mixture of water and ice on the plants, there will be a reduced risk of frost damage.[9]

It is undisputed that sprayed water is the most effective form of frost protection, but there are alternative methods available. In addition to being less effective, some of the alternatives have negative impacts on the environment. In situations where an inversion layer of warm air exists within fifty feet of the ground (referred to as a "radiation frost"), it is possible to provide some level of frost protection by using large fans (referred to as "wind machines") to draw down the warmer air and mix it with the colder air, thereby increasing temperatures around the plants.[10] Heaters are often used in conjunction with wind machines for additional temperature increase.[11] There is a copper solution that can be sprayed on the crops, but the solution eventually washes off the crops and into the surface and groundwater systems. Despite these alternatives, in advective freezes (which are caused by large cold air masses), the only effective method of frost protection is to spray water on the crops.[12] Most frost events in Mendocino County and many in Sonoma County are advective freezes, for which wind machines and heaters are ineffective.[13]

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[6] *Id.*

[7] Glenn McGourty, Winegrowing Advisor, & Rhonda Smith, Viticulture Advisor, Univ. of Cal., Div. of Agric. and Natural Res., State Board Workshop PowerPoint Presentation, Frost Protection Considerations, slide 4 (Apr. 7, 2009), *available at* http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/russian_river_frost/presentations/2_glenn_mcgourty.pdf.

[8] Pam Jean, Sonoma Cnty. Water Agency, State Board Workshop PowerPoint Presentation, Russian River Frost Protection Workshop, slide 4 (Apr. 7, 2009), *available at* http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/russian_river_frost/presentations/5_pam_jeane.pdf.

[9] McGourty & Smith, *supra* note 7, slide 38.

[10] *Id.* slide 8.

[11] *Id.* slides 36-37.

[12] *Id.* slides 14-15, 33-34; Jean, *supra* note 8, slide 4.

[13] Jean, *supra* note 8, slide 4.

B. Russian River Salmonid Strandings and Associated Science

The Russian River watershed comprises approximately 1485 square miles of land and river.[14] There are numerous streams tributary to the mainstem of the Russian River, and water is diverted for municipal, industrial, and agricultural uses. There are two major reservoirs in the watershed: Lake Sonoma and Lake Mendocino. The reservoirs are primarily operated by the Sonoma County Water Agency (SCWA) and subject to various permits and conditions, including State Board issued water right licenses and federally issued Incidental Take Permits developed in conjunction with Biological Opinions.[15] In total, there are approximately 1778 claimed water rights in the watershed, with 533 rights dedicated, at least in part, to frost protection uses.[16]

Chinook and coho salmon are present in the Russian River watershed and both are protected under the federal Endangered Species Act (ESA).[17] Steelhead trout are also present, and they are listed as threatened under the ESA. In February of 2009, the Northern California Habitat Supervisor for the National Marine Fisheries Service (NMFS)[18] sent a letter to the chief of the State Board's Division of Water Rights.[19] The letter explained that there had been two reports of salmonid strandings in 2008: steelhead fry along the mainstem of the Russian River near Hopland, and coho fry in a tributary named Felta Creek.[20] Subsequently, it was revealed that there were ten observed stranded steelhead and thirty-one stranded coho.

The two stranding events described in the letter occurred in the spring of 2008—the coldest spring in thirty years.[21] It was also one of

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[14] Public Comment Letter from Jesse W. Barton, Gallery & Barton Law Corp., on behalf of William Selyem et al., submitted to Jeanine Townsend, Clerk of the Cal. State Water Res. Control Bd., regarding Proposed Russian River Frost Protection Regulation 3 (July 5, 2011), *available at* http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/russian_river_frost/comments070511/jesse_barton.pdf [hereinafter Gallery & Barton Comment Letter].

[15] *See* State Water Res. Control Bd., Div. of Water Rights, Cal. Envtl. Prot. Agency, Revised Draft Environmental Impact Report: Russian River Frost Protection Regulation 12 (Sept. 2011), *available at* http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/russian_river_frost/docs/090177rev_deir.pdf.

[16] *Id.*

[17] The provisions of the ESA begin at 16 U.S.C.A. § 1531 (Westlaw 2015).

[18] Subsequent to most of the proceedings in this matter, NMFS changed its name to NOAA Fisheries.

[19] Letter from Steven A. Edmondson, N. Cal. Habitat Supervisor, Nat'l Marine Fisheries Serv., to Victoria Whitney, Cal. State Water Res. Control Bd., Div. of Water Rights (Feb. 19, 2009), *available at* http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/russian_river_frost/docs/noaa_request_letter.pdf.

[20] *Id.* at 2.

[21] Winegrape Growers, Sonoma Cnty. Farm Bureau, Mendocino Cnty. Farm Bureau, Russian River Flood Control & Water Conservation Improvement Dist. & Cal. Land Stewardship Inst., State

the driest, with virtually no rain during March and April that year. March 2008 was the driest on record.[22] The average flow of the Russian River at Hopland in March to April is 976 cfs (cubic feet per second).[23] But flows in April 2008 were barely above the minimum in-stream flows mandated by the State Board—peaking at 200 cfs and often below the 185 cfs that the SCWA is required to maintain in normal years between the east fork of the Russian River and Dry Creek in Sonoma County.[24]

The February 2009 letter concluded by requesting that the State Board implement emergency regulations to address and prevent future salmonid strandings allegedly associated with frost protection diversions.[25] The State Board declined to adopt emergency regulations, but it began a series of meeting and workshops that culminated in adoption of Section 862 in September 2011.[26] Out of these meetings and workshops, the State Board developed or relied on several studies. At trial, the State Board ultimately relied on four studies to support its theory that frost diversions were causing or contributing to salmonid strandings.

The first study is a *Frost Protection Threat Assessment* authored by NMFS.[27] It is a survey of other studies, without analysis of any specific salmonid stranding incident. In short, the study identifies the already well-known facts that (1) frost protection diversions remove water from the river or stream, and (2) salmonids are present in the Russian River watershed.[28] The study claims that frost protection presents a threat to salmonids, but it fails to demonstrate an actual link between frost diversions and salmonid strandings.[29]

The second study, which is relied upon in the *Frost Protection Threat Assessment*, is titled *An Experimental Study of Stranding of Juvenile Salmonids on Gravel Bars and in Sidechannels During Rapid Flow*

Board Workshop PowerPoint Presentation, Russian River Frost Program, slide 6 (Nov. 18, 2009), *available at* http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/russian_river_frost/presentations2009nov/winegrape_growers.pdf [hereinafter Winegrape Growers PowerPoint Presentation].

[22] *Id.*

[23] *Id.*

[24] Gallery & Barton Comment Letter, *supra* note 14, at 18 & Exhibit C, at 1.

[25] Letter from Edmondson, *supra* note 19, at 2.

[26] *Russian River Frost Protection: Frost Protection Regulation*, CAL. ST. WATER RESOURCES CONTROL BOARD, http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/russian_river_frost/prtctn_reg.shtml (last updated Apr. 15, 2015).

[27] NAT'L MARINE FISHERIES SERV., DRAFT FROST PROTECTION THREAT ASSESSMENT FOR THREATENED AND ENDANGERED SALMONIDS IN THE RUSSIAN RIVER WATERSHED, PREPARED FOR THE STATE WATER RESOURCES CONTROL BOARD PUBLIC WORKSHOP ON FROST PROTECTION, NOVEMBER 18, 2009 (Nov. 10, 2009), *available at* http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/russian_river_frost/comments111009/steven_edmondson.pdf.

[28] *Id.* at 1-7.

[29] *Id.* at 4.

Decreases.[30] As the name suggests, this study involved laboratory experiments with salmonids to determine whether, and to what extent, strandings occurred on gravel bars or side channels when flows were reduced.[31] Bearing in mind that neither the State Board nor NMFS suggested that frost protection diversions are stranding salmonids in side channels, it appears the State Board relied on the gravel bar stranding element of the experiment and study.

The gravel bar experiment used downramping rates of 6, 30, and 60 cm/hour (centimeters per hour), and it counted any salmonids stranded after dewatering of the simulated river stretch.[32] The author found that for chinook fry, "the incidence of stranding over the simulated river bar was low, averaging 2% over all trials."[33] Notably, the experiment demonstrated that "[s]tranding was not related to ramping rate."[34]

The gravel bar experiment and study seemingly offer no support for the State Board's theory that salmonids are stranded in the Russian River watershed when there is an increased downramping rate due to frost protection diversions. To the contrary, the study concluded that stranding was not related to ramping rate at all. A uniform 2% of the fry were stranded, regardless of whether the flows were decreased at 6 cm/hour or ten times that rate.[35]

The third study is titled *Hydrologic Impacts of Small-Scale Instream Diversions for Frost and Heat Protection in the California Wine Country*.[36] This study investigates the correlation between frost protection and heat protection pumping on streamflow conditions in two streams that are tributary to the Russian River.[37] Unsurprisingly, the study concludes that there is a correlation between the onset of frost protection diversions and reduced streamflow.[38] The study suggests that salmonid eggs could

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[30] Michael J. Bradford, *An Experimental Study of Stranding of Juvenile Salmonids on Gravel Bars and in Sidechannels During Rapid Flow Decreases*, 13 REGULATED RIVERS: RES. & MGMT. 395 (1997).

[31] *Id.* at 395, 396.

[32] *Id.*

[33] *Id.* at 395, 397.

[34] Bradford, *supra* note 30 at 395, 398. The downramping rates associated with the 2008 salmonid strandings were well within the rates deemed acceptable for SCWA's releases from its reservoirs. BRAD NEWTON, WAGNER & BONSIGNORE, TECHNICAL MEMORANDUM REPORT (Exhibit 1 to Public Comment Letter from Jesse W. Barton, Gallery & Barton Law Corp., on behalf of Russian River Water Users for the Environment, submitted to Jeanine Townsend, Clerk of the Board, Cal. State Water Res. Control Board (Sept. 19, 2011) (on file with author)).

[35] Bradford, *supra* note 30, at 395, 397.

[36] Matthew J. Deitch, G. Mathias Kondolf & Adina M. Merenlender, *Hydrologic Impacts of Small-Scale Instream Diversions for Frost and Heat Protection in the California Wine Country*, 25 RIVER RES. & APPLICATIONS 118 (2009).

[37] *Id.* at 118-19.

[38] *Id.* at 131-32.

be affected by low streamflow conditions, and that irregular flows may cause a loss of steady food supply for recently hatched salmonids.[39] The study never mentions, however, the issue of salmonid strandings caused by significant downramping rates.

The fourth study is titled, *Biological Context of the Spring 2008 De-Watering Event in the Upper Mainstem of the Russian River*.[40] This study was prepared by a NMFS biologist and purports to report on the April 2008 salmonid stranding that occurred in the mainstem of the Russian River near Hopland. The study is based on *one hour* spent by the biologist, during which time he observed ten stranded salmonids over approximately fifty to seventy-five meters of river length.[41] Based on the ten salmonids observed, the study extrapolates that over the course of fourteen nights during the spring of 2008, there were 25,872 salmonids stranded.[42] And all due to frost protection water diversions. The study explains that this precise number of stranded fish is based on the following assumptions:

> 1) There was an average stranding density of 10 stranded fish per 100 feet of stream for events equal to that observed on April 20; 2) Stranding density varied by severity of events, and; 3) A constant 25 percent of the river length had features likely to induce stranding during an event.[43]

The superior court characterized the study and its assumption-based stranding model as "flawed for a variety of reasons."[44] "The most significant is the admitted lack of data or science to support the conclusions," explained the superior court.[45] In fact, after numerous requests for the data supporting the NMFS Spring 2008 Study, an inquiry from a Congressman, and Freedom of Information Act requests, the NMFS biologist

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[39] *Id.* at 118, 131.

[40] Nat'l Marine Fisheries Serv., Sw. Region, Biological Context of the Spring 2008 De-Watering Event in the Upper Mainstem of the Russian River 1 (Mar. 2011), *available at* http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/russian_river_frost/docs/nmfs_hopland_rpt.pdf.

[41] *Id.* at 2.

[42] *Id.* at 4.

[43] *Id.*

[44] Order Granting Petition for Writ of Mandate in Consolidated Actions at 8 n.5, Light v. California State Water Res. Control Bd., No. SCUK CVG 11 59127 (Cal. Super. Ct. Mendocino Cnty. Sept. 26, 2012) (attached as Exhibit A to Judgment, Light v. State Water Res. Control Bd., No SCUK CVG 11 59127 (Cal. Super. Ct. Mendocino Cnty. Mar. 25, 2013)) (on file with author) [hereinafter Order Granting Petition]; Robert C. Wagner & Brad Newton, Technical Memorandum Report 1-4 (June 30, 2011) (Exhibit H to Gallery & Barton Comment Letter, *supra* note 14).

[45] Order Granting Petition, *supra* note 44, at 8 n.5.

who authored the study finally admitted that there *was no data supporting the key assumptions*.[46] The superior court observed that "[t]he model does not include a statistical component of naturally occurring strandings in the same areas for comparative analysis. It also does not address the effect of rapid flow reductions from diverters other than farmers."[47]

C. The Vineyardists' Response

In 2009, and in response to NMFS concerns regarding salmonid strandings and claims that frost diversions may contribute to such events, a diverse collection of grape and pear growers and organizations formed the Russian River Frost Program (RRFP).[48] The RRFP brought together growers, the Sonoma County Farm Bureau, the Mendocino County Farm Bureau, the Russian River Flood Control and Water Conservation District (RRFCD), the California Land Stewardship Institute, the Sonoma County Wine Commission, the Mendocino Wine Grape and Wine Commission, UC Extension, local county agricultural commissioners, the California Farm Bureau Federation, and elected officials.[49] The RRFP organized meetings and fostered better communication regarding frost protection and river issues.

The RRFP, in turn, caused better communication and coordination between Russian River frost protection diverters and the agencies that operate Coyote Dam and Lake Mendocino.[50] For example, in 2008, Coyote Dam was operated on a remote basis, with water release decisions made on telemetric information from a United States Geological Survey (USGS) flow gauge located near Hopland.[51] Depending on flow rates, there is an approximate eight-hour delay between when Coyote Dam releases reach the Hopland flow gauge.[52] To address this situation, growers using water from the upper Russian River began collecting information regarding the estimated cumulative amounts of water needed for frost protection.[53] This information was provided to SCWA and the RRFCD, and growers began providing those agencies with early alerts when a frost event was deemed imminent.[54] Growers were aided by improved

[46] Gallery & Barton Comment Letter, *supra* note 14, at 30.

[47] Order Granting Petition, *supra* note 44, at 8 n.5.

[48] Winegrape Growers PowerPoint Presentation, *supra* note 21, slides 1-2, 36-41.

[49] *Id.* slides 1-2, 36-41.

[50] Jean, *supra* note 8, slides 8-9; Winegrape Growers PowerPoint Presentation, *supra* note 21, slides 4, 9.

[51] Winegrape Growers PowerPoint Presentation, *supra* note 21, slide 18.

[52] *Id.* slide 22.

[53] *Id.* slide 4.

[54] *Id.*

frost related information, including water release scheduling when applicable from a weather consultant, which was coordinated through the Mendocino County Farm Bureau.[55]

Much was learned during the 2009 efforts to coordinate communications and Coyote Dam releases. The program was very successful, but it became clear that it could be even more so if a river gauge were installed closer to Coyote Dam. So, in August of 2009 the RRFCD coordinated with the USGS to expedite installation of a new flow gauge in the Talmage area near the City of Ukiah's wastewater treatment plant.[56] Releases from Coyote Dam reached the new gauge in approximately two hours, thereby providing for a more accurate and calibrated release program.[57]

In addition to these programs, there were significant efforts to obtain grant funding for purposes of constructing off-stream storage reservoirs and other water infrastructure.[58] Off-stream reservoirs allow a grower to store water ahead of frost events, so that it is unnecessary to directly divert water from the river during a frost event, and therefore instantaneous cumulative demand is reduced. In 2009, the California Land Stewardship Institute, in partnership with the RRFCD, applied for and was awarded a $5.7 million dollar grant through the Agricultural Water Enhancement Program of the National Research Conservation Service for the purposes of water conservation and water quality enhancement.[59] These grant funds, along with the 50% cost share match by the landowners, have been used to construct several off-stream storage ponds in Mendocino County, and also financed wind machines, weather stations, and other beneficial projects in Sonoma County.[60] In Mendocino County, the grant-funded offstream storage reservoirs constructed between 2009 and 2011 (before adoption of Section 862) reduced frost protection water demand by more than 91 cfs, which is significantly greater than the maximum flow reduction of 83 cfs that occurred in the upper Russian River during the evening of April 20, 2008.[61] Of note, one of the off-stream ponds, as well as a groundwater well used to fill the pond, was constructed with grant funding and replaced the Felta Creek direct diversion in Sonoma County that was alleged to have

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[55] *Id.* slides 4, 23.

[56] *Id.* slide 22.

[57] *Id.*

[58] *Id.* slides 52-54.

[59] *Id.* slides 52-53.

[60] *Id.*

[61] Gallery & Barton Comment Letter, *supra* note 14, at 31 & Exhibit J, at 1.

contributed to the 2008 salmonid stranding cited in support of Section 862.[62]

III. SECTION 862

Despite the significant efforts of the grape and pear growers and many other stakeholders, the State Board ultimately chose to adopt Section 862. The State Board commended the actions of the growers but concluded that voluntary actions were not sufficient to address the situation. As a result, the State Board adopted Section 862 in September of 2011.[63]

Notwithstanding the fact that frost protection is a recognized and declared beneficial use of water in California,[64] on September 20, 2011, the State Board adopted Section 862, which declares that all water diversions for frost protection uses in Mendocino and Sonoma Counties downstream of Lake Mendocino and Lake Sonoma between March 15 and May 15 of the year are "unreasonable" under article X, section 2 of the California Constitution and Water Code Section 100, unless the diverter complies with a State Board approved Water Demand Management Program (WDMP).[65] Section 862 applies to diversions made under all types of California water rights (riparian, pre-1914 appropriative, permitted or licensed appropriative, and including the pumping of hydraulically connected groundwater).[66]

Section 862 requires the development of the WDMPs by individuals or "governing bodies."[67] A WDMP must have five elements:

> (1) an inventory of the frost diversion systems within the area subject to the WDMP, (2) a stream stage monitoring program, (3) an assessment of the potential risk of stranding mortality due to frost diversions, (4) the identification and timelines for implementation of any corrective actions necessary to prevent stranding mortality caused by frost diversions, and (5) annual reporting of program data, activities, and results. In addition, the WDMP shall identify the diverters participating in the program and any known diverters within the area subject to the WDMP who declined to participate. The WDMP also shall include a schedule for conducting the frost inventory, developing and

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[62] Winegrape Growers PowerPoint Presentation, *supra* note 21, slide 5.

[63] *Russian River Frost Protection: Frost Protection Regulation*, *supra* note 26.

[64] CAL. CODE REGS. tit. 23, § 662.5 (Westlaw 2015).

[65] *Id.* § 862; Resolution, *supra* note 3, at 1.

[66] *See* CAL. CODE REGS. tit. 23, § 862(e) (Westlaw 2015).

[67] *Id.* § 862(b).

> implementing the stream stage monitoring program, and conducting the risk assessment.[68]

According to the State Board's own analysis, implementing a WDMP and complying with the various requirements is expected to initially cost a typical 160-acre vineyard owner between $9,600 and $352,000.[69] It will cost an additional $3,000 to $36,200 per year to keep that 160-acre vineyard in compliance.[70] It is expected to cost a typical 40-acre vineyard between $2,400 and $87,880 in order to initially comply with its mandates.[71] It will cost an additional $750 to $9,000 per year to keep that 40-acre vineyard in compliance.[72]

Other estimates are significantly higher.[73] In 2010, a study (the "Eyler Report") was prepared that analyzed the economic impacts associated with implementing Section 862.[74] The report analyzes assumed 10% and 30% crop loss scenarios, which could occur as a result of growers using inferior frost protection methods (e.g., wind machines during an advective freeze) or because a grower cannot afford to comply with Section 862 and, therefore, cannot divert water for frost protection.[75] The economic impact under either crop loss scenario is enormous.[76] The Eyler Report estimates that a 10% crop loss to the Mendocino and Sonoma County growers will amount to $2,126,771,858 (over $2 billion) in *annual* lost business income throughout California.[77] A 30% crop loss will result in $6.7 billion in *annual* lost business income. These figures even account for an estimated increase in business revenues associated with alternative frost protection technologies in the amount of approximately $175 million annually.[78] These business income losses will significantly impact the growers' employees, winery businesses and their employees, and allied industry businesses and their employees.[79] In addition, the Eyler report estimates that a 10% crop loss will result in over

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[68] *Id.* § 862(c).

[69] Draft Notice of Proposed Rulemaking, *supra* note 4, at 6 ("Cost Impacts on Representative Persons or Businesses").

[70] *Id.*

[71] *Id.* at 7 ("Effect on Small Businesses").

[72] *Id.*

[73] Gallery & Barton Comment Letter, *supra* note 14, at 45-46; ROBERT EYLER, ECONOMIC IMPACT OF FROST PROTECTION REGULATION IN CALIFORNIA: RUSSIAN RIVER WATERSHED 4-5 (Oct. 27, 2010) (Exhibit S to Gallery & Barton Comment Letter, *supra* note 14).

[74] *See* EYLER, *supra* note 73, at 1. The Eyler Report is authored by Dr. Robert Eyler, who is a Professor of Economics at Sonoma State University.

[75] *Id.* at 3-6.

[76] *Id.* at 6.

[77] *Id.*

[78] *Id.*

[79] *Id.* at 35-49.

$143 million in lost taxes annually, while a 30% loss will result in over $450 million in annual lost taxes.[80] Land values are estimated to decrease by over $100 million in the 10% loss scenario and $341 million in the 30%-loss scenario. Annual property taxes are predicted to decrease by over $1 million for the 10% crop loss scenario and almost $4 million for the 30% loss scenario.[81]

The central feature of a WDMP is the "corrective action plan."[82] Through these plans, the WDMPs will restrict, alter, or otherwise impact vested water rights. Section 862 provides as follows:

> Corrective actions may include alternative methods for frost protection, best management practices, better coordination of diversions, construction of offstream storage facilities, real-time stream gage and diversion monitoring, or other alternative methods of diversion. Corrective actions also may include revisions to the number, location and type of stream stage monitoring [g]ages, or to the stream stages considered necessary to prevent stranding mortality.[83]

Unless an individual grower is willing to pay for the cost of preparing a solo WDMP, these "corrective action" decisions will be made by the "governing bodies"—essentially neighboring growers.[84]

Section 862 requires that in crafting the corrective action plans, "the governing body shall consider the relative water right priorities of the diverters and any time delay between groundwater diversions and a reduction in stream stage."[85] Section 862 compels neighboring growers to weigh each other's claimed water right priorities when implementing corrective action plans that will restrict, alter, or otherwise impact vested water rights.[86] Section 862 contains no provisions regarding resolution of disputes over relative water right priorities.

Section 862 applies solely to water diversions used for frost protection purposes. Despite the fact that all water diversions remove water from the stream, Section 862 does not apply to any other type of water use, such as irrigation or municipal and industrial uses. Most notably, Section 862 does not in any way affect the diversions of the SCWA, which is, by far, the single largest water diverter in the Russian River

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[80] *Id.* at 6.

[81] *Id.*

[82] CAL. CODE REGS. tit. 23, § 862(c)(4),(5), (e) (Westlaw 2015).

[83] *Id.* § 862(c)(4); Resolution, *supra* note 3, at 4.

[84] CAL. CODE REGS. tit. 23, § 862(b) (Westlaw 2015); Resolution, *supra* note 3, at 4.

[85] CAL. CODE REGS. tit. 23, § 862(c)(4); Resolution, *supra* note 3, at 4.

[86] CAL. CODE REGS. tit. 23, § 862(c)(4); Resolution, *supra* note 3, at 4.

watershed and which holds one of the most junior in priority water rights.

IV. The Rule of Reasonable Use

Article X, section 2, was added to the California Constitution in 1928, in response to the decision of the California Supreme Court in *Herminghaus v. Southern California Edison Co.*, wherein the Court upheld the right of a riparian water user as against an appropriator notwithstanding the unreasonableness or wastefulness of the riparian use (the riparian claimed the right to flood irrigate, to the detriment of the appropriator).[87] The practical effect of *Herminghaus* was to require upstream appropriators to forgo diversions so that a downstream riparian could have the full flow of the river to support natural flows over riparian lands.[88] Responding to *Herminghaus,* and recognizing the need to put all waters of the state to reasonable and beneficial use to the fullest extent possible, the people of the State of California enacted article X, section 2, of the California Constitution, which provides in pertinent part as follows:

> It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which the owner's land is riparian under reasonable methods of diversion and use, or as depriving any appropriator of water to which the appropriator is lawfully entitled.[89]

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[87] Herminghaus v. S. Cal. Edison Co., 252 P. 607, 618-24 (Cal. 1926).
[88] Wells A. Hutchins, The California Law of Water Rights 13 (1956).
[89] Cal. Const. art. X, § 2.

Beginning shortly after adoption of article X, section 2, the California courts have decided several cases interpreting the constitutional mandate of reasonable use. The cases make clear that article X, section 2, applies to all types of water rights.[90] The central issue in these cases is whether a particular water use or method of diversion is wasteful in the amount of water used.[91]

Up to this point, the cases interpreting article X, section 2, either involved senior water right users (such as riparians) seeking to enjoin diversions by junior water right users, or junior water right users attempting to claim some portion of senior water rights. These matters originated in superior-court proceedings and were generally between two competing water users. The cases focused on whether the amount of water being used was wasteful, considering all relevant circumstances.

A. THE *FORNI* CASE

This pattern changed in 1974, when the State Board adopted a regulation governing water used for frost protection from the Napa River. The regulation, which has since been amended and renumbered, read in pertinent part as follows:

> Because of the high instantaneous demand for water of the Napa River in Napa County for frost protection and the inadequacy of the supply to satisfy the demand during the frost season after March 15 in most years, diversion of water from the Napa River after March 15 for frost protection except to replenish water stored in reservoirs prior to March 15 is an unreasonable method of diversion within the meaning of Article 14, Section 3[92] of the California Constitution and Section 100 of the Water Code. No permits for the Appropriation of water from the Napa River after March 15 of any year for frost protection shall be

[90] Peabody v. City of Vallejo, 40 P.2d 486, 491 (Cal. 1935); Erickson v. Queen Valley Ranch Co., 99 Cal. Rptr. 446, 450-51 (Ct. App. 1971).

[91] Chow v. City of Santa Barbara, 22 P.2d 5, 18 (Cal. 1933) (holding that it was unreasonable for downstream riparians to claim the exclusive right to floodwaters that could be impounded upstream without detriment to the riparians); *see Peabody*, 40 P.2d at 491-92 (confirming right of upstream appropriators to impound flows deemed in excess of reasonable needs of downstream riparians); City of Lodi v. E. Bay Mun. Util. Dist., 60 P.2d 439, 449-451 (Cal. 1936) (holding that upstream junior appropriator should not be enjoined from impounding water, but if downstream senior appropriator's wells are impacted then a physical solution should be imposed and paid for by the junior appropriator); Joslin v. Marin Mun. Water Dist., 429 P.2d 889, 895 (Cal. 1967) (concluding that downstream riparian's claim to use of water in stream for purposes of transporting rock, sand and gravel was unreasonable); *see also Erickson*, 99 Cal. Rptr. at 450-51 (holding that diversion of water through canal resulting in transportation losses of five sixths of the water diverted was unreasonable method of diversion).

[92] In 1974, article XIV, section 3, contained the language that is now found in article X, section 2, of the California Constitution.

> granted except to replenish winter storage and such permits shall not be granted until a water distribution program among the water users is established that will assure protection to prior rights. Regardless of the source of the water, the Board will retain jurisdiction to revise the terms and conditions of all permits issued for frost protection should future conditions warrant.[93]

As explained by the court of appeal in *People v. Forni*, the assertion that use of Napa River water for frost protection was an unreasonable use

> is predicated upon allegations that the river flow during the frost season is insufficient to supply the instantaneous needs of all the vineyardists entitled to water. As a consequence, it is alleged, direct diversion during the frost season may at times dry up the river and deprive many of the vineyardists of water which they need to protect their vines from frost.[94]

After adopting the regulation, the State Board then filed suit seeking declaratory relief establishing the regulation's validity.[95] Respondents, who were vineyard owners claiming riparian water rights, filed a motion for summary judgment on the grounds that the State Board lacked jurisdiction to regulate riparian water users under the reasonable use provisions of the California Constitution and Water Code. The trial court agreed with respondents and granted the motion.[96]

On appeal, the First District Court of Appeal reversed the trial court.[97] Treating the motion for summary judgment as a motion for judgment on the pleadings, the court of appeal made several pertinent rulings. First, the court held that if the allegations of the complaint were true, then the State Board had properly *alleged* the unreasonable use of water.[98] The opinion emphasized, however, that "[w]hether the requirement of building water reservoirs in the case at bench is the only feasible method for achieving the constitutional mandate of reasonableness is manifestly a question of fact."[99] Second, responding to the argument that the State Board exceeded its jurisdiction in adopting a regulation impacting riparian water right users, the court held that "[p]roperly construed, section 659 amounts to no more than a policy statement which

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[93] People *ex rel.* State Water Res. Control Bd. v. Forni, 126 Cal. Rptr. 851, 857 n.4 (Ct. App. 1976) (quoting CAL. CODE REGS. tit. 23, § 659 (repealed 1979)).

[94] *Forni*, 126 Cal. Rptr. at 853.

[95] *See id*.

[96] *See id.* at 854.

[97] *Id.* at 858.

[98] *Id.* at 856.

[99] *See id.*

leaves the ultimate adjudication of reasonableness to the judiciary."[100] The court further explained, "Indeed, the initiation of the present action furnishes the best proof that [*the State Board*] *did not consider the regulation and the policy declaration therein binding as to respondent riparian owners*, and submitted the issue for judicial determination."[101] Finally, the *Forni* opinion confirmed that a riparian water user could not be compelled by the SWRCB to obtain a permit as a prerequisite to diverting water for frost protection uses.[102]

The *Forni* court remanded the case back to the trial court for a trial on the factual issues.[103] Before trial, the parties stipulated to terms of settlement, which the court adopted as its judgment on December 29, 1976. The *Forni* judgment differs from Section 862 in several important ways. First, the *Forni* judgment provides that when flows in the Napa River exceed 78 cfs, then *all* diverters (riparian and appropriative) are allowed to pump at their full capacities during frost events.[104] Second, when flows dip below the 78 cfs threshold, then water is allocated first to riparians in accordance with the size of their acreage, and then to appropriators in accordance with allotments specified in an appendix to the judgment.[105] No diversions are allowed when 10 cfs or less are flowing in the Napa River.[106] Notably, the stipulated judgment honors the rule of priority that is the fundamental feature of California's law of water rights (i.e., riparians have rights senior to appropriators, and appropriators have seniorities based on the principle of first in time, first in right).[107]

The *Forni* decision is complex and, frankly, a bit convoluted. Not surprisingly, it is often incorrectly described in articles discussing reasonable use case law. It is important to correctly understand the *Forni* decision when considering key issues of State Board jurisdiction to regulate the unreasonable use of water.

In *Forni,* both the plaintiff and defendants presented arguments on the facial validity of Napa River frost protection regulation, yet the court of appeal declined to directly address the issue. Instead, the opinion contains the above-cited language declaring the regulation valid, but only as a "policy declaration."[108] What is not always understood about the *Forni*

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[100] *Id.*

[101] *Id.* at 857 (emphasis added).

[102] *See id.* at 857-58.

[103] *See id.* at 858.

[104] Judgment Granting Permanent Injunction at 2-3, People *ex rel.* State Water Res. Control Bd. v. Forni, No. 31785 (Cal. Super. Ct. Napa Cnty. Dec. 29, 1976) (on file with author).

[105] *Id.* at 7.

[106] *Id.* at 3.

[107] *See id.* at 7.

[108] *See* Forni, 126 Cal. Rptr. 851, 857 (Ct. App. 1976).

case is that the language about the regulation being a "policy declaration" is, essentially, the court's way of declaring the facial challenge to the Napa River frost regulation as moot. In doing so, the court recognized that the State Board lacked jurisdiction to regulate the riparian water users, but also is able to reach the key issue of whether Napa River frost diversions were unreasonable. The *Forni* court is able to do this because the State Board named as defendants all the major riparian diverters subject to the frost regulation. This allowed the court to bypass the issue of whether the frost regulation was facially valid and, instead, invoke traditional judicial jurisdiction to resolve reasonable use issues between competing users.

A proper reading of *Forni* reveals that the opinion does not endorse the State Board's jurisdiction to directly regulate reasonable use by riparians (and by reasonable extension also pre-1914 appropriative and groundwater users). A few commentators have incorrectly declared that the jurisdictional issues raised in the *Light* case were decided forty years prior in *Forni*, and in favor of the State Board. This is simply not true and, as discussed later, should be clear by reference to language in the *Light* decision that reverses the aspects of the *Forni* decision that recognize limitations on the State Board's ability to regulate riparian water users.[109]

B. POST-*FORNI* DECISIONS

In 1986, the Fourth District Court of Appeal considered whether the SWRCB had jurisdiction to hold a quasi-adjudicatory hearing to determine whether irrigation practices of the Imperial Irrigation District (IID) were reasonable under article X, section 2, of the California Constitution.[110] The court held the State Board did have such powers, but the opinion is materially distinguishable from the *Forni* case. First, the opinion makes clear that the State Board's case-specific, quasi-adjudicatory proceeding to determine the reasonableness of IID's irrigation practices is "far different" from the broad regulation at issue in *Forni*.[111] The court explained, "[t]he adjudicatory function performed by the Board in this case is far different in nature and effect from the adoption of a regulation declaring unreasonable the diversion of water from a particular river during a specified season which was involved in [*Forni*]."[112] Second, the

[109] *See* Light v. State Water Res. Control Bd., 173 Cal. Rptr. 3d 200, 213-14 (Ct. App. 2014).

[110] Imperial Irrigation Dist. v. State Water Res. Control Bd., 231 Cal. Rptr. 283 (Ct. App. 1986).

[111] *Id.* at 289.

[112] *Id.*

Fourth District addressed appropriative water rights, not riparian or groundwater rights.[113]

In 1989, the Third District Court of Appeal issued its opinion in *California Trout, Inc. v. State Water Resources Control Bd.* ("*Cal-Trout*"). The *Cal-Trout* petitioners sought a writ of mandate compelling the State Board to apply Fish and Game Code[114] section 5946 to dams on four creeks in Mono County.[115] In short, section 5946 applies to water right licenses issued in portions of Inyo and Mono counties after September 9, 1953, and requires compliance with Fish and Game Code section 5937. Section 5937 mandates that "[t]he owner of any dam shall allow sufficient water at all times . . . to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam."[116] The trial court denied the writ, but the court of appeal reversed.[117] In pertinent part, the opinion held that article X, section 2, of the California Constitution does not preclude the Legislature from creating rules regarding the reasonable use of water.[118] The *Cal-Trout* opinion makes clear, however, that if the particular legislative act were itself unreasonable it would be an unconstitutional act in violation of article X, section 2, of the California Constitution.[119]

In 2006, the Third District Court of Appeal considered whether the State Board properly included "term No. 91" ("Term 91") in a state-filed water rights permit assigned to the County of El Dorado and El Dorado Irrigation District (collectively referred to as "El Dorado").[120] Term 91 is a standard water right permit term that has been included in certain new water rights permits since 1980.[121] It prohibits the diversion of water when the state and federal water projects are releasing stored water to meet water quality standards applicable to the Sacramento-San Joaquin Delta.[122]

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[113] *Id.* at 290 ("Accordingly, we hold in this case involving IID's use of water under appropriative rights that the Board's authority includes the power to adjudicate the article X, section 2, issue of unreasonable use of water by IID.").

[114] At the time, this was called the "Fish & Game Code."

[115] Cal. Trout, Inc. v. State Water Res. Control Bd. (*Cal-Trout*), 255 Cal. Rptr. 184, 186 (Ct. App. 1989).

[116] CAL. FISH & GAME CODE § 5937 (Westlaw 2015).

[117] *Cal-Trout*, 255 Cal Rptr. at 213.

[118] *See id.* at 207-08.

[119] *Id.* at 208.

[120] El Dorado Irrigation Dist. v. State Water Res. Control Bd., 48 Cal. Rptr. 3d 468, 472 (Ct. App. 2006).

[121] Term 91 has also been applied retroactively to certain water licenses with priority dates before 1980. *Id.* at 478-79.

[122] *See id.* at 478.

The water right permit issued to El Dorado was not, however, a typical permit. The permit was obtained pursuant to specific statutory authority allowing the State of California to assign long-held appropriative rights permits to counties for use within the watershed from which the water that is the subject of the right originates.[123] These provisions of the Water Code are commonly referred to as the "County of Origin" statutes.[124]

The petitioners in the *El Dorado v. State Board* case sought to have Term 91 removed from their "County of Origin" water right. Among other things, they argued that the State Board could not impose Term 91 on the appropriative water right permit because the permit held a priority date of 1927.[125] As Term 91 was not imposed on many water rights prior to 1980, the petitioners argued that before Term 91 could be imposed on their 1927-priority water right, the fundamental rule of seniority that applies to appropriative water rights requires that all other junior appropriators (i.e., all those from 1928 up to 1980) should first have to comply with Term 91.[126]

The court agreed with the *El Dorado v. State Board* petitioners. The opinion holds that the State Board is empowered under article X, section 2 of the California Constitution and the Public Trust Doctrine to restrict appropriative water rights in order to meet water quality standards. The court held that in doing so, however, "[e]very effort . . . must be made to respect and enforce the rule of priority."[127]

V. *Light*

A. The Trial Court Proceedings

In October of 2011, two cases were filed challenging Section 862. On October 19, 2011, Rudolph H. Light and Linda Light filed their case in Mendocino County Superior Court. My firm's group of clients, named the "Russian River Water Users for the Environment" (RRWUE), filed their case on October 20, 2011, in Sacramento County Superior Court.[128] The cases were consolidated in Mendocino Superior Court, and in February 2012, that court issued an order staying implementation of Section 862 pending resolution of the litigation.[129]

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[123] *Id.* at 472.
[124] *See id.* at 486. Cal. Water Code §§ 10500, 10505.5, 11460-11463.
[125] *El Dorado Irrigation Dist.* .48 Cal. Rptr. 3d at 484-85.
[126] *Id.*
[127] *See id.* at 490-91.
[128] Order Granting Petition, *supra* note 44, at 12.
[129] *Id.*

After briefing and a one-day hearing, the court invalidated Section 862 on several grounds. The statement of decision underlying the judgment contained two sections totaling over fifty pages of analysis.[130] The trial court found that the administrative record in the case contained evidence of only the two fish stranding incidents from 2008.[131] The trial court found that the stranding of the ten salmonids on the mainstem of the Russian River near Hopland was caused by a combination of the following:

> 1) the severe cold temperatures on April 20, 2008; 2) the low humidity in the air; 3) the above average number of preceding frost events that spring consuming any prior storage; 4) the duration of this and prior frost events; 5) the far below average in-stream flow resulting from the dry conditions; 6) the failure of SCWA to timely release water to compensate for the incoming freezing weather; and 7) the commencement of frost protection by farmers.[132]

The statement of decision found the same factors caused the thirty-one fish stranding in Felta Creek, but without the influence of the reservoir releases, and noted there were no other stranding incidents referenced in the administrative record for 2009, 2010, or 2011.[133]

The judgment concludes that Section 862 violates article X, section 2, of the California Constitution and exceeds the State Board's jurisdiction because it declares hundreds of vested water rights unreasonable without any case-by-case analysis.[134] In this regard, the order contains extensive analysis of case law relevant to the State Board's limited jurisdiction and the protections afforded vested water right holders.[135] The court begins by referencing the State Board's "expansive powers" to regulate all appropriative rights acquired since 1914.[136] Despite those powers, there are limitations on the State Board's ability to regulate riparian and pre-1914 appropriative rights, explained the trial court, and case law has both declared unconstitutional an attempt by the State Board to extinguish unexercised riparian rights and also emphasized that any delegation by the Legislature to the State Board of the power to limit such

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[130] *See* Judgment, *supra* note 44, Exhibits A, B.

[131] Order Granting Petition, *supra* note 44, at 7-8, 9.

[132] *Id.* at 7.

[133] *Id.* at 7-8.

[134] *Id.* at 30.

[135] *See id.* at 12-30.

[136] *Id.* at 18, 19; People v. Shirokow, 605 P.2d 859, 865 (Cal. 1980); Cal. Farm Bureau Fed'n v. State Water Res. Control Bd., 247 P.3d 112, 117-118 (Cal. 2011).

rights would be in the context of a quasi-adjudicatory proceeding (not a blanket regulation such as Section 862).[137]

Second, the judgment declared that Section 862 violates the fundamental rule of priority that governs all California water rights, because it fails to establish procedures and protections for honoring senior water rights.[138] The ruling goes into detail about how and why the governing bodies and WDMPs lack the authority or ability to honor the seniority system when implementing corrective action plans and other coercive means of restricting frost protection water diversions.[139] The trial court found the State Board's claims regarding oversight of WDMPs and protection of water rights to be illusory, when real life decisions about which farmers can and cannot divert water for frost protection would be occurring in the evening hours on specific days.[140]

Third, the judgment found that the State Board improperly delegated its authority to adjudicate unreasonable use determinations to the governing bodies.[141]

Fourth, the judgment held that Section 862 was not "reasonably necessary" under Government Code section 11350(b)(1), because (1) the State Board failed to ascertain what stream conditions are necessary to protect salmonids, and (2) the State Board failed to do a case-by-case analysis of the unreasonableness of each diversion.[142] In this regard, the order provides, "The law requires the [State Board] to draft a regulation when there is substantial evidence showing the necessity for it—not to draft a regulation mandating private individuals to gather the evidence necessary to support the regulation in the first place."[143]

Finally, the judgment declared that the State Board's Environmental Impact Report (EIR), prepared pursuant to the California Environmental Quality Act (CEQA), was flawed in several respects.[144] Although the full scope of the trial court's CEQA rulings is beyond the scope of this Article, the rulings all derived from the fact that nowhere in the EIR or anywhere else in the administrative record did the State Board explain what

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[137] Order Granting Petition, *supra* note 44, at 19-20; Rowland v. Ramelli (*In re* Waters of Long Valley Creek Stream Sys.), 599 P.2d 656, 661-62 (Cal. 1979); Meridian Ltd., v. City & Cnty. of S.F., 90 P.2d 537, 549-50 (Cal. 1939).

[138] Order Granting Petition, *supra* note 44, at 30-32.

[139] *Id.* at 30-34.

[140] *Id.* at 32.

[141] *Id.* at 32-34.

[142] *Id.* at 36-40.

[143] *Id.* at 40.

[144] *Id.*; *see* Supplemental Order in Writ of Mandate in Consolidated Actions Addressing Only Previously Unresolved CEQA Claims, Light v. State Water Res. Control Bd., No. SCUK CVG 11 59127 (Cal. Super. Ct. Mendocino Cnty. Mar. 6, 2013) (attached as Exhibit B to Judgment, *supra* note 44) (on file with author).

stream conditions are actually necessary to protect salmonids. Without this crucial information, the trial court determined that the EIR lacked sufficient detail to provide a reasonable analysis of the potential environmental impacts associated with implementing Section 862.[145]

B. The Court of Appeal Decision

In June 2014, the First District Court of Appeal reversed the trial court's decision in all respects.[146] In contrast to the trial court judgment, the *Light* opinion held that Section 862 does not declare any water uses unreasonable.[147] Instead, the opinion declares that the State Board is empowered to regulate all surface water rights[148] to prevent unreasonable use without first establishing the unreasonable use of water.[149] Citing Water Code sections 174, 275, and 1058, and *Cal-Trout*, the *Light* opinion holds that the State Board's jurisdiction "necessarily includes the power to enact regulations governing the reasonable use of water."[150]

The *Light* opinion rejects arguments by RRWUE and the Lights that the WDMPs amount to a de facto permitting process, in violation of the longstanding prohibition against the State Board requiring permits from pre-1914, riparian and groundwater users.[151] In this regard, the *Light* opinion explains that "[l]imited and particularized prohibitions designed to prevent unreasonable use are different from, and by no means legally equivalent to, the comprehensive regulation embodied in a water use permit."[152] The *Light* opinion acknowledges that the *Forni* decision recognized limitations on the State Board's jurisdiction to regulate riparian rights holders but rejects that view, explaining that "we conclude *Forni* construed the Board's authority too narrowly."[153]

The opinion declares premature the arguments that Section 862 violates the rule of priority—on the grounds that there can be no violation of priority of water rights until a WDMP is approved in a manner that fails to honor senior water rights.[154] The opinion acknowledges "the validity of some of plaintiffs' observations about the shortcomings of the current level of scientific knowledge," but ultimately concludes that the State

[145] Supplemental Order, *supra* note 144, at 3-10.
[146] Light v. State Water Res. Control Bd., 173 Cal. Rptr. 3d 200, 213-26 (Ct. App. 2014).
[147] *Id.* at 219.
[148] The opinion fails to address "hydraulically connected" groundwater.
[149] *Light*, 173 Cal. Rptr. 3d at 219.
[150] *Id.* at 215.
[151] *Id.* at 217.
[152] *Id.*
[153] *Id.* at 214.
[154] *See id.* at 219-20.

Board demonstrated the necessity for Section 862.[155] In this regard, the court characterizes the science underlying Section 862 as "coarse but conservative."[156] The opinion fails to address RRWUE's central argument that the State Board did not even identify what conditions are necessary to protect salmonids—a prerequisite to determining the necessity of a regulation or preparing an informed EIR.

The opinion also neither mentions nor addresses the two key pieces of evidence presented by the plaintiffs: (1) a map prepared by NMFS and purporting to show that only very limited stretches of the streams and rivers in the Russian River Watershed are susceptible to salmonid strandings, and (2) evidence that the reductions in flows on the April 2008 night when NMFS claims frost diversions resulted in salmonid strandings were well within the parameters authorized in the biological opinion issued to SCWA by NMFS for the same watershed.[157]

In an unpublished portion of the opinion, the court reversed each of the trial court's CEQA rulings.

VI. Implementation of Section 862

The State Board's 2011 resolution approving Section 862 contained details of a three-year phased implementation schedule.[158] The *Light* opinion incorporates this phased approach, with the first phase of compliance beginning in February of 2015.[159] The initial phase involves information gathering and identification of all frost diversions.[160] Subsequent phases will involve development of the salmonid mortality assessment and, ultimately, implementation of any corrective actions.[161] Full compliance is required by 2017.[162]

A small number of growers have submitted individual WDMPs. Most growers joined group WDMPs, with one large group submission for Sonoma County and two for Mendocino County (one WDMP addresses diversions from the mainstem of the Russian River, while the other covers diversions from tributaries).

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[155] *Id.* at 224-26.

[156] *Id.* at 206.

[157] *See id.* at 200-26.

[158] Resolution, *supra* note 3, at 6-7.

[159] *See Light*, 173 Cal. Rptr. 3d at 208 n.4; *see* State Water Res. Control Bd., Notification of Implementation of the Russian River Frost Protection Regulation 1-3 (Nov. 6, 2014), *available at* http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/russian_river_frost/docs/regimplement_nov2014.pdf.

[160] Resolution, *supra* note 3, at 5-6.

[161] *Id.*; State Water Res. Control Bd., *supra* note 159, at 1-3.

[162] State Water Res. Control Bd., *supra* note 159, at 3.

VII. Conclusions and Implications of the *Light* Decision

The *Light* decision was certainly a disappointment to my firm's grower clients. The most significant concern focused on the court's acceptance of the State Board's theory of salmonid stranding when the science presented seemed scant and even contradictory. In particular, there was disbelief at the court's acceptance of the NMFS report, which was based on a single hour of actual observation and then constructed on multiple assumptions for which the author admitted there was no supporting data.

On the other hand, a theme of the *Light* decision is that many of the arguments challenging Section 862 were simply premature. In particular, the *Light* court identified as premature any arguments regarding the priority of water rights, and it held that such claims could be raised at the time the SWRCB approves a WDMP or thereafter.[163] Such issues may not manifest themselves until such time as the salmonid mortality assessments are completed and "corrective actions" are identified for specific water users.

The full extent and impact of the *Light* decision will probably not be understood until it is applied in future cases and in different factual scenarios. It undermines *Forni* by confirming that the State Board may adopt regulations impacting riparian water users.[164] Language in the decision also suggests that the State Board's jurisdiction to regulate all water users may be broader than has previously been recognized. For instance, the discussion of the *Cal-Trout* case suggests the First District Court of Appeal interprets that case and Water Code section 174 as authorizing the State Board to have powers regarding the State's waters that are concurrent with the Legislature.[165] This interpretation of the State Board's powers seems at odds with the standard legislative-administrative framework by which the Legislature establishes an agency's jurisdiction and then the agency is empowered to adopt regulations interpreting its statutory framework and filling in gaps in a reasonable manner.

It remains uncertain how the "governing bodies" will make the hard decisions when "corrective actions" are deemed necessary, and whether there will be significant impacts to growers in Mendocino and Sonoma counties. For the grape and pear growers of Mendocino and Sonoma counties, the *Light* decision and implementation of Section 862 are not theoretical studies—they are regulatory actions with direct impacts on

[163] *Light*, 173 Cal. Rptr. 3d at 219-20.
[164] *Id.* at 213-14.
[165] *See id.* at 214-15.

the ongoing operations of small- and medium-sized family farms. I hope that this Article provides an understanding of the growers' perspective on Section 862, and that there is a fair implementation of Section 862 based on sound science and honoring our long-established system of water rights.[166]

[166] Information regarding the ongoing implementation of Section 862 can be found on the State Board's website. *See Russian River Frost Protection: Frost Protection Regulation*, *supra* note 26.